**CASE STUDY 2**

 **LEGAL NOTE TO MR BENEDICT MAXIMOV**

This legal note assumes the accuracy of the information Mr Benedict Maximov (BM) has

supplied to me, on which my analysis is based. After a careful review of the facts and laws

applicable to the issues raised, it is my humble opinion that Mr BM can manage the insolvency

issues affecting his companies and facilitate the deal with KuasaNas (in the event

Government clearance is obtained).

I would now proceed to explain the rationale for my submission.

**Issue for Consideration:**

I have raised two issues for consideration:

First, whether the insolvency issues affecting the company can be restructured and managed?

If the answer to the first question is positive, whether Mr BM can facilitate the deal with

KuasaNas?

Under these issues for consideration, I would address the following:

1. The proposed strategy for dealing with the group
2. Whether one or more insolvency proceedings are required to achieve the goal of selling a stake in the group to KuasaNas (should the intended contract receive Government clearance)
3. Where the proceedings will take place
4. What impediments may exist to proceedings taking place
5. What advantages/disadvantages may exist in relation to proceedings being organised in the way you propose
6. The factors that will allow you to determine the above
7. Any further facts or information that may be needed to answer the question
8. Where you envisage the application of the European Insolvency Regulation and/or UNCITRAL Model Law in achieving this?
9. In particular, how the provisions of these texts may assist or impede the strategy you propose to implement?
10. In December 2019, Brexit finally happened. Advise as to the possible effect, if any, of Brexit on your solution?

For ease of reference, I would summarise my understanding of the structure of the Group and applicable laws:

 **GROUP COMPANY**

 **EFWON INVESTMENTS**- Incorporated in Delaware, United States. Insolvency laws of US applicable. $100m equity and $250m debt finance from a syndicate of banks.

 **EFWON TRADING**

**(SUBSIDIARY OF EFWON INVESTMENTS)** Incorporated in England. The laws of England and Wales are applicable. It received the entire $350m from Group company as loan secured by future revenue from the company’s trading activities. Also obtained a $100m facility from a Lender based in Monaco secured by its revenue and advanced the funds to Efwon Romania.

 **EFWON ROMANIA**

**(SUBSIDIARY OF EFWON TRADING)** Incorporated in Romania and its insolvency laws would be applicable. It received $350m from Efwon Trading secured by broadcasting revenue etc.

**EFWON HONG KONG**

**(SUBSIDIARY OF EFWON TRADING)** Incorporated in Hong Kong and its insolvency laws would be applicable. It received $100m (annually) from Kretek (Indonesia) from 2015-2019. Trading secured by broadcasting revenue etc.

**EFWON HONG KONG**

**(SUBSIDIARY OF EFWON TRADING)** Incorporated in Hong Kong and its insolvency laws would be applicable. It’s likely to receive $200m or more from KuasaNas (a Malaysian state company) with the condition of 51% stake and a move to Malaysia.

**Flowing from the structure and facilities attached to each company, additional**

**challenges include:**

There is currently insolvency proceeding against Efwon Romania and freezing injunctions

have been obtained against same. Efwon Romania has payment obligations to Efwon

Trading and, in turn Efwon Trading has payment obligations to Efwon Investments. I also

understand that the creditors in US and Monaco are understandably concerned. Moreso, your

potential investor has “reasonably” demanded that all these issues be settled before it

proceeds to make the investment (provided Government clearance is obtained).

