Case Study 11

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August 10, 2023

**VIA EMAIL** [**benedictmaximov@kmail.net**](mailto:benedictmaximov@kmail.net)

August 10, 2023

Mr. Benedict Maximov, CEO

**EFWON GROUP OF COMPANIES**

Delaware, USA

Dear Mr. Maximov,

**Re: KuasaNas Deal Facilitation**

Thank you for inquiring about our desire to provide you and Efwon Investments, Efwon Trading, and Efwon Romania (together, the Efwon Group or the Group) with professional services. Thank you also for submitting the background information on this matter.

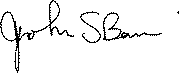
We are pleased to provide Benedict Maximov with a proposed strategy to deal with the Efwon Group issues.

Please note that our -proposals are based on the accuracy of the information supplied to us, and on various assumptions, including the assumption that all relevant and important information was provided. Therefore, all suggestions are preliminary at this stage, and are provided for further discussion.

We have provided you with a proposed strategy solution that we believe is practical and seeks to achieve your objectives in the required time frame. We note that some matters you brought to our attention are urgent, while others are still in the developmental stage.

After reviewing our Report, please contact us if you have any questions or seek further clarification. As a disclaimer, the advice suggested is not intended as legal advice but only strategic suggestions to begin a more detailed discussion.

With professional regards,

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John S. Bain

**ABC & ASSOCIATES**

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# **Advice to Mr. Benedict Maximov**

# **Introduction**

We have reviewed the submitted facts and circumstances surrounding the Efwon Group's insolvency issues and the proposed deal with KuasaNas as provided by your office. Based on our analysis, we present our strategic proposal Report with our advice and suggestions to facilitate the deal. Our proposal also addresses the insolvency concerns that will achieve satisfactory results. This proposal aims to guide the Efwon Group through a structured response to the complex issues facing Efwon Investments, Efwon Trading, and Efwon Romania.

We were specifically requested to advise Benedict Maximov, the Chief Executive Officer of the Efwon Group, on how to facilitate the deal with KuasaNas. We were also tasked with providing advice on dealing with the insolvency issues affecting the companies in the Efwon Group. We consider the primary goal is to prepare the Efwon Group for the sale of a majority stake to KuasaNas, while concurrently dealing with potential insolvency issues, litigation, and geopolitical concerns. The suggested advice is not mutually exclusive but represents our best effort to provide a practical yet cost-effective solution to the issues at hand.

A summary of the flow of funds detailed in your provided information has been documented in Figure 1 below. Please let us know if our understanding is correct.

We have provided answers to the specific questions asked in the same order. Our proposed strategy is based on our years of experience in insolvency matters and preliminary research. However, our suggestions are not the only possible suggestions, and after further discussions with you and your team, we are willing to review and revise our suggested strategies, considering this matter is ongoing.

Our proposed strategic suggestions and recommendations are noted below.

Our Report begins with a Flow of Funds flowchart to tell the insolvency story[[1]](#footnote-1) of how the Group arrived in the current state. Later in the Report, we suggest strategies for dealing with the various positions.



Figure 1. Efwon Group – Flow of Funds[[2]](#footnote-2)

## **Proposed Strategy for Dealing with the Group**

Figure 1 above depicts the flow of funds into the various companies. The diagram shows the investments and loans to subsidiary companies in various jurisdictions. Therefore, a cross-border insolvency approach is unavoidable.[[3]](#footnote-3)

We recommend implementing a comprehensive restructuring strategy to navigate the insolvency issues and facilitate the deal with KuasaNas. This strategy should involve a combination of legal measures, negotiation with creditors, and potential insolvency proceedings to protect the interests of Efwon Investments and Efwon Trading.[[4]](#footnote-4)

In order to shorten the process and follow best practices in insolvency proceedings, it is recommended that we follow the principles of informal restructuring set out in the publication *Statement of Principles for a Global Approach to Multi-Creditor Workouts 11 (2017)[[5]](#footnote-5)* (the INSOL principles) as published by INSOL International. The eight principles documented by INSOL are the authoritative document or best practices for multi-creditor workouts. It is recommended that the [[6]](#footnote-6) INSOL principles should be referred to as soon as any sign of financial distress is recognized.[[7]](#footnote-7) Some authors have documented that insolvency recovery processes have been proven shorter if the INSOL principles are initiated as soon as there are signs of financial distress.

