**CASE STUDY II**

1. **Your proposed strategy for dealing with the group and its various stakeholders.**

The following companies make up the group namely,

1. Efwon Investments Inc established in Texas in the United States.
2. Efwon Trading BV established in the Netherlands as a special purpose vehicle company,
3. Efwon Romania being a wholly owned subsidiary of Efwon Trading BV
4. Efwon Singapore being a wholly owned subsidiary of Efwon Trading BV.

The US creditor banks have lent Efwon Investments an aggregate amount of US$250 million which is secured as follows,

* Security of US$75 million over Maximov’s homes,
* Various pledges including over the shares of Efwon Investments Inc.
* A pledge on projected revenue to flow back from the investment.
* A pledge on the shares of Efwon Trading BV in the Netherlands.

Efwon Trading BV loaned the entire amount of US$350 million over time to the subsidiary in Romania.

A lender in Monaco lent Efwon Trading BV an amount of US$100 million at a high interest rate and secured revenues from the subsidiaries in Romania and Singapore that functioned as guarantors to the loan. The group owes a total amount of US$450 million, 250 million to the syndicate banks in America, 100 million to the shareholder Maximov and 100 million to the Monaco lender.

There is no common insolvency law binding the group as a whole but resort maybe had to the use of international instruments. The strategy to deal with the group and its various stakeholders is through parallel restructuring proceedings in the USA, the Netherlands, Singapore and Romania. It is important to coordinate the proceedings and designing a protocol for communication between the Insolvency practitioners in the various jurisdictions as well as the courts. I would need to look into the possibility of obtaining a worldwide stay to avoid the American Lenders from enforcing their claim against the Dutch company which is substantial, cram-down of creditors across classes and provision of new financing on a priority basis. The investment from KuasaNas should be viewed as new financing to save the whole group, which should be given priority. The proposed restructuring scheme is the WHOA Dutch scheme approved by the court as a public rather than a private scheme because of the advantages of cross-border recognition under the EIR(Recast) in Romania, under Chapter 15 of the United States Bankruptcy Code and the Singapore Model Law, which has adopted the UNCITRAL Model Law on Cross-Border Insolvency. To manage the US lenders, it is recommended to file Chapter 11 proceedings with respect to Efwon Investments Inc.

It is necessary to stay creditors actions to prevent assets being withdrawn from the pool and disrupting the network. The stay needs to be accompanied by a way to free up funds to continue operations either by awarding priority to post bankruptcy financing on existing assets or on future assets of the business.

There needs to be asset stabilization to keep the assets together and prevent creditors from withdrawing the asset when the companies are unable to pay the debt. There should be an ability to monetise claims and offer clean title to buyers. A formal enforcement regime to act in various jurisdictions and a form of insolvency oversight that ensures fair treatment of creditors.[[1]](#footnote-1)

To realise the sale of assets, especially encumbered ones, assets need to be sold unencumbered. Bankruptcy procedures in some jurisdictions can separate the liability from the asset transforming a claim on an asset to a monetary one equivalent to the value of the asset.

There should be a group representative to coordinate the proceedings worldwide. One could engage in planning proceedings in the US, Europe and Singapore.

The proposal is to negotiate with the syndicate of banks in America on an acceptable compromise deal under a restructured Dutch scheme under the WHOA. I would then formerly file a petition with the bankruptcy court in Texas under Chapter 15 for recognition of the scheme but importantly to obtain a suspension of payments and accruing interest on the loans. In Europe I would propose the WHOA and obtain confirmation from the court of the scheme. The advantage of a public confirmation is that it is automatically enforceable in Romania which is part of the EU. I would seek recognition in Romania under the EIR Recast and seek to obtain a moratorium on the pending insolvency proceedings. I would seek to have the Dutch scheme recognized in Singapore as a foreign main proceeding under Article 15 of the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

I need to offer the US lenders an acceptable compromise under the proposed restructuring scheme to avoid them calling upon their security in the Dutch company which in turn is owed by the Romanian and Singapore company. I would propose negotiating with the US lenders 1st on compromising their debt. Draft a scheme of compromise and present it to the US Court under Chapter 15 for recognition.

