

Case Study 2: Efwon Trading

Dear Benedict

1. You have asked for advice in connection with the proposed KuasaNas transaction and in particular, how the insolvency issues affecting the Efwon group companies can be dealt with in order to facilitate that transaction.
2. We have considered how best to protect your position and that of the Efwon Group in light of the proposed sponsorship deal with KuasaNas, whereby: (i) KuasaNas will advance sponsorship funding in excess of \$200m per year in exchange for a majority (51%) stake in the group; subject to: (ii) all insolvency issues affecting each of Efwon Investments, Efwon Trading and Efwon Romania being resolved.
3. The most pressing point is to preserve the value of the group and to ensure that no value-destructive steps are taken whilst the proposed KuasaNas deal goes through.
4. We understand that the Efwon group is a multinational group comprising four separate entities, each of which is incorporated and has assets and creditors in different jurisdictions across the globe. Our analysis of each individual entity within the group is set out below.

Group Structure, Financing Arrangements, Stakeholders, Potential Claims and Assets

5. A structure chart in connection with the Efwon group, together with its borrowing arrangements, is set out in the appendix to this note.
6. Our understanding in respect of each entity, as reflected in that structure chart, is that:

Efwon Investments

7. Efwon Investments is incorporated in Delaware. It faces potential recovery actions from a syndicate of American banks in connection with \$250m lent to it in or around early 2010. That loan is partly secured against: (i) various of your properties; (ii) a pledge on projected revenue flowing back from the underlying investment (i.e. revenues flowing through Efwon Trading); and (iii) a pledge over your shares in Efwon Investments. The loan is also subject to a negative pledge for the entire value of the loan. The loan is due to be repaid shortly in 2020¹ and there may be a default, to the extent that Efwon Romania defaults on its obligations to Efwon Trading and Efwon Trading in turn defaults on its obligations to Efwon Investments.
8. In terms of assets, Efwon Investments has a claim/recovery action against Efwon Trading in respect of the \$350m loan made to Efwon Trading in early 2010. Efwon Investments may also have some cash as a result of revenues generated in 2011-2013, in respect of which "*some was re-invested (i.e. into Efwon Romania) and some used to begin the upstream flow of repayments to Efwon Trading and the latter in turn to Efwon Investments,*"

¹ This advice proceeds on the assumption that it is sought in early 2019.

and also further upstream repayments in 2015-2017. It is unclear where this cash is held (we anticipate it is held in US bank accounts, but please can you confirm). Please can you also confirm whether Efwon Investments holds any other assets (and if so, where).

Efwon Trading

9. Efwon Trading is incorporated in England & Wales. It faces potential claims from: (i) Efwon Investments, in connection with the \$350m intercompany loan made to Efwon Trading in or around early 2010, which loan is secured on future revenue from Efwon Trading's trading activities; and (ii) the Monaco-based lender, in connection with the high-interest loan for \$100m entered into in connection with the 2014 season, and which is also secured on revenue from Efwon Trading's trading activities.
10. In terms of assets, Efwon Trading has a claim/recovery action against Efwon Romania in respect of the \$350m loan made to Efwon Romania over the course of three years². Efwon Trading also holds all of the shares in its (wholly owned) subsidiary Efwon Romania. Efwon Trading may also have some cash, again as a result of revenues generated in 2011-2017 (i.e. as above for Efwon Investments), although it is unclear whether any cash remains or, alternatively, whether all cash has already been applied in repayment of the loans advanced by Efwon Investments and/or the Monaco lender. It is unclear where this cash (if any), which is dollar denominated, is held. Please can you confirm and please can you also confirm whether Efwon Trading holds any other assets (and if so, where).
11. Our understanding is that Efwon Trading is essentially a financing vehicle and does not conduct any operations other than: (i) to borrow and then onwards loan to Efwon Romania, the funds it receives/has received from Efwon Investments and the Monaco lender; and (ii) to receive distributions from Efwon Romania and then make onwards distributions to its stakeholders (being its two creditors, Efwon Investments and the Monaco lender, and also its shareholder(s) (which we understand to be you)³.

