To Benedict Maximov

From Francisco Vazquez

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Re Group Restructuring/Case Study 2

This memorandum outlines a proposed strategy for (i) addressing the insolvency issues affecting Benedict Maximov ("Maximov") resulting from his interest in the Efwon Group,[1] and (ii) facilitating a transaction with KuasaNas (collectively, the "Global Restructuring"). Part I sets forth certain assumptions and describes the key components of a Global Restructuring. Part II discusses implementing the Global Restructuring through an out-of-court process. Part III and Part IV examine implementing the Global Restructuring under Chapter 11 of the United States Bankruptcy Code ("Chapter 11"), and under English law, respectively. Part V describes recognition under the Model Law on Cross-Border Insolvency (the "Model Law"). Finally, Part VI discusses recognition of the components of a Global Restructuring under the Model Law and Regulation (EU) No. 2015/848 of the Council of 29 May 2000 on Insolvency Proceedings (Recast) (the "Insolvency Regulation").

EXECUTIVE SUMMARY

As set forth in greater detail below, Maximov and the Efwon Group may be able to access US and English restructuring tools to execute a coordinated process to implement the Global Restructuring, like what occurred in the Lehman and Nortel cases. In this instance, however, the US and English tools may be insufficient to restructure all of the third-party indebtedness, especially at the Efwon Trading and Efwon Romania levels. Moreover, even if those entities could use US and English law to restructure their debt, it may be difficult to enforce a US or an English court approved restructuring in key jurisdictions, namely Romania. Consequently, Maximov and the Efwon Group should engage in discussions with their principal creditors and attempt to consensually restructure the third-party debt and consummate the transaction with KuasaNas. Absent a consensual resolution, however, Maximov and the Efwon Group could attempt to utilize parallel restructuring proceedings to implement a Global Restructuring and bind key creditors in different jurisdictions.

In particular, Maximov or EI, as the case may be, can likely confirm a Chapter 11 plan that restructures the claims of the American Banks (as defined below) over their dissent. Given that the American Banks are subject to the US court's jurisdiction, it is unlikely that Maximov or EI would require a foreign court's assistance to enforce such a plan. Nevertheless, such a plan would be enforceable elsewhere under the Model Law given that each has their center of main interests ("COMI"), and possibly an establishment in the US.

Efwon Trading and Efwon Romania may also be eligible to be debtors under Chapter 11. Similarly, they may also be able to propose a scheme under English law. However, absent additional significant third-party indebtedness, they may not be able to obtain a US court order confirming a Chapter 11 plan or an English order sanctioning a scheme over the dissent of the Monaco Bank (as defined below) or the Drivers (as defined below), respectively. Moreover, assuming a US court confirms an Efwon Trading or Efwon Romania Chapter 11 plan, a foreign court may not be able to enforce it because neither company appears to have its COMI or an establishment in the US. In addition, a Romania court may be reluctant to enforce an Efwon Romania restructuring, whether under a plan or a scheme, over the Drivers' dissent given (1) pendency of the Romanian Insolvency (as defined below), (2) the prejudice to the Drivers, and (3) Romanian public policy. Accordingly, the best alternative, after an out-of-court restructuring, would appear to be a parallel restructuring of (i) the American Bank's claims under Chapter 11, (ii) the Monaco Bank's claims under a scheme, if possible, or a consensual

[1] The Efwon Group refers to the following group of companies: (i) Efwon Investment ("EI"), a company incorporated under Delaware law, and (ii) Efwon Trading, a company incorporated under the law of England and Wales, and its subsidiaries (a) Efwon Romania, a company incorporated under Romanian law, and (b) Efwon Hong Kong, a company incorporated under the law of Hong Kong.

restructuring or refinancing thereof, if a default is likely, and (iii) the Drivers' claims under a Romanian restructuring.

PART I: ASSUMPTIONS AND OVERVIEW OF THE GLOBAL RESTRUCTURING

For purposes of this memorandum, the following assumptions have been made:

Maximov: Maximov habitually resides in and has substantial property in the US. His COMI is assumed to be in the US. He personally borrowed $250 million pursuant to a loan (the "Bank Loan"), which is governed by NY law, from a syndicate of banks (the "American Banks") to fund the group's operations. None of the members of the Efwon Group are borrowers under the Bank Loan.[2] He currently makes all of the management decisions for the Efwon Group from the US.

Efwon Trading: Efwon Trading, which is incorporated in England, does not have significant operations, assets, or liabilities beyond (i) its ownership stake in Efwon Romania, which is incorporated in Romania, and Efwon Hong Kong, which is incorporated in Hong Kong, and (ii) a loan, which is governed by English law, from a Monaco based lender (the "Monaco Bank"). Efwon Trading's COMI is presumed to be in England and there are insufficient facts to rebut the presumption. Efwon Trading does not have an establishment outside of England.

Efwon Romania: Efwon Romania is incorporated under Romania law. Substantially all of its assets and employees, including officers and directors, are in Romania (except when there is a race outside of Romania). It does not have any significant operations, assets, liabilities, or an establishment outside of Romania. Efwon Romania's COMI is presumed to be in Romania, and there are insufficient facts to rebut the presumption. Efwon Romania also has an establishment in Romania. Two individuals that are under contract to race for Efwon Romania (the "Drivers") are Efwon Romania's only significant third-party creditors. Efwon Romania could reorganize and restructure its obligations to the Drivers under Romanian law notwithstanding that the Drivers commenced insolvency proceedings against Efwon Romania (the "Romanian Insolvency").

The American Banks: The nine American Banks are subject to the jurisdiction of the US and English courts. They may have differing interests given that the structure of the Bank Loan reflects that there are two senior banks with an exposure of $100 million, two mezzanine financial creditor with an exposure of $60 million, and five junior financial creditors with an exposure of $90 million. The American Banks are not in privity with or have claims against any members of the Efwon Group.

The Drivers: The Drivers are not subject to the jurisdiction of the US or English courts. Their contingent, unliquidated claims are substantially less than the going concern value of Efwon Romania.

Monaco Bank: The Monaco Bank (together with the American Banks, the "Banks") is not subject to the jurisdiction of the US courts, but is subject to the English court's jurisdiction. The Monaco Bank is not in privity with or have claims against any other member of the Efwon Group.

In addition, it is assumed that:

- All of the loans, including the Bank Loan and the intercompany loans, have been properly documented and the applicable security interests and/or mortgages have been properly perfected;
- Maximov and the members of the Efwon Group are separate entities and there is no basis to substantively consolidate the entities;
- There is no basis to avoid or unwind any of the transactions involving Maximov and/or the Efwon Group members;
- The value of the racing team (i.e., Efwon Romania) has not changed significantly following its acquisition by Efwon Trading in 2010;

[2] The Case Study is ambiguous, and EI may be the borrower under the Bank Loan. The consequence of EI (and not Maximov) being the borrower will be addressed throughout this memorandum.

- The purchase price of $50 million for Efwon Romania was a fair price and therefore a 51% stake in Efwon Romania would be valued at $25.1 million;
- KuasaNas's offer in excess of $200 million annually will be sufficient to fund Efwon Romania's budget, a portion of which could be allocated to repay the Drivers and the Banks over a period of time;
- Assuming the insolvency issues are resolved, there are no other impediments, including government approvals, to KuasaNas's acquisition or the transfer of the racing team to Malaysia; and
- Efwon Trading and Efwon Roman are the only members of the Efwon Group that have significant third party or outside debt. Accordingly, EI and Efwon Hong Kong would not necessarily benefit from or need to be a debtor in a formal insolvency or restructuring or similar proceedings.

Key Components of Global Restructuring

The ultimate goal of the Global Restructuring is for Efwon Romania to emerge with its license intact and with sufficient funding to operate unhindered by the Drivers' claims. Maximov and the Efwon Group will have to focus on two tracks to accomplish that goal. First, they must restructure their financial obligations to three creditor constituencies: (i) the American Banks, (ii) the Monaco Bank, and (iii) the Drivers. Second, they must facilitate an organization change through a sale of 51% of the equity stake in Efwon Romania to KuasaNas. The second step, albeit important, will not be difficult to accomplish once the financial obligations are addressed. Consequently, this memorandum is focused on restructuring the financial obligations of Maximov, Efwon Trading, and Efwon Romania.[3]

From a high level perspective, a Global Restructuring would likely entail the following steps:

- Maximov and the Efwon Group should engage financial experts to analyze the various potential restructuring options, including the consideration that may be offered to the different creditor constituencies. In that regard, the experts should, *inter alia*, value the Efwon Group and the collateral granted to the Banks. The consideration to be provided to the creditors would likely consist of (1) cash revenues that originate from Efwon Romania, (2) cash proceeds from the collateral granted to the Banks, (3) a portion of the funding to be provided by KuasaNas, (4) equity in Efwon Romania or other members of the Efwon Group, (5) any unencumbered assets, if any, of Maximov or the Efwon Group, or (6) a combination thereof. Additional information, including the amount and priority of the creditors' claims, the value of the Banks' collateral, including revenues that originated from Efwon Romania, and the value of unencumbered assets that may be available to fund distributions, is necessary to propose the actual consideration to be distributed to the Banks, the Monaco Bank, and the Drivers. Accordingly, this memorandum does not propose actual amounts to be distributed to creditors.
- In addition, the Efwon Group should take immediate steps to stabilize its cash flow. It is therefore critical that the Romanian freezing orders be lifted or modified so that Efwon Romania can resume operations and earn revenue as soon as reasonably practicable. Accordingly, the Drivers' claims against Efwon Romania must be fixed and satisfied. Absent a consensual resolution with the Drivers, it appears that Efwon Romania should be able to restructure its liabilities, including the Drivers' claims, through a Romanian restructuring procedure enacted in accordance with European Directive 2019/1023 (the "ED"). Consistent with the ED, it is assumed that Romania has adopted procedures that would allow a debtor to remain in possession of its assets and continue operations and restructure "in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure." It is further assumed that

[3] This memorandum does not address the possibility of liquidation proceedings for Maximov or the Efwon Group members, which would entail a monetization of the debtors' assets and a distribution of such proceeds to creditors, because it is assumed that Maximov would like to retain his interests in the Efwon Group, including at least a 49% equity interest in Efwon Romania.

