INSOL GLOBAL INSOLVENCY PRACTICE COURSE 2021/2022

MODULE B: Case Study II

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1. The facts of the case

With the goal of investing in a less traditional business, in early 2010 Benedict Maximov, an American citizen, decided to invest in Formula 1 ("F1") racing. For this endeavor, Maximov set up Efwon Investments to develop F1 racing activities, a Delaware company, in which Maximov injected USD 100 million his own money alongside USD 250 million borrowed from a syndicate of banks, seated in the United States. As collateral for the loan, Maximov offered his properties around the globe, with an estimated value of around USD 75 million, a pledge on the projected revenue from the business and a pledge over the shares of Efwon Investments. The syndicated loan must be repaid in 10 years and has an interest rate of LIBOR +2%.

Subsequently, Maximov set up Efwon Trading, a company operating under the laws of England and Wales, with the objective of purchasing an F1 team in Europe. To this end, Maximov loaned the USD 350 million raised by Efwon Investments to Efwon Trading, secured by a pledge on future revenue from Efwon Trading's activities.

In late 2010, Efwon Trading entered into an agreement to purchase the Romanian team, taking over the contracts with two drivers, through a wholly owned subsidiary with a seat in Romania, Efwon Romania. For reasons involving the licenses granted by the *Fédération Internationale de l'Automobile* ("FIA"), Maximov had to set up a company in Romania, to which Efwon Trading lent USD 150 million, USD 50 million to purchase the Romanian team and USD 100 million for the projected budget of the year 2011, secured by a pledge on the team's share of the broadcasting revenue from participating in the F1 competition. At that time, there were no sponsorship contracts and therefore no revenue stream from sponsors.

Efwon Romania is the Efwon Group's operational company and where all the main assets are located (i.e., broadcasting rights, licenses, machines, brand, and human resources).

In the 2011 competition, Efwon Romania touted the company logo and a picture of Benedict Maximov on the cars and machines, but the team placed in 17th and had a disappointing first year with earnings of USD 30 million, much of which was reinvested.

The next year, Maximov directed Efwon Trading to loan another USD 100 million to Efwon Romania as the budget for the 2012 season, in which the company placed in 10th and earned USD 60 million, out of which some was reinvested and some were used to repay Efwon Trading, and subsequently Efwon Investments. Although the team had placed better in the

tournament, the American banks pressured Maximov to consider obtaining sponsors for the team, and further accelerate the repayments.

For the year 2013, Maximov directed Efwon Trading to loan another USD 100 million to Efwon Romania and directed his agents to seek possible sponsors for the team. Looking to obtain sponsorships in Asia, Efwon Trading set up a wholly owned subsidiary in Hong Kong, called Efwon Hong Kong. After identifying potential sponsors, Efwon Hong Kong struck a deal with Kretek, an Indonesian company, who was willing to provide USD 100 million annually, from 2015 to 2020. Therefore, the sponsorship revenues are received by Efwon Hong Kong before being transferred to Efwon Romania.

The problem is that Efwon Trading had loaned Efwon Romania all the funds it had raised and Efwon Romania did not have enough capital for the budget of the 2014 season. To ensure the team would be able to race, Efwon Trading obtained a USD 100 million loan from a lender in Monaco, with a high interest rate and secured by its revenues, presumably governed by English law.

From the 2015 through the 2017 seasons, the team performed well and reached a 6th place in the F1 ranking, which meant more revenue for the team, although substantial amounts had to be reinvested in the team, particularly due to changes in technology and safety requirements by FIA.

At the end of the 2017 season, the team's sponsor, Kretek, indicated that it might not continue to sponsor the team beyond 2020, which led Efwon Hong Kong to start seeking new sponsorship opportunities. In early 2018, Efwon Hong Kong located a potential sponsor, KuasaNas, a Malaysian state-owned company, which would be willing to offer funding in excess of USD 200 million annually. KuasaNas, however, conditioned its offer to the purchase of 51% of the shares in Efwon Romania and the transfer of the team to Malaysia, with a racetrack for training and new drivers sufficiently qualified to obtain the licenses required to race in the F1 tournament.

Although the contract with KuasaNas was ready to be signed in mid-2018, a new Malaysian government was elected. Due to allegations of corruption regarding the former government, the new government wished to scrutinize and review all current and intended contracts with state companies, which postponed the finalization of the deal with Efwon Romania.

Before a deal was signed, in late 2018, both the Romanian drivers were injured and subsequently brought claims against Romanian courts, asking for substantial compensation for damages allegedly caused by defects in safety and management of Efwon Romania. The drivers' legal team filed for Efwon Romania's insolvency and obtained a freeze order over the company's assets and income. This stopped the flow of revenues from Efwon Romania to Efwon Trading, and from Efwon Trading to Efwon Investments, leaving the companies in a position to default on their loans from the Monaco lender and the American syndicate of banks in early 2019.