1. **The proposed strategy for dealing with the group:**
	1. Mr BM, the good news about dealing with the Parent Company is that it is based in the United States which has very friendly insolvency legislations. When faced with this type of insolvency which spans over several jurisdictions, the first step is generally to see how all the stakeholders can pause any enforcement actions which would give you time to prepare a repayment plan for their review[[1]](#footnote-1). Unfortunately, there is already a freezing order against Efwon Romania which is a cash cow for the repayment, so the creditors may not be keen on giving you any time (particularly as many assets have already been pledged which they can sell) so it may be advisable that you promptly file for a Chapter 11 procedure in the US.
	2. The Chapter 11 proceedings (debtor in possession) operates with the protection of the automatic stay. Its objective is to permit the debtor in possession to continue to operate its business in the ordinary course while preparing its reorganization plan which may even include transfer of key contracts. The overview of the proposed strategy would involve the following steps:
2. First, you have to file the petition in the US
3. Automatic stay is effective as soon as you file the petition
4. Continue the business operations of the Group in the ordinary course of business
5. The Group may use, sell, or lease property outside the ordinary course of business but you would need to obtain court approval
6. The Group would disclose information including assets, liabilities, and executory contracts
7. Based on your internal review and disclosures, you would begin to negotiate with the creditors and all stakeholders to develop a plan of reorganization
8. The final draft of the plan of restructuring would be circulated and voted upon by the creditors which would be confirmed by the court
9. The plan is implemented and then KuasaNas can proceed to make the investment (upon receipt of clearance from its Government).

 The 8 simplified steps above is the proposed map to reach the desired destination of restructuring with the creditors and receiving the investment from KuasaNas.

1. **Whether one or more insolvency proceedings are required to achieve the goal of selling a stake in the group to KuasaNas (should the intended contract receive Government clearance):**
	1. There is already a pending insolvency proceeding in Romania. By the time the petition is filed in the US, there would be an insolvency proceeding in the US. Efwon trading may also file a petition in UK to manage the lender from Monaco. Based on the facts, Efwon Hong Kong may not have any immediate need to file a petition in Hong Kong as Kretek only informally had doubts of renewing the sponsorship and not that it planned to take any enforcement action.
	2. So yes, there would be more than one insolvency proceedings (US, UK, and Romania) to manage the insolvency issues affecting the Efwon Group.

Kindly note that flowing from the fact that cross-border insolvency proceedings would be required, it is important to mention that an important instrument which would guide the proceedings is the UNICTRAL Model Law on Cross Border Insolvency which is the primary international instrument relating to multinational insolvency matters[[2]](#footnote-2). The Model law is premised on four key concepts:

1. Access-providing access of foreign representatives and creditors
2. Recognition- recognition of foreign proceedings
3. Relief- providing appropriate relief; and
4. Co-operation- facilitating co-operation with foreign courts and foreign representatives

 Furthermore, it may also be important to develop Cross-Border Protocols that would specify procedural and administrative provisions designed to facilitate case management amongst the relevant jurisdictions in issue as was done in the Leham Brothers Protocol[[3]](#footnote-3).

* 1. Some of the material terms of the Lehman Brothers’ Protocol (which should be incorporated for this proceedings in Romania, UK and US) are as follows: Coordination (with the objective to reduce cost of proceedings, provide predictability, maximize recovery for creditors-including the drivers), Communication (between Courts and Insolvency Professionals involved in all the jurisdictions), Information and data sharing (particularly amongst Insolvency Professionals amongst the different jurisdictions to save time), Asset preservation (identified, preserved and maximized for all interested parties), Claims reconciliation (efficient and transparent claim process for interested stakeholders), Maximization of recoveries and Comity (ability to maintain independent jurisdiction regardless of the cross-border proceedings), Notice (Emails as means of issuing notice), Rights of Official Representatives and Creditors (equal access for all parties), Communication Among Tribunals, Communication Among Committees etc.
	2. Thus, although more than one proceeding(s) would be required with potential conflicting local legislations, I believe there is hope in managing the conflict with the adoption of a Protocol that would guide all the proceedings in the interest of everyone.
1. **Where will the proceeding take place?**
	1. As earlier mentioned, we already have a pending proceeding in Romania. So, the two other proceedings would take place in the US (Efwon Investments) and U.K (Efwon Trading). However, note that as a result of the freezing order already pending in Romania, it is pertinent that an application for recognition is filed in the said court to set aside the freezing order in the interest of other creditors and the business. In Re CEFC Shanghai International Group Limited (2020) HKCFI 167, Mainland administrators (who have similar functions as Hong Kong liquidators) were appointed by the Shanghai Court over the Company. Amongst the Company’s assets, there was a claim against its Hong Kong subsidiary, Shanghai Huaxin Group (Hong Kong) Limited, for receivables of over HK $7billion (the HK Receivable). Following their appointment, it came to the Company’s administrators’ knowledge that a creditor had previously obtained a default judgment against the Company and a garnishee order nisi in respect of the HK Receivable.
	2. To prevent the creditor from obtaining a garnishee order absolute, the administrators made an urgent application to the Hong Kong Court for recognition and assistance (including, specifically, an order to stay the garnishee proceedings). In support of the recognition application, the Shanghai Court also issued a letter of request to maintain the principle of collectivity and pari passu distribution. The Hong Kong Court granted the application for recognition and assistance and noted that staying the garnishee proceedings is consistent with the principles underlying recognition of foreign insolvency proceedings and would effectively preserve the HK Receivable for the wider interest of the general creditors.

