INSOL GIPC 2023 / 2024 – CASE STUDY II – PART I

1. I am asked to advise Mr Benedict Maximov as to (i) how to facilitate the deal with the new proposed sponsoring party, KuasaNas, and (ii) how the insolvency issues affecting the companies in the Efwon group can be dealt with. The need for advice arises from the following context, and the current situation facing the Efwon Group, as summarized below.

2. The Efwon group of companies are the vehicles by which Mr Maximov, a successful American business speculator and F1 enthusiast, entered the sport in 2010, following an opportunity to do so as some teams were in financial difficulties, and were looking to exit the sport, in the economic recession that followed the Global Financial Crisis of 2008-2009.

3. The *group structure*, which is ultimately owned and controlled by Mr Maximov, is comprised of:

   (1) **Efwon Investments**: An ultimate holding company incorporated in the US State of Delaware;

   (2) **Efwon Trading:** A wholly owned subsidiary of Efwon Investments, incorporated in England and Wales;

   (3) **Efwon Romania**: A first wholly owned subsidiary of Efwon Trading, incorporated in Romania;

   (4) **Efwon Hong Kong**: A second wholly owned subsidiary of Efwon Trading, incorporated in Hong Kong.

4. As to the *creditors* of and within the Efwon group:

   (1) **Efwon Investments** has a USD250m loan facility provided by a syndicate of US banks:
      1. There are 2 senior lenders with USD100m exposure;
      2. 2 mezzanine financiers with USD60m exposure; and
      3. 5 junior creditors with USD90m exposure;

4. The facility was for a term of 10 years, at an interest rate of LIBOR + 2%; and
5. The security package for the lending included (i) security over Mr Maximov's various homes around the world, valued at USD75m; (ii) a pledge over projected revenue to flow back up the group structure from participation in F1; (iii) a pledge over Mr Maximov's shares in Investments; and (iv) a negative pledge from Investments not to grant any further security, without the lenders' agreement, up to the full value of the loan.

(2) **Efwon Trading** has received:

1. An initial loan of USD350m from its parent company, Efwon Investments. This sum was made up of (i) the USD250m drawn down on the US bank syndicate facility; and (ii) USD100m of equity capital provided by Mr Maximov to Investments. The loan is secured on future revenues earned by Trading.
2. A second loan of USD100m from a Monaco-based lender, at a high interest rate (again secured on Trading's future revenues, to be advanced to Trading from its wholly-owned subsidiary Romania) to support the racing team for the 2014 season.

(3) **Efwon Romania** has received from its parent company, Efwon Trading:

1. An initial loan of USD150m (USD50m was the cost of the acquisition of the racing team; and USD100m was for operating expenses in the first year of racing in 2011);
2. A second loan of USD100m for the second year of racing in 2012; and
3. A third loan of USD100m for the third year of racing in 2013.
4. The lending is secured on Efwon Romania's share of the broadcasting revenues to be received from the entity with the commercial rights to F1, Formula One Group.

5. The other *most commercially fundamental features* of the Efwon group are:

(1) **The Team's FIA Licence**: This is held by Efwon Romania and allows the team's drivers to race in F1, having been granted by the FIA.

(2) **The Team's F1 Broadcasting Rights Revenue-Share Income**: This is received from Formula One Group by Efwon Romania. The amount received is variable, fluctuating according to the overall viewing figures, which are sensitive to, among other things, how genuinely competitive the racing series is. Each Grand Prix can attract audiences up to over 600m per race.

(3) **The Team's Own Sponsorship Income:** This is received by Efwon Hong Kong. In 2013 it signed a deal that provided that for 5 years from 2015 to 2020 an Indonesian company, Kretek, would provide c.USD100m per annum, for exclusive sponsorship of the team. The US syndicate of bankers with the loan facility with Investments have previously advised that a diversified portfolio of sponsors would allow a better flow of repayments up-stream in the group.

(4) **The Team's Drivers' Contracts:** The two drivers' contracts are held by Efwon Romania, having been transferred from the Romanian team taken over by Mr Maximov in 2010, for its first racing season in 2011.

