**INSOL International Global Insolvency Practice Course 2022 / 2023**

***Case Study II-Part II Submission***

MEMORANDUM

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| **Date** | **:** | **August 24, 2023** |
| **To** | **:** | **Mr. Benedict Maximov** |
| **Re** | **:** | **Memorandum in relation to proposed strategy for resolution of Efwon Group** |

1. **Background**

We understand that:

1. In 2010, Mr. Benedict Maximov (an American entrepreneur) (“**Client**” or “**Mr. Maximov**”) incorporated a company under the laws of Delaware, called Efwon Investments (“**Efwon Delaware**”) for investing in a team for participating in Formula 1 (“**F1**”) competition sanctioned by the *Fédération Internationale de l’Automobile* (“**FIA**”).
2. Mr. Maximov invested USD 100 million in Efwon Delaware. In addition, Efwon Delaware borrowed USD 250 million from a syndicate of banks (“**Syndicated Loan**” and the agreement entered in relation to such loan is referred to as “**Syndicate Loan Agreement**”), comprising of:
   1. 2 (two) senior banks (exposure of USD 100 million) (“**Senior Lenders**”);
   2. 2 (two) mezzanine financial creditors (exposure of USD 60 million) (“**Mezzanine Lenders**”); and
   3. 5 (five) junior financial creditors holding an exposure of USD 90 million (“**Junior Lenders**” together with Mezzanine Lenders and Senior Lenders referred to as “**Syndicate Lenders**”).

The terms of Syndicated Loan envisaged bullet payment in 10 years with an interest rate of LIBOR + 2%.

1. The Syndicated Loan is *inter alia* secured by way of following:
2. secured partly on a number of homes of Mr. Maximov across the world, collectively worth approximately USD 75 million;
3. pledge on the projected revenue of Efwon Delaware to flow back from the resulting investment and participation in the sport;
4. pledge over the shares of Efwon Delaware, and
5. negative pledge in respect of the Syndicated Loan.
6. In 2010, Mr Maximov incorporated a company under the laws of England and Wales, called Efwon Trading (“**Efwon UK**”). He also instructed his agents to enquire about setting up a team in Europe, where traditionally teams were located. To facilitate the process, Efwon Delaware extended inter-corporate loan to Efwon UK for an amount of USD 350 million (“**Efwon UK Loan**” and the agreement entered in relation to such loan is referred to as “**Efwon UK Loan Agreement**”) to facilitate setting up of F1 team in Europe. The Efwon UK Loan was secured by future revenue from the Efwon UK’s trading activities.
7. After scouting various prospect, the agents of Mr. Maximov recommended buying an existing team that had a competition licence, but which was not doing too well, to avoid entry qualification and hefty deposit to FIA that may have been otherwise required in a normal scenario. Given that the global economy was grappling with 2008 Global Financial Crisis, it was not difficult to find such a team. Eventually, a team in Romania (with existing license) was finalized for acquisition and access to F1 competition, which had several machines ready for racing-*although in dire need of re-development and upgrading*.
8. In late 2010, Efwon UK entered into contract for acquisition of the Romanian team. In this regard, Efwon UK incorporated a wholly owned subsidiary in Romania (for reasons to do with the licences already accorded by the FIA), called as Efwon Romania (“**Efwon Romania**”). Further, Efwon UK extended inter-corporate loan for an amount of USD 150 million to Efwon Romania to (“**Efwon Romania Loan-I**” and the agreement entered in relation to such loan is referred to as “**Efwon Romania Loan Agreement-I**”) be utilised as follows: (a) USD 50 million as cost for acquisition of the Romanian team; and (b) USD 100 million as the projected budget for the first racing year (which would be in 2011). The Efwon Romania Loan was secured on the team’s share of the broadcasting revenue from participation (there being at that time no sponsorship moneys, owing to contracts having lapsed). Two drivers were contracted with the Romanian team and their contracts were also taken over by the Efwon Romania.
9. Set-out below is the performance trajectory of post the acquisition of Efwon Romania:

| **Year** | **Particulars** |
| --- | --- |
| 2011 | Efwon Romania entered the competition in the 2011 season in machines (carrying the company logo and a picture of Mr. Maximov) and the team placed 17th in the rankings. However, due to drop in viewing fans (in the absence of real competition and monopoly by key teams and drivers), the return for Efwon Romania in 2011 was USD 30 million, much of which had to be re-invested. |
| 2011 | Basis directions from Mr. Maximov, Efwon UK extended further inter-corporate loan of USD 100 million to Efwon Romania (“**Efwon Romania Loan-II**” and the agreement entered in relation to such loan is referred to as “**Efwon Romania Loan Agreement-II**”) as the budget for the 2012 racing season. |
| 2012 | * In 2012, the team placed 10th in the rankings and the revenue was USD 60 million, out of which some was re-invested, and some used to begin the upstream flow of repayments to Efwon UK and the latter in turn to Efwon Delaware. * Mr. Maximov was advised, under pressure from his American bankers, to move from private sponsorship to a more diversified sponsorship portfolio, so that Efwon Romania would be able to grow the repayment stream further. * Efwon UK extended advance of USD 100 million to Efwon Romania (“**Efwon Romania Loan-III**” and the agreement entered in relation to such loan is referred to as “**Efwon Romania Loan Agreement-III**”) for the 2013 season. |
| 2013 | * as strategic step for exploring sponsorship, Efwon UK incorporates a wholly-owned subsidiary in Hong Kong (“**Efwon Hong Kong**” together with Efwon Delaware, Efwon UK and Efwon Romania referred to as “**Debtors**”) to deal with potential sponsorship. * Efwon Hong Kong signed a 5-year agreement (i.e., from 2015-2020) with on Indonesian entity (“**Kretek**”) for exclusive sponsorship worth an estimated sum of USD 100 million annually. |
| 2014 | * To address the liquidity crisis for 2014 season, Efwon UK availed loan of USD 100 million with a high interest rate from a lender based in Monaco (“**Monaco Lender**” and the agreement entered in relation to such loan is referred to as “**Monaco Loan Agreement**”), secured on its revenues, with a view to advancing moneys to Efwon Romania. * Efwon UK extended advanced inter-corporate loan of USD 100 million to Efwon Romania (“**Efwon Romania Loan-IV**” and the agreement entered in relation to such loan is referred to as “**Efwon Romania Loan Agreement-IV**”) for the 2014 season.   Efwon Romania Loan Agreement-I, Efwon Romania Loan Agreement-II, Efwon Romania Loan Agreement-III and Efwon Romania Loan Agreement-IV are collectively referred to as “**Efwon Romania Loan Agreements**”. Efwon Romania Loan-I, Efwon Romania Loan-II, Efwon Romania Loan-III and Efwon Romania Loan-IV are collectively referred to as “**Efwon Romani Loan**”. |
| 2015-17 | * Once sponsorship was in place, the team climbed the rankings upto 6th place. Through the sponsorship and better performance in the rankings, income was better assured during this period and more repayments to Efwon UK and Efwon Delaware were made, although substantial amounts continued to be required as re-investments in the team budget, particularly in light of changes in the technology and enhanced safety requirements by the FIA. * Despite the improvement in the team’s rankings, at the end of the 2017 season, Kretek indicated informally that they had doubts about renewing the sponsorship in 2020 and Efwon Hong Kong was to secure replacement. |
| early 2018 | Efwon Hong Kong was successful in locating a potential interested party, the Malaysian state company supplying alternative energy fuels (“**KuasaNas**”), who was likely to be able to offer funding in excess of USD 200 million annually on the following terms:   * KuasaNas to acquire a majority stake (51%); * team to move to Malaysia, where, amongst other benefits, a deal could be secured to obtain the use of the Sepang GP racetrack for practice and training purposes and new drivers sufficiently qualified to be able to obtain Super Licences could be engaged. |
| mid-2018 | * Malaysian General Election saw the election of a new Government which prioritised review of actual or intended contracts with state companies due to allegations of rampant corruption under the previous regime. * pending finalisation of the review process, in the last race of the 2018 season, the Romanian drivers were injured. |

1. Current position (2018)
   1. Citing defects in safety and management, the drivers have brought claims before the Romanian courts where, if they succeed, substantial compensations are likely to be awarded.
   2. As an interim measure, drivers have filed for the insolvency of Efwon Romania and have obtained, pending an order being made, freezing injunctions over the company’s assets and income.
   3. This will place the Efwon Romania in the position of defaulting on its payments to Efwon UK due to be made in early 2019. This will cause the latter to default in its obligations to Efwon Delaware.
   4. Efwon UK is also at risk of insolvency and will be unable to meet its repayment obligations, including those to the Monaco Lender, raising the spectre of proceedings in the United Kingdom.
   5. American bankers are considering proceedings to foreclose on the security Mr. Maximov has provided.
   6. If the intended contract with KuasaNas passes the Government review, one of the conditions KuasaNas have now stated will form a pre-condition for the deal going ahead will be that the insolvency issues affecting the companies in the Efwon group are dealt with promptly.

A diagrammatic representation of Efwon group is set-out in **Annexure**.

1. Against this background, the Client has approached us for our views on their queries set out in paragraph B (*Queries*) below.
2. **Queries[[1]](#footnote-1)**
3. What should be the proposed strategy for dealing with the Efwon group? Where will these proceedings take place? What are the determining factors in relation to the proposed strategy?
4. Whether one or more insolvency proceedings are required to achieve the goal of selling a stake in the group to KuasaNas (should the intended contract receive Government clearance)? What impediments may exist to such proceedings taking place?
5. What advantages or disadvantages may exist in relation to proceedings being organised in the proposed strategy?
6. Whether you envisage the applicability of the European Insolvency Regulation and/or UNCITRAL Model Law in achieving this? In particular, how the provisions of these texts may assist or impede the strategy you propose to implement?
7. In December 2019, Brexit finally happened. Advise as to the possible effect, if any, of Brexit on your solution.
8. **Assumptions**

Before proceeding with our analysis in relation to the specific queries set out in B (*Queries*) above, we have set out below certain assumptions, which have been relied upon for the purposes of present memorandum:

1. The investment of USD 100 million by Mr. Maximov in Efwon Delaware [*para 2 of A above*] is by way of equity and 100% equity in Efwon Delaware is held by Mr. Maximov.
2. The various properties of Mr. Maximov over which security has been created in favour of the Syndicate Lenders [*para 3(a) of A above*] are *inter alia* situated at United States, India, Hong Kong, Indonesia, etc.
3. As on date, the debt profile of the Efwon group comprises of the following:
   1. Syndicate Loan of USD 250 million by Syndicate Lenders to Efwon Delaware;
   2. inter-corporate loan of USD 350 million by Efwon Delaware to Efwon UK;
   3. loan of USD 100 million by the Monaco Lender to Efwon UK;
   4. inter-corporate loan of USD 450 million by Efwon UK to Efwon Romania.