The freeze order led the American syndicate of banks to consider initiating foreclosure proceedings on Maximov's properties around the globe. Maximov is considering how to protect his position before the American banks, the Monaco lender and how to quickly resolve any

issues regarding the insolvency of the companies in the Efwon Group, a pre-condition to signing the contract with KuasaNas.

2. Matters of interest from a legal standpoint

Having reviewed the facts, it is possible to point out certain matters that are relevant to any strategy, from a legal view, as follows:

(i) The Efwon companies are part of the Efwon enterprise group,[1] all with the common purpose and objective of forming an F1 team and participating the F1 tournament, for the following reasons: (a) Maximov is the common shareholder of Efwon Investments and Efwon Trading, of which Efwon Romania and Efwon Hong Kong are wholly owned subsidiaries, and who is in control[2] of the Efwon Group; (b) each of the Efwon companies' activities is directed to the success of the racing team in the F1 championship, which can be ascertained by the lenders, creditors and other third parties; (c) Maximov is the founder of the Efwon Group, the guarantor of the Efwon Investments' loan, and the decision-maker, which can be observed from the orders given to the different Efwon entities throughout the years and the picture of Maximov in the racing cars; and (d) due to the structure of the Efwon Group, there are several intercompany loans with security over the companies' revenue stream;

(ii) The Efwon Group is an international enterprise group, with seats in multiple jurisdictions (United States, United Kingdom, Romania and Hong Kong) and relevant interests in other jurisdictions (Monaco, Indonesia, Malaysia and wherever the Maximov properties are located across the globe), which means that any insolvency matters would require a global solution;

(iii) The Efwon Group would require a cross-border restructuring, which is why it is important to ascertain the following: (a) where the center of main interests ("COMI") of the Efwon companies is located; (b) whether the different jurisdictions involved in the global solution allow for the recognition of foreign main or non-main proceedings; (c) whether the different jurisdictions will be able to provide relief and stay enforcement and collection proceedings against the group entities; (d) in which jurisdiction would the Efwon Group be able to facilitate the deal with KuasaNas, with a sale of the 51% majority stake in Efwon Romania; and (e) which jurisdiction would provide the most legal certainty to a proposed restructuring of the Efwon Group, considering the need to cooperate and

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[1] According to Part Three of the UNCITRAL Legislative Guide on Insolvency Law, "[t]he term 'enterprise group' covers different forms of economic organization based upon the single legal entity and, for a working definition, may be loosely described as two or more legal entities (group members) that are linked together by some form of control (whether direct or indirect) or ownership (…). The size and complexity of enterprise groups may not always be readily apparent, as the public image of many is that of a unitary organization operating under a single corporate identity". See UNITED NATIONS. *UNCITRAL Legislative Guide on Insolvency Law:* part three: treatment of enterprise groups in insolvency. New York: United Nations, 2012, p. 5.

[2] See *ibidem*, p. 2 (defining control as "the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise").

communicate with the other jurisdictions wherein the other Efwon entities are seated, as well as the need for transparency and judicial oversight necessary to ensure the closing of a deal with KuasaNas before the Malaysian government;

(iv) Certain facts have legal consequences over any strategy for a global restructuring of the Efwon Group, such as: (a) there is already an insolvency proceeding against Efwon Romania initiated by the injured drivers in Romania, as well as liability suits filed by such drivers, with a freeze order over Efwon Romania's assets and revenues currently in place; (b) the loan from the Monaco lender and the American syndicate of banks will be defaulted if the freeze order is not overturned quickly; (c) the American syndicate of banks is considering foreclosing on Maximov's properties around the world; and (d) KuasaNas will not sign a sponsorship deal and purchase the majority stake in Efwon Romania if the Efwon Group does not resolve the insolvency issues affecting the Efwon entities.

In this scenario, the proposed strategy aims to (i) provide immediate relief to overturn the freeze order issued by the Romanian court, (ii) reorganize and restructure the Efwon Group, and (iii) allow the closing of the deal with KuasaNas, with the sale of the majority stake in Efwon Romania.