(5) **The Team's Financial Performance**: A USD30m return was made by Efwon Romania in 2011 which was reinvested in that company. A USD60m return was made in 2012. Some of that was reinvested, and some paid upstream by way of repayment of the loans from (i) Trading to Romania; and (ii) Investments to Trading. At that time, as mentioned above, the US syndicate of bankers with the loan facility with Investments advised that seeking a diversified portfolio of sponsors would allow a better flow of repayments up-stream in the group, even if steadily improving placings would secure a better repayment stream.

(6) **The Team's Racing Performance**: The Team has placed 17th in 2011, 10th in 2012. Although placings for 2013 and 2014 are not currently available, once the Kretek sponsorship was secured, from 2015 – 2017 the team climbed the rankings ultimately placing 6th in 2017. Whatever additional sponsorship funding is made available, however, there may be limited potential for further ranking improvements, as there are five dominant teams from car manufacturers: Renault, BMW, Toyota, Honda, and Ferrari. These are necessarily far larger corporate

enterprises with far deeper pockets, than teams ultimately owned by private individuals, funded by a combination of private wealth, bank lending, team sponsorship, and revenue-share in broadcast rights.

6. Mr Maximov needs advice as problems have recently arisen, such that the current situation facing the Efwon Group is as follows:

   (1) **Requirement for Replacement Sponsorship**: Kretek have informally indicated that they have doubts as to whether they will renew their sponsorship of the team from 2020.

   (2) **Potential Replacement Sponsor with Associated Issues and Risks**: There is one potential replacement – KuasaNas – a Malaysian state alternative energy company, who have indicated (i) they could provide sponsorship in excess of USD200m; but (ii) would want a majority 51% stake in the team (i.e. in Efwon Romania), and (iii) the team to move to Malaysia, where there may be practice-track deals and new drivers sufficiently qualified to obtain Super-Licences from the FIA. A general election in Malaysia has caused this deal to stall while the new government carries out a corruption review. If the proposed sponsorship deal passes this review, KuasaNas have now confirmed that they would require a further condition in light of the matters set out below, (iv) a prompt dealing with the insolvency issues now affecting the Efwon Group.

   (3) **Injury to Both Team Drivers, and Legal Proceedings against the Team**: In the last race of the 2018 season, and while the KuasaNas review process was being finalized, both the team's Romanian drivers were injured. They have now filed legal proceedings in the Romanian Courts: (i) for damages claims against Efwon Romania, based on safety and management defects, such claims apparently being likely to succeed in substantial sums; (ii) insolvency proceedings against Efwon Romania; (iii) a freezing injunction has been obtained against the same company over its assets and income.

(4) **Risk of Default and Insolvency Risk from Legal Proceedings**: The freezing injunction over Efwon Romania's assets and income will, if it remains in place, cause that company to default in its loan repayment obligations to Trading due in early 2019. That will in turn cause Trading to default in its obligations to Investments thereafter. As well as being at risk of insolvency for default in those obligations, Trading is also at further risk of insolvency by defaulting in its obligations under the second loan from the Monegasque lender, of USD100m in principal amount, as set out above. The prospect of these various defaults and the risk of insolvency throughout the Efwon Group has caused the US banking syndicate which has the secured facility with the Group's Delaware holding company, Investments, (i) to be 'understandably jumpy' and (ii) to consider exercising its security, including over Mr Maximov's personal assets (his USD75m homes around the world, and his 100% shareholding in Investments, through which he is the ultimate beneficial owner of the group and its F1 racing team).

7. The key objectives which need to be achieved here are:

(1) To engage with the US banking syndicate to ensure they do not seek to enforce their lending, or exercise their security rights, by presenting a coherent strategy to them as to how the current challenges facing the Group can be addressed satisfactorily and quickly;

(2) To have withdrawn or dismissed, or stay the freezing injunction brought by the drivers' lawyers against Efwon Romania. This seems to me to be the key part of this, as the insolvency risk is most acutely (albeit not solely) caused by the freezing injunction preventing that company dealing with its assets and income, giving rise to the potential domino effect of defaults through the group;

(3) To prevent any risk of legal action by the Monaco-based creditor of Efwon Trading; and

(4) To quickly secure (i) the replacement sponsorship, whether the current option under review in Malaysia, or otherwise; and (ii) quality replacement drivers.