In addition to the above, there are damages claims filed by the drivers which is currently pending before the Romanian courts.

It is assumed that other than as stated in paragraph 3 above, there are no other dues (including trade creditor or statutory dues) of the Efwon group companies, or such dues are duly paid on actual basis.

1. The Governing Law of the Syndicate Loan Agreement is New York law. Further, the Governing Law of the Efwon UK Loan Agreement, Efwon Romani Loan Agreements and Monaco Loan Agreement is English law.
2. ABC Firm (situated in United States) has been engaged on a retainership basis by the Efwon group companies (i.e., Debtors).
3. **Analysis**

This section covers the analysis in relation to the queries raised by the Client in the context of the facts set-out Section A (*Background*).

1. *What should be the proposed strategy for dealing with the Efwon group?* *Where will these proceedings take place? What are the determining factors in relation to the proposed strategy?*
   1. Basis the facts set out in Section A (*Background*) above, we understand that while the Efwon group faces liquidity issue, it is not strictly an insolvent entity, and the business has potential to be rescued. Given that the Debtors are situated at: (a) Delaware; (b) United Kingdom; (c) Romania; and (d) Hong Kong, any potential restructuring should appropriately take into account cross-border resolution.
   2. In the facts of the present matter, given that Syndicated Lenders are considering foreclosure proceedings (which would also impact the security provided by Mr. Maximov) and there is a risk of Monaco Lender initiating insolvency proceedings, it would be prudent to consider options which: (a) are consensually agreed out-of court with the relevant (impacted) creditors; (b) reduce the cost and time involved in litigation; (c) court-sanctioned and therefore binding on the creditors and other stakeholders, thereby preserving and protecting the business of Efwon group; and (d) aid consummation of the proposed transaction with KuasaNas within the expected timelines.In light of the aforesaid objectives, set out below are the potential options that can be considered by the Client:

**Option 1: Pre-Packaged Restructuring Plan under Chapter 11 of the US Bankruptcy Code (Preferred Option)**

* 1. The Debtors can initiate voluntary bankruptcy proceedings under Chapter 11 of the Bankruptcy Code, 1978 (“US Bankruptcy Code”), which amongst others, provides for extra-territorial automatic stay in respect of enforcement proceedings by any creditor from the date of filing of the bankruptcy petition. At the same time, it allows the Debtors to continue to operate the business in the ordinary course, which would be critical considering the upcoming racing season and the potential contractual agreement with KuasaNas.
  2. Given that the deal with KuasaNas is sought to be effectuated in an expeditious manner once the requisite Government approvals are in place and given that the pre-condition for such deal is that insolvency issues affecting the companies in the Efwon group are dealt with promptly, a pre-pack restructuring plan for the Debtors under Chapter 11 of the US Bankruptcy Code would resolve the both the criteria (subject to creditor consensus on the restructuring plan).
  3. The US Bankruptcy Code provides for an enabling framework for pre-pack Chapter 11, by permitting votes solicited prior to the Chapter 11 filings to be counted towards confirmation of the restructuring plan.[[2]](#footnote-2) It may be noted that with advance planning and creditor consensus, a restructuring plan can be approved and implemented in a very short span of time. For instance, recently in *In re Belk, Inc.*[[3]](#footnote-3) a pre-packaged plan of reorganisation was filed by the debtor, which restructured the facilities (without impacting the leases and contract and other business aspects) and the same was confirmed within 24 hours. In *Fullbeauty*[[4]](#footnote-4), only a period of 20 hours lapsed between the filing and confirmation of the plan.
  4. *Eligibility of the Debtors to file Chapter 11 proceeding:* 
     1. While pre-pack is a viable option, before proceeding with broad contours of the restructuring plan, it may be relevant to examine the ability of Debtors to file Chapter 11 petition. The US Bankruptcy Code prescribes that *only a person that resides or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor under this title*[[5]](#footnote-5) (“§ 109 Eligibility Criteria”)*.* As regards ability of subsidiary companies (which are not incorporated in United States) to initiate insolvency proceedings in United States, reference may be drawn to the judgment of the bankruptcy court in Delaware in the matter of *Global Oceans*[[6]](#footnote-6) wherein this issue was dealt in great detail. The court while considering challenge by a minority shareholder placed reliance on the following principles laid down by earlier judgments in terms of eligibility of the foreign debtors: (a) eligibility of a debtor has to be tested “*as of the date the bankruptcy petition is filed”*[[7]](#footnote-7); (b) the eligibility test must be applied to *each* *debtor*[[8]](#footnote-8); and (c) the burden of proof is on the *applicant debtor* [[9]](#footnote-9).
     2. In respect of the ability of subsidiaries to initiate Chapter 11 proceedings, the court examined various factual aspects, including co-mingled funds of the group companies, presence of lawyers on retainer’s basis and presence of books and business material. Eventually, while placing reliance on the decision of *McTague*[[10]](#footnote-10)*,* the court held that availability of funds of the debtors in various bank account in United States (with co-mingled revenue from the subsidiaries) was sufficient to establish that the debtors had property in United States. The court further concluded as follows: “*we conclude that the bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date*.” The court further held that the unpaid retainership fee of the lawyers engaged by the Debtors would constitute property in the United States.
     3. In the present instance:

1. Efwon Delaware is incorporated in Delaware, United States. Further, the 100% shareholder of Efwon Delaware, i.e., Mr. Maximov is resident in United States. Therefore, the *situs* of ownership is in Delaware and accordingly § 109 Eligibility Criteria is met by Efwon Delaware;
2. In relation to Efwon UK, Efwon Romania and Efwon Hong Kong, an argument can be made that § 109 Eligibility Criteria is met by the said Debtors on the basis of the following:
3. assuming that it can be established that the certain funds/revenue proceeds of the Efwon group companies in maintained in the United States, it can be argued that the Debtors have property in United States.
4. ABC Firm (situated in United States) has been engaged on a retainership basis by the Efwon group companies (i.e., Debtors) and the unearned portion of the retainer fee would constitute property in United States.

Basis the facts cited above, it can be argued that the Debtors have property in the United States and therefore Chapter 11 can be filed.

* 1. *Substantive consolidation of insolvency proceedings*
     1. In the interest of expeditious resolution, the Debtors should also move a motion for substantive consolidation.
     2. The *doctrine of* *substantive consolidation* is not specifically envisaged under the US Bankruptcy Code, and it is primarily a court evolved law – the application of which may vary depending on the facts of the matter and the discretion of bankruptcy courts. Substantive consolidation is an *equitable remedy* granted by the US bankruptcy courts[[11]](#footnote-11) which disregards the principles of separate legal existence and contemplates pooling of assets and liabilities of the debtor companies (even if located in different jurisdictions) for the purposes of the insolvency proceedings.[[12]](#footnote-12)
     3. The Delaware bankruptcy court laid down the following test *In Re Owens Corning[[13]](#footnote-13)*: “… *what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) post-petition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors*. In some instances, the courts have also considered that the scope of enquiry should also encapsulate whether creditors treat the debtors as a single entity.[[14]](#footnote-14) Primarily, the test that emerges is whether an argument can be made (basis the facts in each case) that the group forms a single *economic unit*.
     4. In the present matter, it may be inter alia argued that:

1. the Syndicate Lenders and the Monaco Lender treated the Debtors as single entity as all the dealings were principally based on the credibility of Efwon Delaware and its promoter (i.e., Mr. Maximov)-although the end use is for the participation by the team engaged by Efwon Romania;
2. the existing sponsorship arrangement with Kertek and the potential sponsorship with KuasaNas is based on the premise that the Debtors are single economic entity.
3. the funding at entity level has been utilised inter-se between the Debtors for various purposes as detailed in paragraph A (*Background*) above. For instance, the funding extended by Syndicate Lenders at Efwon Delaware has been ultimately utilised by Efwon Romania, through Efwon UK-although for strategic reasons. Accordingly, it can be argued that the assets of the Corporate Debtor are comingled intricately.

Accordingly, it can be argued that substantive consolidation is warranted for resolution of the Debtors.

* 1. *Formulation of Restructuring Plan:*
     1. Given that pre-pack is proposed, the restructuring plan ought to be negotiated and agreed prior to the Chapter 11 filing so that court sanction is not delayed or contested. It may also be noted that only impaired class (i.e., classes of creditors or shareholders having claims or equity interest that are impaired) are entitled to vote on the restructuring plan.[[15]](#footnote-15) Further, it is conclusively presumed that an unimpaired class (and each holder thereof) has accepted the plan and accordingly solicitation of acceptance from such class is not required.[[16]](#footnote-16) As regards acceptance, the Debtors require affirmative consent by holders of claims equalling at least two-third (in amount) and a majority (by numbers) of the allowed claims in the class.[[17]](#footnote-17)
     2. In the present scenario, since substantive consolidation is envisaged and a single restructuring plan is proposed for all Debtors (with the creditors of multiple entities voting together as a class and the requisite majorities being determined on a global basis), the commercial proposal should suitably consider the interest of different classes of creditors (even from different jurisdiction) so that restructuring plan is approved by the requisite majority. We have set out below certain proposals that may be considered for commercially formulating the restructuring plan:

1. *Classification of creditors*: As mentioned above, since classes are the basis of voting on a restructuring plan, it is important that the creditors are classified in such a manner that reduces the risk of any potential challenge. In the present instance, the creditors may be classified in the following categories: (i) secured creditors (*comprising of the Syndicate Lenders, Efwon Delaware (in respect Efwon UK Loan), Efwon UK (in respect of Efwon Romania Loan), Monaco Lender (in respect of Monaco Loan to Efwon UK)*); (b) unsecured creditors (*comprising of Efwon UK (for balance USD 100 million) and the drivers*); and (c) equity shareholders.
2. *Identification of impaired and unimpaired classes:* As mentioned above, only impaired classes are allowed to vote on a restructuring plan. Since the business of Efwon group is viable in the aftermath of global recession and the projected financials (once the sponsorship is in place) reflects a stronger balance sheet, the restructuring plan/reorganization plan may inter alia provide for the following:

*Treatment of Secured creditors:*

1. the repayment schedule of the Syndicate Lenders may be restructured, including by way of extension the timelines of payment and interest component. Further basis negotiation, some part of the Syndicate Loan to equity as the future dividend yield may provide additional leverage for negotiation.

