**GLOBAL INSOLVENCY PRACTICE COURSE 2023 / 2024**

**Case Study 2**

**Memorandum**

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| **To** | General Counsel of Benedict Maximov (“GC”) |
| **From** | Nigel Trayers  |
| **Date** | 15 April 2024 |
| **Regarding** | Efwon Group financial position and restructuring options |

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1. **Introduction**
	1. I have been engaged by the General Counsel (“**GC**”) of Benedict Maximov (“**Maximov**”) to review the current situation of Efwon Group and to advise on a strategy for the restructuring of Efwon Group.
	2. Efwon Group was founded in 2014 to acquire and run an F1 team. The group structure is set out below.



* 1. In addition to the briefing note provided, a long and helpful conference call with the GC (“**the Call**”) has provided additional information which I have considered in providing this memorandum of advice. Details of information disclosed to me in the Call have been referenced below.
	2. As requested during the Call, in addition to setting out my advice on the best way to proceed with the restructuring, I have also set out an overview of the restructuring options available in the key jurisdictions even where they are not the recommended approach.
1. **Detailed background information and stakeholder analysis**
	1. Below I have set out a summary of the key information provided to me that I considered in deciding the best strategy for a restructuring of the Efwon Group. This information is from the briefing note provided, the Call and some additional research undertaken.
	2. Efwon Romania:
		1. Efwon Romania is incorporated in Romania and is the key trading entity of Efwon Group, holding the racing assets and relevant licenses to compete in F1.
		2. Efwon Romania is facing a lawsuit from the team’s two Romanian drivers (“**the Drivers**”), as well as a winding up petition and an asset freezing order.
		3. The local Romanian directors are nervous about the position of the company given the above issues.
		4. From the Call, I understand that the legal advice you have received in Romania is that:
			1. The Drivers case has some merit but that it is understood that they wish to get a quick settlement rather than a protracted legal action and the aggressive legal filings are a tactic to force a settlement given that they expected to not have their contracts renewed due to speculation about a takeover by KuasaNas.
			2. The Drivers are expected to be agree to drop all claims against Efwon Romania for a payment of USD 10 million each.
	3. Efwon Trading:
		1. Efwon Trading is a Netherlands incorporated company whose only asset is its shareholding in Efwon Romania.
		2. Efwon Trading received a loan from the Monaco Lender of USD 100 million.
		3. Its revenues are pledged to the Monaco Lender and its shares are pledged to the US Lenders.
		4. The local nominee directors are concerned about their personal position given the financial situation of the company.
	4. Efwon Investments:
		1. Efwon Investments received a loan of USD 100 million from Maximov and a loan of USD 250 million from the US Lenders, further details are below. The money was lent on to Efwon Trading.
	5. Maximov:
		1. From the Call, I understand that Maximov’s priorities are:
			1. To maintain his status as an ‘F1 owner’, though he is less concerned about his shareholding percentage and the control of the team.
			2. To avoid any significant negative press about lenders foreclosing on him, though he is open to the use of restructuring processes that are public information.
			3. To avoid the US Lenders enforcing against his personal properties which were provided as security.
		2. From the Call, I further understand that the USD 100 million that he put into the group was by way of an unsecured loan to Efwon Investments.
	6. US Lenders:
		1. The US Lenders provided a loan of USD 250 million in 2014 to Efwon Investments. The key terms were:
			1. 10-year term with bullet repayment in 2024.
			2. Interest of Libor + 4%, subsequently increased to 6% after interest waiver required.
			3. Security over properties of Maximov valued at c. USD 75m (only sufficient to partly cover the Senior Lenders (as defined below)).
			4. Various pledges including:
				1. pledge over the shares of Efwon Investments and Efwon Trading.
				2. Pledge over the revenue of Efwon Investments.
		2. The US Lenders consist of three different groups with differing levels of seniority:
			1. Two senior lenders with aggregate exposure of USD 100m (“**Senior Lenders**”)
			2. Two mezzanine lenders with aggregate exposure of USD 60m (“**Mezz Lenders**”)
			3. Five junior financial creditors with aggregate exposure of USD 90m (“**Junior Lenders**”)
		3. Libor has increased substantially from sub 0.5% in 2014 to over 5% in 2023, so the cost of this loan will have increased substantially over time[[1]](#footnote-1).