Mr BM, the relevance of this case to the instant facts is that while proceedings may be pending in different jurisdictions, it is pertinent to bring an application for recognition and set aside the freezing order in the proceedings in Romania for the wider interest of the general creditors and the company.

1. **What impediments may exist to proceedings taking place:**
	1. The first impediment already starring in the face is the freezing order from the court in Romania. A fair question to ask is whether the automatic stay via your petition in the US would be binding on the Court in Romania (Conflict of laws)? In the Joseph Nakash[[4]](#footnote-4) case, one of the issues that came up is that Nakash asserted that the Official Receiver’s second bankruptcy filing, and related asset attachments violated the US automatic stay[[5]](#footnote-5) and the US Bankruptcy Court ultimately agreed. In other words, there was potential conflict between the proceedings in the two different countries.

In order to attempt to bring order to this international chaos, the US Bankruptcy Judge Burton R. Lifland appointed Richard A Gitlin to serve as Examiner and ultimately, the Examiner negotiated a Protocol with the Official Receiver to regulate the proceedings. So, in my view, conflict of laws is already an impediment starring in the face of the stakeholders.

* 1. In the event you scale the conflict of laws impediment, another impediment that may arise is the issue of priority and treatment of creditors (from statutory ranking, creditors with guarantee, even the alleged unsecured creditors with freezing orders against the company). How would they be fairly treated or perhaps how would they all think they were fairly treated? In United Bank for Africa Plc & Tower Aluminium (Nigeria) Plc (In receivership) v. Chief (Dr.) Ernest Shonekan & Ors[[6]](#footnote-6), the Company in receivership was indebted to several banks (all local creditors). However, one of the creditors was already in possession of one of the material assets which would assist the company continue operations and pay all the creditors. The creditor in possession of the material asset refused to restructure and was prepared to frustrate the restructuring so we had to buy out the said creditor. There is no atom of doubt that some secured creditors were taken aback by this decision and felt as though they were being taken for granted but we had to explain the peculiar nature of the circumstance and the importance attached to the material asset in the possession of the said creditor.
	2. The relevance of the case to the issue at hand is that there is a pending freezing order against the company in Romania. We can challenge the action and dispute the debt. However, it is possible that the freezing order may still be subsisting while the litigation is ongoing. If this is the case, that would not be helpful to the payment obligations that need to be settled. The implication of this peculiar circumstance is that the action and proposed settlement with the Petitioners should be given priority to enable us set aside the order and continue operations which should allow the flow of income to settle other creditors.

Another impediment is the language barrier. While preparing this legal note, I had challenges with reviewing the Romanian/Hong Kong/Monaco Insolvency laws because they were not in English. Thus, it may be a requirement that documents are translated to the language of the relevant proceedings amongst the jurisdictions. This issue can be managed in the Cross-Border Protocol. The parties can agree on the interpreter and the finality of the interpretation in relation to the proceedings.

* 1. There may also be issues regarding foreign creditor participation to the local proceedings. Some local creditors may resist any attempt by a foreign creditor to participate in the local proceedings all in an attempt to ensure no foreign creditor affects its share of the pie. There would also be issues regarding executory contracts, co-ordinated claims procedure, discharges etc.

The reality is that no single set of insolvency rule applies globally to insolvency so the earlier we come up with the Protocol to harmonise and agree on the terms that would govern all the proceedings, the better for all the stakeholders.