I would propose negotiating a reduction of interest from the lenders and possibly writing it off. This may be possible under Chapter 11 proceedings in the US with respect to the US creditors as well as under the WHOA, if members vote on it or the court orders the cross-cram down on dissenting creditors. It is necessary to adopt a restructuring strategy that affords priority to post commencement lending.

1. **Where and how these Proceedings will take place.**

The proposal to conduct parallel proceedings will be negotiated with the major creditors, voted on and approved by the courts. The proceedings will take place in the Netherlands, The United States of America, Romania and Singapore. The proceedings will be public because of the automatic recognition in foreign jurisdictions. In Romania under the EIR Recast. In the USA and Singapore under the adopted UNCITRAL Model Law on Cross-Border Insolvency adopted under Chapter 15 of the US Bankruptcy Code and in Singapore in Article 15 of the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

I would argue that the minimum requirements for restructuring in the Netherlands under the WHOA scheme have been met namely that Efwon Trading BV is the Centre of Main Interest (COMI) as it was incorporated in the Netherlands and is likely to go into bankruptcy as revenues from its subsidiary companies in Romania and Singapore have significantly reduced. A WHOA restructuring scheme binds all types of creditors and shareholders. [[2]](#footnote-2)The debtor has the choice of treating the restructuring as a private or public process. [[3]](#footnote-3) The public process would trigger automatic EU cross-border recognition under the EU insolvency regulation. Under the EU insolvency regime, the Dutch scheme would only apply to debtors with their COMI in the Netherlands. [[4]](#footnote-4)

Where the debtor requests a private process, the Dutch Scheme becomes subject to recognition under any applicable treaties or the domestic private international law of the countries in which recognition is sought including national implementation of the UNCITRAL Model Law such as Chapter 15 of the US Bankruptcy Code. This extends even within the EU. Private proceedings are attractive when there are a small number of holdouts or non-responsive creditors to an otherwise consensual deal or to international groups of companies with COMI’S or assets in different jurisdictions. A class is taken to have accepted the plan if at least 2/3 of the value of the class favours the plan. [[5]](#footnote-5) The law allows for a temporary stay of up to 4 months, which can be extended to 8 months. The debtor can prematurely terminate contracts while keeping some valuable contracts. [[6]](#footnote-6) The company or creditors can initiate the reorganization.

The court can be engaged to make use of the various restructuring tools. These include a moratorium of up to 4 months extended up to 8 months.[[7]](#footnote-7) If all classes have voted in favour of the restructuring plan the court will confirm the plan at a special hearing unless certain prerequisites are not fulfilled e.g., when dissenting creditors or shareholders are to receive less than they would in a liquidation.

Chapter 11 proceedings in the US would be filed in the Court in Texas with respect to restructuring Efwon Investments Inc and its debt. Parallel Chapter 15 US proceedings filed by a representative from the Netherlands for recognition of the public WHOA proceedings duly sanctioned by a court in the Netherlands to stay further creditor action in the USA. The stay arises upon the petition for recognition of a foreign main proceeding being granted and is limited to the property of the debtor within the territorial jurisdiction of the United States.[[8]](#footnote-8) The Bankruptcy Court may grant a stay or other interim assistance pending recognition or following recognition of a non-main proceeding.[[9]](#footnote-9)

* 1. **Romania**

Cross-border insolvency matters are governed by the International Insolvency Act which implements the UNCITRAL Model Law on Cross-Border Insolvency since 1 July 2003. The EU Insolvency Regulation is directly applicable since Romania’s ascension to the EU on 1 January 2007. Romania is also obligated to implement the Directive (EU) 2019/1023 of the European Parliament and of the Council on Preventative Restructuring frameworks.