Efwon Romania can avail itself of such procedures in Romania notwithstanding the freezing orders.[4]

- Maximov's obligations under the Bank Loan must be restructured given that the loan is scheduled to mature in 2020 and there are insufficient revenues (or other collateral) to repay the Bank Loan in full on or before the 2020 maturity date. A restructuring of the Bank Loan could take the form of (i) a debt modification (i.e., extend maturity, reduce principal, and/or a waive interest), (ii) an exchange offer, (i.e., exchange current debt for new debt or equity in one or more members of the Efwon Group), or (iii) a combination thereof. In order to garner the support of the American Banks, Maximov could cause EI to subordinate its loan to Efwon Trading until the American Banks are paid in full.
- Efwon Trading's obligation to the Monaco Bank may also need to be restructured or refinanced. Given that the debt was incurred recently, it is reasonable to assume that a restructuring of the Monaco Bank's loan would likely take the form of a debt modification. Moreover, it may be possible to refinance the loan with a new one from the Monaco Bank or another financial institution at a lower interest rate. However, there may not be a need to restructure the Monaco Bank's loan if it is not scheduled to mature in the immediate future or Efwon Trading is not likely to default on its obligation.
- KuasaNas would be bound to provide funding in excess of $200 million annually subject to it obtaining a 51% stake in the racing team. Given that the team was acquired for $50 million in 2010, and there is no indication that the value of the team has materially changed, the initial annual payment would be more than sufficient to pay for the majority stake in the racing team. Accordingly, the Global Restructuring should reflect that KuasaNas's initial $200 million payment will be allocated to (1) Efwon Trading to purchase 51% of its shares in Efwon Romania, and (2) Efwon Romania as sponsorship fees and to fund its operations, including distributions to the Drivers. Future funding by KuasaNas will be allocated to KuasaNas's sponsorship fees with any excess being treated as an equity contribution in Efwon Romania, which may be upstreamed as dividends or as repayment of the loan from Efwon Trading. The funds that are upstreamed could be used to repay the Banks.

PART II: OUT OF COURT RESTRUCTURING

Given that key creditors—the American Banks, the Monaco Bank, and the Drivers—are not subject to the jurisdiction of a common court, Maximov, Efwon Trading and Efwon Romania would likely need to initiate multiple proceedings in the US, England and Romania, respectively, to effectuate a Global Restructuring. Accordingly, before considering formal restructuring alternatives, Maximov

[4] The ED contemplates the implementation of cram down rules similar to those in the US. In particular, under the ED, an EU member state's restructuring process should provide for cram down of a plan over the dissent of a creditor under certain circumstances. According to Article 10 of the ED, a plan can be crammed down over dissenting creditors in a class if the plan satisfies the best-interest of creditors test (i.e., no dissenting creditor would be worse off under the plan than in a liquidation). Here, that would require that plan provide that the Drivers receive at least their pro rata share of the value of the Efwon Romania, which is assumed to be $50 million, after application of the normal ranking of liquidation priorities. Given the amount proposed to be contributed annually by KuasaNas, it being assumed that more than $50 million would be available to be distributed to creditors, Efwon Romania should be able to satisfy that requirement. Moreover, depending on the size and amount of the class of unsecured claims, the Drivers may not control the outcome of the vote of such class, which under the ED may not require more than 75% of the amount of claims or number of creditors. Because the Drivers' claims are contingent and unliquidated, Romanian law (like Chapter 11) may permit a debtor to estimate the Driver's claim at $1.00 for voting purposes, thereby limiting the import of the Drivers' vote on a Romanian restructuring. Further, under Article 11 of the ED, a plan may be crammed down across classes provided, among other things, one impaired voting class votes in favor of the plan. It may therefore be possible for Efwon Romania to separately classify the Drivers' claims from other unsecured claims because they do not "reflect sufficient commonality" under Article 9 of the ED, and rely on a favorable vote by a separate class of unsecured creditors to obtain court approval of the restructuring. In that situation, a Romania court may be willing to confirm a plan over the dissent of a separate class of the Drivers' claims, if the plan satisfies the best interest of creditors test and treats the Drivers "at least as favourably as any other class of the same rank and more favourably than any junior class." For purposes of this memorandum, it is assumed that a Romania court may confirm a restructuring plan over the Drivers' dissent under either Article 10 or 11 of the ED.

and the Efwon Trading should try to negotiate an out-of-court restructuring of the Bank's claims. Similarly, Efwon Romania should try to settle the Drivers' claims. If those negotiations are successful, KuasaNas should be willing to commit to the funding it proposed without a formal restructuring approved by a court.

A debtor may voluntarily restructure its debts outside of the purview of a court. There is no standard form or process for an out-of-court restructuring, but it will reflect the terms of an agreement reached by a debtor and its creditors. A typical out-of-court restructuring may include (i) a debt modification, (e.g., extension of maturity, reduction or write-off of principal, and/or a waiver of interest); (ii) an exchange offer (i.e., exchange debt for new debt or equity); (iii) an equity infusion by existing equity holders or new investors; or (iv) a combination thereof.

Here, an out-of-court restructuring would likely entail (a) a modification of the Bank Loan, and the Monaco Bank's loan, if necessary, and (b) a settlement with the Drivers, pursuant to which their claims are fixed and satisfied. A condition of such a restructuring would be KuasaNas's commitment to fund at least $200 million annually, a portion of which could be allocated to purchase a 51% stake in Efwon Romania from Efwon Trading with the excess being used to pay the sponsorship fees and as contributions to Efwon Romania to fund operations, which would hopefully result in increased revenues. The Banks and the Drivers would be paid, presumably over a period of time, from funds that originated as revenue from Efwon Romania, including sponsorship fees paid or contributions made by KuasaNas.

There are several advantages to an out-of-court restructuring. *See* Jan Adriannse and Hans Kuijl in Resolving Financial Distress: Informal Reorganization in The Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions?, REV. CENT'L & E. EUROPEAN L. 31 (2006); INSOL's Statement of Principles for a Global Approach to Multi-Creditor Workouts II. Among other things, an out-of-court restructuring is generally faster and less expensive than a formal court process. Here, that would be especially true because, *inter alia*, an out-of-court restructuring would entail negotiations with twelve creditors: nine American Banks, the Monaco Bank, and two Drivers. If the American Banks act in concert through a steering committee or a single coordinator and the Drivers do not take divergent views, the negotiations could be streamlined, thereby further minimizing the cost and time associated with the Global Restructuring. In addition, existing management would remain in control, thereby reducing the cost associated with the appointment of a fiduciary. Further, the terms of an out-of-court restructuring will not necessarily become known to the general public, thereby avoiding the disclosure of sensitive information or the stigma that may be associated with a court process, including a negative reaction by Maximov or the Efwon Group's creditors or vendors.

An out-of-court restructuring will work only if all relevant creditors agree.[5] Holdout and non-participating creditors would not be bound to the terms of an out-of-court restructuring. Given that there are only twelve relevant creditors, an out-of-court restructuring may be feasible. However, the American Banks may have divergent interests among themselves given their differing position in the capital structure. Moreover, the Drivers have already obtained freezing orders against Efwon Romania. Consequently, they may not be willing to negotiate with Efwon Group. Absent unanimous creditor support for the Global Restructuring, Maximov, Efwon Trading, and Efwon Romania, the entities with

[5] A debtor that is negotiating an out-of-court restructuring remains subject to litigation. The parties' negotiations would likely benefit from a "standstill period" during which they can share information and negotiate without the threat of ongoing or future litigation. Accordingly, Maximov and the Efwon Group should enter into a forbearance agreement with the American Banks, the Monaco Bank, and the Drivers. Given that the Drivers have already obtained freezing orders against Efwon Romania, they may be unwilling to agree to forbear. However, it may be worth trying to persuade the Drivers that they would be better served by agreeing (i) to allow Efwon Romania to renew its operations, which would preserve, if not, enhance its overall value and therefore preserve or improve their potential recoveries, and (ii) to forbear from taking further action against Efwon Romania while trying to resolve their claims in the context of the Global Restructuring.

significant third party debt, should consider the US and English tools discussed below to restructure their financial obligations over the dissent of one or more of their creditors.[6]

PART III: CHAPTER 11

Under Chapter 11, a high-net-worth individual or a company may address its liabilities through a plan of reorganization. Moreover, Chapter 11 can facilitate a sale of assets or a reorganization of a debtor's corporate structure. Consequently, given the twin objectives of the Global Restructuring—a financial restructuring and an organizational change—a Chapter 11 case may be a good option for Maximov and the Efwon Group members. However, an individual or a company must be eligible to be a debtor in the US for it to avail itself of the benefits of Chapter 11.

