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**15 April 2024**

To **The General Counsel to Mr Benedict Maximov**
From Noble Solicitors LLP
Our ref JN/123456.0001
Subject Efwon Group and proposed deal with KuasaNas

## 1. INTRODUCTION

1.1 Thank you for instructing us on this matter and for your written brief containing the factual background.

1.2 You have sought our advice on how to facilitate the deal with KuasaNas whilst at the same time, protecting Mr Maximov's interests in the Efwon Group (the **Group**) and retaining the ownership of the Maximov F1 team (the **F1 Team**).

1.3 In particular, you have asked us to advise, amongst other things, on the following issues:

1.3.1 our proposed strategy for dealing with the Group and its various stakeholders;

1.3.2 whether one or more insolvency proceedings or (preventive) restructuring frameworks are required to achieve the goal of selling a stake in the group to KuasaNas (assuming the intended contract receive government clearance);

1.3.3 where and how these proceedings will take place;

1.3.4 how these proceedings may (or may not) interact or influence each other;

1.3.5 what impediments may exist to the proceedings taking place;

1.3.6 what advantages / disadvantages may exist in relation to proceedings being organised in the way we propose;

1.3.7 the relevant factors that will allow us to determine the above;

1.3.8 any further facts or information that may be needed to resolve matters;

1.3.9 the application of the European Insolvency Regulation, the UNCITRAL Model Law and/or any other international instruments in achieving this strategy;

1.3.10 how the provisions of these legal instruments are likely to assist or impede the proposed strategy;

1.3.11 whether Efwon (with hindsight) should have structured through England rather than the Netherlands;

1.3.12 the expected outcome for each of the various Stakeholders and whether they are likely to accept that position. If not, whether they can be forced to do so.

## 2. EXECUTIVE SUMMARY

2.1 We recommend that Mr Maximov persuades all the stakeholders:

2.1.1 to enter into a 30 day standstill agreement (which would include the drivers taking no further steps in the winding up proceedings in Romania) to enable discussions to take place to achieve an out-of-court consensual restructuring; and

2.1.2 to adhere to the INSOL Statement of Principles for a Global Approach to Multi-Creditor Workouts.[1]

2.2 Irrespective of whether a standstill agreement is entered into, we suggest that Mr Maximov attempts to obtain the agreement of the creditors to the consensual restructuring proposal set out in section 9 of this letter.

2.3 If agreement can't be obtained, we would recommend that:

2.3.1 Restructuring proceedings are commenced by Efwon Trading in the Netherlands, given that the Centre of Main Interests (***COMI***) of Efwon Trading is likely to be held to be the Netherlands and it would enable those proceedings to be classified as Foreign Main Proceedings. Efwon Trading would then receive all the benefits that ensue to Foreign Main Proceedings on recognition in jurisdictions which apply the Model Law on Cross-Border Insolvency. By commencing proceedings in the Netherlands, it would be possible to seek an order from the Court for a moratorium on claims against Efwon Investments, Efwon Trading and Efwon Romania as well as to use that forum as a single platform for dealing with the liabilities of all three debtors (including the claims by the drivers against Efwon Romania). Those combined Dutch proceedings would be seeking to present a scheme of arrangement to the various creditors for the purpose of compromising the respective debts. Given that approval for the compromise is likely to be obtained by at least one class of creditors (namely the class comprising of Efwon Trading and the Monaco Lender in which Efwon Trading holds 77% of the total debt), that can be relied on as a basis to seek approval from the Dutch Court to compromise the liabilities of all three debtors (ie. Efwon Investments, Efwon Trading and Efwon Romania);

[1] These principles can be found at https://www.insol.org/getmedia/06c2de67-b34c-4163-8834-bc6db0d8315b/STATEMENT-OF-PRINCIPLES-FOR-A-GLOBAL-APPROACH-TO-MULTI-CREDITOR-WORKOUTS-II.pdf

2.3.2 An application is made to the Romania Court to stay those winding up proceedings and liability claims as well as to discharge the injunction over the assets of Efwon Romania;

2.3.3 Chapter 15 Recognition Proceedings are commenced against Efwon Investments in the US. Those proceedings would be filed by the "foreign representative" (ie. the Dutch restructuring officer/plan expert) and would be seeking recognition of the Dutch proceedings commenced by Efwon Investments, as Foreign Non-Main Proceedings. Chapter 15 provides discretionary relief for Foreign Non-Main Proceedings which is likely include an automatic stay of any proceedings being brought/continued in the United States.[2] This stay would prevent any enforcement action that might be contemplated by the US lenders against Efwon Investments in the US and therefore give it some breathing space until such time as the Dutch restructuring is approved by the Dutch Courts. We would then recommend applying to the US Court for recognition of the Dutch restructuring (once approved) on the basis that the US lenders currently have security over US assets – namely the shares in Efwon Investments.

## 3. BACKGROUND FACTS AND DOCUMENTS REVIEWED

3.1 We understand the factual position to be as set out in your briefing note and the views contained in this advice are based solely on those instructions. We have produced a structure chart for the Efwon Group in Annexure 1.

3.2 We have not been provided with any of the underlying documents which are relevant to the matters in issue and in particular, have not been given:

3.2.1 the Memorandum and Articles of Association for any of the companies in the Efwon Group;

3.2.2 the loan agreement or the security documents relating to the loan from:

a. the US lenders;

b. the Monaco lender; or

c. Efwon Investments Inc.;

3.2.3 the financial accounts for the Efwon Group or any of the entities within it;

3.2.4 any correspondence between the various stakeholders.

## 4. POTENTIAL FORUMS FOR ANY PROCEEDINGS AND GOVERNING LAWS

4.1 As we have not been provided with any of the loan agreements, security documents or Memorandums and Articles of Association for any of the companies in the Efwon Group, it is unclear whether there are any exclusive jurisdiction clauses in any of those documents. For the

[2] 11 U.S.C. s.1521

purposes of this advice, we have therefore assumed that they are either silent on jurisdiction or simply contain non-exclusive jurisdiction clauses in favour of the respective place of incorporation of the relevant lender/entity.