3. <u>A breakdown of the proposed strategy</u>

Based on the previously stated facts and matters of interest from a legal standpoint, the best strategy for the Efwon Group would consider the following:

(i) Filing a joint application for Chapter 11 in the United States for Efwon Investments, Efwon Romania, Efwon Trading and Efwon Hong Kong, with the automatic stay of enforcement and collection proceedings worldwide, preventing the foreclosure on Maximov's properties by the American syndicate of banks;

(ii) Concurrently submitting a Restructuring Plan in the United Kingdom for Efwon Trading, mirroring the Chapter 11 plan of reorganization to bind the Monaco lender;

(iii) Subsequently filing an application for recognition of the United States Chapter 11 proceeding as the foreign main proceeding in Romania, for the benefit of Efwon Romania. Such a filing should also request (a) relief to stay the liability suits and the insolvency proceeding initiated by the injured drivers in Romania, (b) relief to release the assets and revenues frozen by the previous Romanian court order, and (c) prevent further action from the injured drivers or other creditors;

(iv) As an option for the Efwon Group, in case there are relevant debts, obligations and liabilities, filing for Common Law recognition of the United States Chapter 11 proceeding as the foreign main proceeding in Hong Kong, through a formal letter of request to

provide assistance from a foreign court, in order to protect the revenues from the sponsorship agreement with Kretek from creditor actions; and

(v) Selling the majority stake in Efwon Romania to KuasaNas, owned by Efwon Trading, pursuant to the Restructuring Plan in the United Kingdom, and signing the sponsorship deal once the Efwon Group exits its restructuring proceedings.

The outlined strategy will be better described and justified below.

3.1. The issue of the COMI

The first step in understanding the strategy for the Efwon Group's restructuring is identifying each of the Efwon companies' COMI. But which regulation should apply to the case: the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") or the Recast European Insolvency Regulation ("Recast EIR", or Regulation (EU) 2015/848)?

3.1.1. UNCITRAL Model Law on Cross-Border Insolvency v. the Recast European Insolvency Regulation: which one better applies to the Efwon Group's restructuring?

The MLCBI is "designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency".[3] Such "instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place".[4] The MLCBI provides a legal framework aimed at assisting States on structuring their cross-border insolvency regimes and following certain basic features, such as (i) access to local courts for foreign representatives and creditors; (ii) recognition of orders issued by foreign courts; (iii) relief to assist foreign insolvency proceedings; and (iv) cooperation and coordination of concurrent insolvency proceedings among courts where the debtor's assets are located.[5] The MLCBI has been adopted by (i) the United States, through Chapter 15 of the United States Bankruptcy Code, (ii) Romania, through Law No. 637/2002, as amended by Government Emergency Ordinance No. 119/2006 (together, the "Romanian International Insolvency Law"), and (iii) the United Kingdom, through the 2006 Cross-Border Insolvency Regulations (SI 2006/1030, or simply "CBIR"), but it has not been adopted in Hong Kong.

The Recast EIR also applies to insolvency proceedings involving international corporate groups, but its scope is limited to situations where one of the debtor entities has a COMI or an establishment within a Member-State of the European Union. In other words, as of 2019, the Recast EIR would be applicable to companies with a COMI in the United Kingdom and in Romania but would not apply in the United States or Hong Kong, nor would it allow recognition

[3] UNITED NATIONS. *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*. New York: United Nations, 2014, p. 19.
[4] *Ibidem*.
[5] *Ibidem*, p. 26-27.

of insolvency proceedings from such States. If a debtor's COMI is not located in a Member-State of the European Union, then the Recast EIR would not apply and local courts from Member-States would be free to apply their own domestic cross-border insolvency framework.

Considering that the proposed strategy involves a Chapter 11 proceeding before the United States court, the relevant provisions of the MLCBI, as adopted by Romania, would be applicable and the Recast EIR would not. Although Hong Kong has not adopted the MLCBI, case law has allowed for the recognition of foreign insolvency proceedings, as well as assistance to foreign courts, as will be demonstrated below.

3.1.2. What is the COMI of the Efwon Group's entities?

After figuring out that the MLCBI should apply in the case, it is important to ascertain what is the COMI of each of the Efwon Group's entities, in order to identify in which jurisdiction (or jurisdictions) the group's restructuring may be carried out. According to Article 2(b) of the MLCBI, a foreign main proceeding is defined as a foreign proceeding taking place in the State where the debtor has the COMI, while Article 2(c) provides that a foreign non-main proceeding is a foreign proceeding taking place in a State where the debtor has an establishment (i.e., a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services).

The COMI is not defined by the MLCBI, which only provides that the presumption of a debtor's COMI is its registered office. On the other hand, the Recast EIR provides a definition of COMI that may be used to fill the blank of the MLCBI,[6] according to which the COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties.

This was the conclusion reached in the Interdil Srl case[7] by the Court of Justice of the European Union, after building upon Eurofood IFSC Ltd.[8] and interpreting the Article 3(1) of Council Regulation (EC) No. 1346/2000 (the European Union Insolvency Regulation prior to the EIR Recast, or simply the "EC Regulation"), which found that the COMI "must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties", according to Recital (13) of the EC Regulation, whilst defining a company's central administration as "the company's actual centre of management and supervision and of the management of its interests".[9]

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[6] See UNITED NATIONS. *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*. New York: United Nations, 2014, p. 44 (stating that "[t]he Model Law does not define the concept 'centre of main interests'. However, an explanatory report (the Virgos-Schmit Report), prepared with respect to the European Convention, provided guidance on the concept of 'main insolvency proceedings' and notwithstanding the subsequent demise of the Convention, the Report has been accepted generally as an aid to interpretation of the term 'centre of main interests' in the EC Regulation. Since the formulation 'centre of main interests' in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (…), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law").

