

To : Mr. Benedict Maximov
From : Ashwin Bishnoi
Date : 20 February 2020
Subject : **Legal Memo on Cross Border Insolvency of the Efwon Group**

1. INTRODUCTION

- 1.1. Dear Mr Maximov, thank you for reaching out to me. I understand your primary objective is to facilitate the sale of the motor business of Efwon Romania (**E Rom**) to KuasaNas (**KN**).
- 1.2. To facilitate this, we need to explore the following:
 - 1.2.1. Whether the “**Group**” (ie E Rom, Efwon Trading UK (**E UK**) and Efwon Investments in Delaware (**E Del**)) can file for restructuring under the US Bankruptcy Code?
 - 1.2.2. Alternatively, is E Rom’s centre of main interest located in Romania? If yes, what is the fastest legal process which facilitates a sale of the motor business of E Rom to an entity in which KN holds 51% equity (**BidCo**)?
 - 1.2.3. Apart from the 51% held by KN what will the shareholding pattern of the BidCo need to be in order to restructure the debts at E UK and E Del as well?
- 1.3. This requires several factual clarifications from you. These factual clarifications or assumptions are also set out in this memo below. We can meet and discuss these in order to chalk out next steps.

2. WHETHER THE GROUP CAN FILE FOR RESTRUCTURING UNDER THE US BANKRUPTCY CODE?

- 2.1. *Global Ocean Carriers*¹ and other similar decisions in the United States have held that where debtors have property (famously quoted in the judgment as even a “*dollar, dime or peppercorn*”)

¹ *In re Global Ocean Carriers Limited*, No. 00-955(MFW) to 00-969(MFW) (Bankr. D. Del. Jul. 5, 2000).

in the United States that is sufficient nexus to the United States for foreign debtors (like E Rom) to avail of the US Bankruptcy Code Chapter 11 process.

2.2. There would be several advantages if this could be established in the present case:

2.2.1. All debtors within the Group can be restructured under one law;

2.2.2. The US funds which have your houses as security would be familiar with the process of law and perhaps most comfortable with it;

2.2.3. The US market gives access to DIP finance, which could be helpful in this case if the Malaysian investigations continue to take time and the next F1 season is open us;

2.2.4. The US automatic stay is cross-border and should stay the actions by the Romanian drivers. We can also examine whether the purview of the US automatic stay would extend to staying enforcement action on property not owned by the debtors;

2.2.5. The US Section 363 sale process would be available for quick and efficient sale of the motor business to BidCo; and

2.2.6. The *ipso facto* clause benefits under US law will aid in ensuring that KN does not renege on its sponsorship commitment using the filing of insolvency proceeding by the Romanian drivers as the trigger.

2.3. Therefore, while the E Del lenders get comfort under the process you also get a stay on enforcement action on your houses – a win-win!

2.4. However, in order to avail this option, the following are required:

2.4.1. Each of the debtor parties and their creditors should ideally be agreeable to this process, to avoid prolonged litigation; and

2.4.2. The Group debtor parties will need to prove that there is property in the US. This could be that their revenues are deposited in bank accounts in US or otherwise. In *Global Ocean Carriers* minimal funds deposited with bankruptcy counsel was held as “property” and the court refused to go into the question of “adequacy” or “sufficiency” of property.

2.5. Of course, US Bankruptcy Code has certain disadvantages as well which you should consider:

2.5.1. It is usually an expensive tool;

2.5.2. The insolvency process is a formal process and so customers feel that the company is in

“insolvency”, however, given the filing in Romania, this is not a significant concern in the present case;

2.5.3. It can be time taking process especially when compared to prepacks in the UK;

2.5.4. There is a possibility that a trustee is appointed to govern the debtors where the creditors make the case²;

2.5.5. It is possible that the a “Section 363 sale” results in an auction in which case your control over BidCo with KN is not necessarily a foregone conclusion.

2.6. Therefore, as next steps:

2.6.1. Please consider the pros and cons and whether it is worth exploring a US filing for all the debtors;

2.6.2. Please consider whether all the debtors, their management and the creditors would be on board with such a process, as having them on-boarded will help convince a bankruptcy court in the US; and

2.6.3. If so, please provide details of all connections and property that each of the Group debtors have to the US in order establish nexus over and above minimal property (it is best to be prepared to counter any argument of inadequate nexus or inadequate “property” and therefore shameless forum shopping).

3. ALTERNATIVELY, IS E ROM’S CENTRE OF MAIN INTEREST LOCATED IN ROMANIA? IF YES, WHAT IS THE FASTEST LEGAL PROCESS WHICH FACILITATES A SALE OF THE MOTOR BUSINESS OF E ROM TO AN ENTITY IN WHICH KN HOLDS 51% EQUITY (BidCo)?

3.1. Article 3 of the EU Recast Regulations³ prescribe that the 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 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.