4.2 We have also assumed that the loan to the US lenders is governed by US law and that the loan to the Monaco lender is governed by the laws of The Netherlands. In relation to the loan from Efwon Investments to Efwon Trading, we have assumed this is governed by Dutch law. Please let us know if any of these assumptions are incorrect.

## 5. RIGHTS AND ENTITLEMENTS OF THE US LENDERS

5.1 As we have not been provided with a copy of the loan agreement or the security documents, we have assumed that they are standard in nature and are valid and enforceable. We have therefore not considered whether there are any grounds for challenging enforcement of that security.

5.2 If the US lenders elected to exercise their rights under those documents, they would be entitled to declare an Event of Default in respect of the loan which would then give them an ability to, amongst other things:

5.2.1 Enforce their mortgage over Mr Maximov's homes by exercising their rights of foreclosure; and

5.2.2 Take ownership of the shares of Efwon Investments and Efwon Trading thereby having 100% shareholder control over both entities and the power to appoint their own directors via shareholder resolutions. This would give them total control over the Efwon Group as well as the right to sell the assets of Efwon Trading which include the F1 team and licences held through Efwon Romania.

5.3 Alternatively, it would be open to the US Lenders to bring insolvency proceedings against Efwon Investments and/or Efwon Trading (which they may wish to preface with the service of a statutory demand which if left unsatisfied, would mean the companies are deemed insolvent). This could be done in a number of ways:

5.3.1 Through petitioning to wind up Efwon Investments on the basis that it is unable to pay its debts as they fall due (given that the USD250m loan remains outstanding);

5.3.2 Through the enforcement of the share pledge over Efwon Investments as a result of which the US lenders would own all the shares in Efwon Investments and could then pass a shareholders' resolution to:

a. put itself into a Court supervised liquidation;

b. compel the company to pursue Efwon Trading for the USD350 loan which has still not been paid by petitioning to wind it up and appointing liquidators to pursue any claims which Efwon Trading has against any relevant third parities.

5.4 We are of the view that the US Lenders would be likely to succeed in appointing liquidators over the companies who could then take steps to sell Efwon Trading's ownership of the F1 Team and Licenses (which is held through Efwon Romania) to realise a return and to partly satisfy the outstanding debt.

5.5 This option may not be attractive to the US Lenders though as the nuclear option of winding up would deprive them of the value that could be generated from the KuasaNas sponsorship as well as the projected revenue from the racing which could be significant, especially given that the team has been slowly getting better. Without that additional value, it is assumed that there would be a significant shortfall in relation to the recovery on its debt.

## 6. RIGHTS AND ENTITLEMENTS OF THE MONACO LENDER

6.1 We understand that the Monaco lender is secured against the revenue from Efwon Trading, Efwon Romania and Efwon Singapore. Each of these entities are guarantors under the loan and it would be open to the Monaco lender to petition to wind up one or all of them for the defaults under the loan.

6.2 The difficulty for the Monaco lender is that its security is over the revenue generated from those entities which to date has not been sufficient to cover its costs. Those entities are expected to become profitable in the future (once the USD100m sponsorship is obtained and the team continues to improve) but that value is only realised through the continued operation of the business.

6.3 Attempting to wind up those entities would destroy that additional value and all that would be left would be whatever amount could be obtained for the sale of the F1 team and licence to a third party buyer. However, it is assumed that the value of the sale would not be sufficient to satisfy the debts owed to the various creditors and that there would therefore be a shortfall in recovery.

## 7. CLAIMS BY THE DRIVERS, THE INJUNCTION AND THE ROMANIAN INSOLVENCY PROCEEDINGS

7.1 We are instructed that the drivers have brought negligence and breach of contract claims against Efwon Romania, together with winding up proceedings in the Romanian Courts. In support of the insolvency proceedings the drivers have obtained a freezing injunction over the assets of Efwon Romania which will place it at risk of defaulting on its payments to Efwon Trading. The continuance of these insolvency proceedings in their current form will prevent the proposed acquisition by KuasaNas from going ahead. We have therefore proposed a strategy for dealing with those proceedings below.

## 8. PROPOSED PROCEEDINGS TO ENABLE SALE OF STAKE IN GROUP TO KUASANAS

**DUTCH PROCEEDINGS**

8.1 In the event that the parties are unable to resolve matters consensually (as discussed in section 9 below), it is open to Mr Maximov to force through the acquisition by KuasaNas of a 49% stake in the business through a scheme of arrangement.

8.2 The debtors (in this case Efwon Investments, Efwon Trading and Efwon Romania) do not need any consents or approvals for the initiating of a restructuring under the Dutch legislation, the Wet Homologatie Onderhands Akkoord (***WHOA***). They can commence the process by simply filing a restructuring statement with the court or by requesting that the Court appoints a plan expert to design and negotiate the restructuring plan on behalf of the debtors.

8.3 In addition, a WHOA restructuring can be used for any entity incorporated under Dutch law (ie. Efwon Trading) as well as any entity with a sufficient connection to the Netherlands.[3] In relation to Efwon Investments and Efwon Romania, the Courts have held that a sufficient connection includes where the debtor is part of a group of which a substantial part consists of companies domiciled in the Netherlands.[4]

8.4 Those proceedings would be best commenced in The Netherlands for a number of reasons including the following:

8.4.1 The COMI for Efwon Trading is likely to be the Netherlands which would enable Mr Maximov to take advantage of all the benefits which flow from those proceedings then being deemed the "Foreign Main Proceeding" since it has significant implications on the rights and remedies available to creditors, the recognition of foreign proceedings and the overall efficiency of the insolvency process;

8.4.2 the loans to, and share pledges from, Efwon Trading are governed by Dutch law;

8.4.3 The WHOA is very flexible for restructuring purposes and can be used to amongst other things, to:

a. obtain a worldwide moratorium on creditor claims (upon seeking such an order from the Court);

b. prevent any of the lenders from enforcing their security in certain circumstances;

c. achieve a compromise that can be automatically recognised and enforced in Romania where Efwon Romain is incorporated;

d. cram down the rights of the US and Monaco lenders;

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[3] Hengst, F. (2024) "Restructuring and Insolvency in the Netherlands: Overview, *Practical Law*

[4]See https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/emea/the-netherlands/topics/initial-considerations

e. can deal with the liabilities of group companies (namely the claims by the drivers against Efwon Romania);

8.4.4 It is a debtor in possession model which allows Mr Maximov to remain in control of the assets;

8.4.5 If there are any *ipso facto* clauses in any contracts involving the three debtors, these can be set aside;

8.4.6 There is an ability to obtain fresh liquidity;

8.4.7 The voting threshold for the plan is lower than in other jurisdictions as approval is required from only 2/3 of all creditors in the same class (as opposed to the 75% threshold that exists elsewhere).