[7] Interdil Srl (in liquidation) v. Falimento Interdil Srl and Intesa Gestione Crediti SpA, Case C-396/09, 20 October 2011.

[8] Eurofood IFSC Ltd., Case C-341/04, 2 May 2006.

[9] This was later incorporated in Article 3(1) of the EIR Recast, according to which "[t]he courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open

If the debtor's COMI does not coincide with its place of registration, then the MLCBI's presumption may be rebutted.

When it comes to the insolvency of corporate groups, the Part Three of the UNCITRAL Legislative Guide on Insolvency Law, which is intended to assist in the treatment of enterprise groups in insolvency, affirms that a joint application for an insolvency proceeding may be filed with all group members, or a part thereof, whilst other group members may file concurrent applications, if the group members do not have COMI in the same jurisdiction.

This is precisely the case of the Efwon Group: Efwon Investments, Efwon Trading, Efwon Romania and Efwon Hong Kong may jointly apply for Chapter 11 in the United States (the requirements of which will be further analyzed), Efwon Trading may concurrently submit a Restructuring Plan in the United Kingdom, and Romania and Hong Kong may recognize the Chapter 11 proceedings and enforce the result thereof.

That being said, the COMI for each of the Efwon Group's entities may be ascertained as follows:

(i) Efwon Investments is a Delaware incorporated company, owned and directed by an American citizen, Benedict Maximov. It is through Efwon Investments that Maximov controls and manages, either directly or indirectly, the other entities of the Efwon Group. The United States is, therefore, the location of Efwon Investments' (and the Efwon Group's) center of administration and supervision. Here, the presumption that the COMI is the company's registered office need not be rebutted;

(ii) Efwon Trading is company incorporated in the United Kingdom which was set up by Maximov (it may be assumed that Maximov is a shareholder of Efwon Trading, considering it is not a wholly owned subsidiary of Efwon Investments) with the only purpose of purchasing an F1 team in Europe. To this end, Maximov loaned the USD 350 million raised by Efwon Investments to Efwon Trading, secured by a pledge on future revenue from Efwon Trading's activities. Through Efwon Trading, Maximov "*instructed his agents to enquire about setting up a team in Europe*", which led to the purchase of the Romanian team through Efwon Romania. In the first seasons after Maximov took control of the racing team, Maximov "*directed Efwon Trading to advance a further USD 100 million*" to Efwon Romania, for both the 2012 and the 2013 budgets.

It is clear that the center of administration and supervision of Efwon Trading is located in the United States, although the company is seated in the United Kingdom. According to the proposed strategy, Efwon Trading will be a part of the Chapter 11 filing in the United States, and will also submit a concurrent Restructuring Plan in the United Kingdom, mirroring the plan of reorganization to be submitted in the United States, with the aim of binding the Monaco lender;

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insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties".

(iii) Efwon Romania is a wholly owned subsidiary of Efwon Trading seated in Romania, with assets and human resources in said country. Although Efwon Romania has a registered office in Romania and performs a business activity within the country, it may be argued that its COMI is actually located in the United States. That is because Efwon Romania is directed and managed by Maximov through Efwon Investments (indirectly) and Efwon Trading (directly), and that is ascertainable by third parties, especially considering that the F1 machines carried "*the company logo and a picture of Benedict Maximov*", as was held in the previously mentioned Interedil Srl case; and

(iv) Efwon Hong Kong is also a wholly owned subsidiary of Efwon Trading, incorporated in Hong Kong, after Maximov instructed his agents to investigate sponsorship opportunities in Asia. Efwon Hong Kong's activities are directed by Maximov through Efwon Investments (indirectly) and Efwon Trading (directly), with the sole purpose of furthering the corporate group's objective and main activity.

In light of the above, the best strategy for a global solution to the Efwon Group's situation of distress appears to be the filing of a Chapter 11 reorganization proceeding in the United States for Efwon Investments, Efwon Trading, Efwon Romania and Efwon Hong Kong, with a concurrent submission of a Restructuring Plan in the United Kingdom for Efwon Trading, as well as the filing of recognition proceedings before the Romanian and Hong Kong courts.

