Case Study Two Assignment

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The focal point of this case is the insolvency of the Efwon group in general, and Efwon Romania in particular, for two main reasons. For one thing, it is the corporation that runs the F1 team with licenses accorded by the FIA and which has contracted with the F1 drivers. For another, the pre-condition for the deal between Efwon group and KuasaNas is the insolvency issues affecting the companies in the Efwon group are dealt with promptly.

Taking into account the urgency of the deal and the multinational nature of the Efwon group, the following options will be advised to Benedict Maximov (“the client”) for the purpose of facilitating the deal with KuasaNas.

Settlement with the drivers who have filed for the insolvency of Efwon Romania

The starting point of the disaster is the insolvency proceeding of Efwon Romania. The facts stated that as part of their strategy and as an interim measure, the lawyers acting for the drivers have obtained freezing injunctions over Efwon Romania’s assets and income. Since Efwon Romania is the operation entity of the group, this will not only place the company in the position of defaulting on its payments to Efwon trading due to be made in early 2019 but also cause the latter to default in its obligations to Efwon Investments.

What can be reasonably presumed without being stated in the facts is that as a chain of consequence, Benedict Maximov will be placed in the position of defaulting on its payment to the syndicate of banks.

If this proceeding can be dealt with or put down promptly, the disaster will be avoided temporarily and the deal can be closed shortly. As a result, the funding from KuasaNas in excess of USE 200 million annually will be able alleviate the financial distress of the whole group.

Therefore, I will advise Benedict Maximov first to negotiate with the drivers plaintiffs for a settlement of the personal injury lawsuits before the Romanian court. The facts have not mentioned how substantial are the compensations likely to be awarded. If the compensation is acceptable compared with the funding offered by KuasaNas, this is an first option taking into account the speed of this action without being trapped in the long term insolvency proceeding.

Insolvency proceeding in both Romania and UK

Where a debtor’s centre of main interests is within a Member State, the EIR recognises that Member State as the appropriate forum for main insolvency proceedings concerning the debtor, and provides for automatic recognition of those proceedings by the courts of other Member States. Any further proceedings in other Member States where the debtor has an “establishment” are secondary to those main insolvency proceedings and relate only to assets in that secondary Member State.

* Preventive restructuring frameworks

Directive 2019/1023 requires member states to ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework to allow them to avoid insolvency. National law must provide for the restructuring framework to be available on application by the debtor. It may provide that such frameworks are also available at the request of creditors and employees’ representatives, provided that the debtor agrees.

Negotiation of the restructuring plan is facilitated by provisions which provide for the debtor to remain in total or partial control of its assets and the day-to-day operation of its business. A restructuring practitioner only needs to be appointed where (i) a general stay of enforcement actions is granted and the judicial authority determines that the appointment of a practitioner is necessary to safeguard stakeholders’ interests; (ii) a restructuring plan needs to be confirmed by means of a cross-class cram-down; or (iii) the appointment is requested by the debtor or the majority of creditors. Otherwise, the need to appoint a practitioner is decided on a case-by-case basis, although member states may provide for additional circumstances where the appointment of a practitioner is mandatory.

Therefore, the client may convince part of the company’s creditors to apply for the stay of the actions taken by the drivers and appoint a restructuring practitioner. After this, the client may have time negotiating with the stakeholder for a restructuring plan.

* COMI of the case

COMI will be presumed to be at the registered office, but the presumption is rebuttable if the central administration is located in another Member State and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State. The registered office presumption will not apply if there has been a move of the registered office during the three months prior to the opening of proceedings. Although essentially stating what has been developed by case law since the Regulation, these new rules provide welcome clarity.

One option is to open Efwon Romania insolvency proceeding in the Romania which is the COMI of Efwon Romania and open Efwon Trading in UK which is the COMI of Efwon Trading, respectively.

* Group cooperation and communication

The EIR Recast and the Model Law 2019 establish that insolvency practitioners and courts *shall* cooperate and communicate with each other to the maximum extent possible.

Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group (art. 61(1) EIR recast).

Therefore, the client may apply for group coordination proceedings.

* The effect of Brexit

The recast EU Insolvency Regulation 2015 (the EIR) determines the proper jurisdiction for a debtor's insolvency proceedings, the applicable law to be used in those proceedings and provides for mandatory recognition of those proceedings in EU Member States. The EIR no longer applies to the UK.

The Withdrawal Agreement agreed between the UK and the EU on 17 October 2019 and implemented in English law on 23 January 2020 by the European (Withdrawal Agreement) Act 2020, provided for the EIR to continue to apply to insolvency proceedings provided the main proceedings were opened before 31 December 2020.

It did not, however, specify whether the Insolvency Regulation will continue to apply where only secondary proceedings have been opened. This means that the UK will continue to recognize insolvency proceedings commenced in other Member States, and will receive reciprocal recognition of UK insolvency proceedings where the main proceedings were started before 1 January 2021.

Therefore, if the main proceedings (Romanian proceedings in this case) was started before on or before 31 December 2020, Romanian proceedings will receive reciprocal recognition of UK.

US Chapter 11 procedure

At the same time, the client may file for insolvency proceeding of Efwon Investments in Delaware court. One of the advantage of this option is possible substantive consolidation.

While the legislation of EU has not provision of substantive consolidation, chapter 11 of US bankruptcy code authorize courts to approve substantive consolidation. Substantive consolidation is the pooling of the assets and liabilities of technically distinct corporate entities. For the purposes of confirming a Chapter 11 plan or for liquidating assets under Chapter 7, the creditors of the previously distinct subsidiaries are creditors of a single debtor.

Different standards have been employed by courts to determine the propriety of substantive consolidation. Common to all of these tests is a fact-intensive examination and an analysis of consolidation's impact on creditors. For example, in *Eastgroup Properties v. Southern Motel Assoc., Ltd.*, the Eleventh Circuit adopted a modified version of the standard articulated by the District of Columbia Circuit in *In re Auto-Train Corp., Inc.*, under which the proponent of consolidation must demonstrate that: (i) there is substantial identity between the entities to be consolidated; and (ii) consolidation is necessary to avoid some harm or to realize some benefit.

Taking into account of the control and investment relationship among the Efwon group members, it is likely that Delaware will approve the application for substantive application.

Annex：Diagram of the Efwon Group Structure

**Benedict Maximov**

**Efwon Investments ( Delaware )**

**Efwon trading (UK )**

**100%**

**Efwon Romania**

**100%**

**Efwon Hong kong**

**Monaco lender**

**1. USD 100m own money**

**2. USD 250m loan**

*①secured by maximov’s homes*

*②pledge on project renenue*

*③pledge over shares of Efwon* **Inve***investments*

**Entire USD 350m of loan**

*Secured on future revenue from Efwon* **trading**

**USD 150M loan**

*Secured on team’s share of revenue*

**Kuasaras**

**( Malaysia)**

**Kretek**

**( Indonesia)**

*New deal*

*5 year*

*exclusive sponsorship*