8.5 The main disadvantages with this approach are that:

8.5.1 It will require multiple sets of proceedings – three actions in the Netherlands (albeit they will be run together) and a further set of proceedings in the US in relation to recognition;

8.5.2 It will also require the US and Dutch Courts to work together to enable this cross-border strategy to be achieved;

8.5.3 The restructuring is dependent on the Dutch Courts agreeing that the US Lenders should have their debt compromised in the way that we have proposed by reason of the approval of a single class of creditors (ie the class with Efwon Investments and the Monaco lender) in which Efwon Investments holding 77% of the debt in that class;

8.5.4 The proposal is dependent on the US Court recognising the Dutch proceedings as Foreign Non-Main Proceedings and exercising its discretion to grant the relief of a stay of any enforcement action in the US by the US lenders;

8.5.5 If the US Lenders are able to persuade the Dutch Court that they belong in the same class of creditors as Efwon Investments and the Monaco Lender (and the US Lenders and Monaco Lender don't agree with the plan), then there won't be a single class of creditors in favour of the plan and it won't be approved;

8.5.6 The plan will have to be commenced before the US Lenders are able to take control of the shares of Efwon Trading as that would allow them to compel Efwon Trading to take various steps against this strategy through the passing of relevant shareholder resolutions;

8.5.7 The Dutch restructuring plan (if approved) may need to be recognised in Singapore and in Malaysia if any of the creditors are difficult and choose file proceedings there, given that Efwon Singapore and Efwon Romania both have assets there.

COMI

8.6 Dutch law determines COMI by reference to the *European Union Regulation on Insolvency Proceedings* (the ***EC Regulation***), which applies to all EU member states (except Denmark) and which contains a codified definition of the term COMI.[5] Whilst there is still a rebuttable presumption that it's the place of the company's registered office, if that is overcome, then it's the location that a third party would perceive as being the centre of the debtor's operations.[6]

8.7 The leading authority in this regard is the decision from the European Court of Justice in *Eurofood*.[7] In that case, the Court was of the opinion that COMI "*must be identified by reference to criteria that are both objective and ascertainable by third parties*" and that "*objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."*

8.8 There is an obvious logic to framing the test for COMI in this way as explained by the English Court in *Re Stanford Int'l Bank Ltd* where it said that this test would "*provide certainty and foreseeability for creditors of the company at the time they enter into a transaction.*"[8]

8.9 Further caselaw has clarified that the test should be by reference to factors in the public domain and should exclude "*such matters as might only be ascertained on inquiry."*[9]

8.10 Having regard to the analysis above, it is likely that the Dutch Court will determine that the COMI of Efwon Investments is Texas and the COMI of Efwon Trading is the Netherlands. The COMI of Efwon Romania could be held to be Romania, Singapore or Malaysia (but most likely Romania).

Composition of Classes for Efwon Trading

8.11 Creditors will classed differently if the rights which they obtain upon the implementation of the composition plan are sufficiently disparate that they are not in a comparable position.[10]

8.12 Efwon Investments and the Monaco lender are likely to be considered to be in the same class of creditors since they both have security over the future revenues of Efwon Trading. In that regard, Efwon Investments has 77% of the debt (ie. 350m of the 450m owing) which will be highly relevant for the purposes of voting in respect of any scheme.

Restructuring of Group Debtors

[5] See EC Regulation Article 3(1) Preamble at paragraph 13
[6] EC Regulation Article 3(1) Preamble at paragraph 13
[7] *In re Eurofood IFSC Ltd* 2006 ECR I-3813
[8] *In re Stanford Int'l Bank Ltd* [2010] EWCA (Civ) 137
[9] *In re Kaupthing Capital Partners II Master LP, Inc.* [2011] *B.C.C.* 338
[10] See https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/emea/the-netherlands/topics/initial-considerations

8.13 There is no particular regime in the Dutch legislation for the restructuring of group entities. Ordinarily, group debtors would each have to file separately and the proceedings would need to be co-ordinated. To assist with the co-ordination of the proceedings, the two debtors ought to appoint the same restructuring expert over their respective entities.

8.14 It is possible to use the WHOA procedure in the Netherlands to restructure the debts of group debtors provided that both debtors:

(a) are held to be a "group" pursuant to Article 2.24b of the Dutch Civil Code;

(b) are jointly and severally liable for the claims by creditors against which a compromise has been sought;

(c) have standing to enter into a WHOA. For present purposes, this simply requires them to be able to show that they will be unable to each continue to pay their debts either now, or in the near future (effectively a cash flow insolvency test);

(d) are subject to the jurisdiction of the Dutch Courts so as to be bound by the WHOA.[11]

8.15 However, it should be noted that one of the disadvantages of a WHOA is that it can't be used to restructure employee rights. [12]

8.16 We have assumed from your instructions that the drivers are independent contractors of Efwon Romania and are NOT employees. As such, their claims could be restructured under the WHOA. If this is not correct, please let us know as a different strategy would need to be adopted in relation to their claims.

8.17 Further, the proposed group restructuring would provide a single platform for the adjustment of the rights of the shareholders of Efwon Romania so that KuasaNas Malaysia could acquire its 51% stake in Efwon Romania in return for its annual USD100m sponsorship. This is because a Dutch Scheme allows for the ability to amend or terminate a debtor's contracts with third parties whilst at the same time, preventing counter-parties to any agreements from relying on *ipso facto* clauses during the restructuring process.[13] In addition, it provides for a suspension of payments owed by the debtor whilst this occurs.