Maximov and the Efwon Group Members May Be Debtors in the US

Under section 109(a) of the Bankruptcy Code, "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality may be a debtor under this title." 11 U.S.C. §109(a). A person is defined as including an individual and a corporation. *See* 11 U.S.C. 101(41). There is no insolvency requirement in the US. Consequently, any individual or corporation, solvent or insolvent, may restructure its debts under Chapter 11 if it has a residence, domicile, place of business, or property in the US as of the filing of a bankruptcy petition. *See In re Global Ocean Carries Ltd*., 251 B.R. 31, 37 (Bankr. D. Del. 2000).[7]

Maximov is eligible to be a debtor in the US. First, he appears to be domiciled in the US (e.g., he is a "wealthy American speculator"). *See* 2 Collier on Bankruptcy ¶109.02[2] ("'Domicile' is the place where one has one's true, fixed, permanent home and principal establishment, and to which, whenever one is absent, one has the intention of returning, and where one exercises one's political rights."). Second, he has property in the US in the form of his equity interests in EI, a Delaware company.[8] *See In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 37 (Bankr. D. Del. 2000) (holding that debtor had property in Delaware by virtue of its ownership of stock in a Delaware corporation). Although unclear from the Case Study, it is assumed that he has real estate in the US.

Efwon Trading and Efwon Romania may not currently be eligible to be debtors in the US. However, they could transfer property to the US to satisfy the eligibility requirements (*See GMAM Investment Funds Trust I v. Globo Comunicacoes e Participacoes S.A. (In re Globo Comunicacoes e Participacoes S.A.)*, 317 B.R. 235 (S.D.N.Y. 2004) ("For a foreign corporation to qualify as a debtor under Section 109, courts have required only nominal amounts of property to be located in the United States, and have noted that there is 'virtually no formal barrier' to having federal courts adjudicate foreign debtors' bankruptcy proceedings.'). Indeed, a foreign company can satisfy the eligibility requirement by transferring funds to the US on the eve of a bankruptcy filing. *See In re Yukos Oil Co*., 321 B.R. 396 (Bankr. S.D. Tex. 2005) ("The funds which created jurisdiction in this court were transferred to banks in the United States less than one week prior to the filing of the petition . . . ."). Given the freezing orders, Efwon Romania may not be able to transfer property to the US. However, Maximov or another member of the Efwon Group could fund a retainer in the US for the benefit of Efwon Romania and thereby render Efwon Romania eligible to be a debtor in the US. *See In re Global*, 251 B.R. at 39 (holding that retainer paid by an affiliate was sufficient to render a foreign company eligible to be debtor provided the funds would be used to pay the debtor's counsel). Consequently, Maximov and the Efwon Group members should be able to avail themselves of Chapter 11 and its benefits, certain of which are briefly discussed below.

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[6] It is assumed that, absent a consensual resolution, Efwon Romania can address the Drivers' claims either in the Romanian Insolvency or through a restructuring plan approved by a Romanian court. There is likely no need to obtain recognition of such an insolvency or restructuring by a foreign court because Efwon Romania's principal creditors (i.e., the Drivers) appear to be subject to the jurisdiction of the Romanian courts.

[7] Other Chapters of the Bankruptcy Code (e.g., 7 and 13) impose additional eligibility requirements. Chapter 11 does not.

[8] EI is eligible to be a debtor because it is incorporated (i.e., domiciled) in Delaware.

The Automatic Stay Will Enjoin Litigation Against a Debtor

Upon the filing of a petition for relief under Chapter 11, creditors and other interested parties will be automatically enjoined from commencing or continuing litigation or taking other actions against a debtor and its properties. *See* 11 U.S.C. §362(a). The scope of the automatic stay is extremely broad. It applies to virtually every type of action, whether formal or informal, against a debtor or property of the estate wherever located. The stay is designed to provide a debtor with a breathing spell from its creditors to give the debtor an opportunity to address business problems and formulate a plan of reorganization to satisfy the claims of its creditors. Unless otherwise ordered by a court, the automatic stay will not enjoin, actions against a non-debtor, including a non-debtor affiliate or subsidiary.

The automatic stay is not permanent and can be modified by order of the bankruptcy court for cause, after notice and a hearing, upon the motion of any party-in-interest. *See* 11 U.S.C. §362(d)(1). One of the grounds for relief from the stay is lack of adequate protection as defined under section 361 of the Bankruptcy Code. In addition, a court may lift the automatic stay and allow a creditor to foreclose on its collateral if the debtor lacks equity in the property and does not need such property for an effective reorganization. Moreover, a bankruptcy court may lift the automatic stay to permit litigation that is pending in another forum to proceed for the purpose of liquidating the amount of the claim and possibly allow the creditor to recover its claim from a non-debtor (e.g., insurer), but a court would typically not allow a creditor to enforce its unsecured judgment against a debtor's estate.

A Chapter 11 Plan Can Restructure a Debtor's Liabilities over Creditor Dissent

The culmination of a Chapter 11 case is the confirmation (i.e., bankruptcy court approval) of a plan of reorganization, which provides for the comprehensive treatment of all claims asserted against the debtor and its property and may provide for the readjustment or extinguishment of equity interests. A confirmed plan is binding on the debtor and all creditors regardless of their vote. *See* 11 U.S.C. §1141(a). A discussion of all of the confirmation requirements, which are set forth in section 1129 of the Bankruptcy Code, is beyond the scope of this memorandum. For purposes of this memorandum, it is sufficient to note the following two requirements. First, section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with, among other things, section 1122 of the Bankruptcy Code, which governs the classification of claims and interests. Section 1122 of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. §1122(a). The requirement of substantial similarity does not mean, however, that claims or interests within a particular class must be identical. The focus of the classification is the legal character of the claim as it relates to the assets of the debtor. Accordingly, secured claims are generally separately classified from unsecured claims.

Second, under section 1129(a)(8) of the Bankruptcy Code, a court may confirm a plan only if all impaired classes vote to accept the plan. A claim or interest is impaired if the legal or equitable rights of the holder of such claim or interest are altered. A class of claims accepts a plan "if such plan has been accepted by creditors…that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class." 11 U.S.C. § 1126(c). Thus, a plan may be confirmed over the dissent of creditors in a particular class as long as the voting thresholds for that class are satisfied.

Notwithstanding the foregoing, a court may confirm a plan over the dissent of an impaired class or classes if at least one impaired class (not including insiders) votes in favor of the plan and the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the dissenting class(es).[9] *See* 11 U.S.C. §1129(b). Section 1129(b)(1) does not prohibit any discrimination between classes, only discrimination that is unfair. A plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment. As between two classes of claims or two classes of interests, there is no unfair

[9] The vote of an insider is not counted in determining whether an impaired class has voting in favor of a plan. *See* 11 U.S.C. §1129(a)(10).

discrimination if (i) the classes are comprised of dissimilar claims or interests, or (ii) there is a reasonable basis for such disparate treatment.

Section 1129(b)(2) sets forth in particularity the "fair and equitable" requirement, often referred to as the "absolute priority rule." The fair and equitable requirement is generally satisfied with respect to secured creditors if the plan provides for (i) the retention of the secured creditor's lien and (ii) deferred cash payments that total the amount of the secured claim and have a net present value equal to the value of the secured creditor's collateral.[10] With respect to unsecured creditors, the fair and equitable requirement is satisfied if the plan provides that such creditors will receive or retain property equal in value to the amount of their allowed claim, or be assured that any holders of claims or interests junior to them will not receive or retain anything under the plan. Accordingly, any plan that provides for the reinstatement of the equity in a company must generally provide for payment in full of the claims of the unsecured creditors or be accepted by all classes of unsecured creditors. A court, however, may confirm a plan that allows equity to retain its interests in the reorganized debtor if equity contributes new value.