1. **What advantages/disadvantages may exist in relation to proceedings being organised in the way you propose:**
	1. Some of the advantages in adopting the route proposed and establishing a Protocol regarding all three proceedings include: The probability of maximization of value is increased; it provides a better platform for certainty and predictability of all proceedings, recognise all existing creditors’ rights and establish clear rules for ranking of priority, timely and impartial resolution of insolvency etc.

Now, while there may be challenges (ranging from conflict of law, language, etc as discussed above) regarding the implementation of the proposed proceedings, I do not necessarily consider them as “disadvantages”.

* 1. The primary disadvantage in relation to the proposed proceedings for some creditors (particularly the better positioned and secured creditors) is that rather than receiving 100% of their outstanding while the other creditors may receive nothing, all creditors may receive a fair good faith deposit while the balance would be restructured. In the matter of Virgin Atlantic Airways[[7]](#footnote-7), the company’s financial position was severely affected by the Covid-19 pandemic which caused an unprecedented reduction in passenger numbers and disruption to the global aviation industry. The company came up with a restructuring plan which was opposed by some creditors. In resolving the issue of fairness of the scheme, the Court noted that “…the requirement that a scheme be “fair” does not mean that the court imposes its own view of what is in the interests of creditors or even what is the “best scheme”. Fairness in this context means that the scheme must be one that “an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve”. The Court therefore went on to sanction the scheme.

This case generally serves as a precedent regarding how we would arrive at the different classes of creditors and why it should be sanctioned regardless of whether some creditors feel disadvantaged based on their class as provided in the restructuring plan.

1. **The factors that will allow you to determine the above**

The primary factor that would determine the above is the possibility of the post commencement financing. We already have issues with safety and management with the company in Romania, so what’s the possibility of obtaining new finance particularly with the average performance in the game and possibility of moving to Malaysia?

1. **Any further facts or information that may be needed to answer the question**
* Mr BM, what’s your overall objective of the investment? This is essentially because KusaNas intends to make an equity investment that would take you out as a majority shareholder?
* Secondly, what happens if KusaNas doesn’t obtain clearance to proceed with the investment? Do you have a Plan B?
* What’s the realistic viability of the business assuming we were able to restructure?
* Are you prepared to make more equitable contributions?
* Any plans to retrench any employees?
* Are the creditors prepared to reduce interest obligations or take any hair-cuts?
* What leader are you looking for in the event we restructure with all the creditors? Are you open to allowing the creditors have a representative on the Board pending when the debt is discharged?
1. **Where you envisage the application of the European Insolvency Regulation and/or UNCITRAL Model Law in achieving this?**
	1. As earlier mentioned, I’m of the view that an important instrument which would guide all the proceedings (Romania, US, and UK) is the UNICTRAL Model Law on Cross Border Insolvency which is generally designed to promote a uniform approach to cross-border insolvency through the following mechanisms:
2. Recognition: Determining when a foreign insolvency proceeding should be accorded “recognition” and what the consequences of recognition may be.
3. Transparency: Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State.
4. Co-operation: Permitting Courts to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter.
5. Authorise assistance abroad: Authorising courts and persons administering insolvency proceedings to seek assistance abroad.
6. Jurisdiction and Co-ordination of relief- Establishing rules for co-ordination of relief granted to assist the other insolvency proceedings regarding the same debtor

Now, one of the primary reasons why I envisage its application to all proceedings is that the three proceedings would naturally be bound by domestic legislation(s) and it is important for all three proceedings to be coordinated to maximize the assets for all the stakeholders. Thus, the Model law by its application would simply authorise cross-border co-operation and communication between courts and suggest various ways in which co-operation may be implemented. Please note that it does not specify how that co-operation and communication might be achieved, but rather leaves that open to each jurisdiction to determine by application of its own domestic laws and practices.

* 1. On the other hand, the European Insolvency Regulation (EIR) may be applicable to the proceedings in Romania and England. This is essentially because most cross-border insolvency proceedings that are opened in the EU are governed by the EIR. Generally, as soon as insolvency proceeding has been opened by a Court of an EU member state (e.g Romania), they are automatically recognised in all other EU member states by operation of law. As a result of the automatic recognition, the insolvency proceedings have the same effect in all other EU member states and the recognition includes the authority of a foreign insolvency practitioner in other EU member states.