8.18 In addition, Article 61 of the European Insolvency Regulation states that an insolvency practitioner is entitled to request the opening of a procedure called group coordination proceedings which is intended to assist in inducing co-operation in group proceedings across Member States. The

[11] See Van Den Berg, S., Kortmann, L., Pannevis, N. and Van de Vuurst, M. (2024) "Netherlands; Restructuring & Insolvency Comparative Guide", available at https://www.mondaq.com/insolvencybankruptcyre-structuring/1400248/restructuring--insolvency-comparative-guide

[12] See Van Den Berg, S., Kortmann, L., Pannevis, N. and Van de Vuurst, M. (2024) "Netherlands; Restructuring & Insolvency Comparative Guide", available at https://www.mondaq.com/insolvencybankruptcyre-structuring/1400248/restructuring--insolvency-comparative-guide

[13] See Snijders, J. and Luten, E. (2023) "Restructruing & Insolvency 2023 (Dutch Chapter)" *International Comparative Legal Guides*, available at www.iclg.com

restructuring expert appointed over Efwon Trading and Efwon Romania would have standing to appoint a co-ordinator to help manage and co-ordinate the Dutch Proceedings with the Romanian proceedings.[14] In particular, one essential objective would be to ensure that the Efwon Romania is not wound up in Romania before Efwon Trading has had a proper opportunity to secure a compromise of its debts.

8.19 It is worth noting that participation in the formal coordination procedure is voluntary and is dependent on the discretion of the insolvency practitioner of each group entity as to whether they wish to do so. Efwon Trading should therefore seek to appoint a restructuring expert who considers that they will be able to work with the liquidator that has been proposed for Efwon Romania.

Ability to Cram Down

8.20 Each creditor or shareholder class is required to vote on a WHOA restructuring plan. The approval by a class simply requires 2/3 of the value of the claims (or nominal value of the equity) to vote in favour of the plan. If at least one "in-the-money" class or class in which the value breaks has approved the plan, it can be submitted to the Court for confirmation of it which has the effect of achieving a cross cram down in relation to the other Group company debtors.[15]

Ability to obtain a stay of claims in the Netherlands and Romania

8.21 One of the key features of a WHOA is that it enables the restructuring expert to request a stay of any claims against the debtor whilst a restructuring plan is being prepared and ultimately considered by the Court.

8.22 This mechanism could be deployed by all three debtors (Efwon Investments, Efwon Trading and Efwon Romania) before the Dutch Courts. A mirror stay could also be sought in the Romanian Court once the order has been made in the Netherlands.

8.23 Pursuant to Romanian Insolvency Law[16], there is a prohibition on commencing or continuing with any enforcement action against the debtor and its assets, upon the filing of any insolvency proceedings. Whilst this is helpful for protecting Efwon Romania from being exposed to other debt recovery proceedings (such as claims by trade creditors), it also prevents the company from being able to compromise its debt in the Dutch proceedings.

8.24 Efwon Romania should therefore make an application to the Romanian Court for leave to file its claim in the Netherlands for permission to present a restructuring plan to its creditors, in accordance with the Group restructuring proposal.

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[14] For a further discussion, see Casasola, O. and Madaus, Stephan., (2022) "Cross-border Insolvency Protocols: A Mean of Implementation of Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast at https://eprints.whiterose.ac.uk/193385/

[15] Hengst, F. (2024) "Restructuring and Insolvency in the Netherlands: Overview, *Practical Law*

[16] See Buscu, D., Popa, M. & Dobromir, D. (2024) Restructuring & Insolvency, *Lexology*

Recognition of Dutch Proceedings

8.25 Provided that the Dutch Scheme is conducted through public proceedings (as opposed to confidential proceedings), it will be automatically recognized in the EU Member States (except Denmark) pursuant to the EU Insolvency Regulation.[17]

8.26 It is also expected to be recognized in any jurisdiction which has adopted the Model Law which would therefore enable recognition in the United States.[18]

**PROCEEDINGS IN THE UNITED STATES**

8.27 Given that the COMI of Efwon Investments is likely to be Texas (having regard to the legal analysis below), it is important to commence Chapter 15 recognition proceedings in the United States to ensure that the US Lenders don't attempt to take action in the US whilst the Dutch restructuring proceedings are running their course. Efwon Investments would have the protection of a stay on any claims which could be made against it (whether by the US lenders or any other potential creditors) to give it time to achieve the restructuring of the Group in the Netherlands. Otherwise, it would be open to a US Court to readily assume jurisdiction in respect of any action taken by the US Lenders on the basis of the COMI of Efwon Investments.

8.28 On the subject of COMI, in enacting the Model Law into Chapter 15 of the Bankruptcy Code, US Congress elected to substitute the word "evidence" for "proof" to make it clear that the burden is on the foreign representative to demonstrate where the COMI lies.[19] This intention was confirmed by the Court in *Tri-Continental Exchange Ltd* where it was held that:

*"[i]n effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'centre of main interests.' However, '[t]he registered office … does not otherwise have special evidentiary value and does not shift the risk of non persuasion, ie the burden of proof, away from the foreign representative seeking recognition as a main proceeding."*[20]

[17] See Snijders, J. and Luten, E. (2023) "Restructruing & Insolvency 2023 (Dutch Chapter)" *International Comparative Legal Guides*, available at www.iclg.com

[18] See Snijders, J. and Luten, E. (2023) "Restructruing & Insolvency 2023 (Dutch Chapter)" *International Comparative Legal Guides*, available at www.iclg.com

[19] See the House of Representatives Committee on the Judiciary, United States Congress, *Bankruptcy Abuse Prevention and Consumer Protection Act* (8 April 2005), HR Report Pub L No 109-31, 112-3 [cited Hannan, N. F. (2015) "A Comparative Analysis of the UNICTRAL Model Law on cross-border insolvency in Australia, Canada, New Zealand, United Kingdom and the United States of America" *University of Western Australia, School of Law*, 2015]

