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Memorandum

To	Heather Callow, INSOL International
From	Job van Hooff
Date	13 February 2020
Re	**Case Study II - Part I**[1]

1. PROPOSED STRATEGY FOR DEALING WITH THE GROUP

1.1 For the purpose of this memorandum reference is made to:

(i) The USD 250 million loan agreement between Mr Benedict Maximov (**BM**) as borrower and a bank syndicate (the **Syndicate**), consisting of 2 senior banks (the **Senior Syndicate Lenders**), 2 mezzanine lenders (the **Mezzanine Syndicate Lenders**), and 5 junior lenders (the **Junior Syndicate Lenders**), as lenders (the **Syndicate Loan**);

(ii) The USD 350 million loan agreement between BM as lender and the Delaware company Efwon Investments (**EI**) as borrower (the **BM Loan**);

(iii) The USD 350 million loan agreement between EI as lender and the company incorporated under the laws of England and Wales Efwon Trading (**ET**) as borrower (the **EI Loan**);

(iv) The USD 100 million loan agreement between a Monaco lender (the **Monaco Lender**) as lender and ET as borrower (the **Monaco Loan**);

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[1] This memorandum contains the written assessment by Job van Hooff prior to Module B of the INSOL International Global Insolvency Practice Course 2019/2020. It does not contain an advice by Job van Hooff or Stibbe N.V. that should be relied upon.

(v) The USD 450 million loan agreement between ET as lender and the company, which I assume to be incorporated under the laws of Romania, Efwon Romania (**ER**) as borrower (the **ET Loan**);

(vi) The sponsorship and/or agency agreement between the Hong Kong company Efwon Hong Kong (**EHK**) as sponsor and/or agent and ER as beneficiary and/or principal (the **Sponsor Agreement**);

(vii) The claims for damages made by certain drivers (the **Drivers**) against ER (the **Drivers Claims**);

(viii) The actions brought by the Drivers before the Romanian Courts, including the obtained freezing injunctions over ER's assets and income and the filing for ER's insolvency, the **Romania Actions**);

(ix) The attached structure chart containing the corporate, debt and security structure, as I assume it based on the information presented to me, (**Annex 1**).

1.2 The goal is:

1.2.1 To allow KuasaNas to acquire a majority stake (51%) in the team;

1.2.2 To move the team to Malaysia; and

1.2.3 To allow continuity of the team by bringing the debt structure of the team to a bearable level.

1.3 The imminent issue is the Romania Actions. These actions directly endanger the continuity of the team and, possibly, may result in a loss of the team's F1 licence.

2. STRATEGY

2.1 The strategy is to preserve the team's F1 licence, its assets that are crucial to continue the team, and to allow KuasaNas to acquire a majority stake and to invest new money in the team. For this purpose, the debt structure of ER is crucial.

2.2 I advise to sell ER's assets to a NewCo based in Malaysia, the shares of which are held for 51% by KuasaNas and for the remaining 49% by ER's existing creditors, except for the Drivers. The sale should be conducted in the context of restructuring or insolvency proceedings and the debt structure of ER and its group companies should be amended as discussed in the following paragraphs.

3. INSOLVENCY PROCEEDINGS REQUIRED

3.1 It seems inevitable for ER to apply for certain insolvency or restructuring proceedings (hereinafter "insolvency proceedings"). The Romania Actions are already pending. Subject to verification by local counsel, the Romania Actions may soon result in ER's bankruptcy if no action is taken. Absent payment of the Drivers' claims and/or settlement, this may only be avoided by means of a filing for insolvency proceedings.

3.2 Since ET will be unable to meet its repayment obligations, including to the Monaco Lender, ER will also have to file for insolvency proceedings absent a consensual deal.

3.3 I assume that EI is likely to be unable to meet its repayment obligations to BM. Consequently, insolvency proceedings will also be needed at that level. I am not aware whether BM is able to meet his repayment obligations. If not, also his debts will need to be restructured through insolvency proceedings absent a consensual deal.

4. WHERE THE PROCEEDINGS TAKE PLACE

ER

4.1 Based on my knowledge to date, it may be most logical to use Romanian insolvency proceedings. Alternative options could be filing in England or, probably more attractive, the US. I will discuss this in more detail below.