* 1. **Singapore**

Singapore has in place a framework for the effective management of cross-border insolvency proceedings. This takes the form of the UNCITRAL Model Law on Cross-Border Insolvency, which has been enacted in Singapore in an adapted form ("SG Model Law"). The WHOA scheme would be recognized under Article 2(f) of the SG Model Law and Liquidators as foreign representatives of the Company within the meaning of Article 2(i) of the SG Model Law. “Foreign proceedings" are defined in Article 2(h) of the SG Model Law, and have the following requirements:

* The proceeding must be collective in nature.
* The proceeding must be a judicial or administrative proceeding in a foreign State.
* The proceeding must be conducted under a law relating to insolvency or adjustment of debt.
* The property and affairs of the debtor company must be subject to control or supervision by a foreign court in that proceeding.
* The proceeding must be for the purpose of reorganisation or liquidation.[[10]](#footnote-10)
1. **How will proceedings interact/influence each other or not.**

The proceedings interact/influence each other because of the group structure and the various inter-company loans and securities given. Restructuring and insolvency proceedings often span different jurisdictions, requiring the cooperation of the respective countries' insolvency regimes. Financing from KuasaNas is necessary for the Efwon group to continue its operations. In the absence of funding the group may have to file for insolvency/bankruptcy proceedings in the various jurisdictions.

The interaction of proceedings in group restructuring was reflected in the case involving Diebold Nixdorf,[[11]](#footnote-11) where a WHOA plan was successfully recognized in the US and involved several group companies world-wide. Diebold Nixdorf's global operations and complex international financing structure required multiple, parallel restructuring proceedings in the US and in the Netherlands. As such, on 1 June 2023, Diebold Holding Company, LLC and nine affiliated US and Canadian debtors (US debtors) each filed a voluntary petition for relief under Chapter 11 in the US. On that same date, Diebold Nixdorf Dutch Holding B.V. filed a start declaration under the WHOA for itself and 12 affiliated UK and European debtors (WHOA debtors) at the Amsterdam District Court.

The creditors under the US plan and the WHOA plan were the same. But as a result of the multiple security packages and intercreditor arrangements, the position of those creditors towards the US debtors differed from their position towards the WHOA debtors. This meant that creditors' claims relating to the US debtors were part of the US plan, and claims relating to the WHOA debtors were part of the WHOA plan. As such, the classes in both plans were slightly different, and creditors had to vote on both plans. At the same time, the US plan and WHOA plan were highly interconnected and formed an integral part of the other, primarily: the success of both plans, as well as the Chapter 15 recognition, was a condition precedent for the entire restructuring.

1. **What Impediments may exist to proceedings taking place.**

The transfer of F1 license from Singapore to Malaysia is an impediment as it is not certain drivers will get licenses. There is a risk that Benedict Maximov may lose the FIA license if the FIA does not approve transfer of the license from Romania to Malaysia. This in turn will affect revenue from broadcasting which is handled and distributed by the Formula One group. The loss of licenses may result in the liquidation of the whole group.

There could be jurisdictional conflicts where courts may not recognize the application for a moratorium pending restructuring because of different interpretation of where the group COMI lies. This may affect the group’s restructuring as a whole. An example is the Hydrodec Group Plc, where an Australia court declined in recognizing a UK moratorium in Australia as a foreign main proceeding on the basis that the COMI of the company was not the UK but the USA[[12]](#footnote-12).

A view by foreign creditors that they are not receiving fair treatment and therefore a rejection of the claim. This resistance may come from the Monaco creditor as well as the US creditors.

The ranking of security for the various creditors as each jurisdiction has secured earnings over the sport from the syndicate banks in the US, the Monaco lender.

It is going to be expensive to move the team from Romania to Malaysia. There are limited Formula 1 licenses for competing teams. Drivers and constructors are required to hold Super Licenses granted by FIA. Drivers can only obtain these licenses if they are the reigning champion or have placed well in races in lower categories in motor-sporting. Teams wishing to enter the competition for the 1st time are required to place a deposit with the FIA. The drivers and the team in Romania have already satisfied these requirements. There is no guarantee that the team in Malaysia or drivers will obtain the requisite licenses to ensure team Maximov continues to race. Unless KuasaNas indicates it will fully fund the obtaining of licenses in Malaysia for the drivers and the team it is not worth moving the team to Malaysia and liquidating the company in Romania. A condition of obtaining a Formula 1 license.