The INSOL principles are summarized as follows:

1. All creditors should be willing to cooperate;
2. Creditors should not take any steps to enforce their claims;
3. The debtor should not act adversely against any relevant creditor;
4. The interest of relevant creditors is best served with a coordinated response;
5. The debtor should provide the necessary and relevant information to the creditors and advisors for proper evaluation.
6. The standstill period should adhere to all relevant laws and the relative positions of the debtors at the standstill commencement date;
7. All information provided to the creditors should be held in confidence;
8. If funding is provided, the repayment of the funding is given priority.

In the information provided, we submit that the first two principles of informal restructuring, as advocated by INSOL International 2017, are the most relevant. Because of the perceived relevancy, the first two principles are written in full as follows:

**First Principle:** Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to cooperate to give sufficient (though limited) time (a "Standstill Period") to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor's financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.[[8]](#footnote-8)

**Second Principle:** During the standstill period, all relevant creditors should agree to refrain from taking any steps to enforce their claims.[[9]](#footnote-9) This reduces the exposure to the debtor, but creditors should expect to maintain their current position relative to other creditors. There will be no prejudice against other creditors during the standstill. Conflicts of interest in the creditor group should be identified early and dealt with appropriately.[[10]](#footnote-10) It should be stressed that the Efwon Group should make every effort to avoid publicity when implementing any strategy. If the restructuring process is made public, there is a danger of "a *race to collect,"[[11]](#footnote-11)* where creditors get in each other's way as they seek to enforce their legal remedies at the expense of other creditors[[12]](#footnote-12) This process may involve seeking formal court-supervised procedures, not in the interest of any parties.[[13]](#footnote-13)

Specifically, the proposed strategy for dealing with the Group included the following suggestions:

* 1. *Assess the Financial Position*

We propose thoroughly assessing the financial position of Efwon Trading and Efwon Romania to understand their respective liabilities, assets, and cash flow. This assessment will form the basis for the subsequent restructuring plan.

To begin this assessment process, we shall request the financial statements of all of the companies in the Efwon Group. We prefer audited statements, but internal managerial statements are acceptable in the essence of time. We would also like to review budgets, financial projections, board minutes, and other internal information. [[14]](#footnote-14)

* 1. *Restructuring Plan:*

We propose developing a comprehensive restructuring plan, including debt restructuring, cost reduction measures, and strategic changes to improve the financial viability and performance of the companies. The plan should address the issues leading to insolvency, restore creditor confidence, and enhance the attractiveness of the Group for potential investors like KuasaNas. Once we are provided with the financial statements, we will be better able to create a realistic restructuring plan that will stand the best chance of success.

Our proposal may involve debt restructuring or refinancing to alleviate liquidity issues and avoid potential insolvency. Additionally, we may propose Chapter 11 filing for Efwon Investments in the US to obtain a stay of creditor enforcement actions and delay to formulate a comprehensive restructuring plan.

1. *Addressing Litigation and Insolvency Proceedings in Romania:*

We propose to address the pending litigation against Efwon Romania urgently. Negotiating for an out-of-court settlement is advisable to avoid protracted court proceedings, which would be time-consuming and costly. If we cannot negotiate an out-of-court settlement, we should develop a proactive litigation strategy after consultation with our internal legal team.

Given the pending insolvency claim and freezing injunctions, we recommend initiating insolvency proceedings in Romania for Efwon Romania.[[15]](#footnote-15) Romania has implemented the European Directive 2019/1023 on preventive restructuring framework.[[16]](#footnote-16)

The European Directive provides a framework for a comprehensive and flexible out-of-court or hybrid procedure to restructure the Efwon Group's debts and operations. This framework may prove beneficial in achieving the desired results while preserving the viability of the business. This Directive creates a framework for pre-insolvency restructuring, thereby avoiding, if possible, unnecessary bankruptcies.[[17]](#footnote-17)

1. *Negotiate with Creditors:*

We propose that the Efwon Group negotiate with the various creditors, including the American bankers, Monaco lender, and other financial creditors, to reach agreements on repayment terms, potential haircuts, and debt rescheduling.[[18]](#footnote-18) The objective is to secure their support for the restructuring plan and prevent immediate enforcement actions.

Further, we propose the commencement of an immediate negotiation with the management of KuasaNas. Given the potential substantial investment from KuasaNas, it is imperative to maintain open and transparent communication with them throughout this process, assuring them of your intent to resolve all existing issues promptly.