Chapter 11 Can Facilitate a Sale

Under section 363(b) of the Bankruptcy Code, a debtor in possession "may use, sell, or lease" its property in the ordinary course of business without court approval. A debtor may sell property outside of the ordinary course of its business with bankruptcy court approval. In general, a bankruptcy court will apply a business judgment test and defer to the debtor's decision and approve a sale when it is convinced that there is a sound business reason for the sale. *See* 3 Collier on Bankruptcy ¶363.02[4]. Moreover, a sale may be free and clear of any interest, including liens and mortgages, in the property being sold provided certain requirements are satisfied. *See* 11 U.S.C. §363(f). However, a court will generally approve a sale free and clear of any liens on the property if (i) if the secured creditor consents to such sale, or (ii) the sale price of the property exceeds the amount of the liens. In general, any liens would attach to the sale proceeds. In addition to section 363, a debtor may sell its assets under a confirmed Chapter 11 plan. *See* 11 U.S.C. §1123(a)(5) (listing a sale free and clear of interest in property as a means to implement a plan).

Maximov May Benefit From a Chapter 11 Case

Absent a consensual resolution with the American Banks, Maximov should consider filing a voluntary petition under Chapter 11 for at least two reasons. First, a Chapter 11 filing by Maximov would result in an automatic stay that would enjoin almost all litigation and all foreclosure actions against Maximov and his assets.[11] Courts have held that the automatic stay applies extraterritorially and protects all property of the debtor, "wherever located and by whomever held." *See In re McLean Indus.*, 74 B.R. 589, 601 (Bankr. S.D.N.Y. 1987). Thus, the American Banks would not be able to exercise their remedies on Maximov or his assets, including real estate outside the US, absent relief from the court.[12]

Second, Maximov could obtain confirmation of a plan that restructures the Bank Loan over the dissent of one or more of the American Banks. For purposes of this analysis, it is assumed that (i) the

[10] A plan may also satisfy the fair and equitable requirement as to secured creditors by proving for (i) a sale free and clear of such secured creditor's liens with such liens attaching to the proceeds of the sale, or (ii) the realization of the indubitable equivalent of the secured creditor's claims. *See* 11 U.S.C. §1129((b)(2)(A)(i), (ii).

[11] If EI (and not Maximov) is the borrower under the Bank Loan, EI should consider filing a chapter 11 case to restructure the Bank Loan. A bankruptcy filing by EI would result in an automatic stay that would enjoin litigation against EI and its assets. Maximov, however, would not have the benefit of the automatic stay and the American Banks could foreclose on the assets he pledged to secure the Bank Loan, including his real estate and his interests in EI, unless (i) he personally files for bankruptcy, or (ii) the bankruptcy court in EI's chapter 11 case extends the automatic stay to Maximov and his assets. US courts have in limited circumstances extended the automatic stay to non-debtors under its equitable powers where the extension enhanced the chances of a successful reorganization.

[12] As noted above, a court may grant relief from the automatic stay under certain circumstances. The likelihood of the American Banks or any other creditor obtaining relief from the automatic stay is beyond the scope of this memorandum.

American Banks are Maximov's only secured creditors, and that he has at least one unsecured creditor (not including insiders) that he could impair under a plan and would vote in favor of the plan. Therefore, Maximov could propose a plan that has two classes (not including administrative expenses, priority claims, or interests that would be separately classified): (i) the American Banks and (ii) the unsecured creditor. If the unsecured creditor class and at least five of the nine American Banks holding at least two-thirds of the claims arising from the Bank Loan vote in favor of the plan, the court could confirm the plan over the dissent of the four other banks without applying the cram-down requirements. If Maximov did not obtain the requisite votes to obtain acceptance by the American Banks' class, he could confirm the plan over that class's dissent relying on the accepting vote of the unsecured class (not including insiders) assuming the plan satisfies the cram-down requirements.[13] Moreover, if necessary (i.e., he has no consenting impaired unsecured creditor), he could divide the American Banks into three separate classes of secured claims based on their different positions in the capital structure. If one of those classes approves the plan, he should be able to confirm the plan over the dissent of the other classes provided the plan does not unfairly discriminate against and is fair and equitable as to the dissenting classes.

Maximov may face certain difficulties confirming a plan that allows him to retain his equity interest in Efwon Investment over the dissent of a class of unsecured creditors, if any. Under section 1129(b)(2)(B)(ii), an individual debtor may cram down a plan over the dissent of an unsecured creditor class and retain property included in the estate under section 1115. Some courts have interpreted the scope of section 1115 to include all property of the estate, including a prepetition ownership interest, such as Maximov's interest in EI, thereby abrogating the absolute priority rule. Other courts, including all of the US appellate courts that have addressed the issue, have concluded that the scope of section 1115 is limited to postpetition earnings. Thus, those courts have concluded that an individual debtor remains subject to the absolute priority rule and should not be able to retain property over the dissent of an unsecured class of creditors that is not being pain in full. *See generally* Mark Salzberg & Kate Thomas, *Did BAPCPA Abolish Absolute Priority Rule for Individual Debtors" 9th Circuit Gives it View*, 35 AM. BANKR. INST. J. 40 (May 2016). Consequently, Maximov may be able to confirm a plan that allows him to keep his equity interests in EI over the dissent of the American Banks, but not an unsecured class of creditors. [14]

The Benefits of a Chapter 11 Filing of Efwon Trading and Efwon Romania May Be Limited

A US court may dismiss or abstain from a foreign company's bankruptcy case notwithstanding that the company is eligible to be debtor. Under section 305(a) of the Bankruptcy Code, a court may dismiss or suspend all proceedings in a case if the interests of creditors and the debtor would be better served by such dismissal or suspension. 11 U.S.C. §305. In addition, under section 1112 of the Bankruptcy Code, a court may dismiss a Chapter 11 case upon a showing of "cause," which includes the inability to confirm or to effectuate a confirmed Chapter 11 plan. See 11 U.S.C. §1112(b).

US courts have dismissed Chapter 11 cases where the debtor's US presence is "too tenuous" or where a US case "creates unfairness or hardship on creditors." Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 15 J. BANKR. L. & PRAC. 2 ART. 3 (Apr. 2006). For example, a court US court may dismiss a case where major stakeholders are not subject to the US court's jurisdiction and are unwilling to participate in the US case. *See In re Yukos*, 321 B.R. 411-12 (dismissing Chapter 11 case of Russian oil company because, among other things, the "ability to effectuate a reorganization without the cooperation of the Russian government is extremely limited"). US courts have also dismissed Chapter 11 cases in favor of foreign restructurings where the creditors' expectations were that a restructuring would occur in the foreign jurisdiction. *See In re Northshore*

[13] To satisfy the cramdown requirements, a plan must generally provide that the American Bank (i) retain their liens, and (ii) receive deferred cash payments totaling the amount of the secured claim and have a net present value equal to the value of their collateral, which would depend on, *inter alia*, the value of the banks' collateral and the amount of payments to be distributed under the plan, which would ultimately be a function of Efwon Romania's revenues.

[14] Similarly, EI could not confirm a plan that allows it to retain its interests in Efwon Trading over the dissent of a class of unsecured claims, unless it contributes new value. Otherwise, such a plan would violate the absolute priority rule.

Mainland Servs., Inc., 537 B.R. 192, 206 (Bankr. D. Del. 2015) ("[E]xpectations surrounding the question of *where* ultimately disputes will be resolved—are important, should be respected, and not disrupted unless a greater good is to be accomplished.").

A US court may dismiss an Efwon Trading Chapter 11 case if it concludes that it would be impossible for Efwon Trading to confirm or implement a plan over the Monaco Bank's dissent. Under the Bankruptcy Code, Efwon Trading can confirm a plan over the Monaco Bank's dissent under two circumstances. First, the Monaco Bank may be outvoted by similarly situated secured creditors in its class. However, it is assumed that the Monaco Bank is Efwon Trading's only secured creditor. Consequently, the Monaco Bank will control the voting outcome of the secured class. Efwon Trading would therefore have to rely on the second option, that being persuade an impaired class of unsecured creditors to vote in favor of the plan. If such a class exists and votes in favor of the plan, a court may confirm the plan over the Monaco Bank's dissent if the plan does not unfairly discriminate against and is fair and equitable as to the Monaco Bank. Absent an accepting class of impaired creditors, any effort to confirm a plan over the Monaco Bank's dissent would be futile. Nevertheless, a US court may be willing to give Efwon Trading an opportunity to negotiate a restructuring with the bank like the court did in the chapter 11 case of *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003). There, the US court denied motion to dismiss and abstain from a Colombian airline's bankruptcy case to allow it time to negotiate a restructuring under Chapter 11. Ultimately, the case was a success as the airline obtained an order confirming its Chapter 11 plan that was supported by Colombian creditors. The risk of dismissal of an Efwon Trading Chapter 11 case would increase, however, if the Monaco Bank unequivocally stated that it would not participate in the case.