The Syndicate Lenders may be convinced on the basis that any foreclosure proceedings may not even satisfy the debt of the Senior Lenders based on the valuation. Further, the enforceability of a US court decree in a foreign jurisdiction (such as India where one of the properties of Mr. Maximov is located) may be prone to further delays and litigation in the absence of any reciprocal arrangement. Further, it may be noted that other than the personal properties of Mr. Maximov, the only security in respect of Syndicate Loan is projected revenues and shares of Efwon Delaware, which may not yield the expected proceeds. Accordingly, an out-of court restructuring would be the most plausible scenario in the present instance.

In addition to the above, equity investment of KuasaNas coupled with strong financial projections basis sponsorship arrangement will strengthen the balance sheet at group level and upstreaming of the revenues for repayment of the Syndicate Lenders.

1. given that the Monaco Lender has extended the facilities at exorbitant interest rates, the same may be restructured in terms of applicable interest rates or the repayment schedule (similar to Syndicate Lenders). Since the voting percentage of the Monaco Lender at group level is not significantly high (*after taking into account inter-group debt*), it may not be able to block the voting results. However, any potential challenge by the Monaco Lender (before US bankruptcy court or in Monaco) cannot be completely ruled out.

Alternatively, to avoid any potential challenge by the Monaco Lender, an agreement may be reached wherein the Monaco Lender is pre-paid at a discounted price (for instance, by way of infusion of new capital by Mr. Maximov or priority funding by a third-party). The Syndicate Lender may consider approving such proposal as it would aid approval of the restructuring plan by the Monaco Lender. This would effectively tantamount the Syndicate Lenders consent for deviation from the *absolute priority rule*[[18]](#footnote-18).

1. since majority of the secured debt is in the form of inter-corporate loan, it may be restructured or alternatively wholly or partially converted to equity and/or wiped off. Any potential sacrifice by the group companies will furth bolster the arguments to onboard the secured creditors.

*Treatment of unsecured creditors*

1. specifically in relation to claim of the drivers as unsecured creditors, although the claim is based on the compensation amount pending before the Romanian court, an out-of court settlement may be arrived at basis negotiation. Further, withdrawal of the insolvency proceedings before the Romania court may be made a pre-condition for such compensation amount along with dropping of any security and safety related allegations. This will help avoid any adverse public image of the business as well as help in completion of the deal with KuasaNas once the Government approvals are in place.

Such settlement amount may be paid through specified funds (for instance, infusion of new capital by Mr. Maximov, priority funding by a third-party, etc.).

1. the inter-corporate loan of Efwon UK may be restructured or alternatively wholly or partially converted to equity and/or wiped off.
2. in addition to the financial restructuring, the restructuring plan may also provide for qualitative factors, such as appointment of chief restructuring officer, regular monitoring and reporting to the interested creditors, etc.

(collectively referred to as “Proposed Restructuring Plan”).

* 1. *Confirmation of the Proposed Restructuring Plan*

In respect of the aforesaid Proposed Restructuring Plan, since the only impaired class is the secured creditors, the voting percentage (in term of value and numerosity) shall be met by the said class of secured creditors. For other classes, assuming there is not impairment, the same shall be deemed to have accepted the Proposed Restructuring Plan. Basis the same, the Debtors can present the Proposed Restructuring Plan together with the voluntary petition under Chapter 11.

The Delaware bankruptcy court is likely to confirm the Proposed Restructuring Plan, subject to it being feasible and in compliance with the US Bankruptcy Code (*as detailed above*). Confirmation of the Proposed Restructuring Plan shall convert it to a court order that is binding on the Debtors and all parties in interest.[[19]](#footnote-19)