8. In my view, the best strategy to achieve those objectives is:

(1) To engage with the main interested parties – (i) the US banking syndicate, (ii) the drivers' lawyers in Romania, (iii) KuasaNas, and (iv) the Monaco-based lender to Efwon Trading, seeking to negotiate agreement of a restructuring plan with these key features: (i) for KuasaNas to receive a lower amount of equity in Efwon Romania to ensure the sponsorship deal, and/or seeking to negotiate a higher level of sponsorship funding (which does appear available given they have said they could provide "in excess' of USD200m); (ii) to seek a total or partial debt for equity swap in respect of the Monaco-based lender (i.e. also give them some equity in Efwon Romania, for a total or partial release of their lending); (iii) for provision to be made for the damages claims of the Romanian drivers from funds to be available from the sponsorship deal, conditional on the release of the freezing injunction and a cap on the quantum of the claims; (iv) for Mr Maximov's agents to work on identifying and engaging, through contracts with Efwon Romania, new drivers for the racing team, with assistance from KuasaNas if they (as is suggested) already have potential drivers in mind, as they mentioned when seeking to move the team to Malaysia; (v) for Mr Maximov's agents to work on identifying any other possible sponsors, both for leverage with KuasaNas, if that deal passes the governmental review, but also to seek to manage the risk that the deal does not pass the review.

(2) Following the INSOL Statement of Principles, all parties should initially be approached to agree a standstill period, during which the group's position and the plan can be discussed and negotiated, and with the usual agreement that no further steps be taken by (i) the US banking creditors to enforce their security, or assert their debt claims; (ii) the drivers in their proceedings in Romania; or (iii) the Monaco-based creditor on their lending, or security.

(3) US, English and Romanian restructuring lawyers should be engaged by the Group to advise on and to prepare US Chapter 11, English CBIR recognition, and Romanian restructuring filings, following the approach and strategy below.

(4) Taking the Romanian part of the strategy first, and based on a 2020 Report on the Romanian restructuring position before the implementation of the Preventive Restructuring Directive 1023/2019 prepared by Judge Nastasie and Dr Draghici, as part of the Judicial Co-operation Supporting Economic Recovery Project (JCOERE), the Group can, on advice from its Romanian lawyers, consider either (i) proposing a restructuring within the insolvency proceedings which have already been commenced by the drivers, or (ii) using the 2014 'preventive concordat' and 'ad-hoc mandate' Romanian restructuring processes. Based on the Nastasie and Draghici Report, which says debtors usually prefer to open insolvency proceedings to obtain protection from non-adherent creditors (which is less effective under the 2014 preventive concordat and ad hoc mandate process), it seems the former is likely to be the better strategy, if the drivers' lawyers will not agree to be co-operative with the restructuring, by changing their current aggressive litigation posture.

(5) The US banking creditors may be settled down by knowing the Group has a plan to handle the drivers' actions in Romania as above, on advice from its Romanian lawyers, and may therefore agree, including as part of the standstill agreement, that they will not enforce their loan security over Mr Maximov's assets, or declare the lending in default before bringing proceedings on the lending itself. To protect against any risk of this not proceeding in that way, however, the Group's US Attorneys could advise on and prepare a US Delaware Chapter 11 filing in respect of Efwon Investments (the Delaware entity) and Efwon Trading (its English subsidiary). To ensure jurisdiction for the latter filing, and following the decision in Global Ocean Carriers Ltd., the Attorneys ought to be (i) expressly instructed on behalf of both entities; and (ii) provided with retainer monies to be held on retainer in the US firm's US-banked client account, expressly held on behalf of both entities. The benefit of a US Chapter 11 filing is that the ability of both the US

banking syndicate, and the Monaco-based lender, to exercise their contractual security rights is stayed, so long as there is adequate protection provided for the value of those rights as part of the proposed plan in the Chapter 11 process. Given the nature of the security interests in both cases, however, it is really the US banking syndicate's security which is of immediate concern to Mr Maximov, being personal assets of his which can be immediately executed against (cf. the Monaco lender's security rights only being over revenue-streams).