A challenge is how jurisdictions cooperate with respect to recognition of each other’s rules and enforcement methods.

* 1. **Contracts of Employment.**

The general rule under Art 7(1) EIR Recast is that the applicable law to insolvency and its effects shall be that of the Member State within the territory of which such proceedings are opened. (*lex fori concursus*). In this present case it would be the law of the Netherlands under the WHOA Scheme. One of the exceptions to this rule relates to employee contracts, where Art 13 states that the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment (*lex contractus*). The law of Romania will determine the claim for damages brought by the employees against the subsidiary company.

* 1. **Directors’ duty to report early.**

The EU Preventative Restructuring Directive does not provide for detailed rules on directors’ liability in the event the debtor faces financial difficulties. Preamble 70 states that regard should be had to the interests at stake in defining the position of directors of distressed companies. It states that in order to promote a rescue culture, “it is important to ensure that directors are not dissuaded from exercising reasonable business judgement or taking reasonable commercial risks, particularly where to do so would improve the chances of a restructuring of potentially viable businesses”**.** In Preamble 71 on the other hand it is acknowledged that when a debtor is close to insolvency, “it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor’s estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts of for the distribution of creditors”.

In Romania, if a debtor is insolvent, the legal representative must within 6 months initiate an insolvency petition otherwise criminal liability attracts by punishment of between 3 months to 1 year in jail or a fine. [[13]](#footnote-13) Cross-border insolvency matters are governed by the International Insolvency Act. In addition, the EU Insolvency Regulation is directly applicable.

In light of the obligations of Directors in the Netherlands and Romania to report potential insolvencies early, they may not be supportive of a restructuring plan and prefer to liquidate the company with a presence in the Netherlands and Romania.

1. **What advantages/disadvantages may exist in relation to proceedings being organized in the way you propose.**

The advantage of the WHOA in the Netherlands besides its flexibility, is its automatic recognition in Romania by virtue of it being an EU nation and bound by the EIR Recast.

Another tool under the WHOA is the debtor requesting to protect new financing necessary for the implementation of the restructuring plan from claw-back actions in a case of a subsequent commencement of an insolvency proceeding when and if the rescue attempt fails. [[14]](#footnote-14) Under the restructuring plan, a debt-equity-swap is permissible as well as write-offs, changes of the due dates, sale of the debtor’s assets, group related obligations towards the creditors (e.g. guarantee from an affiliated company[[15]](#footnote-15))

To trigger the cross-class-cram-down, which to introduce is recommended by the Directive EU 2019/1023, Article. 11, all that is needed is at least 1 class of impaired creditors having voted in favour of the restructuring plan. The court’s confirmation will depend on compliance of the absolute priority rule.[[16]](#footnote-16) Deviations are allowed (relative priority rule), when and if there is reasonable ground for the derogation and members of the respective class are not harmed. Another ground for denial of confirmation is Small to Medium Sized Enterprises do not receive 20% of the value of the claims or rights worth at least 20% of the value of their claims. When the plan is confirmed by the court, it is binding on all creditors and shareholders with voting rights. [[17]](#footnote-17)

The advantage of filing a Chapter 11 restructuring in the United States with respect to Efwon Investments is that Efwon Investments need not demonstrate its own insolvency to take advantage of the proceedings. Another advantage is that assets can be sold unencumbered.[[18]](#footnote-18) This will help with respect to the security held over Maximov’s various homes in the amount of US$ 75 million which could be sold to repay the US lenders. Another advantage of using Chapter 11 proceedings is that it provides tools to reject unwanted contracts, [[19]](#footnote-19) recover pre-insolvency payments or sell assets free and clear of claims. [[20]](#footnote-20)

 The disadvantage of the proceedings is that they largely take place in open court with a high degree of transparency. This could mean substantial reputational damage for team Maximov of obtaining future sponsorship deals for the team. Further, traditionally Chapter 11 filings can take up to 2 years to conclude. In this instance time is not on the group’s side because of the nature of the primary business of the group being formula 1 racing.