* 1. *Recognition of the US Chapter 11 proceedings*
     1. The Chapter 11 proceedings and judgment of US bankruptcy court confirming the Proposed Restructuring Plan will have to be recognised by the bankruptcy courts of the Debtors (other than Efwon Delaware) in their respective jurisdictions, i.e., (a) United Kingdom; (b) Romania; and (c) Hong Kong.
     2. Before proceeding with the analysis on recognition, reference may be drawn to certain principles laid down under the UNCITRAL Model Law on Cross-Border Insolvency (1997)[[20]](#footnote-20) (“Model Law”). The Model Law is premised on four basic principles, i.e., (a) access (i.e., providing the foreign representatives with access to the courts of enacting state); (b) recognition of the foreign proceedings; (c) provision for appropriate relief; and (d) co-operation with foreign courts and foreign representatives. In relation to (b), the Model Law defines the term “foreign proceedings”[[21]](#footnote-21) in light of the following key components: (i) a foreign proceeding is a collective[[22]](#footnote-22) proceeding (judicial or administrative); (ii) proceedings are in foreign state; (iii) the proceedings are undertaken pursuant a law relating to insolvency; (iv) assets and affairs of the debtor are subject to control or supervision[[23]](#footnote-23) by a foreign court; (v) the proceeding is for the purpose of reorganisation or liquidation.
     3. Reference is also draft to the definition of “*foreign main proceedings*”[[24]](#footnote-24) which is defined to mean *“…a foreign proceeding taking place in the State where the debtor has the centre of its main interests;”.* While the definition uses the term centre of main interest (“COMI”) for determination of the foreign main proceedings, the term is not specifically defined under the Model Law. The term “*foreign non-main proceedings*”[[25]](#footnote-25) is defined in the context where the debtor has an establishment[[26]](#footnote-26). COMI is basically the jurisdiction where the insolvency proceedings are opened, being the foreign main proceedings. In the present scenario, our argument is that COMI in relation to the Efwon group is in United States.
     4. *Recognition in United Kingdom:* United Kingdom adopted the Model Law in 2006. The Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (“CBIR”) implements/incorporates the principles of the Model Law. Accordingly, recognition of the Chapter 11 proceedings can be sought under the CBIR. Recognition may not be granted if it would be *manifestly contrary to public policy*.[[27]](#footnote-27) The UK Supreme Court has also ruled in *Rubin*[[28]](#footnote-28) that English courts need not enforce New York law judgment unless the defendants have submitted to the same-this issue will have to be suitably established and defended in light of the consensual restructuring proposed by the Debtors. Another potential impediment is pursuant to the *Gibbs* rule[[29]](#footnote-29) which lays down that absent an explicit agreement by a creditor, English law governed debt cannot be discharged by a foreign insolvency proceedings.
     5. *Recognition in Romania:* Romania adopted the Model Law in 2002. The International Insolvency Act No. 637/2002 implements/incorporates the principles of the Model Law and is relevant for recognition of the insolvency proceedings for non-members of the European Union. While there is limited jurisprudence under Romanian law from a cross-border insolvency perspective, given that Romania has adopted Model Law, it is expected that a Chapter 11 proceeding will be recognised in Romania. Further, presumably with the drivers being on-board with the Proposed Restructuring Plan, the likelihood of any potential challenge can be substantially reduced.
     6. *Recognition in Hong Kong:* Hong Kong has not yet adopted the Model Law. However, Hong Kong has applied common law principles in recognising the foreign insolvency proceedings. For instance, in *Re RZ3262019 Limited[[30]](#footnote-30)* the Hong Kong court while recognizing the COMI principles, granted limited agency powers to the provisional liquidator appointed in British Virgin Island, such as to take control and custody of the debtor’s assets in Hong Kong, obtain books of account, etc. In light of the same, co-operation from the Hong Kong courts is expected for giving effect to the Proposed Restructuring Plan.

**Option 2: Pre-Pack Scheme under the UK Companies Act**

* 1. In order to take advantage of recognition of insolvency proceedings in European Union nations (i.e., Romania[[31]](#footnote-31) and Monaco[[32]](#footnote-32)), the Client may also consider a scheme of arrangement under Part 26 of UK Companies Act 2006 (“UK Companies Act”).[[33]](#footnote-33) Similar to an US pre-pack, the framework for schemes contemplates court supervised debtor-in possession model which permits a company to propose a compromise or arrangement with its creditors or members (or any class thereof). A scheme is required to be approved by a majority in number, representing three-quarters in value of the creditors (or of each class of creditors).

*COMI Determination*

* 1. In the context of determination of COMI, guidance may be drawn from EIR 2000 read with recast EIR 2015[[34]](#footnote-34). The EIR applies only to insolvency proceedings where the COMI is located in the European Union (with the exception of Denmark)[[35]](#footnote-35) and further provides for automatic recognition in other member states[[36]](#footnote-36). In the context of COMI, in *Eurofood[[37]](#footnote-37)* while interpreting the scope and ambit of prior version of Article 3(1), the court held that the centre of debtor’s main interest must be interpreted in a uniform way, independently of national legislation of the respective EU nations. Further, the factors to be relied upon for rebutting the presumption as to the COMI had to be both objective and ascertainable by third parties. Further, in *Interdil[[38]](#footnote-38),* while placing reliance on *Eurofood,* the court expanded on the factors for rebutting the presumption of registered office, which includes “*….in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties*.”
  2. In the present instance, the agents running the strategic decision-making are based in England and can be easily ascertained from the facts of the present matter. In this regard, the Client may also consider amending the governing law of the Syndicate Loan Agreement (with agreement from Syndicate Lenders). English courts have sanctioned creditors schemes where the rights of creditors were governed by English law.[[39]](#footnote-39) English courts have in fact held that there is “*sufficient connection*” even where the finance documents were originally governed by the foreign law and jurisdiction and were amended to English governing law and jurisdiction.[[40]](#footnote-40) Once COMI is established in UK, there would be automatic recognition in the EU countries.
  3. Specifically in relation to US, the recognition proceedings will have to be initiated under Chapter 15 of the US Bankruptcy Code and would be in all likelihood be allowed if it can be established that nerve centre was in UK.[[41]](#footnote-41) For Hong Kong, please see the analysis in 1.10. 6 above.