3.2. Why Chapter 11 in the United States and a Restructuring Plan in the United Kingdom?

Chapter 11 of Title 11 of the United States Code (the "United States Bankruptcy Code", or simply the "Bankruptcy Code") has the objective of allowing an equitable and non-discriminatory distribution of the debtor's assets to creditors, while safeguarding business operations and the company's going concern. Some of the relevant features of a Chapter 11 may be important to further the Efwon Group's restructuring, as demonstrated below:

(i) §362(a) of the Bankruptcy Code provides for an automatic stay, with the objective of stopping creditor enforcement or collection suits against the debtor or its property, including foreclosure proceedings brought by secured creditors (such as the American syndicate of banks in the Efwon Group's case). At least in theory, the automatic stay applies worldwide, especially if a creditor has ties to the United States. The automatic stay is one of the most relevant features of the insolvency framework, since it avoids the common pool problem, as explained by Thomas Jackson.[10] According to Jackson, the common pool problem arises when each individual creditor of a debtor in financial distress tries to collect their claims through the "grab" rules of nonbankruptcy law and the debtor's assets are allocated on a first-come, first-served basis, thereby hindering a global solution to the debtor's crisis.

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[10] See JACKSON, Thomas H. *The logic and limits of bankruptcy law.* Washington: BeardBooks, 2001, p. 12-14.

In this scenario, the automatic stay is very important to the Efwon Group's restructuring, because it prevents creditors from collecting claims, seizing assets or initiating litigation outside of the bankruptcy proceeding. Once the petition for Chapter 11 is filed by the Efwon Group, the American syndicate of banks will not be able to foreclose on Maximov's properties, as well as the Monaco lender if it has ties to the United States; the injured drivers liability suits before the Romanian court will only be stayed after an order for recognition of the Chapter 11 as a foreign main proceeding is issued by the Romanian court;

(ii) §1101(1) and §1107(a) of the Bankruptcy Code provide that the debtor remains in possession of the business, which means that management will continue to run the company after the commencement of Chapter 11 and will not be replaced by a trustee or a liquidator. This is particularly important for the Efwon Group, in order to maintain Maximov in charge of the business;

(iii) §365(b)(2)(B) of the Bankruptcy Code provides that *ipso facto* clauses, i.e., clauses that allow the termination of agreements with the commencement of bankruptcy proceedings, are considered null and void in contracts and unexpired lease agreements. This provision allows the Efwon Group to preserve its contracts despite the filing for Chapter 11;

(iv) §1125 of the Bankruptcy Code demands that the debtor provide adequate information for creditors to properly assess the proposed plan of reorganization, to be transmitted through a disclosure statement prior to the voting of the plan. This provision is particularly relevant for the Efwon Group considering the scrutiny from the Malaysian government that the possible agreement with KuasaNas is currently under. The transparency of a Chapter 11 restructuring for the group could placate any worries the Malaysian government may have with regards to any corrupt practices in the negotiation of the sponsorship deal with KuasaNas;

(v) §1123(a)(5)(D) of the Bankruptcy Code allows the plan of reorganization to provide for the sale of the estate's assets, free of any liens, liabilities and obligations, which could be important to implement the sale of the 51% majority stake that Efwon Trading holds in Efwon Romania to KuasaNas. §1123 of the Bankruptcy Code also allows the plan to financially restructure claims, among other broad restructuring alternatives;

(vi) §364 of the Bankruptcy Code allows the debtor to obtain a DIP loan that may be secured by the estate's assets, which could be a way for KuasaNas to invest in the Efwon Group; and

(vii) The joint application for Chapter 11 may be processed in deemed consolidation.[11] Bankruptcy courts in the United States allow the reorganization proceeding to be processed jointly and for the assets and obligations of all entities in the debtor group to be to be pooled together for the purposes of voting the plan of reorganization, while the group's entities conserve their independence and pre-bankruptcy corporate structure. This could allow the Efwon Group to provide a global solution through its plan of reorganization, as if they were one single entity.

These are some of the many relevant features of Chapter 11 in the United States, which could be of importance to the Efwon Group's restructuring, but would the group's entities be eligible to file for Chapter 11? This question is answered below.

3.2.1. <u>Eligibility for a Chapter 11 filing in the United States</u>

For a Chapter 11 application to be filed in the United States, the debtor (or group of debtors) needs to be eligible, and the United States must hold jurisdiction to process such application. Pursuant to §109 of Bankruptcy Code, "[…] only a person that resides or has a domicile, a place of business, or property in the United States may be a debtor under this title". Would that be the case for the Efwon Group's entities? Below is a breakdown of each of the filing entities:

(i) Efwon Investments is a company incorporated under the laws of Delaware, which means its place of business is located within the United States and according to §109 of the Bankruptcy Code the American courts hold jurisdiction for the company's Chapter 11 filing;

(ii) Efwon Trading is a company incorporated in the United Kingdom, Efwon Hong Kong has a seat in Hong Kong and Efwon Romania is registered in Romania. For these companies to be able to file for Chapter 11 in the United States, they must provide evidence that they own property located in the United States.