(6) The Group's English lawyers should be instructed to prepare an application for recognition of the US Chapter 11 proceedings under the English Cross-Border Insolvency Regulations 2006 (CBIR), and of the directors of Efwon Trading as the appropriate foreign representatives of the Chapter 11 proceedings (being debtor-in-possession proceedings pursuant to and during which management retains control of the debtor companies: see e.g. Re 19 Entertainment Ltd. [2016] EWHC 1545 (Ch)). The US Chapter 11 filing, and the English CBIR recognition application in respect of Efwon Trading, can then be made if either the US banking creditors are not settled down as mentioned above, or because the Monaco-based lender seeks to take action against English debtor company Efwon Trading, on its loan facility, in England and Wales.

(7) One potential challenge, impediment or disadvantage to the above proposed strategy is that, in order for the Chapter 11 stay to be effective automatically in England in respect of Trading and as against the Monaco-based lender, rather than as a matter of discretion (i.e. by obtaining an automatic right to a stay on the potential action on their debt), it would have to be shown in the English CBIR application that the US Chapter 11 proceedings amounted to a 'foreign main proceeding,' (article 2(g)), in respect of Efwon Trading, despite that entity being incorporated and having its registered office in England & Wales. For that to be successful, it would have to be shown that Efwon Trading's centre of main interests (COMI) (ibid.) was in the US, not in England, as would be presumed as the starting point based on its registered office being in England, at least in the absence of proof to the contrary (article 16).

(8) Following the approach to COMI for the purposes of the English CBIR in the case of Stanford [2009] BPIR 1157; and [2010] EWCA Civ 137, which following the European case law on COMI in the EU Regulation in Eurofood [2006] Ch 608 (ECJ), the following considerations or factors are relevant in seeking to rebut the presumption that Efwon Trading's COMI is in England, and seeking to prove it in fact has its COMI in the US: (i) where the company conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties; (ii) what is ascertainable by third parties is what is in the public domain and what they would learn in the ordinary course of business with the company; (iii) whether an actual situation existed which was different from that which location at that registered office was deemed to reflect; (iv) that could be so in particular in the case of a "letterbox" company not carrying out any business in the state where its registered office was situated; (v) by contrast, where a company carried on its business in the state where its registered office was situated, the mere fact that its economic choices were or could be controlled by a parent company in another state was not enough to rebut the presumption; (vi) where the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the state where its registered office is situated; (vii) what would have been clear to investors and creditors at the time they made their investments; (viii) whether there is strong evidence of overriding and ascertainable control by a parent company; and (ix) whether the debtor's parent company so controlled its policies and that that situation was transparent and ascertainable at the relevant time. These factors relevant to COMI were further explained, together with the overall approach to be taken, in the context of the EU Regulation in Interedil [2012] Bus Lr 1582 as including (x) all the places in which the debtor company pursues economic activities, where ascertainable by third parties; (xi) all the places in which the debtor company holds assets, and contracts for the exploitation of those assets, where ascertainable by third parties; and that (xii) the COMI assessment is to be undertaken in a comprehensive manner, taking account of the individual circumstances of each case. Finally, there are more detailed statements and guidance on relevant

factors for the COMI assessment set out in the UNCITRAL Digest of Case Law on the Model Law at pages 41 – 42, as follows: (i) the location of the debtor's headquarters, including where those functions are performed, or its 'nerve centre'; (ii) the location of those who actually manage the company, including those who direct the debtor; (iii) the location of the company's primary assets, include its operations; (iv) the location of the majority of the company's creditors; (v) the jurisdiction whose law would apply to most disputes; and (which may be of particular relevance and importance here) (vi) the jurisdiction in which the company's activities have been conducted over an extended period of time, in connection with its involvement in a restructuring or winding up (relying on the US case-law considering COMI under Chapter 15, the US enactment of the Model Law, equivalent to the English enactment in the CBIR: British American Isle of Venice, British American Insurance, Creative Finance, In re Fairfield Sentry, In re Modern Land). The Digest then goes on to summarise 18 further factors mentioned in the case-law, the following of which appear most potentially relevant to the position of Efwon Trading: (i) the location of books and records; (ii) where financing was organized or authorized; (iii) the location from which cash management was run; (iv) the location in which commercial policy was determined; (v) the location of communications and computer systems management; (vi) the location from which the reorganization of the debtor is being conducted; and (vii) the location to which invoices for financial advice were sent.