4.2 I assume that ER is a company incorporated under the laws of Romania. An option may be to file for restructuring framework proceedings under the local law implementing Directive 2019/1023 (the "**EU Restructuring Framework Directive**") in Romania (hereinafter also referred to as Romanian Framework Proceedings). Albeit that it is not necessarily relevant because the EU Restructuring Framework Directive does not lay down rules regarding jurisdiction of Member States' courts, it would be beneficial to determine ER's COMI within the meaning of the EU Insolvency Directive.

4.3 In order for ER to have its COMI in Romania within the meaning of the EU Insolvency Directive, the place where it conducts the administration of its interest on a regular basis and which is ascertainable by third parties will need to be in Romania. The place of ER's registered office will be presumed to be its COMI, unless the registered office has been moved in the previous three months. I doubt whether it is in Romania, but there are no specific indication to the contrary, so I will assume for purposes of this memorandum that it is in Romania.

4.4 Another option may be to restructure ER through an English Scheme of Arrangement. An application for an English Scheme of Arrangement under the Insolvency Act 1986 can be made by a "company" liable to be wound up under the same act. In order to accept jurisdiction, the Court will consider (i) whether the company has sufficient connection with

England;[2] and (ii) whether the scheme will achieve a substantial effect in the foreign jurisdictions in which the company conducts its business. It has to be verified whether these conditions are met, but for purposes of this memorandum, I will assume that they are which means that ER could apply for a scheme of arrangement as well.

4.5 A third option may be for ER to file for a US Chapter 11. Section 109(a) of the US Bankruptcy Code provides that "*a person that resides or has a domicile, a place of business or property in the United States*" is eligible to file a case under the US Bankruptcy Code. The condition that ER has "*property in the United States"* can be easily met, since this criterion has previously been found to be met if the debtor had a US bank account or even a retainer in US counsel's US bank account.[3]

ET

4.6 Based on my knowledge to date, it may be most logical for ET to go through insolvency proceedings or restructuring in England. Possible alternatives would be the US or even Romania. I will discuss this in more detail.

4.7 I assume that ET is a company incorporated under the laws of England and Wales. One of the insolvency proceedings, albeit that it formally is not an insolvency proceeding, to consider is the English Scheme of Arrangement. As stated above, in order to be eligible to apply for an English Scheme of Arrangement ET must have sufficient connection with England; and the scheme will need to achieve a substantial effect in the foreign jurisdictions in which ER conducts its business. For purposes of this memorandum, I will assume that these conditions are met but this will need to be checked by local counsel.

4.8 It may, however, be worthwhile to restructure ET through a US Chapter 11. As discussed above, albeit that ET is a company incorporated under the laws of England and Wales, when it has assets in the US it is eligible to file for US Chapter 11 proceedings.

4.9 It may even be possible to restructure ET through Romanian Restructuring Framework Proceedings. The EU Restructuring Directive does not lay down rules regarding jurisdiction of Member States' courts. It may therefore be possible, dependent upon the regime which determines the competent court, which depends on Romanian local law since Brexit has happened, the ET will use a framework in Romania.[4]

EI/BM

4.10 In my view, the most logical place for insolvency proceedings regarding BM (if need be) and EI is in the United States. BM is an American investor and I presume that he has its habitual

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2 See e.g. *Lehman Bros International (Europe) (in admin)* [2019] BCC 115.

3 *In re Marco Polo Seatrade B.V.*, Case No 11-13634 (Bankr. S.D.N.Y. 2011) Docket No 222.

4 *See* Skauradszun, Dominik and Nijnens, Walter, Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks (April 6, 2019). International Corporate Rescue (ChaseCambria, 2019). Available at SSRN: https://ssrn.com/abstract=3367332.

residence or at least some assets in the US. I make a similar assumption for EI. Section 109(a) of the US Bankruptcy Code that "*a person that resides or has a domicile, a place of business or property in the United States*" is eligible to file a case under the US Bankruptcy Code. Subject to verification by local counsel, if BM and EI do not reside or have domicile in the US and neither have a place of business there, they are nevertheless eligible to file a case under the US Bankruptcy Code when they have funds in bank accounts in the United States.[5]

4.11 If these conditions are met, BM (if need be) and EI can file for Chapter 11 proceedings in the US. Chapter 11 of the US Bankruptcy Code provide a statutory framework to reorganise a debtor under court supervision.