Another advantage of using the WHOA scheme is the automatic enforcement of public proceedings in Romania which is a Member State in the EU. Recital 65 EIR Recast provides for the immediate recognition of judgements concerning the opening, conduct and closure of insolvency proceedings which fall within its scope.

The Dutch scheme offers a regulatory oversight element.

Another advantage of restructuring in Europe is the duty to communicate and cooperate in insolvency cases. In terms of Article 41 EIR Recast the Insolvency Practitioners in main and secondary proceedings involving the same debtor shall cooperate even as far as concluding agreements or protocols. A case in point was Maxwell Communication Corporation plc[[21]](#footnote-21), a UK based media company with a presence in the USA. It filed a Chapter 11 petition in the US and simultaneously petitioned for administration in the UK as it was unable to meet its credit obligations under the UK credit facilities. A protocol was negotiated where the UK administrators and the US appointed examiner undertook to coordinate insolvency proceedings. Similarly in the Lehman Brothers Group, in order to coordinate multiple insolvency proceedings worldwide, a protocol was signed by most of the official representatives of the companies belonging to the group. The purpose of the protocol was to ensure proper notification, communication and data sharing between insolvency practitioners appointed.

In the USA, the advantage of filing chapter 15 petition is that automatic remedies available relevant to Efwon Investments include,

* An automatic stay
* Avoidance of post-petition transfers and post-petition perfection of security.

And discretionary relief available includes.

* Any other necessary relief to give effect to the purpose of chapter 15 and to protect the assets of the debtor or the interests of the creditors. [[22]](#footnote-22)

The method also allows foreign courts to support the restructuring process by granting temporary relief to enable the restructuring process to continue in the various jurisdictions without the threat of creditors calling upon their security and thereby diminishing the value of the assets and ultimately in the worst case scenario a liquidation of the various companies in the group. A case in point where there was cooperation amongst the courts and thereby supporting the restructuring process was the Diebold Nixdorf case[[23]](#footnote-23). In that case, on 11 August 2023, Diebold Nixdorf, the cash machine manufacturer operating worldwide, successfully completed an extensive debt restructuring by combining and carrying out Chapter 11 proceedings in the US, and WHOA proceedings in the Netherlands. The court appointed observer played a key role in the WHOA portion, which was recognised under Chapter 15 in the US for the first time ever and the entire restructuring was announced and completed within two and a half months.

At Diebold Nixdorf's request, the Amsterdam District Court appointed observer was tasked with monitoring the WHOA process and advising on whether the interests of the joint creditors in the combined Chapter 11, WHOA and Chapter 15 proceedings were adequately safeguarded. In this situation, the observer's role was to supervise the drafting and negotiating of the restructuring plan for the benefit of the joint creditors. The observer provided an extensive opinion on the WHOA plan and its implications, including about the way unprecedented elements in the WHOA plan should be viewed - an opinion that the Amsterdam District Court followed. In a previous case of the Grupo Isolux [[24]](#footnote-24), where the concern was that bondholders would enforce their claims against the Dutch BV and use their intercompany claims of the BV on more valuable operating companies to obtain recourse from those operating businesses. The bondholders were offered a composition agreement in the Dutch Suspension of Proceedings. The proceedings were approved under Chapter 15 of the United States Bankruptcy Code as foreign main proceedings, the recognition of a restructuring agreement that bound creditors. This recognition also allows the WHOA plan to be enforced against creditors in the US, making it an even more attractive option for cross-border restructurings.

Disadvantages of Chapter 11 are,

1. It is a formal process taking place in open court. This may cause team Maximov substantial reputational damage. It can take a fairly long time. Traditionally reorganisations can take up to 2 years.
2. Has extensive disclosure requirements that must be publicly available on the court’s docket.
3. **Any further facts or information that maybe needed to the questions/solve the situation.**

Whether there were any outstanding tax claims in all the jurisdictions and their incorporation in the restructuring agreement. High tax claims that are not negotiated with the authorities discourage potential investors from investing in a company in distress. Regulatory approval is also required with respect to licensing, sale of shares and change in the structure of shareholding in companies.