Efwon Romania

12. Efwon Romania is incorporated in Romania and is a wholly owned subsidiary of Efwon Trading. It faces potential claims from: (i) Efwon Trading, in connection with the secured \$350m intercompany loan made to Efwon Romania over the course of three years⁴; and (ii) substantial damages claims brought by the Romanian drivers before the Romanian courts (the Romanian drivers being, for present purposes, contingent unsecured creditors). The drivers have filed for the insolvency of Efwon Romania and obtained interim freezing injunctions over its assets and income, such that Efwon Romania will default on payments to be made to Efwon Investments in 2019.

² Efwon Trading lent as follows: (i) \$150m in 2010/2011; (ii) \$100m in 2012; (iii) \$100m in 2013. Some repayments have been made (a small amount may have been repaid from the \$30m revenue generated in 2011 and a larger amount from the \$60m revenue generated in 2012; further repayments may have been made in 2013; more repayments were made in 2015-2017). We would be grateful if you would please confirm which law governs the intercompany debt.

³ See the structure chart in the Appendix.

⁴ See footnote 1.

13. In terms of assets, Efwon Romania owns business and stock, several machines and the FIA competition license itself (which we understand has substantial value, having been expensive and time consuming to procure). Efwon Romania may also have goodwill and have cash in the form of amounts that have been re-invested in the team over the years. It is unclear where this cash (if any) is held. Please can you confirm and also confirm whether Efwon Romania holds any other assets (and if so, where).

Efwon Hong Kong

14. Efwon Hong Kong is incorporated in Hong Kong and is a wholly owned subsidiary of Efwon Romania. It is responsible for dealing with potential sponsors (including KuasaNas) and does not itself face any claims.

Key risk

15. The key risk to the group arises from the filing of insolvency proceedings in respect of Efwon Romania. The assets of Efwon Romania are now frozen, meaning that a default on its obligations to Efwon Trading is imminent. A default at the Efwon Romania level will mean a default at the Efwon Trading and Efwon Investments levels in turn, leaving those entities also facing significant solvency issues and creditor recovery action.

Proposed restructuring

16. The proposed restructuring involves equity capital injections, whereby KuasaNas will commit to annual funding of in excess of \$200m, in exchange for the ability to acquire a majority stake in the team. In order to effect that transaction, our understanding is that shares will be issued by Efwon Romania to KuasaNas, with the outcome that Efwon Trading's shareholding in Efwon Romania will be diluted (i.e. KuasaNas will hold 51% of the shares in Efwon Romania and Efwon Trading will hold the remaining 49%). The corporate structure will otherwise remain unaffected. Please confirm that our understanding is correct. In particular, please can you confirm that is envisaged that KuasaNas will acquire shares at the Efwon Romania level⁵.

Summary of proposed options

17. Option 1:

18. A 'free-standing' Chapter 11 filing in respect of each of Efwon Investments, Efwon Trading and Efwon Romania, with no insolvency procedures instigated anywhere else. In this respect there would be a 'procedural consolidation' of the three sets of insolvency

⁵ One alternative, for example, would be for KuasaNas to invest its \$200m for a majority 51% stake at the Efwon Trading level, rather than the Efwon Romania level. However, it seems to us that that would be highly unattractive for KuasaNas, because it would mean that its right to a return on its investment (in its capacity as shareholder) would essentially be relegated, or rank behind, the rights of the Monaco lender and Efwon Investments, in their capacities as creditors to Efwon Trading. By contrast, with an investment at the Efwon Romania level, KuasaNas would receive 51% of any distributions from Efwon Romania, with Efwon Trading (and through Efwon Trading, the Monaco Lender and Efwon Investments) receiving the remaining 49%.

proceedings, whereby they would be combined and heard by a single bankruptcy judge, who will co-ordinate them.⁶

19. Option 2:

20. A Chapter 11 filing in respect of each of Efwon Investments, Efwon Trading and Efwon Romania, together with an application for recognition in respect of those Chapter 11 filings: (i) if necessary; and (ii) if possible, for:

- a. Efwon Trading, in England, under either:
 - i. the UNCITRAL Model Law (incorporated in England and Wales pursuant to the English Cross-Border Insolvency Regulations (**CBIR**); or alternatively
 - ii. English common law principles.
- b. Efwon Romania, in Romania, again under the UNCITRAL Model Law (adopted in Romania in 2002⁷).