		4. The current outstanding balance on the loan is unclear from the information provided, but interest has not been fully paid over the period of the loan and the amount outstanding is accruing at a high interest rate, meaning it is likely to have risen, though for the purposes of this memorandum I will assume the outstanding debt is USD 250 million.
		5. Of note is that the US Lenders did not take any security over the assets or revenue of Efwon Trading, or the shares, assets or revenue of Efwon Romania leaving them remote from the key assets, though the pledge over the shares of Efwon Trading does provide them with some leverage.
		6. Whilst Efwon Investments did initially take security over future revenue from Efwon Trading in relation to the USD 350 million loan it provided, this appears to have been later superseded by security provided to the Monaco Lender (further discussed below).
	7. Monaco Lender:
		1. In or around 2018, Efwon Trading obtained a USD 100 million loan from the Monaco Lender. Whilst the interest rate is not stated, the Monaco Lender is a high interest rate lender. It is unclear the level of any outstanding interest and for the purposes of this memorandum I will assume that the overall amount owing is USD 100 million.
		2. The loan was secured over the revenues of Efwon Trading, Efwon Romania and Efwon Singapore.
	8. Formula 1 (“F1”) and the FIA:
		1. An important aspect of the restructuring is to ensure that the team retains its licenses to compete in the F1 World Championship.
		2. From the Call, I understand that F1 and FIA have had concerns about the viability of the team, but that they would welcome KuasaNas’ investment given their aim of growing F1 in Asia and whilst no application has yet been submitted, both F1 and the FIA have given tacit approval for the transfer of the team and licences to a new entity to be majority owned by KuasaNas.
	9. KuasaNas:
		1. I understand from the Call that KuasaNas remain very keen on acquiring a majority stake in the team and that whilst matters were delayed by the Malaysian government review, the intended transaction fits with the Malaysian government’s tourism plans and their hopes of getting F1 to stage a race in the country again. Current indications are that the final sign-off will be received from the Malaysian government within one month and the deal can proceed, subject to resolving the other matters as KuasaNas only wants to invest in a new and solvent structure.
		2. I further understand from the Call that KuasaNas has agreed with the valuation report you obtained (discussed below) and is willing to purchase 51% of the team based on that valuation.
		3. The F1 team will need USD 50 million of funding for next seasin and KuasaNas is willing to contribute it’s 51% share of that (USD 25.5 million).
2. **Potential use of restructuring schemes in various jurisdictions**
	1. In formulating the strategy for this restructuring, I have considered the use of various options in multiple jurisdictions, but primarily focused on the processes available in the countries in which the Efwon Group entities are incorporated.
	2. The three entities in the Efwon Group are incorporated in the United States, the Netherlands and Romania. Therefore, the common starting position is to consider what restructuring options are available in the countries of incorporation.
	3. Romania:
		1. Romania is a member of the European Union (“**EU**”) and has in the recent past made legislative changes to implement the 2019 EU Directive on restructuring and insolvency.
		2. The options available include:
			1. a restructuring agreement whereby restructuring is negotiated in advance with the creditors and following a creditor vote is approved by a judge, with a restructuring administrator then monitoring the company and reporting to creditors[[2]](#footnote-2); and
			2. a preventative agreement which is a Court overseen formal process which suspends enforcement against the company whilst a plan is negotiated, agreed and approved by Court[[3]](#footnote-3).
		3. Despite these new options being available, restructurings in Romania remain a largely untested process as there has not been much uptake since the introduction of the provisions[[4]](#footnote-4).
	4. The Netherlands:
		1. On 1 January 2021, a new Dutch restructuring process came into effect which is known as the WHOA based on the Dutch acronym. It has been referred to as the Dutch equivalent of Chapter 11 or the UK scheme of arrangement[[5]](#footnote-5).