In re McTague,[12] the Bankruptcy Court for the Western District of New York found that USD 194 in a bank account in the United States was deemed sufficient "property" for the purposes of §109 of the Bankruptcy Code.

In re Global Ocean,[13] building upon *In re Independent Engineering Co., Inc.*,[14] the Bankruptcy Court for the District of Delaware found that a retainer sent to American bankruptcy lawyers was sufficient "property" located in the United States to allow the filing for Chapter 11 of 15 foreign entities, because the "retainers were paid on behalf of

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[11] *In re Genesis Health Ventures, Inc.*, 402 F.3d 416 (3d Cir. 2005).
[12] *In re McTague*, 1 B.R. 428 (Bankr. W.D.N.Y. 1996).
[13] *In re Global Ocean Carriers Limited*, 251 B.R. 31 (Bankr. D. Del. Jul. 5, 2000).
[14] *In re Independent Engineering Co., Inc.,* 232, B.R. 529, 533 (1st Cir. BAP 1999).

all Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors".

If Efwon Trading and Efwon Hong Kong do not have bank accounts in the United States, the companies could open bank accounts and deposit USD 1000 funds to become eligible for Chapter 11 in the United States. Efwon Romania, however, cannot do the same, considering its bank accounts and assets are currently frozen due to an order from a Romanian court. The better alternative here would be for the Efwon Group to hire American bankruptcy attorneys on retainer for all the companies in the group. This would allow the United States courts to process a Chapter 11 filing by Efwon Trading, Efwon Hong Kong and Efwon Romania.

If these requirements are met, the United States Bankruptcy court would recognize its jurisdiction over the Efwon Group's entities and allow the processing of the Chapter 11 application. But if Efwon Trading, the United Kingdom company, files for Chapter 11, why would it need to submit a Restructuring Plan in the United Kingdom?

3.2.2. The Chapter 11 in the United States and the problem with the Gibbs Principle

The "Gibbs Principle states that only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding".[15] The principle originated in a case from 1890[16] and it is still applied in the United Kingdom today, with English courts finding that the MLCBI applies only procedurally and any substantive judgments that foreign representatives seek to enforce in the United Kingdom need to be available under English law.[17] This means that even after a restructuring proceeding is successfully concluded abroad (say, in the United States), the result of such proceeding will not be recognized and enforced by English courts.[18]

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[15] See SACHDEV, Varoon. Choice of law in insolvency proceedings: How English Courts' continued reliance on the Gibbs Principle threatens universalism. In: *American Bankruptcy Law Journal*, [*s. l.*], v. 93, p. 343-375, 2019, p. 343.

[16] See Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux [1890] QB 399. See SACHDEV, *op. cit.*, p. 351-353 (explaining that "[t]he 1890 Gibbs case involved a contract for several deliveries of copper. A French purchaser (the defendant) had agreed to purchase the metal from an English copper dealer (the plaintiff). The contract called for the English dealer to make several scheduled deliveries of copper to the defendant's Liverpool location. After agreeing to the contract, the French purchaser experienced financial distress and notified the English seller that it would not accept a scheduled delivery of copper. Subsequently, the company was placed in judicial liquidation in France. (…) The plaintiff took concurrent action in England and France to establish full rights to payment on the contract, and the French action was pending when the English court entered its ruling. (…) The lower court found in favor the seller, and the purchaser appealed to the Court of Appeal. (…) The Court of Appeal unanimously held that the contracts were 'English' because they had been entered into in England and performance was to occur in England. The Court of Appeal held that 'the law of the country of the contract [is] the law that governs not only the interpretation of the contract, but also all the subsequent conditions by which it [is] affected as a contract.' As such, French bankruptcy law had no effect in England regarding the contract; English bankruptcy law alone provided the rule").

[17] See Fibria Celulose S/A v. Pan Ocean Co. Ltd. [2014] EWHC 2124. See also Bakhshiyeva ex rel. International Bank of Azerbaijan v. Sberbank of Russia [2018] EWCA (Ch) 59.

[18] See SACHDEV, *op. cit.*, p. 345.