21. Option 3:

22. If recognition of Efwon Trading and/or Efwon Romania's respective Chapter 11 filings is not possible, then (in addition to Efwon Investments' Chapter 11 filing) local filings in respect of:

- a. Efwon Trading (an administration allowing for the reorganisation of the company under the protection of a statutory moratorium); and
- b. Efwon Romania (an application under the version of the EU Directive on Restructuring and Insolvency of 20 June 2019⁸ that we understand that Romania has implemented).

23. In addition, and again to the extent necessary, applications for the recognition of these local insolvency proceedings may then be made overseas. For example:

- a. To the extent that Efwon Trading and/or Efwon Romania have assets in the US that may be vulnerable to recovery actions, recognition of the local proceedings may be sought in the US under Chapter 15 (being the US iteration of the UNCITRAL Model Law).

⁶ Notably, procedural consolidation does not result in a pooling of assets and liabilities as between different entities. In this respect, procedural consolidation can be distinguished from 'substantive consolidation', where there is a substantive combination of the estates of two or more entities to form one single estate for the purposes of the insolvency proceeding.

⁷ https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

⁸ EUR 2019/1023. Note that in relation to each entity, local legal advice will be required.

- b. To the extent that Efwon Romania has assets in Europe, recognition of local proceedings is automatic under the European Insolvency Directive⁹.

24. Note that in relation to each of the options above, we do not recommend that any steps be taken in relation to Efwon Hong Kong (there being no identifiable need to take such steps).

Option 1: 'free-standing' Chapter 11 relief

Overview

25. There is merit in giving serious consideration, in respect of *each* of Efwon Investments, Efwon Trading and Efwon Romania, towards filing voluntary petitions for their Chapter 11 bankruptcy.
26. Chapter 11 is a powerful restructuring tool that is available to almost any entity worldwide (*irrespective* of where that entity is incorporated), provided those entities have property in the US. One of the advantages of Chapter 11 is that it provides a centralised forum for reorganisation that allows debtors to continue with their business and operations (as 'debtors in possession') under the supervision of the US bankruptcy court.
27. Importantly, under 11 U.S.C §362(a), the filing of a Chapter 11 petition gives rise to an automatic worldwide stay on creditor actions (subject to certain exceptions under 11 U.S.C §362(b)) that are not relevant in the circumstances) that may, depending on the circumstances of the case, be recognised and applied by the courts of other jurisdictions. The automatic stay will allow the Efwon group breathing room whilst the KuasaNas transaction goes through the review process with the Malaysian government.
28. One of the other key advantages of Chapter 11 is that, unless the Bankruptcy Court orders otherwise¹⁰, the debtor and its management will remain in possession of the debtor's business and property throughout the Chapter 11 process. They will have nearly all of the powers and the duties of a trustee appointed by a US Bankruptcy Court.

Eligibility

29. 11 U.S.C § 109 provides that persons residing or with a domicile, place of business or property in the US, or a municipality, may be a debtor for the purposes of the US Bankruptcy Code. Within the context of a corporate group (including for these purposes a multinational corporate group such as the Efwon group), the eligibility test must be applied to each individual debtor¹¹. The test for eligibility is the date of the filing of the petition¹².

⁹ EUR 2015/848. However, see further below in relation to the impact of Brexit, in relation to any assets held in the UK.

¹⁰ A trustee may be appointed in circumstances where, for example, there is a suggestion of fraudulent or dishonest activity, or where the business has been grossly mismanaged or abandoned. We do not consider, based on the facts presented, that this is the likely to be the case here.

¹¹ See *Bank of America v World of English*, 23 B.R. 1015, 1019-20 (N.D.Ga.1982)

¹² See for example *In re Axona International Credit & Commerce, Ltd* 88 B.R. 597, 614-615 (Bankr. S.D.N.Y. 1988), applied in *In re Global Ocean Carriers Ltd* 251 B.R. 31,39 (Bankr. D Del 200)

30. Accordingly:

- a. Efwon Investments is incorporated in Delaware and therefore qualifies as a debtor for the purposes of a Chapter 11 filing (because it has a domicile, place of business and property there).
- b. Efwon Trading and Efwon Romania are incorporated in England and Romania respectively and will not therefore qualify as debtors *unless* they have some place of business or property in the US. For this reason, we would be grateful if you could confirm whether these entities hold any assets or property in the US. There is no requirement that assets/property held in the US need to be substantial: a *de minimis* amount will be sufficient¹³ and eligibility may be 'procured' by, for example, transferring money into a retainer account held by US legal counsel prior to filing. This advice, accordingly, proceeds on the assumption that both entities *will* be eligible to file for Chapter 11 protection, on the basis that they have (or will have) property in US as at the date of the filing.