1. *Chapter 11 Proceedings*:

We are considering initiating Chapter 11 proceedings in the United States for Efwon Investments and Efwon Trading.[[19]](#footnote-19) This process allows for reorganizing the companies' financial obligations while maintaining control and ownership, thus protecting the interests of all stakeholders. However, we shall conduct a careful analysis to ensure that Chapter 11 is appropriate based on specific circumstances.

1. *Government Review and KuasaNas Deal*:

We propose to pursue the Malaysian Government's review process for the intended contract with KuasaNas. Simultaneously, the Efwon Group should engage in open communication with Government officials, highlighting the potential positive impact of the deal on the economy, job creation, and the further development of the motorsports section of the Malaysian economy. All action demonstrating the steps taken to address the insolvency issues promptly and efficiently would most likely assist in any discussions with governmental officials.

In assessing the financial conditions of the entities in the Efwon Group, we have requested audited financial statements. Audited financial statements provide a statement on material uncertainties relating to events or conditions, casting doubt about the firm's continuing as a going concern. The going concern is a common qualification when a firm's financial viability is in doubt. Auditing standards require professional accountants to evaluate the going concern uncertainty.[[20]](#footnote-20) In conducting the audit, accountants will include a statement in their reports if they find any evidence of the risk of business failure. Auditors must also evaluate whether the company should continue as a going concern. Standard auditing procedures require that accountants must also qualify their audit reports if there is a high risk that a business may not continue when the audit is completed.

This Report is constructed assuming that the audit report produced by companies' auditors is suitable as an early indication of possible upcoming company failure. Users of financial statements, including investors, the Board of Directors, the Courts, employees, and business analysts, rely on the audit report to evaluate firms in financial distress. The stakeholders in firms in danger of failing should be aware of going concern risks when making business and investment decisions. It is reasonable that auditors, financial advisors, and business writers are obliged to report on the statistics and markers that indicate business failure risks.

Informal workouts or out-of-court restructuring are negotiations and processes unrelated to judiciary intervention.[[21]](#footnote-21) An out-of-court or informal reorganization aims to restore the Group's health within the framework of a legal entity.[[22]](#footnote-22) Informal reorganizations occur outside the formal statutory framework. The two methods of informal reorganization include business restructuring and financial restructuring[[23]](#footnote-23). In the US, there is a Chapter 11 bankruptcy. In the UK, we can find administrative efforts to restructure and widespread acceptance of the guidelines included in UNCITRAL. In the EU, UNCITRAL is an accepted method of insolvency proceedings. Romania has recently adopted the European Directive 2019/1023 on preventive restructuring frameworks. This means Romania allows an out-of-court informal procedure to deal with financially-distressed but viable businesses.

## **Insolvency Proceedings**

Because the Efwon Group is a global enterprise, insolvency or restructuring may require multiple insolvency proceedings in different jurisdictions.[[24]](#footnote-24) Therefore, different rules of private international law on the jurisdiction to open insolvency proceedings may be necessary. However, for these proceedings to produce effects worldwide, questions of jurisdiction, recognition, and enforcement of other rulings in the primary jurisdictions will also need to be addressed.[[25]](#footnote-25) In this case, judgments concerning the confirmation of a reorganization plan, avoidance actions, or the liability of directors of insolvent companies are particularly relevant.

Some of the jurisdictions where insolvency proceedings may be needed include the following:

(a) *Efwon Investments*: We recommend that a Chapter 11 bankruptcy proceeding in the United States may be necessary to restructure its debts, shield it from creditors, and allow it to continue its operations.

(b) *Efwon Trading*: Insolvency proceedings in the UK could be needed[[26]](#footnote-26). This would likely involve administration, allowing an insolvency practitioner to take control of the company to pay off its debts.

(c) *Efwon Romania*: The pending litigation could trigger Romanian insolvency procedures. However, Romania has a fully implemented European Directive 2019/1023, which provides a preventative restructuring framework that could help avoid formal insolvency[[27]](#footnote-27).