		2. The process is attractive as it is based on debtor-in-possession and provides a moratorium[[6]](#footnote-6).
		3. Court involvement in the WHOA is intended to be minimal and there is scope for the process to be completed in just a few weeks[[7]](#footnote-7).
		4. Voting requires a 2/3rd majority of creditors in favour for each class and there is no numericity or headcount test[[8]](#footnote-8). The WHOA also provides for cross class cram down[[9]](#footnote-9).
		5. There has been a recent case of a WHOA and Chapter 11 being used in an interconnected way in the Diebold Nixdorf case[[10]](#footnote-10) which shows a clear template for using these procedures in an interconnected and inter-conditional way and gives a precedent for the US Courts recognizing WHOA plans.
		6. There is also an example of a WHOA being combined with an English scheme of arrangement in the case of Vroon, this being done to bind foreign creditors and so the English scheme could be recognized in Singapore (another common law jurisdiction)[[11]](#footnote-11).
	5. United States:
		1. Chapter 11 is the mechanism for restructuring of companies in the United States.
		2. It is a debtor-in-possession type scheme, where management continue to run the company and can, with court approval, borrow new money[[12]](#footnote-12).
		3. A company does not have to be US incorporated to file for Chapter 11, but pursuant to section 109(a) of the Bankruptcy Code, it must at least have property in the United States. The US Court has interpreted property broadly and having a US bank account has been deemed to be sufficient as per the criteria established In re GLOBAL OCEAN[[13]](#footnote-13).
		4. In group situations, consolidation is possible. The Court will usually have administrative consolidation with one Judge appointed to oversee all debtors in the group, whilst substantive consolidation is possible[[14]](#footnote-14). Substantive consolidation is rarely actively enforced by Courts, but where creditor approved plans include consolidation these are often approved by the Court as a way to deal with the practical issues of group restructurings[[15]](#footnote-15).
		5. The debtor entities will have the exclusive right to propose a plan for the first 120 days[[16]](#footnote-16).
		6. In order to get a plan approved each class of creditors being impaired must approve the plan by a majority in number and two-thirds in amount[[17]](#footnote-17). If a class of creditors does not accept the plan it may still be possible to cram down that class provided at least one impaired class has voted in favour and no junior class to the dissenting class is receiving anything under the plan[[18]](#footnote-18).
		7. Finally, if there is a need for the process to be completed quickly, there is scope for a ‘prepack’ Chapter 11 plan whereby negotiations and votes are held in advance and when the matter is filed with the Court the Court is asked to approve the disclosure statements and approve the plan[[19]](#footnote-19).
	6. In the restructuring of a multi-jurisdictional group such as this it is important to be cognizant of how procedures in one country interact with procedures in another country or if they are recognised in different countries.
	7. Some of the key concepts to be aware of include the UNCITRAL Model Law and the European Insolvency Regulation.
	8. The UNCITRAL Model Law on Cross-Border Insolvency (“UMLCBI”) was developed to provide a framework to assist States in adopting laws and regulations which would facilitate a fair and harmonized way to deal with insolvency[[20]](#footnote-20). The UMLCBI does not set out a prescribed way to approach all matters, but rather provides options that States can choose to adopt dependent on their circumstances and the degree to which they are willing to abide by a universalism approach versus a protective territoriality approach.
	9. Countries that adopt the UMLCBI use the concept of centre of main interest (“COMI”) to decide on how a foreign proceeding should be treated, i.e. as foreign main proceeding or foreign non-main proceeding[[21]](#footnote-21).
	10. In terms of the jurisdictions directly related to Efwon Group, both the United States[[22]](#footnote-22) and Romania[[23]](#footnote-23) have adopted the UMLCBI. The Netherlands has not adopted the UMLCBI and generally adopts a principal of territoriality in relation to foreign non-EU proceedings[[24]](#footnote-24).