Risks associated with Option 1

31. The key risk is one of recognition and enforcement of the US proceedings (and in particular the worldwide stay) in respect of Efwon Trading and Efwon Romania. For those entities, there may be a need for additional protection (for example, in the form of recognition of their respective Chapter 11 proceedings) because:

- a. Efwon Trading faces claims from (i) Efwon Investments (i.e. an intercompany claim); *and* (ii) the Monaco lender. As to those possible claims:
 - i. Efwon Investments has an obvious nexus to the US (because, amongst other things, it is incorporated in Delaware) and, in that regard, is highly unlikely to wish to breach the automatic stay on creditor actions, in breach of an order of the US bankruptcy court (i.e. Efwon Trading's Chapter 11 proceedings). In addition, you are of course the shareholder of Efwon Investments and it would make no sense, having filed for Chapter 11 relief on behalf of Efwon Trading, for you to procure¹⁴ that Efwon Investments brings a creditor recovery action against Efwon Trading in breach of the Chapter 11 automatic stay.
 - ii. However, it is not clear whether the Monaco lender has any nexus to the US or, in other words, whether it would be prepared to breach an order of the US bankruptcy court staying creditor actions against Efwon Trading by instigating some form of recovery action. The Monaco lender would not be subject to the jurisdiction of the US courts. That being the case there may be an additional need, once Efwon Trading has filed for Chapter 11, to bring

¹³ See *In re Global Ocean Carriers Ltd*, in which funds held in a bank account, and a retainer paid over to US counsel, was sufficient to found eligibility for the purposes of a Chapter 11 filing. For a further example, see *In re Yukos Oil Company* 321 B.R. 396 (Bankr. S.D.Tex 2005).

¹⁴ i.e. by exercise of power in your capacity as shareholder of Efwon Investments.

recognition proceedings in England and Wales under the UNCITRAL Model Law (implemented in England and Wales, in modified form, pursuant to the Cross-Border Regulations 2006 (**CBIR**)) or at common law, the benefit of which will be to procure a stay on creditor recovery action. There may be a need to do so, to the extent that assets held by Efwon Trading are not held in the US. We address recognition issues under the Model Law and common law further below.

- b. Efwon Romania faces claims from Efwon Trading (i.e. an intercompany claim) and from the Romanian drivers. Again, there may be a need to bring an application for recognition in Romania (again, under the UNCITRAL Model Law) in order to enforce the automatic stay in effect by virtue of the Chapter 11 proceedings. In particular, we note that the Romanian drivers are unlikely to be subject to the jurisdiction of the US courts (and they have, in any event, already filed for Efwon Romania's insolvency locally). Our understanding is that many of Efwon Romania's assets are held in Romania, not the US.
32. It may be possible to circumvent some of these risks so as to obviate the need and the burden of instituting additional local insolvency procedures. For example, it may be possible to negotiate some form of imposed or voluntary stay outside of the US with non-US creditors: however, it is unclear to us at this stage whether, for example, the Monaco lender or the Romanian drivers would be amenable.

Option 2: Chapter 11 filing together with recognition applications overseas

33. For the reasons set out above (i.e. the risks inherent in making 'standalone' Chapter 11 applications), there may be a need to seek recognition of Efwon Trading and Efwon Romania's respective Chapter 11 filings.

UNCITRAL Model Law

34. The UNCITRAL Model Law applies in England (subject to certain modifications as set out in the CBIR) and in Romania where assistance is sought by a foreign court or foreign representative in connection with a foreign proceeding¹⁵.
35. The Chapter 11 proceedings relating to Efwon Trading and Efwon Romania would fall within the definition of "*foreign proceedings*" on the basis they are each a collective judicial proceeding in the US, pursuant to the US Bankruptcy Code, in which Efwon Trading and Efwon Romania's assets and affairs are subject to control or supervision by the US Bankruptcy Court, for the purpose of reorganisation¹⁶.

¹⁵ See the Model Law (set out at Schedule 1 of the CBIR) at Article 1(a).