1. **Whether you envisage the application of the European Insolvency Regulation and/or UNCITRAL Model Law and/ or other international instruments in achieving this.**

For a successful cross-border restructuring, there will be a need to employ international instruments like the European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. The European Insolvency Regulations (EIR) is binding in its entirety and directly applicable in all Member States. The Netherlands and Romania are Member States. As Member States they are also bound to implement the Directive (EU) 2019/1023 of the European Parliament and of the Council on Preventative Restructuring frameworks. The EIR Recast is applicable only to insolvency proceedings where the debtor’s Centre of Main Interest (COMI) is located in the European Union (EU). The EIR applies to collective public proceedings. (Article 1(1). The scope of the EIR includes debtor-in-possession and preventative restructuring proceedings. Main proceedings have a universal effect. There is automatic recognition in other Member States (Art. 19 and 20). Secondary proceedings have territorially limited effect in Member States where the debtor has an establishment. Effects restricted to assets situated in that Member State. (Art. 3(2). An Insolvency Practitioner can exercise his power in other Member States. (art 21). The effect of automatic recognition of the WHOA scheme in Romania is that it enables the group representative to register the scheme in Romania and oversee the Insolvency proceeding to ensure it is in accordance with the WHOA.

The United States of America and Singapore have incorporated the UNCITRAL Model Law on Cross-Border Insolvency in their laws. In the USA it has been incorporated under Chapter 15 of the Bankruptcy Code. It is based on the UNCITRAL Model Law on Cross-Border Insolvency.[[25]](#footnote-25) After notice and hearing, the court must enter an order recognizing the foreign proceeding if the proceeding is a foreign main proceeding or a foreign non-main proceeding. [[26]](#footnote-26)

In Singapore, the Model Law has been incorporated under the Insolvency, Dissolution and Restructuring Act 2018 (2020 rev ed), “IRDA”. In the case of Ascentra Holdings, Inc (In Official Liquidation) & 2 Ors v SPGK Pte Ltd [2023] SGCA 32, the Singapore Court of Appeal ("Court") was faced with a fundamental question regarding the scope of the SG Model Law and what proceedings it covers. The Court had to determine whether a company must be insolvent before the relevant proceedings may be regarded as foreign proceedings. The Court held that the SG Model Law does not require a company to be insolvent or in severe financial distress before a proceeding concerning that company may be recognised as a foreign proceeding. While the SG Model Law does require that such proceedings be conducted "under a law relating to insolvency or adjustment of debt", it is sufficient if the law under which the relevant proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts.

1. **How do the provisions of these texts assist or impede the strategy you propose to implement.**

The EIR (Recast) allows for automatic recognition of the WHOA, scheme in Romania. It therefore aids in the restructuring of the group. Chapter 15 of the US Bankruptcy Code incorporates the UNCITRAL Model Law on Cross Border Insolvency and can be used to provide interim relief. The Court reiterated the US position in *Modern Land[[27]](#footnote-27)* that the US has recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt.Chapter 15 provides for the commencement of a bankruptcy case in the United States that is ancillary or complimentary to an insolvency proceeding pending in another country. It allows for the imposition of an automatic stay within the United States.[[28]](#footnote-28) It also allows for the potential enforcement of a foreign bankruptcy plan by the U.S. bankruptcy court. As a general rule, most jurisdictions will not recognize the results of an American bankruptcy case filed by a non-American corporate entity. [[29]](#footnote-29)

As part of the SG Model Law, Singapore courts may recognise foreign restructuring and insolvency proceedings, as well as foreign representatives in such proceedings. This allows for the Singapore courts to support the reorganisation or liquidation efforts by granting orders such as stays of proceedings or execution against the company or its assets in Singapore, examination and taking of evidence, and granting powers of administration to the foreign representatives. The recognition of the Dutch WHOA proceedings in Singapore is important in terms of restructuring because the creditor from Monaco’s loan was secured from guarantees given from revenues in Singapore and Romania. An impediment to restructuring under the EIR (Recast) is that the damages claim brought by Romania drivers constitutes an on-going dispute excluded from re-organisation. Although the courts in Romania have the jurisdiction to determine the claim, they may be limited in terms of enforcement because of registration of the WHOA scheme in Romania under the EIR. This stems from the provisions in Article 18 EIR Recast, where pending lawsuits concerning an asset or right which forms part of the debtor’s insolvency estate are governed solely by the law of the Member State in which the lawsuit is pending. The damages claim brought against Efwon Romania is therefore determined by Romanian Law. The WHOA restructuring cannot therefore compromise the claims and suspend proceedings with respect to the damages claim. The WHOA upon registration in Romania can suspend further insolvency proceedings. Article 13 EIR Recast states that the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