Seeking Chapter 11 relief in the US continues to be an attractive alternative. Some reasons for seeking Chapter 11 protection include cash flow challenges, lack of access to credit, tort liabilities for defective products, unexpected financial challenges, and technological changes.[[28]](#footnote-28) However, some authors warn that, despite the perceived friendliness of Chapter 11, it is not a cure for all corporate woes and should only be sought as a last resort.[[29]](#footnote-29)

## **Jurisdictional Considerations**

Using an international law perspective, the specific and highly developed insolvency options of the European Union are not replicable anywhere else in the world.[[30]](#footnote-30) The benefits of facilitating international trade and investment are crucial to world order and global economics. One of the goals of UNCITRAL is to facilitate cross-border recognition in insolvency matters.[[31]](#footnote-31) Because of the sensitivities of insolvency proceedings, usually excluded from international instruments dealing with the jurisdiction and international recognition and enforcement of commercial law rulings, UNCITRAL developed a Model Law on Cross-Border Insolvency (MLCBI) in 1997.[[32]](#footnote-32)

Based on the information provided, it is likely that insolvency proceedings will be required, particularly for Efwon Romania. The choice of venue for these proceedings will depend on various factors, including the jurisdiction of where the individual company's center of main interests (COMI) is located and the applicable insolvency laws. In this case, as Efwon Romania is a Romanian company, initiating insolvency proceedings in Romania would be the logical course of action.

In the final analysis, we submit that legal proceedings will likely occur in the respective countries where the companies are registered. In the present circumstances, this implies that the proceedings will occur in the United States for Efwon Investments, the United Kingdom for Efwon Trading, and Romania for Efwon Romania. This is, of course, unless there are benefits in bringing most of the action to jurisdictions with well-developed insolvency regimes like the US, EU, or the UK.

Over time, the USA and UK bankruptcy proceedings have developed below the political horizon.[[33]](#footnote-33) In both jurisdictions, professional practitioners can contribute to developing insolvency proceedings. The Efwon Group should carefully consider the present insolvency issues and choose the jurisdiction that offers the type of relief sought and the benefits of litigating in either country. Above, we stated our recommendations of jurisdiction for the various insolvency matters.

## **Impediments to Proceedings**

Out-of-court debt restructuring involves changing or reorganizing the composition of the structure of assets and liabilities of financially distressed entities.[[34]](#footnote-34) The objective is to restructure the assets and liabilities without judicial intervention[[35]](#footnote-35). To this end, all parties must be interested in promoting efficiency, restoring growth, and minimizing the costs of the debtor's financial difficulties.[[36]](#footnote-36) Informal debt restructuring is important in insolvency systems.[[37]](#footnote-37) When an entity is financially distressed, all parties can effectively protect their interests if an agreed informal solution can be negotiated. In SUNENERGY,[[38]](#footnote-38) the recent case of the bankruptcy judge noted:

This court ordered the appointment of a Chapter 11 trustee pursuant to 11 USC sec. [1104(a)(2)] as being in the interest of creditors, any equity security holders, and other interests of the estate.[[39]](#footnote-39)

While proceeding with insolvency proceedings, potential impediments may arise. Factors such as legal requirements, procedural complexities, potential objections from creditors or stakeholders, and potential conflicts of law should be carefully evaluated. Additionally, the freezing injunctions obtained by the drivers' lawyers may pose challenges that need to be addressed within the framework of the insolvency proceedings. The involvement of multiple jurisdictions and the complexity of the Efwon Group's structure could potentially complicate the process. It is important to assess and address these potential impediments during the restructuring carefully.

In this engagement, major impediments could include resistance from creditors, especially the American bankers and the Monaco lender, objections from regulators, and continued uncertainty surrounding KuasaNas' investment due to political issues in Malaysia. While initiating insolvency proceedings in Romania is recommended, it is essential to identify and assess any potential impediments to the process.

## **Advantages and Disadvantages of Proposed Proceedings**

We submit that the proposed insolvency proceedings in Romania offer several potential advantages. Implementing the European Directive 2019/1023 (the Directive) allows for a flexible and preventive restructuring framework designed to support the rehabilitation of financially distressed but viable businesses, which defines Efwon (Romania) based on the information provided.[[40]](#footnote-40) The Directive's framework enables the Efwon Group to restructure its debts and operations to preserve its value and ensure ongoing operations as *Debtors in Possession (DIP)*.[[41]](#footnote-41) The assets, managing creditor claims, and facilitating the deal with KuasaNas are also protected. Other advantages include protection from other creditors and a structured way to manage the Group's liabilities.

It is equally important, however, to consider the potential disadvantages. These include the need to comply with specific procedural requirements, potential delays, and the need to gain the cooperation and support of creditors and stakeholders. Some consideration must also be given to increased costs and the need to navigate the legal intricacies of different jurisdictions. These challenges can be mitigated through effective communication, transparency, and proactive engagement with all relevant parties involved in the proceedings. Other disadvantages include potential damage to reputation, loss of control in the case of administration, and the expenses and time involved in insolvency proceedings.