² Thomas L Belknap, ‘Does Chapter 11 work for foreign shipping companies’, Maritime Reporter and Engineering News (April 2013) p. 2.

³ Regulation (EU) 2015/848 of the European Parliament and of the Council, 20 May 2015 on Insolvency Proceedings

- 3.2. The element of objective ascertainability has also been impressed upon in the *Eurofood* judgment.
- 3.3. The Romanian drivers will argue that E Rom's centre of main interests is in Romania firstly because it is incorporated in Romania and that this presumption is not rebutted because:
- 3.3.1. The Super Licenses, which is the very essence of this business, is held in Romania by E Rom;
- 3.3.2. In F1 the employees, technicians, practice areas and equipment is key to the performance of the car and the company, and these are all located in Romania and all capital investments to improve these, safety and testing have gone into E Rom in Romania; and
- 3.3.3. It is quite clear that all the revenues of the Group that have been generated thus far, have been generated in Romania and have had to be sent upwards to E UK and E Del only through repayment of debt.
- 3.4. In order to understand this further and perhaps even to rebut this presumption, I would need to understand objectively and as ascertainable by third parties:
- 3.4.1. What is the exact nature of the economic activity carried out by E Rom and where the board meetings of E Rom have been held?
- 3.4.2. Is it the case that all decisions are principally taken by E UK or E Del and that the "controlling mind" of E Rom is located outside Romania, whether that is the UK or Delaware?
- 3.4.3. Whether there is any clause in any of the credit facilities availed that require that the centre of main interest of E Rom be maintained in a specified jurisdiction?
- 3.5. However, thus far, on the basis of the facts as you have presented them, it would appear to me that the centre of main interest (**COMI**) for E Rom will likely be in Romania, and to disprove this or move the COMI outside Romania and to the US or UK, would require many more facts to emerge.
- 3.6. If we proceed with the assumption that Romanian insolvency proceedings will be the foreign main proceedings, we next look to Romanian insolvency law to determine the likely legal process going forward.

3.7. Romania has recently fully implemented the European Directive 2019/1023 on preventive restructuring frameworks.

3.8. The fundamental pretext of this EU Directive is to enable debtors to effectively restructure at an early stage whether through asset sales, debt to equity swaps or otherwise without requiring a formal insolvency process. This includes providing a debtor in possession mechanism for resolve distress assuming that there is no accounting fraud in E Rom. This presents the following opportunities for restructuring E Rom:

3.8.1. The directive gives E Rom a stay from enforcement of individual actions, which will mean that the Romanian drivers will not be able to assert their claims any further against E Rom.

3.8.2. The directive also permits the filing of a pre-agreed restructuring plan approved by the pre-agreed classes. Since E Rom has no other creditors other than the debt owed to E UK, E UK ought to be able to control the process. However, this is something we will need to explore further under Romanian law to be sure that related party debt carries voting rights.

3.8.3. In the event E UK debt can be voted in the E Rom insolvency, E Rom ought to have a pre-agreed restructuring proposal agreed with its secured creditor (ie E UK). As part of this restructuring plan, it can agree to sell its motor business to BidCo for a specified consideration, which will be used to repay its creditors. I have assumed that the Super Licenses can be transferred in an insolvency asset sale. In some jurisdictions, a license can only be transferred with the "company". This I will need to confirm with Romanian counsel.

3.9. The EU recast regulations are applicable to "*public collective proceedings, including interim proceedings, which are based on laws relating to insolvency, and in which, for the purposes of rescue, adjustment of debt, reorganization or liquidation.....*". This begs the question whether the present proceedings filed by the Romanian drivers would suffice or whether a fresh proceeding would need to be initiated. To this end:

3.9.1. I will need to see the proceeding papers filed by the Romanian drivers to ascertain whether it is apparent that this is merely a pressure tactic or is there a genuine need for such a proceeding for the rescue, debt adjustment, liquidation of E Rom.

3.9.2. This also presents you with an opportunity to counter this proceeding in E Rom that these

proceedings are *mala fide* and not being transportable across EU would cause much greater problems than the ones they solve.

3.9.3. However, the grounds you use for 3.8.2 above need to be carefully thought through. If you use the argument that E Rom is not insolvent, this may deny you the opportunity to use the EU recast regulations should E Rom or E UK wish to file E Rom into an insolvency proceeding.

3.9.4. In any event, for the E Rom proceedings to be recognised in the UK and potentially in the EU, you should take note of the recent case of *Sturgeon Central Asia Balance Fund*⁴. The UK High Court held that foreign solvent proceedings will not be seen as a “collective proceeding” and so would not be accorded recognition in the UK under their regulations implementing the UNCITRAL Model Law on cross border insolvency. Does this mean that the UK court will test for itself whether E Rom is insolvent? What test will it apply? Will it consider insolvency of only E Rom or across the Group? These are some of the questions that remain unanswered.