5. POSSIBLE IMPEDIMENTS

ER

5.1 The test for application for Romanian Framework Proceedings is that there is a likelihood of insolvency for ER. This test should be met.

5.2 An application for Romanian Framework Proceedings as a general rule causes a stay of individual enforcement actions. It should be assessed to what extent the Romanian legislator has adopted legislation that provides for exceptions to this stay. Relevant possible exclusions include: the situation in which ER is unable to pay its debts as they fall due; and claims by employees.[6] Local counsel advice is required in this respect.

5.3 Moreover, it must be assessed whether the jurisdictions in which ER has assets and business activities recognize the Romanian Framework Proceedings. In those jurisdictions that have adopted the UNCITRAL Model Law on Cross-Border insolvency, including the UK and the US, the proceedings will likely be recognised as main proceedings provided that ER has its COMI in Romania.

ET

5.4 As stated above, in order to be eligible to apply for an English Scheme of Arrangement ET must have sufficient connection with England; and the scheme will need to achieve a substantial effect in the foreign jurisdictions in which ER conducts its business. Local counsel analysis is needed in this respect.

EI/BM

5.5 Insolvency is not a prerequisite to commence Chapter 11 proceedings. The debtors remain in possession, subject to bankruptcy court oversight for transactions outside the ordinary course.

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[5] See e.g. *In re McTague*, 198 B.R. 428, 429 (USD 194 in a bank account was sufficient property for bankruptcy eligibility.

[6] Article 6 EU Restructuring Framework Directive.

The criteria for jurisdiction, as explained above, should be met. At this stage, I do not see any impediments to file for Chapter 11.

6. ADVANTAGES/DISADVANTAGES

6.1 The table below summarizes certain key aspects of the US Chapter 11, the English Scheme of Arrangement and the Romanian Framework Proceedings, capturing some of the relative advantages and disadvantages to each of the proceedings.

	Chapter 11	Scheme of Arrangement	EU Restructuring Framework
Required Majority (per class)	2/3 amount, ½ + 1 in number[7]	¾ in amount, ½ + 1 in number	½ + 1 in amount and, if so provided in Romanian law, ½ + 1 in number
Cross class cram-down	Possible	Not possible	Possible
Stay	Yes	No	Yes, but exceptions may apply if so provided in Romanian law

ER

6.2 Advantages of Romanian Framework Proceedings include:

6.3 These proceedings will be recognised in the EU and are likely to be recognised in countries that have implemented the UNCITRAL Model Law as main proceedings if ER has its COMI in Romania. Pending negotiations of a restructuring plan in a preventive restructuring framework, ER can enjoy an automatic stay of all individual actions brought by creditors, including secured and preferential creditors.[8] However, as discussed in more detail below, actions brought by employees, possibly including the Drivers, may be excluded from this stay depending on the choices made by the Romania legislator. Local counsel should verify this.

6.4 Relatively low thresholds for voting apply compared to an English Scheme of Arrangement or US Chapter 11. Cross class cram-down is possible.

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7 U.S.C. § 1126.

8 Article 6 EU Directive on Preventive Restructuring Frameworks.

6.5 Disadvantages of Romanian Framework Proceedings include:

6.6 The possible limitations of the stay (see above).

6.7 There are limited possibilities to restructure employees' claims:

6.7.1 a transfer of ER's undertaking within the meaning of Directive 2001/23/EC may lead to an automatic transfer of the employees, including possibly the Drivers (this should be verified by local counsel) and their rights, including their damages claims, to the purchaser;[9] and

6.7.2 if the Romanian legislator has chosen to exclude the possibility to restructure existing or future claims from employees as allowed for by Article 1 subsection 5a of EU Directive 2019/1023, it is not possible to restructure their rights.

6.8 If the Drivers do not qualify as employees, it must be assessed whether they rank junior, senior or pari passu to ER's other creditors. Depending on their rank, it may be difficult to affect their rights in view of the following. Member States are able to protect a dissenting class of affected creditors by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class. Alternatively, Member States can protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule'). Member States have discretion in implementing the concept of 'payment in full', including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States are also able to decide on the choice of the equivalent means by which the original claim could be satisfied in full. Which options the Romanian legislator chose, will have to be assessed by local counsel.