Because of the securities granted in some loan agreements, a secured creditor may seek to foreclose on their security to the detriment of the creditors. The security for the original bank loan of $250m included homes worth $75m, the projected revenue stream, share pledged in the holding Group Efwon Investments, and a negative pledge for loan valuation. Therefore, negotiations between the major creditors are more important than negotiations with the debtor.

Many diverse creditors have substantial funds outstanding, so that the negotiation procedure can be complex and uncertain.[[42]](#footnote-42) A successful restructuring is probable if the management of the Group or any entity in the Group enjoys a good relationship with all involved parties.

## **The Determining Factors**

The main factors that will determine the course of action include the companies' current financial situation, the stance of key creditors, the progress of the ongoing litigation, and the position of KuasaNas.

In addition to the above, to determine the most suitable approach, the Efwon Group needs to consider various factors, including the following:

* The location of Efwon Romania's center of main interest (COMI) and adherence to jurisdictional requirements;[[43]](#footnote-43)
* The legal framework and effectiveness of insolvency laws in Romania and the United Kingdom and their suitability for the restructuring objectives;
* The location of key assets and revenue streams;
* The overall goals and priorities of Efwon Investments and Efwon Trading;
* The analysis of applicable insolvency laws; and
* The cooperation and support of the creditors, including the drivers' claimants, in the proposed restructuring process.

The center of the debtor's COMI has become a crucial aspect of insolvency proceedings.[[44]](#footnote-44) The support and cooperation of the creditors have been previously mentioned and are crucial to the outcome the Efwon Group seeks.

The eight principles documented by INSOL are the authoritative document or best practices for multi-creditor workouts. If the Efwon Group can negotiate with all stakeholders to accept the INSOL Statement of Principles (2017), this will be an ideal starting point for a successful resolution to the insolvency matters facing the Group. The recovery process will be shorter if the Group can convince the stakeholders to use the INSOL Statement of Principles (2017).[[45]](#footnote-45)

## **Additional Information**

We need a more detailed understanding of the financial situation of all three companies, the specific terms of the loan agreements, the potential liability from the litigation, and the stance of KuasaNas on the current predicament.

To provide more precise advice, obtaining additional financial analysis regarding all three companies would be helpful. We want our financial and legal team to examine the specific nature of the freezing injunctions and financial information about Efwon Romania and Efwon Trading. Our team will also consider any contractual obligations or agreements with other parties that could impact the restructuring process. Specifically, for this engagement, it would be preferable if you could provide us with the following information:

* Detailed financial statements and projections for Efwon Trading, Efwon Romania, and Efwon Investments. Audited financial statements are preferable but not necessary;
* The terms and conditions of the intended deal with KuasaNas, including the proposed acquisition structure, specific conditions or requirements, and potential liability from the litigation. All written correspondence between the parties should be provided for further analysis;
* the specific terms of the loan agreements, including the promissory notes, the rate of interest, the collateral securities, the penalties, and a risk assessment of the liabilities;
* The nature and extent of the freezing injunctions obtained by the drivers' lawyers, including the potential impact on ongoing operations and the ability to repay creditors. We require the injunction itself, all legal briefings, agreements, legal submissions, depositions, and statements or rulings by any court about this matter, and any other documents you consider relevant; and
* The current status of negotiations with creditors and any potential agreements reached. All correspondences between the Group and the major creditors, including agreements, proposed haircuts, names and email addresses of the negotiating parties, and any other information you consider relevant to this matter.

## **Application of European Insolvency Regulation and UNCITRAL Model Law**

Given that companies in the Efwon group are based in different jurisdictions, the cross-border insolvency frameworks provided by the European Insolvency Regulation and UNCITRAL MLCBI may be helpful. The European Insolvency Regulation could be particularly relevant for proceedings between Efwon Trading and Efwon Romania, while the UNCITRAL MLCBI could facilitate coordination between proceedings in the US and the UK.

These legal frameworks provide mechanisms for cooperation and coordination between different jurisdictions in cross-border insolvency cases. These texts' specific provisions and their implications for the proposed restructuring strategy will be crucial in navigating potential challenges related to jurisdiction and recognition of insolvency proceedings.