	11. What is generally referred to as the European Insolvency Regulation (“**EIR**”) comes from European Union Regulation on insolvency proceedings in 2015 which reformed a Regulation set in 2000. The main features of the Regulation were to:
		1. Extend the application to pre-insolvency proceedings to promote rescue of businesses;
		2. Creation of an EU wide online register of proceedings;
		3. Effort to avoid opening of multiple proceedings;
		4. New rules around secondary proceedings; and
		5. Rules to facilitate cross border implementation[[25]](#footnote-25).
	12. The Regulation also provided further clarity on the definition of COMI, which is an important driver as to where proceedings should take place, with the COMI now presumed to be the place of incorporation of a company though this is a rebuttable presumption[[26]](#footnote-26). A key aspect of deciding the location of COMI is where the company usually administers its business, but crucially it should be the location which can be ascertained by third parties[[27]](#footnote-27).
	13. The EIR sets out the idea of main and secondary proceedings. Main proceedings will take place where the COMI of the company is, whilst secondary proceedings can be opened within the territory of another member state where the company has an establishment, solely with the view to liquidating the company’s assets in that jurisdiction[[28]](#footnote-28).
	14. A key aspect of the EIR is the automatic recognition of proceedings in other member states[[29]](#footnote-29).
	15. One point to note is that following Brexit, recognition of restructuring and insolvency matters between the UK and EU members states is no longer automatic and governed by the EIR[[30]](#footnote-30). Whilst the UK has a very well-established restructuring framework, the recognition of UK restructuring will be subject to local laws in the specific member states[[31]](#footnote-31). In the particular circumstances of Efwon Group, it therefore appears that if a group restructuring of each entity is required, the automatic recognition of a, for example, WHOA process in the Netherlands by Romania would be a simpler approach then seeking recognition of a UK scheme or plan process in Romania. It will be discussed further later in this advice which processes are recommended and why.
3. **Group valuation and waterfall analysis**
	1. As discussed on the Call, in order to understand each stakeholder’s relative position in the restructuring it is critical to understand the value of the business in both a sale/going concern scenario and in a liquidation scenario.
	2. From the Call, I understand that Maximov has already engaged expert valuers and the analysis states that the F1 team is worth USD 300 million in a going concern scenario, whilst in a closure or liquidation scenario the value is likely to be minimal (less than USD 20 million) as the valuable license held by Efwon Romania would be terminated by F1/the FIA.
	3. Based on the valuation and agreed deal parameters with KuasaNas, the sale of a 51% stake will bring in USD 153 million.
	4. It is further understood that there is only a USD 1 million cash balance in Efwon Romania and no cash at Efwon Trading or Efwon Investments.
	5. USD 20 million from the KuasaNas funds will be required to pay the Drivers for the settlement. The balance of USD 1 million cash currently in Efwon Romania will be required to pay off other miscellaneous creditors and cover costs and expenses for the liquidation of Efwon Romania.
	6. This will leave an amount of USD 133 million available to Efwon Trading. As the Monaco Lender is the only party with security over the assets/income of Efwon Trading it will expect to be repaid its USD 100 million debt in full, leaving a further balance of USD 33 million available at the level of Efwon Trading.
	7. As the US Lenders have security over the shares of Efwon Trading, they will have priority to these funds ahead of the unsecured loan provided to Efwon Investments by Maximov.
	8. Given the structure of the US Lenders, the Senior Lenders will be repaid USD 33 million and face a shortfall of USD 67 million.
	9. The Mezz Lenders are owed USD 60 million, whilst the Junior Lenders are owed USD 90 million and there are no remaining funds to pay either of these.
4. **Proposed restructuring – financial considerations and method of implementation**
	1. Based on the waterfall analysis set out above, it is clear that the Efwon Group is not in a position to repay its debts in full and needs to implement a restructuring.
	2. Based on all of the information provided it is suggested that Efwon Group should consider placing Efwon Investments and Efwon Trading into Chapter 11.
	3. Based on the facts of this case, it is not considered necessary to implement any insolvency or restructuring proceedings outside of the Chapter 11. This is because of where the value breaks in the waterfall analysis, i.e. the Monaco Lender will recover in full. If this had not been the case or if the valuation report had found the value of the business to be much lower, then consideration would have been given to implementing a restructuring in the Netherlands utilising the WHOA process.