I’m also aware that by January 2020, Romania will have fully implemented the European Directive 2019/1023 on preventive restructuring framework. By way of background Mr BM, one of the objectives of the directive is to ensure debtors in financial difficulties continue business in whole or in part while operations are restructured, and the debtor should be able to benefit from a temporary stay of individual enforcement actions. Some of the relevant provisions of the Directive to the fact in issue include: Article 1 (preventive restructuring framework available for debtors in financial difficulties/procedures leading to discharge or debt); Article 5 (Debtor in Possession); Article 6 (Stay of individual enforcement actions); Article 8 (Content of Restructuring Plans); Article 9 (Adoption of Restructuring Plans); Article 10 (Confirmation of Restructuring Plans); Article 15 (Effect of Restructuring Plans) etc.

* 1. Furthermore, the Corporate Insolvency and Governance Act 2020 would also be fully implemented in the UK[[8]](#footnote-8) soon. The legislation makes provision for “standalone” company moratorium which is essentially similar to the “debtor-in-possession” process with the aim of facilitating the rescue of a company as a going concern. It also has provisions restricting operation of termination clauses and may even restructure priority in payment of debts.

The reality though is that payments to creditors are due in 2019. So, the fact that the Directive may be fully effective by January 2020 (or the Corporate Insolvency and Governance coming into effect in UK by 2020) may not be that helpful to address our immediate need of lifting the freezing order already granted. However, we may use the provisions of the Directive as a guide to persuade the Court in Romania to set aside the order on the grounds that this is a viable business, debtor acted in good faith yet has insolvency issues and requires stay against any enforcement action to draft a repayment plan.

1. **In particular, how the provisions of these texts may assist or impede the strategy you propose to implement?**
	1. Some of the relevant provisions of the Model law that would assist the strategy include: Article 9 (Right of Direct Access), Article 11 (Application by foreign representative to commence a proceeding); Article 13 (Access of foreign creditors); Article 14, Article 15 (Application for recognition of a foreign proceeding), Article 19 (Relief that may be granted upon application for recognition of a foreign proceeding), Article 22 (Protection of creditors and other interested persons); Article 23 (Actions to avoid acts detrimental to creditors); Article 25 (Corporation and direct communication between foreign courts); Article 30 (Coordination of foreign proceedings); Article 32 (Rule of payment in concurrent proceedings).

These provisions don’t eliminate the fact that there may still be challenges with enforcing a judgment in another jurisdiction. For instance, in Rubin v Eurofinance SA 2012 UKSC 46, one of the issues that came up was whether an English Court should recognize and enforce a default judgment for a fraudulent transfer entered by the US Bankruptcy Court against defendants who were English residents and did not appear in the US case. The UK Supreme Court held that the US judgment should not be enforced under either common law or UK’s Foreign Judgments (Reciprocal Enforcement) Act because the defendants did not submit to the jurisdiction of the US. The UK Supreme Court found that there is no separate rule at common law in England for foreign insolvency judgments, and that under common law the English courts will not enforce a judgment where the English creditor was neither present nor had submitted to the jurisdiction of the foreign court.

The relevance of this case is where the creditor from Monaco deliberately chooses not to participate in the proceedings in UK or worse decides to enforce a local action in Monaco and Efwon trading chooses not to participate in the said proceedings, we may have a challenge with registering the court judgment in Monaco despite complying with the provisions of the Model Law.

* 1. On the other hand, the provisions of the EIR that may assist the proposed strategy include Article 3 (International Jurisdiction-determination of centre of main interests); Article 12 (Payment systems and financial markets); Article 13 (Contracts of employment); Article 18 (effects of insolvency proceedings on pending lawsuits or arbitral proceedings); Article 19 (Recognition); Article 23 (Powers of the insolvency Practitioner); Article 24 (Establishment of insolvency registers); Article 27 (Conditions for access to information); Article 32 (Recognition and enforceability of other judgments); Article 34 (Opening of secondary proceedings); Article 41-43 (Cooperation and Communication); Article 46 (Stay of the process of realisation of assets); Article 47 (Restructuring Plans); Article 48 (Impact of closure of insolvency proceedings); Article 53 (Right to lodge claims); Article 54 (Duty to inform creditors); Article 66 (Choice of court for group proceedings); Article 73 (Languages) etc.
	2. The implication of these EIR provisions may be boiled down to the following principles:

Jurisdiction to open insolvency proceedings is governed by a debtor’s centre of main interests (COMI). The Court of another member state may open secondary proceedings where the debtor has an establishment within that member state. These proceedings are generally limited so that they deal with assets within their member state. Insolvency proceedings in one member state are automatically recognised in all other member states and shall have effect in each member state as they would have in the state in which proceedings have been opened.