Recently, in Rubin v. Eurofinance SA,[19] the Supreme Court of the United Kingdom found that the MLCBI, adopted through the CBIR, "supplements the common law, but does not supersede" the common law, based on the interpretation that Article 7 of the CBIR does not hinder a court's power to provide additional assistance to a foreign representative pursuant to English law. The Supreme Court also found that the CBIR does not address "the enforcement of foreign judgments against third parties", despite Articles 21, 25 and 27 of the CBIR, mirroring the MLCBI, providing broad relief for foreign representatives. The MLCBI and the CBIR, then, would be procedural in nature and would not allow the courts to alter substantive rights.[20]

Subsequently, in International Bank of Azerbaijan v. Sberbank of Russia,[21] the English Court of Appeal found that due to "the transitory nature of the relief available via the CBIR, and the vitality of Gibbs, (…) debtors who seek to discharge debts arising under English law to commence parallel proceedings in England".[22]

Although criticized,[23] the Gibbs Principle is currently applied by English courts. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("MLREIJ") included Article X[24] to provide a way to overturn such a narrow interpretation of Article 21 of the MLCBI as given in view of the Gibbs Principle, but it has not yet been adopted by the United Kingdom.

The application of the Gibbs Principle by English courts represents a risk to the Efwon Group's global restructuring, since Efwon Trading is a company incorporated in the United Kingdom and it is fair to assume that the loan agreement entered into with the Monaco lender is governed by English law. If such agreement is not governed by English law, the present solution would need to be altered accordingly.

Because of the Gibbs Principle, restructuring Efwon Trading's debt via Chapter 11 will not be enforceable in the United Kingdom, which requires Efwon Trading to restructure its indebtedness before English courts, instead of simply seeking the recognition of the Chapter 11 as Efwon Trading's foreign main proceeding pursuant to the CBIR.

3.2.3. The Restructuring Plan in the United Kingdom

The Restructuring Plan is a proceeding provided by Part 26A of the 2006 Companies Act, as amended by the United Kingdom Corporate Insolvency and Governance Act of 2020 ("CIGA 2020"). A Restructuring Plan is an arrangement between a company and its

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[19] See *Rubin v. Eurofinance SA*, [2012] UKSC 46, [2013] 1 AC 236.

[20] See SACHDEV, Varoon. Choice of law in insolvency proceedings: How English Courts' continued reliance on the Gibbs Principle threatens universalism. In: *American Bankruptcy Law Journal*, [*s. l.*], v. 93, p. 343-375, 2019, p. 359.

[21] See Bakhshiyeva ex rel. International Bank of Azerbaijan v. Sberbank of Russia [2018] EWCA (Ch) 59.

[22] See SACHDEV, *op. cit.*, p. 364.

[23] See FLETCHER, Ian. *Insolvency in Private International Law*. 2 ed. London: Oxford University Press, 2005, part 2.7.1 (stating that "the Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history").

[24] According to Article X: "Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment".

shareholders or creditors (or any class of them). The Restructuring Plan is considerably like a Scheme of Arrangement under Part 26 of the 2006 Companies Act.[25]

To propose a Restructuring Plan, a company must have faced, or be likely to face, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

For the Restructuring Plan to be sanctioned, it must be approved by each class of creditors that is impaired by the plan, with a consent threshold of at least 75% by value of those present and voting in each class. However, if certain conditions are present, the Restructuring Plan may be used to cram down dissenting classes of creditors, such as (i) creditors in the dissenting class are not worse off than in the alternative to the Restructuring Plan, (ii) the plan is approved by at least one impaired class of creditors, and (iii) the dissenting class is treated fair when compared to other classes.

After the Restructuring Plan is sanctioned by the court, the order binds the company and the creditors, even the dissenting creditors. The sanction order is final, although it may be subject to appeal on rare occasions.

In the Efwon Group's case, in order to restructure the Monaco lender's debt, presumably governed by English law, a Restructuring Plan mirroring the group's Chapter 11 plan of reorganization would be required to provide a global solution in light of the aforementioned Gibbs Principle.

With Brexit happening in December 2019, there seem to be no relevant changes to the specific strategy outlined for the Efwon Group restructuring, considering it does not rely on the Recast EIR or any European Union regulation.

3.3. Filing for recognition of the foreign main proceeding and relief in Romania

Considering that the Chapter 11 proceeding before the United States court is the foreign main proceeding of the Efwon Group, which includes Efwon Romania as one of the joint applicants, Efwon Romania must apply for recognition of the Chapter 11 proceeding as a foreign main proceeding in Romania. The following requirements need to be met:

(i) The first requirement for recognition of the Chapter 11 as a foreign main proceeding is that Efwon Romania has a COMI in the United States. As previously mentioned, although Efwon Romania has a registered office and an establishment in Romania, the company's COMI, defined as the central administration of the business, is actually in the United States;

(ii) The second requirement is if the recognition of the foreign main proceeding violates the provisions of public policy of the Romanian State, such as the violation of legal provisions concerning the exclusive competence for judgment of the Romanian

[25] In the Virgin Atlantic Restructuring Plan, the court singled out the similarities and differences between a Restructuring Plan and a Scheme of Arrangement (In the matter of Virgin Atlantic Airways Limited and in the matter of Part 26A of the Companies Act 2006 [2020] EWHC 2376 (Ch))

courts, according to Article 7 of Title I of the Romanian International Insolvency Law[26] - somewhat equivalent to Article 6 of the MLCBI. Taking into consideration that a Chapter 11 in the United States is a widely known and accepted instrument for the reorganization of a debtor, it is rather unlikely that the Romanian court finds there is a public policy violation; and

(iii) The third requirement is the submission of all the documentation necessary for the recognition of the foreign non-main proceeding, such as a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, for example.