6.9 Depending on the outcome of the above analysis, it may be a better option to restructure through a US Chapter 11. The filing for US Chapter 11 proceedings operates as an automatic stay.[10] From a US law perspective, it causes a suspension of enforcement and other actions by creditors against the debtor and its property with universal effect, including the Romania Actions.

6.10 Assuming that ER does not have its centre of main interests in the US and neither has an establishment in the US, the US Chapter 11 proceedings will however not be recognised in Romania under their legislation that implemented the UNCITRAL Model law.[11] In practice,

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9 Such a transfer of undertaking would result in the NewCo becoming liable for the damages due by ER under the employment contracts with the Drivers and other employees (if any) unless the Romanian legislator has chosen to adopt legislation in line with Article 5 section 2 of Directive 2001/23, in which case the employees' employment contracts would be transferred to NewCo but NewCo would not become liable for the damages claims that arose prior to the transfer.

10 U.S.C. § 362(a).

11 Romania has adopted legislation based on the UNCITRAL Model Law on Cross-Border insolvency, *See* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

however, filing for US Chapter 11 may still block the Romania Actions since creditors taking action that violates the automatic stay are likely to be found guilty of US contempt of court and are subject to US sanctions in that respect, even when they take this action in a jurisdiction in which the US Chapter 11 proceedings are not recognised.[12]

6.11 Chapter 11 would, therefore, be an option if the deterrent effect of US contempt of court sanctions is expected to block ER's creditors from taking or continuing their actions, including the Romania Actions. Since ER operates a Formula 1 team and, therefore, is active in a global sports competition I assume that its creditors have such present or expected future connections to the US, that they will not act contrary to US court orders. However, this needs to assessed based on an overview of the creditors.

6.12 A further advantage of US Chapter 11 proceedings is the possibility of a cross-class cram down.

6.13 In addition to the lack of formal recognition, disadvantages of US Chapter 11 include:

6.14 Voting thresholds are relatively high. US Chapter 11 proceedings have very substantial costs. The debtor will need to provide wide-ranging information on its business and is required to pay professional fees, also on creditors' side.

ET

6.15 Advantages of an English Scheme include that it is cheaper than Chapter 11 and may be relatively less burdensome. It may have effect in Romania, subject to verification by local counsel.

6.16 Disadvantages include:

6.17 A Scheme of Arrangement does not come with a stay on enforcement actions by individual creditors.

6.18 A cross-class cram down is not possible because of which all classes of creditors will have to adopt the plan. The classic test of a creditor class is that 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."[13] In practice, this does not seem to be an issue since ET's creditors, i.e. the Monaco Lender and EI, seem to rank pari passu. If they do not rank pari passu, the impossibility of a cross-class cram down may be an issue.

6.19 Relatively high voting thresholds compared to Romanian Framework Proceedings apply.

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[12] *See In re Marco Polo Seatrade B.V.*, Case No 11-13634 (Bankr. S.D.N.Y. 2011) Docket No 100 (contempt motion) and 155 (notice of withdrawal of contempt motion on the basis of a conditional release agreement).

[13] *Sovereing Life Assurance Co v Dodd,* [1892] 2 QB 573 at 583, CA.

EI/BM

6.20 Advantages of a US Chapter 11 include:

6.21 The automatic stay as discussed above combined with the US court's serious sanctions on violation thereof. The possibility to bind creditors who are against the restructuring plan (cram down) even when they are part of a dissenting class (cross class cram down). The possibility to fund ongoing activities from the cash flow from new sales so long as those sales do not represent the proceeds of pre-petition collateral and to prime pre-petition secured creditors.

6.22 Disadvantages of a US Chapter 11 include:

6.23 US Chapter 11 proceedings have substantial costs. The debtor will need to provide wide-ranging information on its business and is required to pay professional fees, also on creditors' side. Relatively high voting thresholds compared to Romanian Framework Proceedings.

General

6.24 In the scenario of preference, insolvency or restructuring proceedings are implemented at at least three levels in three different jurisdictions. This will likely give rise to coordination issues that may hinder the restructuring of the group. With the help of local counsel, such possible issues should be identified as well as which possible advantages and disadvantages it would have to centralize the proceedings in one jurisdiction, presumably the US.