[20] *In re Tri-Continental Exchange Exchange Ltd* 349 *B.R.* 627 [cited Rochelle, B. (2017) "Cross-Border Insolvency in the U.S. and U.K.: Conflicting Approaches to Defining the Locus of a Debtor's Center of Main Interests" *International Lawyer*, 2017, Volume 50, Number 2 at p.394-395]

8.29 The Courts have also adopted two lines of authorities for how to determine the COMI: (1) the "nerve centre" or "principal place of business" test; and (2) the objective third party approach.[21]

8.30 The first of these tests emerged in *Tri-Continental Exchange Ltd*[22] where the Court held that the principal place of business concept was essentially the same as the COMI. There were further judicial refinements of what the principle place of business meant in non-insolvency related cases such as *Hertz v Friend*[23] where the Court held that it amounted to the "*nerve centre*" or "*headquarters*" of the company and was the place where the company's officers "*direct, control and coordinate the corporation's activities*". In the insolvency context, other US courts have since adopted the terminology used in *Hertz.*[24]

8.31 Whichever test is ultimately applied by the US Courts, it would almost certainly conclude that the COMI for Efwon Investments is Texas.

Chapter 15 Recognition of Dutch Proceedings in the US

8.32 The Model Law's passage into the US was facilitated by the *Bankruptcy Abuse Prevention and Consumer Protection Act 2005* which created Chapter 15 of the *United States Bankruptcy Code*. The principles of Chapter 15 in relation to international insolvency were based on the Model Law.[25]

8.33 Turning briefly to the principles which the Model Law was designed to address, Chapter III created a uniform approach to the recognition of foreign insolvency proceedings through the introduction of concepts like "Foreign Main Proceedings" and "Foreign Non-Main Proceedings."

8.34 The US has embraced the Model Law by ensuring that the definition of "foreign proceeding" in s.101(23) of the US Bankruptcy Code includes proceedings in a foreign country "under a law relating to insolvency or adjustment of debt".

8.35 The expansive definition in the Bankruptcy Code has meant that US Courts have been willing to recognise as foreign proceedings, UK schemes of arrangement which restructure US law governed debts, assuming of course that the Model Law's jurisdictional requirements have been met in relation to COMI or an establishment in the UK.[26]

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[21] Rochelle, B. (2017) "Cross-Border Insolvency in the U.S. and U.K.: Conflicting Approaches to Defining the Locus of a Debtor's Center of Main Interests" *International Lawyer*, 2017, Volume 50, Number 2 at p.395.

[22] *In re Tri-Continental Exchange Exchange Ltd* 349 *B.R.* 627

[23] *Hertz Corp. v Friend 559 U.S. 77, 130 S. Ct. 1181, 175L. Ed. 2d 1029 (2009)*. For a further discussion, see Moller, C., McGovern E., Schaffer, E. & Venditto, M. (2015) "COMI and get it: international approaches to cross-border insolvencies" *Corporate Rescue and Insolvency Journal*, 2015, Volume 8

[24] See for example *In re Fairfield Sentry Ltd* 440 *B.R.* 60 Bankr. S.D.N.Y. 2010)

[25] For a further discussion see Fernandes, D. L. & Pathak, D. (2018) "Harmonizing UNCITRAL Model Law: A TWAIL Analysis of Cross Border Insolvency Law", *Asian Yearbook of International Law*, Volume 24, at pp.80-105. Hannan, N. F. (2015) "A Comparative Analysis of the UNICTRAL Model Law on cross-border insolvency in Australia, Canada, New Zealand, United Kingdom and the United States of America" *University of Western Australia, School of Law*, 2015

[26] McCormack, G. (2023) "UK contracts and modification under foreign law: time to consign the Gibbs rule to legal history?" Journal of Business Law, 2023, 4, 289-308

8.36 In *Agrokor*, the US Court undertook an analysis of Croatian insolvency law and procedure in order to assess whether its process was sufficiently fair so as to satisfy the factors set out in *Finanz AG Zurich*.[27] Having reached the conclusion that the law "tracks closely to the structure" of the US Bankruptcy Code and many other foreign insolvency laws, the US Court concluded that the procedure was fair and subject to the proper jurisdiction of the Croation Court.

8.37 As a further example of the lengths to which a US Court is prepared to go to assist a foreign Court with the enforcement of an insolvency proceeding, s. 1521(a) of the Bankruptcy Code allows the Court to award a wide variety of relief for the purpose of preserving the assets of the foreign debtor or for otherwise providing assistance in respect of the foreign proceedings.[28] That relief is "*largely discretionary and turns on subjective factors that embody principles of comity*".[29]

8.38 In addition, section 1507 of the Bankruptcy Code enables the Court to offer "additional assistance" under US law based on considerations such as whether that assistance is "consistent with the principles of comity", will reasonable ensure, among other things: (i) the just treatment of all creditors and interest holders; (ii) protection of US creditors 'against prejudice and inconvenience in the processing of claims in such foreign proceeding'; and (iii) "distribution of proceeds of the debtors property substantially in accordance with the order prescribed" in the legislation.[30]

8.39 US caselaw has made it clear that the discretionary relief available under s 1507 and 1521 extends to the recognition and enforcement of a restructuring plan or scheme of arrangement approved by a foreign court.[31]

8.40 Although there are still circumstances in which the Court may decline to grant relief – such is if isn't in the interests of the creditors and the debt's interests are also not sufficiently protected (section 1522) or if the relief would be contrary to the public policy of the US (section 1506) – recognition and enforcement of foreign insolvency proceedings in the US is much easier than it is in other jurisdictions such as the UK.[32]

8.41 Those proceedings would be filed by the "foreign representative"[33] (ie. the Dutch Restructuring Officer) and would be seeking recognition of the Dutch proceedings commenced by Efwon Investments, as Foreign Non-Main Proceedings (since the COMI of Efwon Investments is Texas).