1. *Whether one or more insolvency proceedings are required to achieve the goal of selling a stake in the group to KuasaNas (should the intended contract receive Government clearance)? What impediments may exist to such proceedings taking place?* 
   1. In my opinion multiple insolvency proceedings would not benefit the turnaround and restructuring proposal. It is advisable to consider one *foreign main proceeding* with recognition by way of *foreign non-main proceedings*. If parallel proceedings are undertaken, it may substantially impact the viability of the business as a whole and lead to erosion in value of the assets of the Debtors. The same is also critical for preservation of the value of the assets of the Efwon group. Considering the fact that Debtors do not have substantial fixed assets in all relevant jurisdictions, the actual realisation may substantially be wiped off and the creditors as a whole may be significantly impaired in case of parallel proceedings.
2. *What advantages or disadvantages may exist in relation to proceedings being organised in the proposed strategy?*

Set out below are certain advantages and disadvantages that may be relevant for both the Option 1 and Option 2 covered in response to Query 1 above:

* 1. *Advantages:*
     1. since the Proposed Restructuring Plan is premised on the consensual agreement of all the classes of creditors, it will help rescue the business in a time-bound manner;
     2. the business and going concern operations of the Debtors will not be impacted in both Option 1 and Option 2, which will help the Debtors to continue the ordinary course of business and participate in the upcoming racing season. Since the macro-economic factors are strengthened in the aftermath of the global recession, the strong revenue streams will help bolster the financials of the Debtors in longer run;
     3. the Client will be able to take management decisions, which will also help in quick turnaround and decision making;
     4. confirmation and implementation of the Proposed Restructuring Plan (which also contemplates withdrawal of the insolvency proceedings pending before the Romanian court) will be significantly useful in completing the proposed deal with KuasaNas and provide much needed sponsorship funding for the upcoming racing season;
     5. given that pre-pack plan and English scheme are both sanctioned by the relevant courts, it would have a binding effect on the relevant stakeholders;
     6. the Proposed Restructuring Plan will help rescue of viable business and help achieve maximization of value. It will also allow the Debtors to avoid parallel insolvency proceedings that may be initiated by the creditors in multiple jurisdictions.
  2. *Disadvantages:*
     1. The Proposed Restructuring Plan provides for impairment of secured creditors. Within the class, while the majority will be driven by inter-corporate loan exposure, the participation and consensus of the Syndicate Lender is quintessential, failing which, there is a looming threat of initiation of foreclosure proceedings;
     2. Since Monaco is not a European Union nation and it hasn’t adopted the Model Law, it is crucial that the Monaco Lender is agreeable to the Proposed Restructuring Plan (including any revisions in the repayment schedule). If not, any potential litigation by Monaco Lender, including in Monaco cannot be completely ruled out;
     3. As highlighted in our response in 1 above, while Hong Kong has not adopted the Model Law, it has applied common law principles to aid the foreign insolvency proceedings. However, the same is very subjective and such co-operation cannot be stated with certainty;
     4. while confirmation or sanction (as applicable) of the Proposed Restructuring Plan can be accomplished in a time-bound manner, it does not guarantee implementation thereof, failure of which may push the Debtors back to threat of insolvency proceedings. Accordingly, it is essential that the adequate funding to give effect to the Proposed Restructuring Plan are in place.
     5. if Efwon UK is not onboard with the Proposed Restructuring Plan (including in respect of write-off Efwon UK debt), there may be concerns, even post implementation in light of the UK judgments in *Gibbs* and *Rubin* as detailed above).

1. *Whether you envisage the applicability of the European Insolvency Regulation and/or UNCITRAL Model Law in achieving this? In particular, how the provisions of these texts may assist or impede the strategy you propose to implement?*
   1. Please see the response to Query 1 above. The provisions of the Model Law and EIRP Regulations provide a great deal of guidance for (a) determination of the *centre of main interest;* and (b) recognition of the insolvency proceedings.
2. *In December 2019, Brexit finally happened. Advise as to the possible effect, if any, of Brexit on your solution.*

It is understood that UK exited the European Union on January 31, 2020. However, certain principles envisaged under the EU restructuring and insolvency law have been adopted as part of the Brexit process, which primarily governs the types of debtors that may commence insolvency proceedings in the UK.[[42]](#footnote-42) Specifically, schemes continue to be available to companies with *sufficient connection* to UK. However, since UK is no longer within the scope of the EU’s Recast Insolvency Regulation, the scheme may not be automatically recognized, and separate recognition proceedings will have to be initiated.

**ANNEXURE**

**Mr. Benedict Maximov**

**(USD 100 Million (***2010***))**

**2 Senior Lenders**

**(USD 100 Million)**

**100**

**KusaNas (Malaysia)- Potential sponsor**

USD 150 million (*2010*) + USD 100 million (*2011*) +USD 100 million (*2012*)

Exclusive Sponsorship Agreement

*USD 100 million annually (2015-2020)*

**100%**

Efwon Hong Kong

**100%**

Efwon Romania

USD 350 million (*2010*)

USD 250 million

(*2010*)

USD 100 million (*2013*)

**Monaco Lender**

**Kertek (Indonesia)**

**100%**

Efwon Trading

(“**Efwon UK**”)

**100%**

Efwon Investments (“**Efwon Delaware**”)