3.9.5. Fortunately (or unfortunately) US Chapter 15 (implementing UNCITRAL cross border regulations in the US) recognise a wider body of proceedings and will probably recognise foreign proceedings even where the debtor is technically solvent on the date of filing but runs a risk of insolvency. Therefore, recognition of the E Rom proceedings in the US should be possible.

3.10. Therefore, E Rom’s COMI is likely to be in Romania. In case it be can be proven to be insolvent, a foreign proceeding there and its attendant rescue mechanism by way of a pre-agreed sale will be implementable and recognisable across the EU and in the US. The US does not have as strict a requirement against recognising solvent proceedings should E Rom found to be solvent.

3.11. These outcomes may change based on the facts and assumptions outlined above.

⁴ *In Re Sturgeon Central Asia Balanced Fund Ltd (in Liquidation)*, [2020] EWHC 123 (Ch).

4. APART FROM THE 51% HELD BY KN WHAT WILL THE SHAREHOLDING PATTERN OF THE BIDCO NEED TO BE IN ORDER TO RESTRUCTURE THE DEBTS AT E UK AND E DEL AS WELL?

4.1. As I understand there are the following external creditors within the Group with the following security:

Creditor	Security
<ul style="list-style-type: none"> • 2 US\$ 100 Million of senior bank debt at <u>E Del</u> 	<ul style="list-style-type: none"> • Security over houses provided by Mr Maximov worth US\$75 million
<ul style="list-style-type: none"> • 2 US\$ 60 million of mezzanine financial institutions debt at <u>E Del</u> 	<ul style="list-style-type: none"> • Pledge on projected revenues from participation in the sport of E Del
<ul style="list-style-type: none"> • 5 junior financial creditor debt aggt US\$ 90 million at <u>E Del</u> 	<ul style="list-style-type: none"> • Pledge over shares of E Del
<ul style="list-style-type: none"> • US\$ 100 million debt from Monaco lender 	<ul style="list-style-type: none"> • Pledge over revenue of E UK

4.2. This means:

4.2.1. All external creditors are structurally subordinated since they are not in the debt capital structure of E Rom;

4.2.2. The debt at E Del, since secured by homes of Mr Maximov, you will wish to ensure is settled and the charges over homes lifted;

4.2.3. It is not clear, but it would appear from your memo that the external creditors have charges over the revenues from their respective borrowers and not over the revenue of E Rom or Efwon Hong Kong. E UK and E Del having minimal revenues, there is, therefore, minimal value to this security;

4.2.4. The 2 senior banks in E Del may not be willing to, or be permitted to, under US regulations to take stock in BidCo;

4.2.5. The other creditors at E Del may be willing to take in BidCo equity instead of their debt. This also means that your equity stake in BidCo will be low and possibly less than controlling stake, but that is the subject matter of later negotiation; and

4.2.6. This may be a worthwhile deal to protect against any enforcement on the houses;

4.2.7. The Monaco creditor is arguable closer to the revenues of E Rom. Accordingly, he/she may have a stronger claim to higher recovery. In case, you wish to keep equity between yourself and the E Del creditors, you can pay out the Monaco lender using the proceeds recovered by E UK on its debt in E Rom.

4.3. In case a proceeding under US law is not available as discussed under Paragraph 2 above, the following legal proceedings may be required in addition to the Romanian proceedings discussed in Paragraph 3 above in order to form stakes in BidCo:

4.3.1. The E Del creditors will commence non main proceedings under US law to assert their rights to have an equity stake in BidCo to be formed in an appropriate jurisdiction with shareholding between E Del creditors and E Del other than two senior bank creditors at E Del and the Monaco creditors who will have to be paid out from the proceeds of the business sale to KN;

4.3.2. Given the E UK is effectively operating as an SPV of E Del, equity may support that E UK be consolidated with E Del. Even otherwise, you could attempt to establish that E UK has property in the US and could file as a debtor in the US;

4.3.3. If there are more than one legal proceeding, the coordination mechanisms under the UNCITRAL Model Law (as adopted) could be utilised by various bankruptcy courts across Romania, UK/US to procedurally coordinate hearings to ensure that the restructuring plan is implemented smoothly and fast.

5. CONCLUSION

5.1. In conclusion:

5.1.1. A lot depends on the facts and circumstances and I will need to carefully discuss those with you in order to formulate a path forward.

5.1.2. However, pending that, I have set forth my preliminary thoughts on the path forward.

5.1.3. If possible, we should try and open insolvency proceedings in the United States to give

comfort to the E Del creditors and to protect you from any enforcement action on the houses. The conditions to do that are outlined in Paragraph 2 above.

5.1.4. Alternatively, E Rom has its COMI in Romania and a “pre-packaged” restructuring with creditors at Romania may be explored. This too depends on some of the assumptions made above.

5.1.5. In order to implement the sale to KN, a new BidCo needs to be formulated and Paragraph 3 shares thoughts on the likely shareholding in this BidCo.

I trust you find this memo of assistance.

Regards,

Ashwin Bishnoi