1. **In December 2019, Brexit finally happened. Advise as to the possible effect, if any, of Brexit on your solution?**
	1. With Brexit, the European Insolvency Regulation (EIR) would no longer be automatically applicable to Efwon Trading. Notwithstanding the loss of the automatic recognition, there is an effective legal framework for recognition of inbound proceedings particularly as UK and Romania have adopted the Model law. Thus, the Practitioners which shall be engaged for the UK proceedings seeking recognition in Romania would need to apply to the Court for recognition or vice versa.

The reality though is that I do not necessarily think they would be a possible effect on the pending proceeding because by virtue of the Withdrawal Agreement agreed between the UK and EU on October 17, 2019, the EIR would continue to be applicable provided the main proceedings were opened before December 2020. In the instant case, the main proceeding has already been opened so it may be academic to delve into the effect as it is not relevant to the substance of our case.

**CONCLUSIONS AND RECOMMENDATIONS:**

* 1. Flowing from all the above, the first issue raised for consideration lies in the positive. There is a possibility of restructuring the facilities which would enable your potential investor to proceed with the investment. Regarding the second issue, it is pertinent to note that you may be limited regarding the facilitation of the deal with KuasaNas as a result of the political factors so it may be pertinent to start considering another investor or worst-case scenario if new finance fails and all investors decide to enforce their facilities.
	2. Therefore Mr BM, I would suggest you proceed to adopt the following measures:
* First, file the petition in the US & UK. Automatic stay is effective as soon as you file the petition.
* File for recognition at the Court in Romania and file an application to set aside the freezing order in the interest of other stakeholders and the business.
* Continue the business operations of the Group in the ordinary course of business and ensure you are transparent and keep all communications open particularly with your investor in Hong Kong to avoid a new action in Hong Kong. I would suggest you also start looking for another investor in the event Plan A doesn’t obtain Government approval.
* All IPs and the Court should agree on the Protocol that would govern the proceedings.
* The Group would disclose information including assets, liabilities, and executory contracts.
* Based on your internal review and disclosures, you would begin to negotiate with the creditors and all stakeholders to develop a very realistic plan of reorganization which should not just be limited to asset restructuring but managerial as well particularly as there were managerial issues that led to the action in Romania.
* The final draft of the plan of restructuring should be circulated and voted upon by the creditors which would be confirmed by the court. In the event some creditors in minority oppose the plan, we may have to seek for a cram down.
* The plan is approved, implemented and then KuasaNas can proceed to make the investment (upon receipt of clearance from its Government).

I’m available for any clarification(s).

**\* Thank you \***

1. See Statement of Principles for a Global Approach to Multi-Creditor Workouts II [↑](#footnote-ref-1)
2. Prof G Ray Warner, Enterprise Group Restructuring: Dutch Options and United States Enforcement published October 13, 2021 [↑](#footnote-ref-2)
3. Chap 11 Case No-08-13555 (JMP) Jointly Administered [↑](#footnote-ref-3)
4. In Re Nakash Case No 94-B-44840 (BRL) (Bankr. SDNY 1984) [↑](#footnote-ref-4)
5. 11 USC s. 362 [↑](#footnote-ref-5)
6. Suit No: FHC/L/CS/178/2016 which was pending before Hon Justice Buba of the Federal High Court, Ikoyi Lagos. [↑](#footnote-ref-6)
7. 2020 EWHC 2376 (Ch); Case No: CR-2020-003222 [↑](#footnote-ref-7)
8. Worthy note is that this has already been implemented but we are sticking to the facts of the case study which envisages that we are in 2018. [↑](#footnote-ref-8)