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[27] Finanz AG Zurich v Branco Economico SA, 192 F.3D 240, 249 (2D CIR 1999)

[28] Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90

[29] Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, 329 BR 325, 333 (SDNY) [cited Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90

[30] See Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90

[31] See In Avanti Comm'ns Grp plc, 582 BR 603 (Bankr SDNY 2018); In re Rede Energia SA 515 BR 69 (Bankr SDNY 2014); In re Metcalfe & Mansfield Alternative Investments, 421 BR 685 (Bankr SDNY 2010). [cited Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90]

[32] Assuming of course that the foreign insolvency proceedings are not taking place in the European Union where legislative assistance is much greater.

[33] 11 U.S.C. s 101(24)

Chapter 15 provides discretionary relief for Foreign Non-Main Proceedings which is likely include a moratorium on any proceedings being brought in the United States.[34] This moratorium would prevent any enforcement action that might be contemplated by the US lenders against Efwon Investments in the US and therefore give it some breathing space until such time as the Dutch restructuring is approved by the Dutch Courts. We would then recommend applying to the US Court for recognition of the Dutch restructuring (once approved) on the basis that the US lenders currently have security over US assets – namely the shares in Efwon Investments.

Judicial Insolvency Network (*JIN*) Guidelines

8.42 To ensure that the parallel proceedings work effectively with the Dutch Proceedings, the debtors should take advantage of the JIN Guidelines which apply to various Courts in, amongst other places, the United States and the Netherlands.[35] The objective of the JIN Guidelines is:

*"to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction … by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted."*

8.43 One of the main benefit from these Guidelines is that they emphasise the importance of administrators in cross border proceedings working together.[36] As a result, transparency between the Courts in relation to both sets of proceedings will help facilitate the continuation of the US stay whilst the restructuring plan is approved in the Netherlands.

8.44 However, in order for the JIN Guidelines to be used, the debtors will need to apply to the respective Dutch and US Courts to seek an order or agreed protocol from the Judge that they should be adopted.

**PROCEEDINGS IN ROMANIA**

8.45 In view of:

8.45.1 the liability claims which have been made by the drivers against Efwon Romania;

8.45.2 the continuing winding up proceedings which have been field against the company; and

8.45.3 the injunction which has been issued over Efwon Romania's assets,

an application should be made to the Romanian Courts to discharge the injunction and to stay the proceedings pending the proposed restructuring.

[34] 11 U.S.C. s.1521

[35] In particular they apply to the United States Bankruptcy Court for the Southern District of Texas and the District Court Midden-Nederland in the Netherlands.

[36] See Guideline 1 at https://www.jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf

There would be good grounds for discharging the injunction once the proposed restructuring proceedings have been filed in the Netherlands. This is because control of Efwon Trading would be in the hands of an independent restructuring officer who could take control of Efwon Romania through the passing of a shareholders' resolution by Efwon Trading. The entities would also be unable to dissipate assets under Dutch law once the restructuring proceedings have been filed.

Further information that may be needed to resolve matters

8.46 In order to ensure that our strategy is appropriate, it would be helpful to have more information on the following:

8.46.1 Whether there are any other creditors (and in particular trade creditors) for any of the companies in the group so that action can be taken to protect that entity's position;

8.46.2 Whether there are any unpaid taxes or government fees owing by any of the debtor companies as they will take priority in any restructuring (and may not be able to be compromised);

8.46.3 Whether there are any employee claims against any of the debtors (as again, they may not be able to be compromised). You will note above that for the purposes of this advice, we have assumed that the drivers are independent contractors, not employees, and can have their claims potentially crammed down;

8.46.4 Whether there are any potential claims which may exist against the directors of any of the debtor companies for negligence, misfeasance or some other type of wrongful conduct. If so, their position will need to be considered, especially if they have contractual indemnities from the relevant debtor in their terms and conditions of employment;

8.46.5 Whether there are any defaults under the loan which entitle the US Lenders to immediately appoint Receivers over the shares of Efwon Trading and to vote those shares. If so, they could control that debtor via shareholder resolutions and interfere with the proposed restructuring strategy.

Should Efwon (with hindsight) have structured through England rather than the Netherlands?

8.47 It is fortunate that Efwon Trading was not incorporated in England as that would have required additional restructuring proceedings in Romania to deal with the claims by the drivers as well as restructuring proceedings in the US (to deal with the US governed debt owing to the US lenders), due the longstanding operation of the rule in *Gibbs*.[37] This common law principle, which has been in existence for over 130 years, provides that the discharge of a debt under foreign insolvency law will not be given effect in the UK in circumstances where the contract under which the debt has arisen, is governed by UK law. The rationale for that principle is that it would otherwise enable the laws of a foreign jurisdiction to determine the rights and obligations of the parties, to which

[37] *Antony Gibbs & Sons v La Societe Industrielle team Commerciale des Metaux* [1890] LR 25 QBD 399

they had not agreed to be bound. The rule promotes a territorialist approach to cross-border insolvency which is contrary to what is intended under the Model Law. This is because it prioritises the rights of local contracting parties above those of a collective body of creditors which is inconsistent with the global aspiration of a single system of adjudication and distribution.

8.48 Proponents of the *Gibbs* principle advocate that it provides certainty on the jurisdiction and governing law for insolvency and prevents opportunistic creditors from engaging in forum shopping.[38] It was also observed by the English Court of Appeal in *Bakhshiyeva*[39] that the rule prevents a party from unilaterally amending the terms of the agreement insofar as it relates to any restructuring process which might be undertaken. In that case, the Court expressly rejected the use of the Model law in a manner which was designed to circumvent the rule in *Gibbs*.

8.49 The law on recognition and assistance in the UK then evolved somewhat with the leading Privy Council decision of *Cambridge Gas*.[40] In that case, Lord Hoffman developed a new rule for the recognition of insolvency related judgments and its application even extended to the recognition of US judgments on Chapter 11 plans of reorganisation, thus taking a step forward for the promotion of universalism ideals.