¹⁶ See the Model Law at Article 2(i). The expression "*reorganization*" is not specifically defined in the CBIR, but definitions can be found in the *UNCITRAL Legislative Guide on Insolvency Law* at Legislative Guide, Preface, para 12(kk): "*The process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern.*"

Efwon Trading and Efwon Romania's Centre of Main Interests (COMI)

36. Under Article 15 of the English Model Law, a foreign representative of Efwon Trading may apply to the court for recognition of the Chapter 11 proceedings, and those proceedings shall (subject to certain exceptions, including those concerning public policy) be recognised under Article 17, provided they fall within the definition of either a 'foreign main proceeding' or as a 'foreign non-main proceeding', where:

- a. *Foreign main proceeding* means a foreign proceeding taking place in the state in which Efwon Trading/Efwon Romania have their COMI;
- b. *Foreign non-main proceeding* means a foreign proceeding, other than a foreign main proceeding, taking place in a state in which Efwon Trading/Efwon Romania have an establishment; and
- c. *Establishment* means any place of operations where Efwon Trading/Efwon Romania carry out a non-transitory economic activity with human means and assets or services¹⁷.

37. In terms of additional information required, we therefore need to ascertain (for the purposes of any application for recognition) where Efwon Trading/Efwon Romania's respective COMIs are located.

38. Efwon Trading is incorporated and therefore has its registered office in England and Wales. Efwon Romania is incorporated and therefore has its registered office in Romania. That being the case there is a rebuttable presumption under the Model Law that the COMI of those respective entities is England and Romania¹⁸. That presumption can, however, be rebutted if there are factors in relation to the debtors that are both objective and ascertainable by third parties (essentially, to creditors of Efwon Trading and Efwon

¹⁷ See the Model Law at Article 2(g), 2(h) and 2(e) respectively.

¹⁸ For a helpful summary, see *In re Entertainment Limited* at [5], per Mr Jeremy Cousins QC:

"It is clear from the decision of the Court of Appeal in Stanford International Bank Limited [2011] 1 Ch 33 that, in deciding issues as to COMI for purposes of the UNCITRAL Model Law, which is given effect in English law by the 2006 Regulations, I am to apply the test promulgated by the European Court of Justice in the case of Eurofood IFSC Limited [2006] Ch 508. The effect of this decision is that, under the European Council Regulations on Insolvency Proceedings, there is a rebuttable presumption that the registered office is the company's COMI; see the judgment of the European Court at paras 34 and 35, which are in the following terms:

"34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

"35. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated."

Romania, including the Monaco lender) that enable it to be established that their COMIs are in fact elsewhere.

39. With the above in mind, it would be helpful to understand: (i) from where Efwon Trading/Efwon Romania's business activities, direction and operations are carried out; (ii) whether they have offices in England/Romania (rather than simply a post box or 'letterbox' office); (iii) who the directors are, their nationalities and where they are resident; (iv) where board meetings are held; (v) what the Efwon website says about its business (for example, whether it makes clear that it is a US concern or forms part of a group in the US, and which phone numbers are provided); (vi) where these entities conduct their banking (as above)¹⁹; (vii) whether the entities have any staff, and where they are based; (viii) where its customer and creditor relationships are established (aside from in respect of the Monaco lender); (ix) whether any representations have been made to the Monaco lender as to whether Efwon Trading's COMI is situated²⁰.

40. It seems to us Efwon Trading's COMI may be in:

- a. England, where it has its registered office, and where its COMI is therefore presumed to be; or
- b. the United States, on the basis that its main purpose, as set out above, is essentially to act as a financing vehicle, i.e. to receive and distribute funds. We also note our understanding that the Efwon Group is ultimately beneficially owned by you (and you are a US citizen). There may, in addition, be other reasons as to why the COMI is the US, depending on, for example, the answers to the factors (i) to (ix) set out above; or
- c. Romania. The value in the Efwon Group is held at the Efwon Romania level. Efwon Trading's investments are in Efwon Romania. Investors in Efwon Trading know that ultimately the main asset in question is a Romanian F1 team.

41. It seems to us that Efwon Romania's COMI may be in:

- a. The US, on the basis that the Efwon Group is ultimately beneficially owned by a US citizen, or for other reasons; or
- b. Romania.