**2 Mezzanine Lenders**

**(USD 60 Million)**

**5 Junior Lenders**

**(USD 90 Million)**

1. Note to Draft: Please note that certain queries provided in the Case Study II have been clubbed (wherever required) to provide a holistic response. [↑](#footnote-ref-1)
2. 11 U.S.C. § 1126(b) of the US Bankruptcy Code. [↑](#footnote-ref-2)
3. Case No 21-30630 (MI) (Bankr SD Tex 2021). [↑](#footnote-ref-3)
4. *In re FULLBEAUTY Brands Holdings Corp*, 19-22185-rdd (Bankr SDNY). [↑](#footnote-ref-4)
5. 11 USC § 109(a) of the US Bankruptcy Code. [↑](#footnote-ref-5)
6. *In re Global Ocean Carriers Limited*, et al., Debtors. 251 B.R. 31. [↑](#footnote-ref-6)
7. *In re Axona International Credit & Commerce, Ltd.,* 88 B.R. 597, 614–15 (Bankr.S.D.N.Y.1988). [↑](#footnote-ref-7)
8. *Bank of America v. World of English*, 23 B.R. 1015, 1019–20 (N.D.Ga.1982). [↑](#footnote-ref-8)
9. *In re Secured Equipment Trust of Eastern Air Lines, Inc.,* 153 B.R. 409, 412 (Bankr.S.D.N.Y.1993). [↑](#footnote-ref-9)
10. *In re McTague*, 198 B.R. 428, 429 (Bankr.W.D.N.Y.1996). [↑](#footnote-ref-10)
11. *In re Continental Vending Machine Corp*., 517 F.2d 997, 1000 (2d Cir. 1975). [↑](#footnote-ref-11)
12. *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005); *see also Genesis Health Ventures*, *Inc*. v. *Stapleton*, 402 F.3d 416, 423 (3d Cir. 2005)). [↑](#footnote-ref-12)
13. 419 F. 3d.195 208 (3d Cir. 2005). [↑](#footnote-ref-13)
14. *In re Republic Airways Holdings Inc*., 565 B.R. 710, 717 (Bankr. S.D.N.Y. 2017). [↑](#footnote-ref-14)
15. 11 USC § 1126 of the US Bankruptcy Code. [↑](#footnote-ref-15)
16. 11 USC § 1126(f) of the US Bankruptcy Code. [↑](#footnote-ref-16)
17. 11 USC § 1126(c) of the US Bankruptcy Code. [↑](#footnote-ref-17)
18. 11 USC § 1129(b)(2) of the US Bankruptcy Code. [↑](#footnote-ref-18)
19. 11 USC, § 1141(a) of the US Bankruptcy Code. [↑](#footnote-ref-19)
20. <available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> <last visited on August 21, 2023> [↑](#footnote-ref-20)
21. Article 2(a) of the Model Law. [↑](#footnote-ref-21)
22. UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (“**Judicial Perspective**”) specifies the an indicative evaluation parameter for when a proceeding can be considered as collective. It states that *a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors’ rights is unaffected by it* (para 72 of the Judicial Perspective) <available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf> <last visited on August 21, 2023> [↑](#footnote-ref-22)
23. The Judicial Perspective specifies that the Model Law does not specify either the level of control or supervision, nor the time at which such control or supervision shall arise. Further, the potential instead of actual control and supervision will also suffice (para 85 of the Judicial Perspective). [↑](#footnote-ref-23)
24. Article 2(b) of the Model Law. [↑](#footnote-ref-24)
25. Article 2(c) of the Model Law. [↑](#footnote-ref-25)
26. Article 2(f) defines the term “establishment” to mean “*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.”* [↑](#footnote-ref-26)
27. CBIR, Schedule 1, Article 6. [↑](#footnote-ref-27)
28. *Rubin and another v Eurofinance SA and others* [2012] UKSC 46. [↑](#footnote-ref-28)
29. *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399) [↑](#footnote-ref-29)
30. [2022] HKCFI 3602. [↑](#footnote-ref-30)
31. EU Insolvency Regulation have become directly applicable to Romania since Romania’s accession to the EU on January 1, 2007. [↑](#footnote-ref-31)
32. Monaco has not adopted the Model Law, nor is it a member of European Union. [↑](#footnote-ref-32)
33. This is based on the presumption that at the time of consideration of the scheme, UK was a member state in European Union and Brexit was not given effect to. [↑](#footnote-ref-33)
34. Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015 on insolvency proceeding/ [↑](#footnote-ref-34)
35. Article 3 of EIR 2015. [↑](#footnote-ref-35)
36. Article 19 and 20 of EIR 2015. [↑](#footnote-ref-36)
37. *In re Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch 508. [↑](#footnote-ref-37)
38. *Interedil Srl (in liquidation) v Fallimento Interedil Srl* *and another*[2012] Bus. L.R. 1582; *see also In re Eurofood IFSC Ltd (Case C-341/04)* [2006] Ch 508. [↑](#footnote-ref-38)
39. *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245; *Re Primacom Holdings GmbH* [2011] EWHC 3746 (Ch) (at the convening stage) and [2012] EWHC 164 (Ch) (at the sanction stage). [↑](#footnote-ref-39)
40. *Re Apcoa Parking Holdings Gmbh and other companies* [2014] EWHC 3849 (Ch). [↑](#footnote-ref-40)
41. *In re OAS S.A.,* 533 B.R. 83 (2015) [↑](#footnote-ref-41)
42. Insolvency (Amendment) (EU Exit) Regulations 2019, SI 2019/146 (as amended by the Insolvency (Amendment) (EU Exit) Regulations 2020, SI 2020/647 and the Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019, SI 2019/1459)). [↑](#footnote-ref-42)