8.50 In short, it was Lord Hoffman's view that common law assistance must at least be able to extend to giving provision for whatever could have already been done had it been a domestic insolvency meaning that local remedies under English law were then suddenly available. This was a significant development in English common law and had the benefit of avoiding the need to commence parallel proceedings in the UK Courts in relation to foreign insolvency proceedings.[41] The other important feature of the decision is that it provides for judicial assistance for creditors who did not participate in, or submit to, the foreign proceedings.

8.51 However, that all changed in 2012 with the UK Supreme Court's ruling in *Rubin*.[42] In that case, it was held that the English court would not enforce a judgment made by a New York court in insolvency proceedings to which the defendant did not submit. The justification for that decision was to prevent English parties from being subject to proceedings of a foreign jurisdiction to which they did not agree to be bound. *Rubin* has been followed with support in the subsequent decisions in *Saad Investments*[43] and *Singularis*.[44]

8.52 Having regard to the current state of English case law (and the continued application of the rule in Gibbs), it is helpful that Efwon Trading was not structured through England since it would have required 3 sets of restructuring proceedings in England, Romania and the US to ensure that each

[38] See for example, Elliot, P. "Cambridge Gas – so much hot air?" (2012) 6 *C.R. & I*. 217 and Baird, K. "No more crystal ball glazing" (2013) *Spr. Recovery* 8

[39] *Bakhshiyeva v Sberbank of Russia* [2019] B.C.C. 452 at [93].

[40] *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] *B.C.C* 962

[41] For a discussion on the pros and cons of parallel proceedings, see Vaccari, E. (2022) "WHOA, Brexit! What future for London as Europe's (largest) insolvency forum?" *Journal of International Banking Law and Regulation*, 2022, 37(2), 46-68

[42] *Rubin v Eurofinance* SA [2012] UKSC 46.

[43] *PricewaterhouseCoopers v Saad Investments Ltd* [2015] *B.C.C*. 53

[44] *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] *B.C.C*. 66

of the debts were compromised in the forum of the law which governs them to then enable them to be recognised and enforced in England.

## 9. STRATEGY FOR ACHIEVING CONSENSUAL SOLUTION

9.1 We recommend that the we encourage all of the stakeholders to enter into a standstill agreement for at least 30 days to provide the parties with a reasonable period of time in which to explore a consensual solution. We also recommend that the stakeholders be encouraged to follow the INSOL Statement of Principles for a Global Approach to Multi-Creditor Workouts.[45] Those principles provide a protocol to assist the parties with achieving a consensual out-of-court restructuring and include the following:

9.1.1 Agreeing a standstill period (First Principle);

9.1.2 Refraining from taking any action which might adversely affect the return to creditors as compared with the date of commencement of the standstill period (Third Principle);

9.1.3 Having transparent access to all relevant financial information relating to the debtor's business (Fifth Principle).

9.2 Irrespective of whether all parties are prepared to sign a standstill agreement, we consider that the proposal set out below has a realistic prospect of being agreed by the stakeholders as it is fair and reasonable to everyone's respective positions as different ranking creditors.

9.3 If the parties are willing to agree to this, it would then avoid the need for any Court proceedings which would not only save the Group time and money, more importantly, it would avoid any negative reputational connotations which are associated with formal restructuring proceedings.

9.4 Unfortunately the INSOL Statement of Principles are not automatically binding on the parties. If some of the parties are not prepared to agree to an arrangement that is materially similar to what we have suggested below, we recommend that we be instructed to commence proceedings in the Netherlands and in the United States to compromise the creditors' respective positions by way of schemes of arrangement, as set out earlier in this advice.

<u>Proposal</u>

9.5 We note that the sponsorship offer from KuasaNas is critical in order for the Efwon Group to service its debt levels and that there isn't time to identify any other potential investors. We also note that a condition of that sponsorship is that KuasaNas be given a 51% stake in Efwon Romania in return for its cash injection.

[45] https://www.insol.org/getmedia/06c2de67-b34c-4163-8834-bc6db0d8315b/STATEMENT-OF-PRINCIPLES-FOR-A-GLOBAL-APPROACH-TO-MULTI-CREDITOR-WORKOUTS-II.pdf

9.6 Without this funding, it is likely that the Group will collapse and both sets of lenders will seek to recover whatever they can. That recovery would be limited to the value of Efwon Romania's ownership of the F1 team and the F1 licences (and in the case of the US Lenders, to the additional limited value of USD75 million in relation to the security which they hold over the homes of Mr Maximov. Those assets could be realised by the two sets of lenders in the manner set out in sections 5 and 6 of this advice above.

9.7 We understand that the market value of those assets is not sufficient to satisfy either of the loans and would result in a significant shortfall in the lenders' recovery. For those reasons, the following proposal is likely to be of interest to the relevant stakeholders:

9.7.1 The US Lenders:

9.7.1.1 suspend any repayment obligations owed to them under the loan for a period of 12 months to enable the team to improve its operations and ultimate positioning in the races through the deployment of the sponsorship funds (which will then generate greater broadcasting revenue);

9.7.1.2 agree to what is effectively a release of some of their security (through KuasaNas' acquisition of 51% of the shares in Efwon Romania which they currently hold a beneficial interest in indirectly, through their share pledge over the shares of Efwon Trading);

9.7.1.3 In return, the US Lenders will receive an additional 1% interest on the interest payments due under the loan once the servicing of it resumes. Further, Efwon Romania and Efwon Singapore would make them second in time guarantors (after the Monaco Lender) which would not only provide them with additional security, it would also mean that their relative position against the other stakeholders remains the same so that they are second to the Monaco Lender but ahead of KuasaNas.

9.7.2 The Monaco Lender:

9.7.2.1 suspends any repayment obligations owed to it under the loan for a period of 12 months for the same reasons as for the US Lenders;

9.7.2.2 agrees to Efwon Romania and Efwon Singapore becoming guarantors of the loan from the US Lenders to Efwon Investments but second in time to the guarantee given to the Monaco Lender**;**

9.7.2.3 In return, it will also receive an additional 1% interest on the interest payments due under the loan once the servicing of it resumes;

9.7.3 The drivers agree to accept a settlement of up to USD10 million in relation to their claims (subject to further analysis of the quantum of their claims, the details with which we have not yet been provided). However that sum is not payable for 6 months to give the Group time to improve its operational revenue as a result of the injection of funds from KuasaNas;

9.7.4 Efwon Investments agrees to suspend any repayment obligations under the loan owed to it by Efwon Trading for a period of 12 months.