A US court would likely dismiss an Efwon Romania Chapter 11 case because creditors' expectations appear to be that an Efwon Romania insolvency or restructuring would be addressed in Romania. Indeed, the Drivers–Efwon Romania's most significant creditors–have already obtained freezing orders in the Romanian Insolvency. US courts have dismissed Chapter 11 cases under similar circumstances. *See In re Northshore*, 537 B.R. 206 (dismissing Chapter 11 cases in favor of Bahamian proceedings). Moreover, Efwon Romania can reorganize under the laws of Romania, which has implemented the ED and presumably provides a debtor and creditors with certain rights and safeguards. This ability to restructure debts under Romanian law favors dismissal or abstention of an Efwon Romania Chapter 11 case. *See In re Spanish Cay Co*., 161 B.R. 715, 726 (Bankr. S.D. Fla. 1993) (abstaining from a Chapter 11 case in favor of a proceeding in Bahamas where the debtor's primary assets were located and whose law governed rights of key parties after finding that creditors would be "justly treated and protected from prejudice" by the Bahamian court). Consequently, a US court may be inclined to dismiss or abstain from Efwon Romania's Chapter 11 case in favor of the Romanian Insolvency or a possible Romanian restructuring.

Assuming *arguendo* that a US court does not dismiss or abstain from a Efwon Trading or Efwon Romania Chapter 11 case, the automatic stay would technically prevent the Monaco Bank and the Drivers from enforcing their remedies against Efwon Trading and Efwon Romania, respectively. Similarly, an order confirming a Chapter 11 plan for Efwon Trading and Efwon Romania would technically be binding on the Monaco Bank and the Drivers. Moreover, Efwon Trading could obtain an order authorizing a sale of its equity in Efwon Romania free and clear of any interests.[15] However, for practical purposes, it may be difficult, if not impossible, to enforce the automatic stay or a bankruptcy court's orders as against the Monaco Bank and the Drivers unless they voluntarily submit to the US courts' jurisdiction or a relevant court grants recognition to or enforces the US court's orders. As discussed in Part V, an English or Romanian court may refrain from granting recognition to an Efwon Trading or Efwon Romania Chapter 11 case because neither appears to have its COMI or an establishment in the US. Moreover, a Romanian court may be reluctant to enforce a plan that restructures the Drivers' claims for additional reasons.

[15] An order approving a sale of Efwon Trading's equity in Efwon Romania could be free of any interests on such equity. However, any claims against Efwon Romania, such as the Drivers' claims, would survive such a sale and remain enforceable.

PART IV: ENGLAND

In England, a company can restructure its debts through an out of court restructuring, administration, a company voluntary arrangement (a "CVA"), or a scheme of arrangement (a "scheme").[16] *See* Jennifer Payne, *Debt Restructuring in English Law; Lessons from the United States and the Need for Reform*, 130 L.Q.R. 282, 285 (Apr. 2014); Ian Johnson, England & Wales, The Insolvency Review 41.[17]

Administration

Under the Insolvency Act 1986 (the "Insolvency Act"), the primary objective of an administration is to rescue a company as a going concern. If that objective is not reasonably practicable, an administrator must perform his functions with the objective of achieving a better result for creditors as a whole than if the company was wound up. If neither of the foregoing is reasonably practicable, the administrator should realize property to make a distribution to one or more secured or preferential creditors. An administrator may be appointed where a company is, or is likely to become, unable to pay its debts and the objectives of an administrator is likely to be achieved. The appointment of an administrator for a company will generally result in a broad moratorium against any legal action, including collection or foreclose on liens, on a debtor or its assets without the consent of the administrator or permission of the court *See* Insolvency Act, Schedule B1, para 43. Unless extended, which occurs often in complex cases, an administration will end after one year. During that period, an administrator may propose a scheme of arrangement to address a company's liabilities. Moreover, administration has been used to facilitate the sale of a company's business or assets, including a sale that was negotiated prior to a company's administration (i.e., a prepack). *See* 4 PALMER'S COMPANY LAW ¶ 14.038.1. Such a sale may be free of a charge if the net proceeds of such sale are used to discharge the security. *See Disposals, Conveyances and Transfers*, LIGHTMAN & MOSS ON THE LAW OF ADMINISTRATORS AND RECEIVERS OF COMPANIES 11-111, "The key attraction of pre-packs is that they enable a very rapid sale and this is more likely to preserve value, food will and confidence than a slower and more protracted administration process." Payne at 293.

The benefits of administration appear to be more limited than Chapter 11. First, only an English company, a company incorporated in an EU member state (other than the UK), or a company not incorporated in an EU member state but with its COMI in a member state (other than Denmark) may generally be placed into administration. *See* Insolvency Act, Schedule B1, para. 111. Accordingly, an administrator may be appointed for Efwon Trading (incorporated and COMI in England) and Efwon Romania (incorporated and COMI in Romania), but not the other Efwon Group members. *See* Johnson at 44. (noting that with limited exceptions, "[a]n administrator cannot be appointed to a company whose COMI is located outside the EU"). Second, administration is not a debtor-in possession proceeding as management will be displaced in favor of administrators. *See* Payne at 293. Third, administration does not provide for cram down. *Id*.

Scheme of Arrangement

Under Part 26 of the Companies Act 2006, a company may propose a scheme, which is a compromise or arrangement between a company and its creditors or any class of creditors, to restructure the company's rights and liabilities. A class must be confined "to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest." *Hawk Insurance Co. Ltd.*, [2002] B.C.C. 300 (CA (Civ Div 2001)). A court has no jurisdiction to

[16] In England, an individual may address its financial distress through (i) a bankruptcy proceeding, or (ii) an individual voluntary arrangement. It is not clear whether either alternative would be available to Maximov, an America, and therefore a discussion of those alternatives is beyond the scope of this memorandum.

[17] A CVA is a statutory procedure, under the Insolvency Act, pursuant to which a company and its unsecured creditors can agree to (i) a composition in satisfaction of the company's debts or (ii) an arrangement of the company's affairs. However, CVAs are not commonly used because there is generally no provision a moratorium enjoining litigation and a secured creditor, such as the Monaco Bank, cannot be bound to a CVA absent its consent. *See* Payne at 288. CVAs are not discussed at length herein because they are not a practical alternative.

sanction a scheme if the class composition is incorrect. A scheme of arrangement becomes legally binding on the company and on all of the creditors to whom it applies if:

1. a majority in number representing not less than 75% in value of each class of creditors, present and voting in person or by proxy, vote in favor of the scheme at meetings convened for such purpose with leave of the High Court of Justice of England and Wales (the "High Court");

2. the High Court subsequently sanctions the approved scheme; and

3. an office copy of the sanction order is delivered to the Registrar of Companies in England and Wales.

Consequently, a scheme permits cramdown over dissenting creditors in a class, but not across classes (unlike Chapter 11, which does both).

A company does not have to be insolvent to propose a scheme. Solvent companies often propose schemes to address their liabilities. A company can propose a scheme if it is a "company liable to be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency (Northern Ireland) Order 1989." *See* Companies Act, part 26 s. 895.[18] An unregistered company may be wound up under section 221 of the Insolvency Act. Section 220 of the Insolvency Act defines an unregistered company "as any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom." Thus, a foreign company, which on its face would be an unregistered company, can implement a scheme. *See* Lucas Kortmann & Michael Veder, *The Uneasy Case for Scheme of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?*, 3 NIBLEJ 13, 243-44 (2015). Brexit should not limit the availability of a scheme to a foreign company.

Notwithstanding that a foreign company can propose a scheme, an English court has discretion to not consider a scheme. In determining whether to consider a scheme proposed by a foreign company, an English court will generally consider (i) whether the company has a "sufficient connection" with England; and (ii) whether the scheme will achieve a substantial effect. *See Re Noble Group Ltd.*, [2018] EWHC 3092. The following is a brief discussion of those two requirements.

Sufficient Connection

Absent a sufficient connection to England, an English court may refrain from exercising its discretion to sanction a foreign company's scheme. *See Syncreon Group B.V.*, [2019] EWHC 2068 (Ch) (noting the court will not exercise jurisdiction over a Dutch company "without being satisfied that it has a 'sufficient connection' with the jurisdiction"*).* English courts have held that they have jurisdiction to sanction a scheme of a company that has its COMI in England. *See* Christian Pilkington, SCHEMES OF ARRANGEMENT IN CORPORATE RESTRUCTURING 69 (2d ed. 2017). The existence of business operations or the presence of assets would likely also satisfy the sufficient connection requirement. *See Magyar Telecom BV, [2013] EWHC 3800 (Ch).* Moreover, the presence of creditors in England would also likely be a sufficient connection because they would be bound to comply with the scheme by the court's order sanctioning the scheme. *See id.*

The sufficient connection element may be satisfied if the agreements evidencing the debt being restructured under the scheme are governed by English law. S*ee BlueCrest Mercantile BV v. Vietnam Shipbuilding Industry Group,* [2013] EWCH 1146 (Comm) ("The courts have in recent years found a sufficient connection where the claims of the relevant creditors are governed by English law."); *Rodentstock GmbH,* [2011] EWHC 1104 (Ch) (finding a sufficient connection with England where the facility agreement was governed by English law and England was the forum selected for the resolution of disputes). Moreover, a change of the original law governing the instrument evidencing the debt being

[18] Only a company that is "formed and registered" under the Companies Act may implement a scheme that facilitates a reconstruction or amalgamation under section 900 of the Companies Act. Such schemes are beyond the scope of this paper.

restructured to English law will also help establish a sufficient connection. *See Apcoa Parking Holdings GmbH*, [2014] EWHC 3849 (Ch).