## **Impact of Brexit**

The two words *Britis*h and *exit* are combined to create the word Brexit. Brexit refers to the UK's decision in a 2016 referendum to disengage itself from the large and powerful [European Union](https://www.investopedia.com/terms/e/europeanunion.asp) (EU).[[46]](#footnote-46) Brexit took place in the first month of 2020. In 2019, the UK and the EU made an interim free-trade agreement. This short-term agreement was intended to ensure the continued free trade of goods without tariffs or quotas between the parties. Trade services are 80% of the UK economy, creating uncertainty.[[47]](#footnote-47) A no-deal Brexit that was prevented would have had a lasting negative effect on the UK economy.[[48]](#footnote-48)

The implementation of Brexit has a potential impact on the applicability of the European Insolvency Regulation in the United Kingdom. Brexit may have affected the application of the European Insolvency Regulation between the UK and Romania. However, the UK has adopted the UNCITRAL MLCBI, which can potentially fill this gap. We stress that the impact of Brexit on the proposed solution needs further careful consideration. While the full consequences of Brexit are still unfolding, assessing its potential effects on cross-border insolvency proceedings, recognition of judgments, and the applicability of European insolvency frameworks in the United Kingdom is crucial. Our legal experts will continue to assess Brexit's impact on the particular circumstances in the insolvency proceedings of the Efwon Group. Specifically, we will assess how Brexit may affect the proposed solution and the interaction with the European Insolvency Regulation. As this is a work in progress, we will continue to advise on this aspect of the engagement.

## **Implementation of European Directive 2019/1023**

The availability of a preventive restructuring framework in Romania could be advantageous, allowing Efwon Romania to avoid formal insolvency proceedings and potentially satisfy the demands of KuasaNas. Given the cross-border nature of the Efwon group's operations, it is likely that the European Insolvency Regulation and UNCITRAL MLCBI will come into play. These frameworks aim to harmonize and facilitate international insolvency proceedings. Their provisions may guide and assist in addressing conflicts of laws and jurisdictional challenges throughout the restructuring process. We will continue to assess the application of the European Insolvency Regulation and the UNCITRAL MLCBI in the chosen jurisdiction.

# **Conclusion**

We were requested to advise Benedict Maximov, the Chief Executive Officer of the Efwon Group, on how to facilitate the deal with KuasaNas. We were also tasked with providing advice on dealing with the insolvency issues affecting the companies in the Efwon Group.

Mr. Maximov is advised that the current situation of the Efwon Group is complex but potentially manageable with careful planning and execution. Our advice in the paragraphs above should serve as a roadmap to navigate the issues and ensure a successful investment by KuasaNas. We stressed the importance of minimizing any publicity of the proposed insolvency strategy, and we highly recommend adherence to the eight INSOL principles where possible.

At ABC & Associates, we have insolvency professionals with expertise in international insolvency law and cross-border restructuring to assist the Group in navigating the complexities of the Efwon group's situation effectively. We have developed a tailored strategy suitable for further discussions, considering the specific circumstances, applicable laws, and the best interests of the Efwon Group generally and specifically for Efwon Investments and Efwon Trading.

The advice above is based on the limited information you provided. For a more comprehensive strategy, additional facts or information are required to provide more comprehensive and tailored advice. Some of the necessary information required is detailed above. Further meetings with you, your in-house management team, your in-house key professionals, consultants, and other stakeholders are key to deriving the best solution for the current engagement.

Again, thanks for contacting us and allowing us to provide you with this preliminary professional advice.

ABC & Associates

August 10, 2023

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# **APPENDICES**

# **APPENDIX 1 – PROPOSED STRATEGIC SOLUTION**

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Figure 2. Proposed Strategic Solution[[49]](#footnote-49)

# **APPENDIX 2 – KUANANAS DEAL**



Figure 3. KuansaNas Deal[[50]](#footnote-50)