42. Note that we do not consider that recognition of either Efwon Trading or Efwon Romania's Chapter 11 proceedings would be possible under the UNICITRAL Model Law as a *foreign non-main proceeding*. As far as we are aware, neither Efwon Trading nor Efwon Romania

¹⁹ These were all factors that were considered in *In re Entertainment Limited* and which, on the facts of the case, led the Judge to conclude that the debtor's COMI was in the US notwithstanding its incorporation in England.

²⁰ See further *In re Videology Ltd* [2018] EWHC 2186 (Ch), in which the Judge refused to recognize Chapter 11 proceedings as foreign main proceedings (but did recognize them as foreign non-main proceedings).

have an establishment in the US (viz. a place of operations where they carry out a non-transitory economic activity with human means and assets or services).

Alternative to recognition of Efwon Trading's Chapter 11 under the Model Law: recognition and assistance under English common law

43. To the extent that recognition of Chapter 11 proceedings is not possible under the CBIR, it may be possible to look to the English common law (although the position is not entirely settled and we would recommend seeking local advice). Recognition and assistance in England, in respect of Efwon Trading's Chapter 11 proceeding, may be possible at common law notwithstanding that Efwon Trading is not incorporated in the US²¹.

Option 3: local proceedings and (if required) recognition overseas of those local proceedings, as necessary

44. As an alternative to recognition applications (for example, if recognition is refused in England or Romania, on the basis (for example) that the COMI of Efwon Trading/Efwon Romania is *not* in the US), it may be necessary to institute local proceedings.

Efwon Trading

45. The key risk with Efwon Trading arises in respect of possible recovery actions taken by the Monaco lender which might derail the group restructuring. That being the case, consideration may need to be given to the possible appointment of an insolvency practitioner as Efwon Trading's administrator. One of the consequences of entry into administration is the imposition of a statutory moratorium on creditor action, which restricts the ability of third parties (in this case the Monaco lender) to enforce their rights against the company without the prior consent of the administrator or the Court.

Efwon Romania

46. Because the Romanian drivers have filed for insolvency and obtained interim freezing injunctions over its assets and income, there is a real risk: (i) of a liquidator being appointed; and (ii) the liquidator taking steps to sell Efwon Romania's assets without regard to the group's overall reorganisation strategy, including in connection with the potential KuasaNas cash injection.

²¹ "The general approach of the English law in recognising foreign insolvency proceedings at common law has been to regard the proper forum for such proceedings as being the place of the company's incorporation (which is usually equated with the place of the company's domicile), and thus to recognise proceedings taking place in that forum." (See *Cross-Border Insolvency*, 4th Edition, Richard Sheldon QC, at [6.22]). The same text goes on to state, however, that "It does not inevitably follow that no other foreign insolvency proceeding [i.e. aside from insolvency proceedings instituted by the law of the place of incorporation] is capable of being recognised in England" (see [6.68] et seq.). The issue of recognition under English common law principles remains a complex area of law. Again, we recommend that specialist local legal advice is sought.

47. On the assumption²² that Romania has fully implemented the European Directive 2019/1023 on preventive restructuring frameworks²³ (**Directive**), this means that Efwon Romania 'will have access to a preventive restructuring framework that enables it to restructure with a view to preventing insolvency and ensuring its viability, without prejudice to other solutions for avoiding insolvency.'²⁴
48. Efwon Romania will be able to access the framework on the basis that it remains totally, or at least, partially, in control of its assets and the day-to-day operation of its business on a debtor in possession basis.²⁵ Efwon Romania will also benefit from a stay on individual enforcement actions to support the negotiations of a restructuring plan,²⁶ meaning that any enforcement actions brought by the Romanian drivers will be put on hold.