Substantial Effect

An English court will generally not exercise its discretion and sanction a scheme where to do so would not have a substantial effect or prove to be futile. *See Magyar*, [2013] EWHC 3800 (Ch) ("The court will not generally make any order which has no substantial effect and, before the court would sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose."). Consequently, an English court will analyze whether the scheme will be given effect in other relevant countries. This will generally require the company to provide evidence from foreign experts that the scheme will be enforced in those jurisdictions. As discussed in greater detail in Part V, the courts of the EU member states have generally recognized schemes and this should continue despite Brexit. Moreover, other countries, such as the US, may enforce a scheme under the Model Law.

A Scheme May Not Foster the Global Restructuring

Efwon Trading and Efwon Romania could propose schemes to address their debts. However they would remain subject to litigation until their schemes, which presumably would include a moratorium, became effective. Consequently, they may benefit by combining a scheme with a pre-pack administration that would result in a stay and could be used to effectuate a sale of Efwon Trading's interest in Efwon Romania to KuasaNas. The decision to implement this strategy will depend, in part, on the perceived risk of litigation. The Monaco Bank has not threatened litigation and the Drivers do not appear to be pursuing remedies outside of Romania. Consequently, there does not currently appear to be a need for a moratorium, or to place them into administration.

Before pursuing a scheme, the Efwon Group should analyze whether (1) the English courts will exercise discretion to sanction such a scheme, and (2) such scheme would be enforceable elsewhere. It is likely that Efwon Trading has a sufficient connection to England because (1) Efwon Trading's COMI is in England and (2) Efwon Trading's debt is governed by English law. Moreover, as will be discussed in Part V, the sanctioning of an Efwon Trading scheme is not a futile act because it will likely be enforced elsewhere. However, an English court may be reluctant to sanction a scheme proposed by Efwon Romania because it does not appear to have any connections, much less sufficient connections, to England. Moreover, it does not appear that such a scheme would be enforced in Romania for the reasons discussed in Part V

In any event, Efwon Trading and Efwon Romania likely cannot obtain an order sanctioning a scheme that affects the Monaco Bank or the Drivers, respectively, over their dissent. A class of one creditor can veto a scheme because a scheme can only be sanctioned if all classes vote in favor of the scheme. Consequently, unless Efwon Trading can create a class of creditors that can satisfy the Companies Act voting requirements without the Monaco Bank's vote, an English court will not sanction a scheme that restructures the Monaco Bank's claim without its consent. Similarly, unless Efwon Romania creates a class of unsecured creditors that would satisfy the voting requirements without the Drivers' vote, an English court will not sanction a scheme that restructures the Drivers' claims without their consent.

PART V: RECOGNITION AND ENFORCEMENT UNDER THE MODEL LAW

The Model Law is a procedural device to be integrated into the insolvency laws of any nation that adopts it. *See* UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, part 2, ¶20, http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf (the "Guide to Enactment"). To date, 48 jurisdictions in 46 States, including Romania, the UK, and the US, have enacted a version of the Model Law. The Model Law establishes "simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize." Guide to Enactment, part 2, ¶29. The following is a brief overview of the requirements for

recognition and other relief under the Model Law, with reference to the US version (i.e., Chapter 15 of the US Bankruptcy Code ("Chapter 15")).

The Model Law applies to a "foreign proceeding," which is defined as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." Model Law, art. 2(a). Chapter 15's definition of a foreign proceeding is similar to the Model Law's version, but includes the phrase "adjustment of debt" to ensure that a solvent debtor may be the subject of a foreign proceeding. *See* 8 COLLIER ON BANKRUPTCY ¶1501.03[1] (Alan Resnick & Henry Sommer eds., 16th ed. 2014). Courts have recognized Chapter 11 cases and English administrations and enforced Chapter 11 plans and English schemes under the Model Law.

Under the Model Law, a foreign proceeding shall be recognized, if (1) the foreign proceeding is a foreign main or foreign nonmain proceeding, (2) the petition for recognition was filed by a foreign representative, and (3) the petition satisfies certain procedural requirements. Model Law, art. 17. "By establishing a simple objective eligibility requirement for recognition, Chapter 15 [and the Model Law] promotes predictability and reliability." *In re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd*., 389 B.R. 325, 333 (S.D.N.Y. 2008). If the requirements are satisfied, recognition should only be denied if it would be "manifestly contrary to the public policy of this State" under Article 6 of the Model Law discussed below.

To be eligible for Chapter 15 recognition, a foreign proceeding must be a foreign "main" proceeding or a foreign "nonmain" proceeding. If the foreign proceeding is not foreign main or foreign nonmain, a court may not grant recognition.

Foreign Main Proceeding/Foreign Nonmain Proceeding

A foreign main proceeding is "a foreign proceeding taking place in the State where the debtor has the centre of its main interests." Neither the Model Law nor Chapter 15 define a debtor's COMI, but they provide that a debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's COMI. This presumption may be rebutted.

COMI is derived from the Insolvency Regulation, which defines COMI as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *See* Guide to Enactment, part 2, para. 81. In determining a debtor's COMI under the Model Law, a court should consider "the location (i) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors." *Id.*, para 145. If these factors are not sufficient to determine COMI, a court should consider all relevant factors, including the location (i) of the debtor's books and records, (ii) where financing was organized or authorized, (iii) where cash management system is un, (iv) of principal assets, (v) of employees, (vi) of the debtor's reorganization, and (vii) the jurisdiction whose law would apply in most disputes: *See id*., para 148.[19] US courts will generally consider the following factors in analyzing COMI: (i) the location of the debtor's headquarters; (ii) the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); (iii) the location of the debtor's primary assets; (iv) the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and (v) the jurisdiction whose law would apply to most disputes. *See In re Serviços de Petróleo*

[19] Under the Insolvency Regulation, a court must analyze a debtor's COMI in connection with the opening of proceedings in its jurisdiction and not recognition. Accordingly, the COMI analysis is different under the Insolvency Regulation, which imposes a temporal element to the COMI presumption. Moreover, Insolvency Regulation's presumption should be rebutted "where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes … that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State." Insolvency Regulation, Preamble ¶30.

Constellation S.A., 600 B.R. 237 (Bankr. S.D.N.Y. 2019).[20] US courts will also consider (a) creditor and third party expectations, (b) international interpretations of COMI, and a debtor's principal place of business or never center. *Id.*

A foreign nonmain proceeding is a foreign proceeding "taking place in a State where the debtor has an "establishment," which is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." Model Law, art. 2. A foreign proceeding premised only on the existence of debts or assets in a foreign country, however, would likely not qualify as a foreign nonmain proceeding and therefore would not be eligible for recognition. *See* Guide to Enactment, part 2, para 90.

According to the Guide to Enactment, COMI and establishment should be determined as of the commencement of the foreign proceeding and not the date of the commencement of the ancillary proceeding. *See* id., para 157-160; *See also Videology Ltd, Re,* [2018] EWHC 2186 (Ch) (holding COMI must be determined "when the proceedings commenced"). Several US courts, however, have concluded that COMI should be determined at the time of the Chapter 15 filing and not the date the foreign proceeding began. *See In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013). Thus, a US court may consider the activities conducted following the start of the foreign proceeding, which may result in a shift of a debtor's COMI from its original or operational location to another jurisdiction. This is an ongoing debate, and it is possible that Chapter 15 will be amended to provide a consistent rule in the US.

The Model Law does not address recognition of foreign proceedings for groups. Courts have, however, concluded that COMI/establishment should be evaluated on a debtor by debtor basis. *See In re Constellation*, 600 B.R. at 248 (Bankr. S.D.N.Y. 2019) (granting recognition of Brazilian cases of members of a group as foreign main and foreign nonmain); *Videology Ltd, Re,* [2018] EWHC 2186 (ch) (granting recognition of Chapter 11 cases of members of a group as foreign main and foreign nonmain). In analyzing the COMI of a holding company, a court may consider the activities and assets of its subsidiaries. *See In re Inversora Electrica de Buenos Aires S.A.*, 560 B.R. 650, 656 (Bankr. S.D.N.Y. 2016).

Relief Available Upon Recognition[21]

The Model Law provides that upon recognition of a foreign *main* proceeding, the following are stayed: (i) individual actions concerning the debtor's assets, rights, obligations, or liabilities, (ii) execution against the debtor's assets, and (iii) the right to transfer, encumber or otherwise dispose of the debtor's assets. Model Law, art. 20. The scope of the Model Law's stay generally corresponds to the stay conferred in a plenary proceeding. *See* Guide to Enactment, part 2, para 183; 11 U.S.C. §1520 (Chapter 15 incorporating section 362's automatic stay); The Cross-Border Insolvency Regulations 2006, art. 20 (England's version of the Model Law incorporating the Insolvency Act's moratorium).