Along with the application for recognition of the Chapter 11 as the foreign main proceeding, the foreign representative may also request any additional appropriate relief deemed necessary to the success of the debtor's restructuring process, as provided by Article 21 of the MLCBI.

Once the Chapter 11 is recognized as a foreign main proceeding by the Romanian court, according to Article 20 of the MLCBI, (i) the "[c]ommencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed"; (ii) "[e]xecution against the debtor's assets is stayed"; and (iii) "[t]he right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended".[27] In other words, once the Romanian court recognizes the Efwon Group's Chapter 11 as the foreign main proceeding for Efwon Romania, then the liability suits filed by the injured driver is stayed and the freeze order against the company's assets is also suspended.

This would allow the Efwon Group some breathing room, especially considering that the revenue stream flowing through Efwon Romania will not be impeded and will continue to flow toward Efwon Trading and Efwon Investments. This begs the question: would the Hong Kong court also find the Chapter 11 of the Efwon Group as Efwon Hong Kong's foreign main insolvency proceeding?

3.4. Filing for Common Law recognition of the foreign main proceeding and assistance in Hong Kong

Hong Kong has not adopted the MLCBI and lacks statutory provisions affording express powers to the Hong Kong courts for the recognition of foreign insolvency proceedings or other orders for the assistance of foreign representatives.

This would represent a problem for the recognition of the Efwon Group's Chapter 11 as a foreign main insolvency proceeding for Efwon Hong Kong and to obtain any necessary relief, but from the facts of the case it is possible to ascertain that there would not be any relevant consequences involving Efwon Hong Kong if it were not involved the Efwon Group

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[26] See AZANDA, Ieva; SCHWEINITZ, Oliver von. Romanian International Insolvency Law. May 2004, available at: https://www.iiiglobal.org/sites/default/files/1-_Romanian_Insolv.pdf.

[27] See UNITED NATIONS. *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*. New York: United Nations, 2014, p. 10.

restructuring. That is because Efwon Hong Kong is merely a vehicle used to obtain sponsorship for the F1 racing team and does not have any relevant debts or obligations that would require relief or protection of Efwon Hong Kong's assets.

Notwithstanding, according to the Hong Kong Companies Court in Joint Liquidators of A Co v. B & C[28] and in CEFC Shanghai International Group Limited,[29] if a foreign court issues a formal letter of request to provide assistance, the Hong Kong court may recognize foreign insolvency proceedings and provide assistance the court deems appropriate, as long as the relief sought is available to an insolvency representative under Hong Kong law. Although Hong Kong law does not restrict the enforcement of security by secured creditors,[30] unsecured creditors' enforcement proceedings could be stayed – and according to the circumstances involving Efwon Hong Kong, any creditors would likely be unsecured.

Furthermore, if there are no relevant creditors in Hong Kong, then the Chapter 11's automatic stay for Efwon Hong Kong may be enough to stay any enforcement and collection proceedings against the company.

4. A local alternative to the proposed strategy

The aforementioned strategy takes into consideration the international nature of the issues at hand in the Efwon Group's restructuring and attempts to provide a global solution, but such a solution may be costly due to the need for commencement of proceedings in different jurisdictions, as well as the risk certain steps may pose (i.e., difficulty in recognizing the Chapter 11 as Efwon Hong Kong's foreign main proceeding and obtaining the appropriate relief).

If the timing of the case were different, a local alternative to the proposed strategy could be the use of the preventive restructuring framework provided by European Directive 2019/1023, which was fully implemented by Romania in January 2020. Pursuant to Article 6 of European Directive 2019/1023, during the negotiations of a restructuring plan the debtors can benefit from a stay of individual enforcement actions, such as the liability suits filed by Efwon Romania's injured drivers.

If the preventive restructuring framework were enacted before the Efwon Group's situation of distress, it would have been simpler to obtain relief to overturn the freeze order on Efwon Romania's assets and the revenues would continue to flow to Efwon Trading and Efwon Investments, avoiding a default of the obligations before the Monaco lender and the American syndicate of banks, respectively.

[28] See *Joint Liquidators of A Co v. B & C*, 2014 4 HKLRD 374.
[29] See *CEFC Shanghai International Group Limited*, 2020 HKCFI 167.
[30] See *Joint Administrators of African Minerals Ltd v. Madison Pacific Trust Ltd*, 2015 HKEC 641.