7. RELEVANT FACTORS AND INFORMATION NEEDED

7.1 I already set out several factual and local law checks that need to be conducted above.

7.2 Important factors include:

7.2.1 Precise legal structure;

7.2.2 Value of the assets at each level;

7.2.3 Assets that are needed for continuing the team and its licence and their location;

7.2.4 Qualification of Drivers as employees under EU Directive or not;

7.2.5 COMI of each of the companies involved within the meaning of (i) the EU Insolvency Directive; and (ii) UNCITRAL Model Law in relevant jurisdictions;

7.2.6 Place of incorporation and registered office of each of the companies involved;

7.2.7 Amount of claims per creditor per entity;

7.2.8 Scope and enforceability of security rights per creditor at each level;

7.2.9 Ranking of creditors at each level;

7.2.10 Terms of financing agreements and other key contracts;

7.2.11 Liquidation value at each level; and

7.2.12 Post restructuring value at each level.

8. APPLICATION EIR OR UNCITRAL MODEL LAW

8.1 The EU Restructuring Framework Directive does not contain rules in respect of recognition. Recitals 13 and 14 and Article 6(8) of the Directive clearly express the desire of the European legislator to add implemented national preventive restructuring frameworks to Annex A EIR Recast.[14] In order to fall within the scope of the EIR Framework, the Romanian preventive restructuring framework must have been added to said Annex. If it is on that Annex and if the Romanian court rules that the relevant preventive restructuring framework proceedings qualify as main proceedings, the proceedings and the outcome thereof will be recognised in all EU Member States except Denmark.

8.2 Will Romanian Restructuring Framework Directive proceedings be recognised under the UNCITRAL Model Law? A proceeding must be a 'foreign proceeding' to qualify for recognition. Article 2(b) defines 'foreign proceeding' 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."

8.3 The definition is not as narrow as it may look. It is meant to encompass proceedings that aim to restructure debts of debtors that face potential insolvency.[15] See the Guide on Enactment paragraph 65: *"the expression "insolvency proceedings" may have a technical meaning in some legal systems, but is intended in subparagraph (a) to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent"* and 67 *"the focus of the Model Law is upon severely financially distressed and insolvent debtors and the laws that prevent or address the financial distress of those debtors."* Debtor in possession proceedings are intended to qualify, provided that they are subject to court oversight.[16] Albeit that it is not

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[14] *See* Skauradszun, Dominik and Nijnens, Walter, Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks (April 6, 2019). International Corporate Rescue (ChaseCambria, 2019). Available at SSRN: https://ssrn.com/abstract=3367332.

[15] *See* Mevorach, Irit and Walters, Adrian, The Characterization of Pre-Insolvency Proceedings in Private International Law (July 1, 2019). European Business Organization Law Review (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3448821, p. 15.

[16] Guide on Enactment, paragraph 74.

settled in case law, I believe that there are strong arguments that Romanian Framework Proceedings can be recognised under the UNCITRAL Model Law.

8.4 A Scheme of Arrangement is not recognised under the EIR Recast because it is not placed on Annex A to the EIR Recast. A scheme of arrangement can, however, be recognised under the UNCITRAL Model Law.[17]

8.5 The same applies to US Chapter 11 proceedings.

8.6 The application of the EIR Recast and the UNCITRAL Model Law will assist in the restructuring since it will allow for recognition of the relevant proceedings in relevant jurisdictions.

9. BREXIT EFFECTS?

9.1 As an effect of Brexit, absent any treaty, the EU Framework Proceedings if added to Annex A of the EIR Recast will no longer be recognised under the EIR Recast in England. However, it may still be recognised under the English implementation of the UNCITRAL Model Law. That may not be the end of the story, in view of the so called 'rule in Gibbs'.[18]

9.2 According to the rule in Gibbs, a debt governed by English law cannot be discharged by a foreign insolvency proceeding, other than where the relevant creditor submits to the foreign insolvency proceeding. The rule was recently reconfirmed by the High Court in re *Bakhshiyeva v Sberbank of Russia & ors* [2018] EWHC 59 (Ch) in which Hildyard J held *"I would hesitate, in a reconstruction rather than insolvency context, to remove or vary individual rights for the greater good and in the name of universalism".* Therefore, it should be checked whether ER has any debts governed by English law. An amendment by means of Romanian Restructuring Framework Proceedings may not be recognised in England given the rule in Gibbs.