Recognition of a foreign *nonmain* proceeding does not have the same immediate effect. Instead, a court has discretion to grant appropriate relief. In particular, upon recognition of any foreign proceeding (including a nonmain proceeding), a court may, in its discretion, grant "any appropriate relief" necessary to protect the debtor's assets or the interests of creditors. Model Law, art. 21.[22] For example, a court may, upon recognition, (i) stay individual actions against a debtor or the execution

[20] In determining an individual's COMI, US courts have considered "the location of a debtor's primary assets; the location of the majority of the debtor's creditors or a majority of creditors would be affected by the case; and the jurisdiction whose law would apply to most disputes." *In re Loy*, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007).

[21] Prior to recognition, the Model Law authorizes a court to grant provisional relief that is "urgently needed" to protect the assets of the debtor or the interests of creditors." Model Law, art. 19. Such relief may include a stay. It would likely not include enforcement of a restructuring plan, which is relief typically granted following recognition.

[22] In addition to "appropriate relief," a US court may grant "additional assistance" under section 1507(a) if such assistance is consistent with principles of comity. *See* 11 U.S.C. § 1507. "The analogous Model Law section was designed to insure access to relief that might be available under law other than the insolvency law." 8 COLLIER ON BANKRUPTCY ¶1507.01 (footnote omitted).

against the debtor's assets; (ii) suspend the right to transfer or encumber a debtor's assets; (iii) provide for discovery; (iv) entrust the administration of all of the debtor's assets to the foreign representative; and (v) grant any additional relief that would be in a plenary proceeding, which includes enforcement of a foreign debt restructuring, such as a scheme or Chapter 11 plan. *See, e.g., In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014) (enforcing Brazilian plan in US); *In re Compagnie Euoropeenne d'Assurances Industrilles S.A.*, No. 07-12009 (Bankr. S.D.N.Y. Sept. 26, 2007) (enforcing English scheme of Italian company following nonmain recognition); *Videology Ltd*., [2018] EWHC 21866 (Ch) (entrusting distribution of sale proceeds to English company debtor under Chapter 11 following nonmain recognition). Thus, the type of foreign proceeding being recognized may not be significant because a court may grant substantially the same relief in assistance of a foreign nonmain proceeding as a main proceeding. *See Constellation*, 600 B.R. at 293 ("Debtors who are recognized as participating in foreign nonmain proceedings may be afforded nearly identical relief as those recognized as operating in foreign main proceedings.").

Appropriate relief under the Model Law is subject to demonstrating that the interests of creditors and other interested persons, including the debtor, are adequately protected. *See* Model Law, art 22.[23] This generally requires a court to balance the relief requested against the interests of parties. A court may be satisfied that creditors are adequately protected by demonstrating that local creditors were allowed to participate in the foreign proceeding and had "an effective voice in the negotiations leading" to the foreign restructuring. *Videology Ltd*., [2018] EWHC 21866 (Ch); *see also In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899, 910 (Bankr. S.D. Fla. 2015) (granting discretionary relief after finding that Brazilian proceeding afforded creditors "due process").

Public Policy Considerations

A court may refrain from taking any action under the Model Law, including granting recognition, if it "would be manifestly contrary to the public policy of the" court's country. Model Law, art. 6. This exception should be "interpreted restrictively and … only intended to be invoked under exceptional circumstances concerning matters ousted only in exceptional and limited circumstances." Guide to Enactment, part 2, ¶30. United States courts have noted that as long as the foreign jurisdiction's procedures "meet our fundamental standards of fairness," the foreign proceeding and its laws and orders will be accorded comity and recognized in the United States. *See, In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). A court considering a request for recognition should not engage in "an independent determination about the propriety of individual acts of a foreign court." *Id*. Differences in the insolvency laws of the country in which the foreign proceeding is pending and the forum of the request for recognition would generally not justify this exception.

PART VI: RECOGNITION OF MAXIMOV OR EFWON GROUP US OR ENGLISH PROCEEDINGS

Notwithstanding that a US or an English court may approve a restructuring under a Chapter 11 plan or a scheme, a debtor may need a foreign court's assistance to ensure its success. Here, it is envisioned that Maximov or EI, as the case may be, will restructure the Bank Loan under Chapter 11. Given that the American Banks are subject to the US court's jurisdiction, it is unlikely that Maximov or EI would need a foreign court's assistance to implement its Chapter 11 plan. However, as set forth below, it is likely that such a plan would, if necessary, be enforced elsewhere.

Efwon Trading and Efwon Romani may try to restructure under Chapter 11 or a scheme. As discussed in Parts II and III, it however, may be difficult for them to restructure the claims of the Monaco Bank or the Drivers, respectively, absent creditor consent. Putting aside those difficulties, it may nevertheless be difficult to obtain a foreign court's assistance for the reasons discussed below.

[23] The corresponding section of Chapter 15 uses "sufficiently" in place of "adequately" to void confusion with the concept of "adequate protection" under the Bankruptcy Code.

Recognition of a Maximov, Efwon Trading, or Efwon Romania Restructuring Under the Model Law

As mentioned in Part V, a court may grant recognition to and relief to assist a foreign "main" proceeding or a foreign "nonmain" proceeding. Consequently, a court may grant relief or aid to a Maximov Chapter 11 plan or an Efwon Trading or Efwon Romani Chapter 11 plan or scheme if they are the product of a foreign main or foreign nonmain proceeding.

Here, it is assumed that Maximov and EI, which is registered in the US, have their COMI in the US. Consequently, a Chapter 11 case for Maximov or EI, as the case may be, would likely be recognized as a foreign main proceeding (i.e., pending in the debtors' COMI) in a country that has enacted the Model Law. In addition, assuming they have an establishment in the US, Chapter 11 cases could be recognized as foreign nonmain proceedings elsewhere under the Model Law. Following recognition, a foreign court would likely enforce a Maximov or EI Chapter 11 plan under the Model Law provided it is satisfied that the interest of creditors and the debtor are adequately protected. Moreover, a Maximov or an EI Chapter 11 plan that restructures US law governed debt (i.e., the Bank Loan), would likely be enforced elsewhere under generally accepted principles of private international law principles that a contract may be modified under the law governing the contract.[24]

Efwon Trading and Efwon Romania are not registered in the US and accordingly their COMI is presumed to be elsewhere. Moreover, it does not appear that either has an establishment in the US. They could conceivably move their COMI or create an establishment in the US, but should do so before they commence a Chapter 11 case to address the timing concern noted in Part V if they intend on seeking recognition under the Model Law.

If Efwon Trading successfully moves its COMI or creates an establishment in the US, an English or Romanian court could grant recognition to an Efwon Trading Chapter 11 case. An English court, however, would likely not enforce a Chapter 11 plan that restructures the Monaco Bank's loan, which is governed by English law, over its dissent. According to the "Gibbs rule," which is in effect in England, a foreign court cannot change or discharge English law governed debt absent the consent of the creditors. Consequently, an English court would likely refuse to enforce a Chapter 11 plan that restructures the Monaco Bank loan absent the bank's consent. *See JOSS International Bank of Azerbaijan*, [2018] EWCA Civ 2802 (Civ Div.) (affirming denial of a stay under the Model Law because it would prevent creditors from enforcing their English law rights in violation of the Gibbs rule). In contrast, a Romanian court may enforce the same Chapter 11 plan under the Model Law notwithstanding that it would not be enforced in England. *See In re Agrokor D.D.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018) (recognizing Croatian settlement agreement notwithstanding that it may not be enforced in England under Gibbs). [25]

If Efwon Romania successfully moves it COMI to or creates an establishment in the US, an English and a Romanian court could grant recognition to Efwon Romania's Chapter 11 case under the Model Law. For reasons discussed below, it is unlikely that a Romania court would enforce an Efwon Romania Chapter 11 plan under these circumstance. Moreover, an English court's order enforcing a Chapter 11 plan that restructures the Driver's claims may be inconsequential because the Drivers are not subject to the jurisdiction of the English courts. In addition, Efwon Romania could attempt to move its COMI or create an establishment in England in advance of proposing a scheme that restructures the

[24] If EI (and not Maximov) is the borrower under the Bank Loan, EI could restructure the loan under Chapter 11. The US is presumed to be EI's COMI because it is registered in Delaware. The fact that EI's principal revenue is derived from its Efwon Romania, which has assets and operations in Romania, could support finding COMI is elsewhere. However, such factors are not necessarily sufficient to rebut the presumption given that EI is controlled and managed by Maximov, who is located in the US. Consequently, a court may grant recognition to an EI Chapter 11 case as a foreign main proceeding. If EI is engaged in activities (in addition to borrowing funds under the Bank Loan) in the US, a court could recognize an EI Chapter 11 case as a foreign nonmain proceeding on the basis that it has an establishment in the US.

[25] A Romanian court would only enforce the plan if it was satisfied that creditors were sufficient protected. This would likely require a showing that the Monaco Bank had an opportunity to participate in the Chapter 11 case.

Drivers' claims with a view towards obtaining recognition of such a scheme in Romania. However, a Romanian court may be unwilling to enforce a scheme for the reasons discussed below.