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1. According to Skeel, (2009), if you read a contract or corporate law decision, you will be able to see the written story of how the parties got into the position they are in. It is important to keep this in mind when developing a solution to their particular issues. See Skeel Jr, D. A. (2009). Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare. *Mich. State Law Review*, 1187. Retrieved July 23, 2023, from <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1327&context=faculty_scholarship> [↑](#footnote-ref-1)
2. At times, by flowing funds, it is easy to tell the story of a reorganization process. The diagram is not a flow of time, merely a fund flow from the origin to the relevant entities. According to Doti (2007), “A flowchart approach helps to sort out the varying rules in an organized way.” (p-vi) [↑](#footnote-ref-2)
3. Wessels, B., Kokorin, I. (2023). The European Insolvency Regulations. *INSOL.* [↑](#footnote-ref-3)
4. Mellahi & Wilkinson (2004) identified various symptoms of organizational failure, including negative profitability, shrinking financial resources, dwindling market, a loss of legitimacy, and decreased market share value. Muñoz-Izquierdo et al. (2019) described business failure manifestation includes when a company files for insolvency proceedings or seeks to renegotiate outstanding amounts with creditors. These actions indicate that the firm is financially distressed, insolvent, and may not have the liquidity to meet its day-to-day expenses. [↑](#footnote-ref-4)
5. (INSOL International, (2017). [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. (Adriaanse & Kuijl, 2006) [↑](#footnote-ref-7)
8. See https://australianloanrestructuringissues.com/category/turnarounds/page/2/ [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. (Adriaanse & Kuijl, 2006, p. 146) [↑](#footnote-ref-11)
12. (Chen, 2020). [↑](#footnote-ref-12)
13. Adriaanse and Kuijl 2006 refer to this as the "*self-fulfilling prophecy-effect of a public procedure"* (p. 146). [↑](#footnote-ref-13)
14. See *KAMAL v. BAKER TILLY US, LLP*, Civil File No. 21-1549 (MJD/DTS) (D. Minn. Apr. 7, 2022). This case demonstrates the necessity of detailed financial assessments of company records during a restructuring process. [↑](#footnote-ref-14)
15. According to Iancu (2020), under Article 4 of the New Code of Insolvency in Romania, 4 the fundamental principles are most relevant: “*Maximizing the rate of asset selling and receivable recovery,* p*roviding the debtors the opportunity to efficiently and effectively redress the business,* *providing equal treatment of creditors with similar ranking, and acknowledging the existing rights of creditors and observing the priority order of receivables, based on a set of clearly determined and uniformly applicable rules.” (p. 62).* [↑](#footnote-ref-15)
16. While the Case Study 2 noted that Romania has updated its insolvency laws by implementing the European Directive 2019/1023, a recent article from an INSOL insider and doctoral student, Lavinia-Olivia Aspru, tells a different story of the realities in insolvency proceedings in Romania. The author writes: “The insolvency law in Romania, although it suffered many changes, is not able to keep pace with the ingenuity of badfaith traders. We make this assertion under the conditions that we refuse to believe that the lawmaker on purpose has not clearly established the liability regime of persons guilty of companies’ entering into insolvency, allowing some influent persons to avoid the strictness of the law.” The author implies that monied persons are still allowed by ignore the law and benefit from the status quo. This is not a topic of this paper, but the topic is timely because the questions involved Romania. See Laviia-Olivia Aspru (2023). *The Liability Regime in the Insolvency Procedure from Romania.* INSOL Publications*.* [↑](#footnote-ref-16)
17. See Volberda, H. (2021). Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023. *Utrecht Law Review*, *17*, 65. https://doi.org/10.36633/ulr.638 [↑](#footnote-ref-17)
18. See *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019), where the Bankruptcy court allowed creditor negotiations, “…the Court's conclusion that bankruptcy courts can decide matters integral to the restructuring of debtor-creditor relations…” [↑](#footnote-ref-18)
19. Various authors have described the insolvency laws in the US as *debtor-friendly* (Bracewell & Giuliani, 2012; Lee, 2011). Through Chapter 11 of the Bankruptcy Code, distressed businesses can reorganize and have a *breathing space*, notwithstanding the efforts of secured creditors to foreclose on their collateral or force a liquidation (Bracewell & Giuliani, 2012; Lee, 2011). Bracewell and Giuliani (2012) argue that Chapter 11 protects and preserves distressed businesses by allowing for and encouraging financial restructuring binding to all stakeholders. [↑](#footnote-ref-19)
20. (Pedrosa & López-Corrales, 2018). [↑](#footnote-ref-20)