	4. In terms of the financial and structural parameters of a deal, it is suggested that the following plan be put forward under the Chapter 11 (“**the Plan**”):
		1. The US Lenders will be offered 79.6% of the shares in Efwon Investments valued at USD 117 million (based on its 49% shareholding in the F1 team following KuasaNas investment). This will breakdown as follows:
			1. Senior Lenders will receive 45.5% of the shares in Efwon Investments valued at USD 67 million. Along with the USD 33 million cash payment, the Senior Lenders will effectively be paid in full.
			2. Mezz Lenders will receive 34.1% of the shares in Efwon Investments valued at USD 50.1 million, leaving a shortfall of USD 9.9 million.
			3. Junior Lenders will receive no cash or shares.
		2. Maximov will retain 20.4% of the equity of Efwon Investments (equivalent to 10% of the F1 team), but will need to provide USD 24.5 million of the funding for the next season (with the balance of USD 25.5 million coming from KuasaNas).
		3. The agreement will include a clause to allow Maximov to buy back the shares of the Senior Lenders and the Mezz Lenders in one years’ time at a rate of 1.2 times the current value. This provides Maximov with the opportunity to regain control of 49% of the F1 team if his financial position improves based on his expectation that his crypto assets will recover strongly in 2024.
		4. The security over Maximov’s properties will be released by the Senior Lenders.
5. **Implementation of the restructuring plan**
	1. The top priority actions are to stablise the situation and provide time for working through a full restructuring with the stakeholders.
	2. Two matters will need to be tackled simultaneously at the outset; 1) agreeing a standstill agreement with creditors and 2) dealing with pressing legal matters in Romania. The matters need to be tackled simultaneously as it is unlikely that the creditors of the wider group will sign off on the standstill until some clarity is provided on the issues in Romania.
	3. The position of the nominee directors at Efwon Trading and Efwon Romania is concerning them. In order to alleviate the concerns of these directors about the positions of the companies, it is important to put the companies into a stable position. This would be best achieved by getting the creditors to sign a standstill agreement to provide time for the restructuring plan to be developed and implemented. This is also in line with the First Principle of Insol International’s Statement of Principles for a Global Approach to Multi Creditor Workouts II.
	4. It is envisaged that to satisfy the directors of Efwon Romania, Efwon Trading will need to confirm that it will not call in its debts. In order for Efwon Trading to be comfortable doing this, it will also require the Monaco Lender and the US Lender to confirm that they will also standstill.
	5. The proposal is for a three-month standstill arrangement and the terms will broadly mirror the principles of the Insol Internationals Statement of Principles for a Global Approach to Multi Creditor Workouts II.
	6. The other urgent first step is to resolve the issues in Romania. My initial research suggests that the winding up order filed against Efwon Romania has been filed on an inappropriate basis and does not meet the criteria as the debt claimed is not certain or due and payable[[32]](#footnote-32). Subject to obtaining specialist Romanian law advice, the intention is to seek to have that filing rejected as it is not compliant with the legal criteria and to also have the asset freeze lifted. Achieving these aims will assist in negotiating a settlement with the Drivers. As noted above, it is expected that the Drivers will accept a payment of USD 10 million each to settle their claims.
	7. Once the initial stabilisation steps have been implemented and the standstill is in place, the terms of the Plan (as outlined above) will be presented to the creditors. The key steps to implement it will be:
		1. A new company, Efwon Racing will be incorporated in Singapore. Efwon Racing will be incorporated as a subsidiary of Efwon Investments.
		2. KuasaNas will pay USD 153 million for a 51% holdings in Efwon Racing. Efwon Singapore will become a subsidiary of Efwon Racing.
		3. Efwon Racing will establish a branch in Malaysia to operate the team.
		4. The assets of Efwon Romania, including the required F1 licences, will be transferred to Efwon Racing. Efwon Romania will then be liquidated.
		5. Once the Monaco Lender is repaid, Efwon Trading will be superfluous and will also be liquidated.
	8. The structure of the Efwon Group post restructuring will be as follows:

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1. **Specific considerations relating to implementing the Chapter 11 Plan**
	1. In this section, I will set out details of some of the technical aspects of Chapter 11 that we will need to consider in implementing the Plan.