1. **Should Efwon (with hindsight) have restructured through England rather than the Netherlands?**

For a foreign company to use the English scheme of arrangement to restructure, it should satisfy the “sufficient connect” test between the foreign company and England.[[30]](#footnote-30) “Sufficient connection” has been held to include foreign contracts governed by English law. [[31]](#footnote-31) The company need not be insolvent to use the scheme. From the facts, COMI may be difficult to establish as neither parent or subsidiary companies nor creditors reside in England. It is not clear whether English law is applicable to the credit agreements from lenders. Companies in the past have shifted COMI to the United Kingdom as was the case of Hertz because of the popularity and relative ease of an English scheme and automatic recognition in Europe under the EIR Recast to members of the European Union and further worldwide amongst countries that have adopted the UNCITRAL Model Law on cross-Border Insolvency in their local legislation. Since BREXIT, recognition of an English no longer enjoys automatic recognition in Europe. This would affect recognition and enforcement in the Netherlands. The scheme cannot resort to the UNCITRAL Model Law on Cross-Border Insolvency for recognition and enforcement in the Netherlands as the Netherlands has not signed and incorporated the Model Law in its laws. Resort would be had to private international law of the Netherlands. The WHOA would therefore have the advantage over the English scheme with respect to automatic recognition under the EIR Recast.

Recognition of a restructuring under the English Scheme would not enjoy the automatic recognition in the Netherlands where Efwon BV resides. With the introduction of the Dutch Scheme under the WHOA, it would not be necessary to consider restructuring under the UK Scheme.

1. **What will the outcome for each of the various stakeholders be, are they likely to accept the same and, in case they will not, can they be forced to accept them?**

A liquidation of the subsidiary in Singapore and Romania will affect the security of the Monaco’s lending and its loan of US$100 million. The Monaco lender’s security extends to Efwon Trading BV’s revenue in the Netherlands. The lender holds security in 3 jurisdictions being revenue from Efwon Trading BV in the Netherlands and the 2 subsidiary companies in Romania and Singapore. Under the WHOA, it is possible to cancel the guarantees given by the Romanian and Singaporean subsidiaries. The lender would be offered a limited cash settlement as long as it’s not worse off than liquidation. In my view it would be worse off in liquidation as the American lenders hold greater security and are likely to receive all the finance available to the detriment of the Monaco lender.

With respect to the US Lenders, I would recommend cancellation of shares in Efwon Investments Inc. Repay the US lenders with some of the proceeds from the consideration offered by KuasaNas. I would recommend a sale of the homes of Maximov valued at US$ 75 million, free of encumbrances as provided for under a Chapter 11 restructuring, to repay the US lenders. The amount of employee’s damages claim in Romania would be determined by the Romanian Court. I would negotiate on settlement of the claims.

I would dispose of the subsidiary companies in Romania and Singapore and establish a company in Malaysia giving KuasaNas 51% shareholding and Efwon Trading BV 49% shareholding. I would allow the insolvency proceedings to continue in Romania but ensure that the court coordinates its proceedings in line with the WHOA scheme.