Overseas recognition of local proceedings

49. As alluded to above, there may be need to couple the Efwon Trading/Efwon Romania local filings with recognition applications overseas. Whether this is necessary ultimately depends on whether there are assets and/or claims to protect overseas.
50. In the US, applications for recognition proceed under Chapter 15 of the US Bankruptcy Code (which is the US iteration of the UNCITRAL Model Law)²⁷.
51. In the UK, recognition may be possible under the UNCITRAL Model Law (as addressed above); *automatically* under the European Insolvency Directive²⁸ (**EIR**) where the COMI of the debtor is located in the EU; at common law; or under statute²⁹.
52. In Romania, recognition may be possible under the UNCITRAL Model Law (addressed above) or automatically under the EIR where the COMI of the debtor is located in the EU.
53. We note that Efwon Trading holds assets in Romania (being the shares in Efwon Romania, which is incorporated in Romania and which is likely to hold its share register there). That being the case, helpfully, the EIR *would* apply automatically in the UK on the basis that the administration of Efwon Trading is a public collective proceeding based on laws relating to insolvency in which, for the purposes for the purpose of rescue, adjustment of debt, reorganisation or liquidation, a temporary stay of individual enforcement actions is granted

²² [Assumption as stated]

²³ The full text of which can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN>

²⁴ See Article 4(1) of the Directive

²⁵ See Article 5(1) of the Directive

²⁶ See Article 6(1) of the Directive

²⁷ It would also be possible to bring a US secondary filing under Chapter 11 filing, but given the costs involved, this appears to be unnecessary on the facts. Secondary Chapter 11 filings are unlikely to be worth the cost and burden unless there exist compelling advantages. One of the key advantages of a Chapter 11 filing is that it is possible to bring US powers (for example US avoidance provisions). This would not be possible under a Chapter 15 filing (where it may be possible to use local, but not US, powers).

²⁸ But see below in relation to Brexit.

²⁹ Recognition under statute (the Insolvency Act) may also be possible; we do not address this further in this note.

by a court or by operation of law, in order to allow for negotiation between the debtor and its creditors³⁰.

Brexit

54. The key impact of Brexit in relation to the above is the loss of the *automatic* recognition regime, under the EIR, of UK insolvency proceedings in the EU and of EU insolvency proceedings in the UK. In an article prepared by Ms Lucy Aconley and Mr Philip Wells of Allen & Overy, featured in the Butterworths Journal of International Banking and Financial Law in March 2021³¹, the position is explained as follows:

“Pre-Brexit, the legal landscape in relation to matters of recognition across the EU was relatively straightforward. Recognition of insolvency proceedings was governed by the EIR and before that Council Regulation (EC) No 1346/2000. While there were a number of conditions and caveats (such as the choice of law provisions found in Arts 8-18 of EIR), the overriding principle enshrined in the EIR was that the location of the debtor’s centre of main interests (COMI) or establishments determined where proceedings should be brought and which law should apply. Furthermore, the rest of the EU automatically recognised the effects of, and any judgments handed down in the course of, insolvency proceedings commenced in accordance with the EIR. Inbound and outbound recognition of insolvency proceedings was on the same terms across the EU; a level playing field if you like. The key principle underpinning this EU-wide framework was reciprocity. As soon as the UK exited the EU, this reciprocity was broke.”

55. Post-Brexit, the position can be summarised as follows:

56. UK insolvency proceedings (including the proposed Efwon Trading administration) may be recognised in the EU via domestic legislation adopting the UNCITRAL Model Law, or alternatively through whichever rules of private international law are applicable in the relevant EU member state.

57. As noted above, Romania has adopted the UNITRAL Model Law and, it seems to us that well-trodden path is likely to be the easiest route to recognition.

58. Unlike under the EIR, recognition is not automatic under the Model Law. There is a procedure involved in applying for recognition and any discretionary relief or assistance. The scope of recognition and assistance available to Efwon Trading in Romania (including, importantly, the availability of an automatic stay) will ultimately be a matter of local Romanian law (specifically, it will depend on the legislation by which the Model Law has been adopted in Romania).

³⁰ See the EIR at Article 1 and Annex A, which specifically refers to English administrations. However, again see below in relation to Brexit. [The EIR no longer applies in the UK.](#)

³¹ *How to get recognised: cross-border recognition of insolvency and restructuring proceedings post-Brexit* <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/cross-border-recognition-of-insolvency-and-restructuring-proceedings-post-brexit>

59. Similarly, EU insolvency proceedings (including the proposed Efwon Romania proceedings under the Directive) will not be automatically recognised in the UK. To the extent recognition of Efwon Romania's insolvency proceeding needs to be sought in the UK, an application would need to be made under the CBIR (or at common law). To the extent recognition of Efwon Romania's insolvency proceeding needs to be sought in the US, that would require an application under Chapter 15.

Appendix