	2. Efwon Investments is registered in the United States and will therefore be eligible to enter Chapter 11. Efwon Trading is incorporated in the Netherlands, but has assets (a bank account with funds) in the United States. In line with the judgement in Global Ocean Carriers, this would be sufficient to satisfy the criteria in section 109 of the Bankruptcy Code[[33]](#footnote-33).
	3. As it is intended to place two entities (Efwon Investments and Efwon Trading) into Chapter 11, we will need to file two separate petitions with the US Bankruptcy Court. Despite filing two separate petitions there exists a mechanism to consolidate the proceedings, either through procedural consolidation or substantive consolidation[[34]](#footnote-34). Procedural consolidation (or joint administration) has no substantive impact on the distinctiveness of the two entities whilst substantive consolidation refers to a situation where the assets are largely pooled[[35]](#footnote-35). Whilst there have been numerous examples of substantive consolidation being granted by the US Courts over the years, the Bankruptcy Code does not specifically provide for it[[36]](#footnote-36). In any event, based on the circumstances of this case and noting that there is clear details of assets and ownership by entity, substantive consolidation is not required, though procedural consolidation will be useful to ensure both cases are on a single docket and overseen by the same judge.
	4. For the plan voting process, the votes of the Senior Lenders and Mezz Lenders will be solicited. Based on the plan as set out above, the Junior Lenders will receive no cash or shares and are deemed to be out-of-the-money. For this reason, their vote does not need to be solicited as they are deemed to reject the plan[[37]](#footnote-37). Provided that the plan is passed by at least one impaired class, and it is expected to be passed by the Mezz Lenders given they would receive nothing in a bankruptcy scenario, then the Junior Lenders can be crammed down.
	5. The Junior Lenders can still raise objections and we need to ensure that the plan passes two key criteria; 1) does not unfairly discriminate and 2) must be fair and equitable[[38]](#footnote-38).
		1. A plan would unfairly discriminate if another class of equal rank received more under the plan. As the Mezz Lenders have a higher rank they are entitled to receive more than the Junior Lenders and as such, the Plan does not unfairly discriminate. Similarly, Maximov will not receive any payment in relation to the USD 100 million loan to Efwon Investments due to its lack of security.
		2. The concept of fair and equitable has two limbs; 1) the absolute priority rule and 2) no payment in excess of allowed claim[[39]](#footnote-39).
		3. The Plan does involve Maximov retaining c.20% of the equity of Efwon Investments and therefore would be at risk of violating the rules of absolute priority as the equity investment ranks below that of the Junior Lenders. However, there is a New Value Exception to the absolute priority rule which I consider will ensure the Plan does not fall foul of this rule as Maximov is contributing USD 24.5 million to the Plan to part fund the F1 team’s business for the coming season. It is noted that the new value must be i) new; (ii) substantial; (iii) necessary for the success of the plan; (iv) reasonably equivalent to the value retained; and (v) in the form of money or money's worth[[40]](#footnote-40) and the investment from Maximov does seem to meet these criteria as the funding is needed for the team to function and the amount of USD 24.5 million for c.10% interest in the F1 team is not substantially different from the USD 300 million assessed value (i.e. USD 30 million for 10%).
	6. The Plan will also need to satisfy the “best interests of creditors test” which is to ensure that creditors receive at least what they would receive under a Chapter 7 liquidation of the company[[41]](#footnote-41). Given the value in liquidation as per the expert valuation report is only USD 20 million and this would go to the Monaco Lender given their position in the waterfall. The security provided to the US Lenders is only valued at USD 75 million and would be insufficient to pay the Senior Lenders in full. As such, in a Chapter 7, the Junior Lenders would also have received a zero return. Additionally, the Mezz Lenders would receive a zero return in a Chapter 7 liquidation, but they are receiving substantially more under the Plan.
	7. In conclusion, subject to final legal advice from a US bankruptcy attorney, the Plan should meet the relevant criteria to be passed and to cram down the Junior Lenders against their will and allow for a successful restructuring of the Efwon Group.

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