9.3 Moreover, the recognition of the English scheme may suffer from the Brexit. Currently, in those EU Member State jurisdictions that have not adopted the UNCITRAL Model Law, recognition of the English scheme is often deemed to be possible in view of the Brussels I regulation. However, the Brussels I regulation will no longer apply in case of Brexit.

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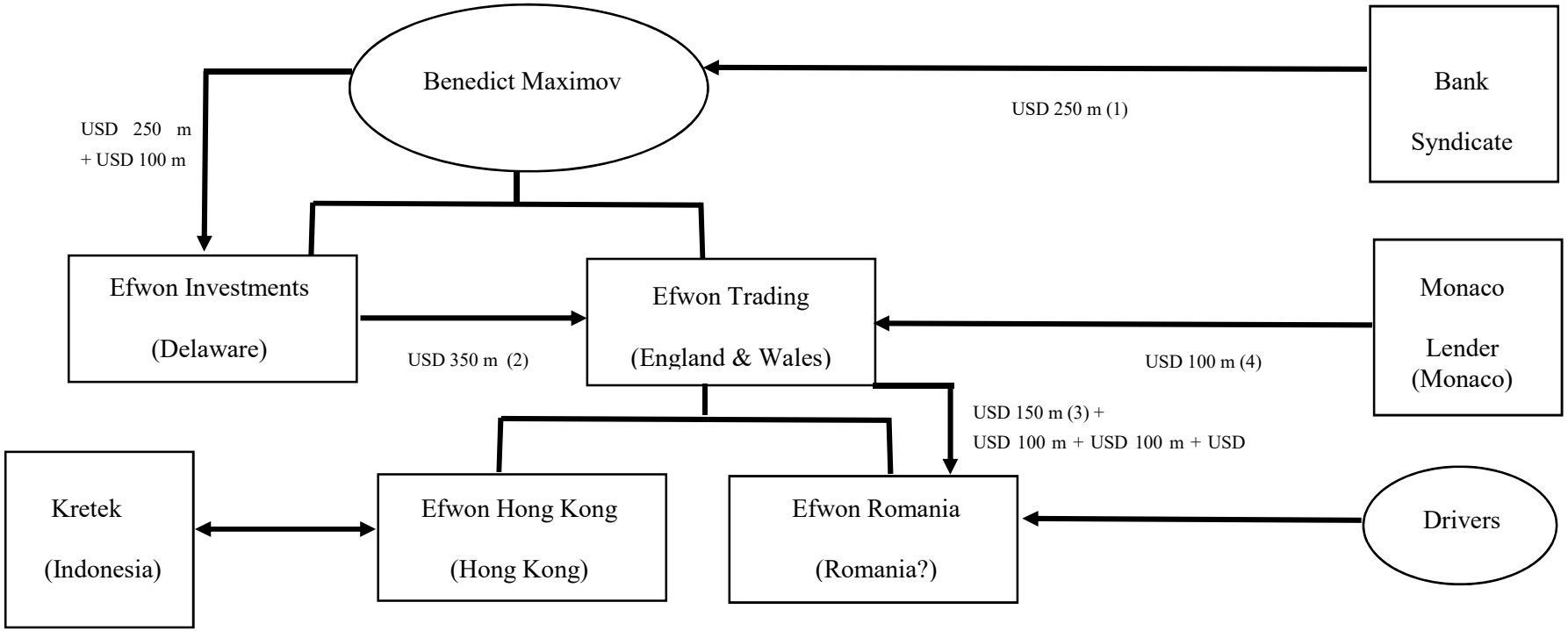
17 *See* Mevorach, Irit and Walters, Adrian, The Characterization of Pre-Insolvency Proceedings in Private International Law (July 1, 2019). European Business Organization Law Review (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3448821, p. 16.

18 Which derives from in re *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399.

ANNEX 1



1. Tranches:
   2 senior: USD 100 m
   2 mezzanine: USD 60 m
   2 5 junior: USD 90 m

   Security:
   (i) security over BM Houses worth 75 m
   (ii) pledge on the projected revenue
   (iii) pledge over EI shares + negative pledge value of the loan

2. Security:
   future revenue EI's trading activities

3. Security:
   team's share of broadcasting revenue

4. Security:
   revenues (pari passu with (2)/EI's security?)