(9) Based on what we currently know or seems likely, there is a good chance that COMI could be established in the US for Efwon Trading. Mr Maximov is based in the US and is the driving force of the Group. He likely arranged for Trading's incorporation from the US, its administrative and management decisions and organization appears likely to have been undertaken from the US too, so as to be seen as its 'nerve centre,' in combination with the other group companies: i.e. in a manner not likely to have respected Trading's separate identity. The books and records are likely to be in the US conveniently held together with the other group companies' records to support such a combined administration and management approach. Trading undertakes no significant commercial trading or business in England, as a financing

vehicle which merely receives loan funds by way of borrowing and then passes through the income it receives. Its parent company, Efwon Investments, is in the US, and the parent is likely managed together with Trading by Mr Maximov in the US as mentioned above. The overwhelming majority of Trading's creditors by percentage (77% v. 33%) and number (9 v. 1) are in the US. The other creditor is not based in England but is in Monaco. For that reason, the overwhelming majority of its debt is also likely governed by US law. Trading's financings in 2011 and 2014 were likely each planned, negotiated and executed by Mr Maximov and his advisers in the US, and it would have been ascertainable in the ordinary course of business by third parties, e.g. the Monaco based lender, that that was the case, at the time if these negotiations and when executing the finance documents.

(10) However, in order to best prepare for the CBIR recognition application, however, it would be advisable to gather as much information as possible from Mr Maximov relevant to these factors to seek to assess and build a case for presentation to the English Court, such that when it considers everything holistically on the COMI question, having regard to the totality of the evidence, there is the best possible chance of persuading the Court that Efwon Trading's COMI is in the US. The length of time for which the US Chapter 11 advice and process has been ongoing in the US, and the extent of the activity in the US in that regard, seems particularly important in this case, and is obviously somewhat more controllable by careful and appropriate actions taken now, unlike most of the other factors which are a matter of historical fact.

(11) The main advantage of my proposed approach of using CBIR recognition of the US Chapter 11 is to co-ordinate more of the overall group restructuring process in the US and to avoid a third main process being necessary (in respect of Efwon Trading in England). Of course, if the further facts and information on these COMI factors and issues, when considered in the round by the English advisers, would not support a recognition application of the US Chapter 11 of Trading as a foreign main proceeding, with good prospects of success, then opening an English main process in respect of Efwon Trading to allow for the

overall restructuring may well be necessary if the Monaco-based lender is not-co-operative and is non-aligned. In those circumstances, and subject to the English lawyers' further advice, an English administration in respect of Efwon Trading may be the most appropriate option.

(12) At sub-paragraphs (7) – (10) above, I have set out how it is envisaged the UNCITRAL Model Law (as implemented in England in the CBIR) can assist in achieving the strategic objectives. The strategy proposed and discussed above does not rely on the EU Insolvency Regulation, and is unaffected by Brexit. First, there is no contest between EU jurisdictions for being the main proceeding of either Efwon Romania, or Efwon Trading (prior to Brexit in December 2019) so as to establish binding primary jurisdiction throughout the EU. Secondly, there is no need for one EU jurisdiction's proceedings over a debtor to be recognized in another EU jurisdiction (unless, which is not proposed above, alterations were to be made to the level of debt between Efwon Romania and Efwon Trading, which were then reflected in judgments in the Romanian process, and which then needed to be recognized and enforced in England, prior to Brexit, at which time the option would be lost in any event). Finally, there is no need for co-ordination of related EU insolvency proceedings between group companies. Although judicial co-ordination as between the Romanian insolvency process, and the US Chapter 11 proceedings, might well be helpful, this is not something that is the subject of, to be assisted by, the EU Regulation.

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11 August 2023