21. (Garrido, 2012). [↑](#footnote-ref-21)
22. Adriaanse & Kuijl (2006) [↑](#footnote-ref-22)
23. (Adriaanse & Kuijl. 2006; Vidović, 2017) [↑](#footnote-ref-23)
24. Delado, J. C. (2022). Jurisdiction and Recognition of Insolvency-Related Judgments: A Comparison between the European Insolvency Regulation and the UNCITRAL Model Law. INSOL. Retrieved on July 23, 2023, from <https://insol.azureedge.net/cmsstorage/insol/media/document-library/technical%20paper%20series/jurisdiction-and-recognition-of-insolvency-related-judgments.pdf> [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. Traditionally, four stand-alone options were available in the UK to distressed companies seeking to restructure debt (Payne, 2018). These include a contractual workout, a Company Voluntary Arrangement (CVA), a scheme of the arrangement, and administration (Gov.UK, 2023; Payne, 2018). There are advantages and disadvantages to each of these options. Additionally, combining these options is common to maximize several advantages (Payne, 2013; Payne, 2018). [↑](#footnote-ref-26)
27. *Supra*, note 5. [↑](#footnote-ref-27)
28. (Bracewell & Giuliani, 2012). [↑](#footnote-ref-28)
29. (Lee, 2011). [↑](#footnote-ref-29)
30. *Supra*, note 7. [↑](#footnote-ref-30)
31. The UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation is available at: https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-GuideEnactment-e.pdf., 87 States in 120 jurisdictions have adopted legislation based on the MLCBI. [↑](#footnote-ref-31)
32. *Supra*, note 7. [↑](#footnote-ref-32)
33. Lee R. S. (2011). Corporate Reorganization as Corporate Reinvention: Boarders and Blockbusters in Chapter 11. *Harvard Business Law Review Online*, Vol. 1, No, 53, 2011. Available at SSRN: <https://ssrn.com/abstract=1942126> [↑](#footnote-ref-33)
34. See Adriaanse & Kuijl, 2006; Garrido, 2012; Vidović, 2017. [↑](#footnote-ref-34)
35. See Garrido, 2012; Vidović, 2017. [↑](#footnote-ref-35)
36. According to Garrido (2012), "Restructuring activities can include measures that restructure the debtor's business (operational restructuring), and measures that restructure the debtor's finances (financial restructuring)" (p. 1). [↑](#footnote-ref-36)
37. See International Monetary Fund, 1999; The Law Firm Network, 2014. [↑](#footnote-ref-37)
38. *SUNERGY CALIFORNIA LLC v. Official Committee of Unsecured Creditors*, No. 2: 21-cv-01429-JAM (E.D. Cal. Oct. 28, 2021). [↑](#footnote-ref-38)
39. Ibid. [↑](#footnote-ref-39)
40. Skeel Jr, D. A. (2009). Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare.*Mich. St. L. Rev.*, 1187. Retrieved July 23, 2023, from <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1327&context=faculty_scholarship>. “In the unusual case where everyone agrees that the business is not viable, the overall narrative indicates that it is time to close the business down and sell its assets for whatever they will bring as scrap. More often, the debtor’s representatives will insist that the business has great promise, but has been throttled by too much debt or an unexpected economic shock. The company, they will argue, is worth preserving—just like the railroads that were restructured in the early days of American corporate reorganization and the many businesses that have been reorganized in the century since.” [↑](#footnote-ref-40)
41. The Debtor In Possession, or DIP, refers to a person, business, or any entity that has sought Chapter 11 bankruptcy protection and is still in possession of property secured by a lien or other security interest on which creditors have a legal claim. The main purpose of DIP is to avoid a default on the creditors by operating a business during the liquidation. <https://www.wallstreetmojo.com/debtor-in-possession/> [↑](#footnote-ref-41)
42. (Garrido, 2012; Dick, 2021). [↑](#footnote-ref-42)
43. If COMI exist elsewhere the secured creditors typically requests the court to dismiss the case in favor of commencing proceedings in another jurisdiction. This effort by creditors have not always been successful. [↑](#footnote-ref-43)
44. Wessels & Kokorin (2023). “Before opening insolvency proceedings, the competent court is under an obligation to examine [of] its own motion whether the center of the debtor’s main interest is actually located within its jurisdiction (Recital 27).” The concept of COMI will apply to all of the entities within the group that seeks an insolvency solution. [↑](#footnote-ref-44)
45. (Vidović, 2017). [↑](#footnote-ref-45)
46. <https://www.investopedia.com/terms/b/brexit.asp> [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. Ibid. [↑](#footnote-ref-48)
49. This diagram does not show a conclusive solution. In the statement of Facts that accompanied this Case Study, the Professors noted: “Please note that there is no right answer. The outcome is entirely dependent on your assessment of the facts and strategy you choose to deal with the facts as stated.” GIPC 2023 Case Study 11 (p. 5) [↑](#footnote-ref-49)
50. *Supra*. Note 48 [↑](#footnote-ref-50)