Under the Dutch Scheme plans can be crammed down on dissenting classes, provided the dissenters are getting their share in terms of the “absolute priority rule”- of the reorganization value of the company. The plan must be approved by at least one class of creditors subject to the plan. [[32]](#footnote-32)

The Dutch WHOA and the US Chapter 11 both have cross cram-down provisions in the event there are dissenting creditors subject to certain safeguards. Cross-class cram-down is used by companies to impose a restructuring plan with the court’s approval upon the dissenting class of creditors. Cross-class cram-down means classes of creditors or members who vote against a proposal but would not be worse off under the restructuring plan than they would be in the most likely outcome where the restructuring plan not to be agreed cannot prevent it from proceeding. [[33]](#footnote-33) Chapter 11 of the US Bankruptcy Code Section 1129(b) requires that the restructuring plan should be fair and equitable to all classes, especially dissenting classes, which requires observance of the “Absolute Priority rule”. The rule states that unless the dissenting senior classes have been paid as per the plan under the Bankruptcy Code, the Junior classes of Creditors will not receive any value under the plan.

**END**

1. Couwenberg, Oscar, & Lubbben, “Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganization Options”, (2021) North Carolina Journal of International Law 46: 2, 353-388. [↑](#footnote-ref-1)
2. Article 370.1. [↑](#footnote-ref-2)
3. Article 396.6. [↑](#footnote-ref-3)
4. Art 369(7); Commission Regulation 2015/848, 205 O.Y. (L 141) arts. 3.1, 3.2 (EC). [↑](#footnote-ref-4)
5. Art 381(7). [↑](#footnote-ref-5)
6. Art 373(1). [↑](#footnote-ref-6)
7. Art 376 para.1-2. [↑](#footnote-ref-7)
8. 11USC, S 1520(a)(1). [↑](#footnote-ref-8)
9. 11 USC, s1519 [↑](#footnote-ref-9)
10. https://www.lexology.com/library/detail.aspx?g=6756b2f7-ed94-4362-874b-9c585deef2ee [↑](#footnote-ref-10)
11. In re Diebold Nixdorf Dutch Holding B.V., No. 23-90729, (Bankr. S.D. Texas, Houston Div., July 12, 2023). [↑](#footnote-ref-11)
12. *Re Hydrodec Group Plc* [2021] NSWSC 755. [↑](#footnote-ref-12)
13. https://ceelegalmatters.com/restructuring-2022/restructuring-romania-2022. [↑](#footnote-ref-13)
14. Art 42a. [↑](#footnote-ref-14)
15. Art 372 [↑](#footnote-ref-15)
16. Art. 384, para.4, Fw. [↑](#footnote-ref-16)
17. Art 385, Fw. [↑](#footnote-ref-17)
18. 11 USC § 363 (F). [↑](#footnote-ref-18)
19. 11 U.S.C. § 365 [↑](#footnote-ref-19)
20. § 363(f). [↑](#footnote-ref-20)
21. Maxwell Communications Corp., [1992] B.C.L.C. 465; 170 B.R. 800 (Bankr. S.D.N.Y. 1994); Aff’d B.R. 807 (Bankr. S.D.N.Y. 1995); 593 F.3rd 1036 (2nd Cir., 1996). [↑](#footnote-ref-21)
22. 11 USC, § 1521(a). [↑](#footnote-ref-22)
23. https://www.debrauw.com/articles/us-and-dutch-courts-allow-combined-us-netherlands-restructuring-for-diebold-nixdorf [↑](#footnote-ref-23)
24. C/13/16/37-S [↑](#footnote-ref-24)
25. Section 1501(a) Bankruptcy Code which sets out the objectives of the Code. [↑](#footnote-ref-25)
26. 11 U.S.C. § 365. [↑](#footnote-ref-26)
27. In re Modern Land (China) Co. Ltd., 641 B.R. 768 (Bankr. S.D.N.Y. July 18, 2022. [↑](#footnote-ref-27)
28. 11 U.S.C § 1520 (a) (1). [↑](#footnote-ref-28)
29. Oscar Couwenberg & Stephen J. Lubben, “Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganisation Options”, (2021) 46(2) North Carolina Journal of International Law, 353-358. [↑](#footnote-ref-29)
30. Company’s Act S 895(2) [↑](#footnote-ref-30)
31. Primacom Holding GmbH v. Credit Agricole EWHC (Ch) 3746, [98]. [↑](#footnote-ref-31)
32. Art 383.1. [↑](#footnote-ref-32)
33. Journal of Law and Legal research, 1-11. [↑](#footnote-ref-33)