9.8 The main benefits of this proposal are that:

9.8.1 None of the stakeholders have to take a haircut on their recovery - they just have to simply wait longer to receive it but in return, the Lenders all benefit from a 1% uplift on interest;

9.8.2 It preserves the relative positions of the creditors. Given that KuasaNas would be acquiring a majority stake of Efwon Romania (which would diminish the value of the security held by the US Lenders in circumstances where there is no such concession given by the Monaco Lender), the second in time guarantees given by Efwon Romania and Efwon Singapore to the US Lenders would enable them to retain their position as creditor relative to the Monaco Lender.

## 10. CONCLUSION

10.1 As set out above, we have suggested a proposal which seeks to achieve a consensual out-of-court restructuring.

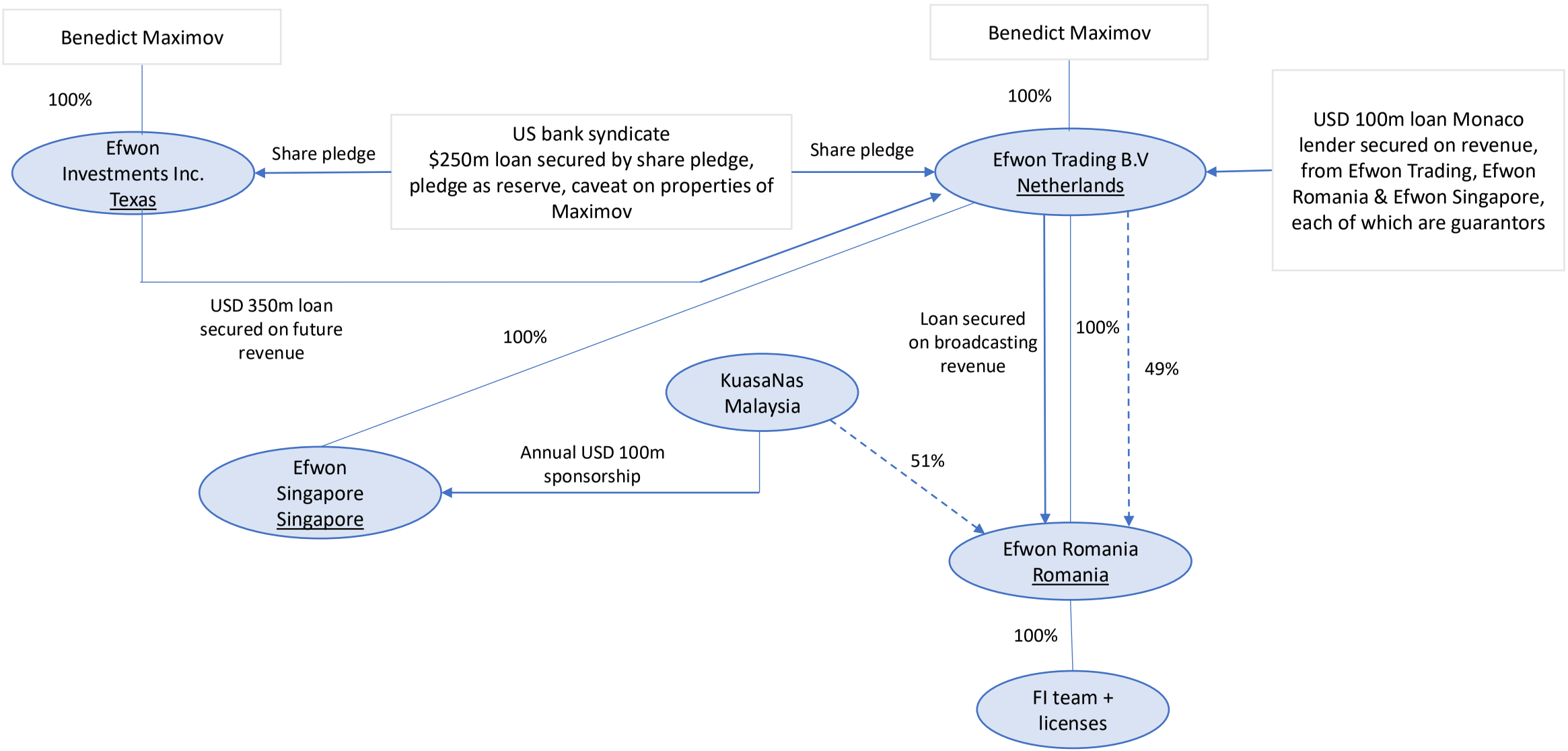
10.2 If that is not possible, we recommend initiating the proceedings outlined in section 8 to force through the proposed Group restructuring through the Dutch Courts (via a scheme of arrangement), together with ancillary proceedings in the US and Romanian Courts. That approach will give the Group a viable strategy for restructuring its debts.

10.3 We hope this advice is of assistance. Please do not hesitate to contact us if you have any questions.

**NOBLE SOLICITORS LLP**

**15 April 2024**

# Annexure 1


Benedict Maximov
100%
Efwon Investments Inc. Texas
Share pledge
US bank syndicate $250m loan secured by share pledge, pledge as reserve, caveat on properties of Maximov
Share pledge
Benedict Maximov
100%
Efwon Trading B.V Netherlands
USD 100m loan Monaco lender secured on revenue, from Efwon Trading, Efwon Romania & Efwon Singapore, each of which are guarantors
USD 350m loan secured on future revenue
100%
Loan secured on broadcasting revenue
100%
49%
KuasaNas Malaysia
Annual USD 100m sponsorship
51%
Efwon Singapore Singapore
Efwon Romania Romania
100%
FI team + licenses