Given that the Drivers appear to be subject only to the jurisdiction of the Romanian courts, it is critical that a Chapter 11 plan or scheme the restructures the Drivers' claims over their dissent is enforced in Romania. However, there is a significant risk that a Romania court will not enforce such a Chapter 11 plan or scheme for at least three reasons.

First, a Romanian court may refuse to enforce an Efwon Romania Chapter 11 plan or scheme if it concludes that Efwon Romania should be the subject of "unitary insolvency proceedings" in Romania given its substantial connections to Romania, including that it is the debtor's principal place of business and the location of the majority of its creditors and assets. *See In re Northshore*, 537 B.R. at 198 (noting Bahamian court's dismissal of requests for recognition of Chapter 11 cases). Moreover, Efwon Romania may not be able to file a Chapter 11 case or propose an English scheme without violating the terms of the freezing orders warranting a Romanian court's refusal to enforce a Chapter 11 plan or a scheme in Romania. *See In re Gold & Honey Ltd.*, 410 B.R. 357, 373 (Bankr. S.D.N.Y. 2009) (US court refrained to grant recognition of Israeli proceeding filed in violation of the US automatic stay).

Second, a Romanian court may not be convinced that the Drivers were sufficiently protected in the Chapter 11 case or in the scheme process. There is nothing in the US Bankruptcy Code or the Companies Law that would hinder a foreign creditor's ability to participate in a Chapter 11 case or the scheme process. However, an Efwon Romania Chapter 11 plan that restructures the Drivers claims and allows Efwon Romani to retain its assets could only be confirmed if all classes of impaired creditors voted in favor of the plan. In considering a request for enforcement of Efwon Romania's plan, a Romanian court could analyze the creation of the classes and the creditor vote. Here, a Romanian court may be troubled and refuse to enforce a plan if, *inter alia*, (i) Efwon Romania created a single class of unsecured creditors in which the Drivers' claims were diluted by the quantum of other debt or (ii) the Drivers were out voted because their claims were estimated at $1.00, which is permissible under the Bankruptcy Code. In addition, an English scheme may only be confirmed over the Drivers' vote if the remaining members of the class outvote them. Consequently, a Romanian court may refuse to enforce a scheme if it finds that the Drivers were artificially diluted by inclusion in a class with dissimilar creditors.

Third, Romanian public policy appears to be protective of a debtor's employees. *See* CONSTITUTION OF ROMANIA, November 21, 1991, art. 41-43 (highlighting employee Constitutional rights). Consequently, a Romanian court may refuse to enforce a plan or scheme that restructures the Drivers' claims over their dissent on the basis of the public policy exception in the Model Law.

Recognition of Efwon Trading or Efwon Romania Restructuring Under EU Regulations

An EU Member states' recognition or enforcement of an insolvency or restructuring proceeding in another member state generally implicates three regulations: the Insolvency Regulation, Regulation (EU) No. 1215/2012 (the "Brussels Regulation"), and Regulation (EU) No. 593/2008 (the "Rome Regulation"). *See* Susan Block-Lieb, *Reaching to Restructure Across Borders (Without Over-Reaching), Even After Brexit*, 92 AM. BANKR. L.J. 1, 18 (2018). The following is a brief discussion of each and their relevance to the Efwon Group.

The Insolvency Regulation is an instrument of private international that governs the opening of insolvency proceedings for a company that has its COMI in the EU. *See* Bob Wessels & Ilya Kokorin, EUR. UNION REG. ON INSOLVENCY PROCEEDINGS §2 (4th ed. 2018). It applies to the insolvency proceedings identified in Annex A of the Insolvency Regulation. Under Article 3 of the Insolvency Regulation, a member state has jurisdiction to open main insolvency proceedings for a debtor with the center of its main interests in the member state. A member state may open secondary proceedings that have effect only in its territory for a debtor that has an establishment in the member state, but has its COMI elsewhere in the EU. Under Article 19 of the Insolvency Regulation, any judgment opening a main insolvency proceeding in a member state will be automatically recognized throughout the EU

(with the exception of Denmark). Consequently, pre-Brexit, an English administration, which was on Annex A, of a company with its COMI in England was automatically recognized throughout the EU (with the exception of Denmark).[26] Post-Brexit, England is no longer part of the EU and therefore, absent a bilateral or multilateral agreement, English insolvency proceedings, such as administrations, are no longer entitled to automatic recognition in EU states.[27]

Pre-Brexit, courts of EU Member states generally enforced English schemes in their jurisdictions. *See* Block-Lieb at 22. The consensus appears to have been that an order sanctioning a scheme was a judgment enforceable under the Brussels Regulations, which generally provides for the reciprocal enforcement of judgments in the EU. *See* Kortman at 256-67 (noting that German court refused to enforce an order sanctioning an insurance company's scheme because it impaired German policyholder's German law-based claims). Under Article 25 of the Brussels Regulation, contract parties are bound to the governing law and choice of forum clauses in their agreements. Consequently, some courts concluded that a creditor is bound to an English scheme restructuring English law governed debt under Article 25. Under Article 8 of the Brussels Regulation, an EU Member state may enforce a judgment issued by a court in a foreign court where at least one of the defendants resides to avoid the risk of irreconcilable judgments. An EU Member state court could have thus enforced an English scheme as long as one affected creditor was in England to avoid the risk of conflicting judgments.

There is no reason to believe that EU courts will not continue enforcing schemes post-Brexit despite England no longer being subject to the EU Regulations. *See* Block-Lieb at 37-38 (noting that Brexit may complicate enforcement of schemes in the EU, but "not spell the end of foreign scheme of arrangements"). A scheme may be enforceable under the Rome Regulation, which generally provides that contract parties are bound to the governing law of their agreements. The Rome Regulation remains binding in the EU irrespective of Brexit. Accordingly, an English scheme that restructures English law governed debt may be enforceable by the courts of the EU member states under the Rome Regulation. However, it does not appear that any court has concluded that a scheme falls within the scope of the Rome Regulation. *See* Block-Lieb at 22.[28] Nevertheless, an EU Member state, such as Romania, that has adopted the Model Law will likely follow the US courts' lead and enforce a scheme as a foreign main or foreign nonmain proceeding provided that the recognition requirements discussed in Parts IV and V have been met. Other countries will likely enforce a scheme on a case-by-case basis under their applicable laws. *See* Pilkington at 78 (noting that a foreign court could enforce a scheme addressing English law governed debt under general principles of private international law).

In this instance, Romania is the only EU Member State in which a member of the Efwon Group, namely Efwon Romania, would likely attempt to restructure its debt. Because the COMI of Efwon Romania is Romania, a Romanian restructuring or insolvency proceeding would be recognized throughout the EU under the Insolvency Regulation, assuming it is included on Annex A. If Efwon Romania's COMI is elsewhere, but it has an establishment in Romania, its restructuring or insolvency proceeding would be effective within Romania, which may be sufficient given that the Drivers are in Romania. Either way, an Efwon Romanian proceeding in Romanian would likely be recognized as a foreign main or nonmain proceeding, depending on its COMI or an establishment being in Romania, in the US and England under their versions of the Model Law.

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[26] Pre-Brexit, an Efwon Trading administration would have had automatic effect throughout the EU because Efwon Trading's COMI is in England. An Efwon Romania administration would likely only have had effect in England given that Efwon Romania's COMI is in Romania

[27] The Insolvency Regulation applies to proceedings "based on laws relating to insolvency," which does not include a scheme that is governed by the Companies Law and not the Insolvency Act. In addition, English schemes were not identified on Annex A. Consequently, a scheme was not entitled to automatic recognition under the Insolvency Regulation pre-Brexit.

[28] According to Article 12, the Rome Regulation does not apply to "[q]uestions governed by the law of companies." Because a scheme is governed by the Companies Act, some have argues that the Rome Regulation does not apply to schemes. Others, however, have posited that the Rome Regulation's exclusion is "aimed predominantly at corporate governance issues." Block-Lieb, at 21 (citation omitted).

Conclusion

The factual background set forth in the Case Study is not complete, and therefore certain assumption have been made throughout regarding, *inter alia* (i) Maximov and the Efwon Group members' COMI, (ii) jurisdiction over the American Banks, the Monaco Bank, and the Drivers, and (iii) the law governing the Banks' claims. These variables and others, many of which were identified throughout the memorandum, influence the strategy outlined herein. Should the variables change, the strategy would likely also change. For example, Chapter 11 may be the preferred route for each member of the Efwon Group if all of the creditors are subject to the jurisdictions of the US courts. Similarly, an English scheme may be the preferred vehicle if all of the creditors are subject to the jurisdiction of the English courts and the American Bank's claims are governed by English law. Moreover, while a Romanian restructuring appears to be the best alternative to address the Drivers' claims, a Romanian proceeding alone is likely insufficient to implement a Global Restructuring because the group's significant creditors (with the exception of the Drivers) appear to be elsewhere. Ultimately, the best solution may be an out-of-court restructuring that should be favored over parallel proceedings in multiple jurisdictions and the resulting complexities, expense, and delay.