**Case Study II**

**Memorandum: Advice in relation to insolvency issues affecting the Efwon group**

1. **Details of Efwon Group’s debt and liabilities**

Before discussing the restructuring strategy, it is important to lay down the details of the Efwon group’s debt and liabilities:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Sr. No.** | **Relevant group company** | **Details of debt/liability** | | **Security** |
|  | Efwon Investments registered under the law of Delaware | USD 250 million loan borrowed from a syndicate of banks consisting of:   * 2 senior banks (exposure of 100 million USD); * 2 mezzanine financial creditors (60 million USD); and * 5 junior financial creditors holding an exposure of 90 million USD.   *(collectively referred to as “****Efwon US Debt****”)* | | 1. the loan is secured partly on a number of homes of Maximov across the world, collectively worth some USD 75 million; 2. a pledge on the projected revenue to flow back from Efwon’s resulting investment and participation in the sport; and 3. a pledge over the shares of Efwon Investments, and a negative pledge for the entire value of the loan |
|  | Efwon Trading registered under English law |  | USD 350 million loan from Efwon Investments | Future revenue from the company’s trading activities. |
|  | USD 100 million loan from Monaco based lender | Efwon Trading’s revenues |
| *((i) and (ii) collectively referred to as “****Efwon UK Debt****”)* | |  |
|  | Efwon Romania registered in Romania |  | USD 450 million loan from Efwon Trading (in total) | Efwon Romania’s F1 team’s share of the broadcasting revenue |
|  | Potential liability from the Romanian drivers’ claims before the Romanian courts where substantial compensation may be awarded |
| *((i) and (ii) collectively referred to as “****Efwon Romania Debt****”)* | |

1. **Advice in relation to insolvency issues affecting the Efwon group to facilitate the deal with KuasaNas**
2. **Proposed strategy for dealing with the group**

Some of the key issues that will need to be addressed by the strategy to deal with Efwon Group’s insolvency issues are:

* + Obtaining a stay against enforcement actions against the security wherever located (which includes Benedict Maximov’s homes everywhere);
  + Use a restructuring proceeding which will comprehensively deal with the debt of the entire Efwon Group (i.e., should have low eligibility thresholds for foreign debtors) and bind all creditors of the Efwon Group;
  + You may need to use a restructuring proceeding which provides for cram-down of dissenting creditors (if there is a risk of creditors not approving the restructuring plan)

In view of the above objectives, the Efwon Group may follow the following strategy to restructure its debt and deal with the insolvency issues affecting different group entities:

1. Initiate Chapter 11 proceedings against the Efwon Group

You may consider initiating bankruptcy proceedings under Chapter 11 of the US Bankruptcy Code against Efwon Investments, Efwon Trading and Efwon Romania to restructure their debt.

A Chapter 11 proceeding will provide the benefit of a: worldwide stay on creditor actions (which may be particularly important in view of the presence of security (i.e., Benedict Maximov’s homes) across the world), a debtor-in-possession model, cram-down of dissenting creditors (as further discussed in paragraph II(e) below).

*Eligibility requirements under the US Bankruptcy Code for foreign debtors*:

Section 109(a) of the US Bankruptcy Code provides that any person “*that resides or has a domicile, a place of business, or property in the United States*” may be eligible to undergo Chapter 11 proceedings in the US.

While Efwon Investments (which is registered under law of Delaware) meets this eligibility requirement, foreign companies (such as Efwon Trading and Efwon Romania) will need to show evidence of ‘property’ in the US to meet the eligibility requirements for a ‘debtor’ to undergo Chapter 11 proceedings under the US Bankruptcy Code.

Case law precedents[[1]](#footnote-1) have established a relatively low threshold for establishing presence of property in the US for the purposes of section 109(a). For example, existence of US bank accounts[[2]](#footnote-2) (with minimal deposits), retainer deposits held by the debtor’s US lawyers[[3]](#footnote-3) has been sufficient to meet the requirement of section 109(a).

The property requirement has to be shown to be met as on the date of the bankruptcy petition.[[4]](#footnote-4) Therefore, Efwon Trading and Efwon Romania may establish US bank accounts or hire legal counsel in the US on a retainership to allow them to undergo a Chapter 11 proceeding.

Restructuring under a Chapter 11 plan could involve different strategies such as conversion of debt into equity, extend maturity of debt, refinance the debt, among others.

1. Parallel insolvency proceedings in the UK

*Presence of Efwon Group in the UK and Gibbs rule*

The Efwon Group also has a presence in the UK through its UK based subsidiary, Efwon Trading. Moreover, to the extent that Efwon UK Debt or any other debt of the Efwon Group is governed by English law, those debts may need to be restructured under English law.

This is because in the case *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux[[5]](#footnote-5),* the English court held that a debt can only be discharged in accordance with the governing law of the debt. Therefore, according to what is popularly referred to as the ‘Gibbs rule’, a debt governed by English law, can only be discharged under English law and not a foreign insolvency proceeding, unless the relevant creditor submits to such foreign insolvency proceeding.

Therefore, any English-law governed debt of the Efwon Group may need to be restructured under an English restructuring/insolvency process, especially if there is a possibility of dissenting creditors (such as the Monaco based lender) who may challenge the Chapter 11 restructuring plan in the UK on the basis of Gibbs rule.

*Restructuring processes available in the UK*

UK’s restructuring regime offers different insolvency/restructuring processes such as (i) administration and company voluntary arrangements (CVAs) under UK’s Insolvency Act 1986, and (ii) schemes of arrangement (under Part 26 of Companies Act 2006) and restructuring plans (under Part 26A of Companies Act 2006).

Prior to Brexit, UK was also governed by EU’s Recast Insolvency Regulation (EU) 2015/848 (RIR) recasting Regulation 1346/2000. According to RIR, ‘main’ insolvency proceedings could be opened in the jurisdiction where the debtor’s centre of main interest (COMI) was located, which is then automatically recognised in other EU member States. Recital 23 of RIR provides that main insolvency proceedings have universal scope and are aimed at encompassing all of the debtor's assets.

According to Recital 30 of RIR, the place of the registered office of the debtor is presumed to its COMI. However, this presumption can be rebutted if the company's central administration is located in a jurisdiction other than its registered office, and where it is established on the basis of a comprehensive assessment of all relevant factors, in a manner that is ascertainable by third parties that the debtor’s centre of management and supervision and of management of its interests is in another jurisdiction.

However, post Brexit, RIR ceased to apply to insolvency proceedings initiated after 31 December 2020.

Schemes of arrangement and restructuring plans were not covered by RIR (even prior to Brexit) and a foreign debtor needed to meet a lesser threshold of a “sufficient connection” with the UK (even if it does not have any assets or its COMI in the UK) to be able to undergo these restructuring processes.

*Eligibility and approval thresholds for schemes of arrangement and restructuring plans in the UK*

A ‘sufficient connection’ can be established on the basis of the governing law of debt and jurisdiction clause in favour of UK courts.[[6]](#footnote-6) In addition, the foreign debtor will also need to convince the UK court that the scheme would have international effectiveness (i.e., it would be effective in States where creditors may take actions or the debtor’s home jurisdiction). Therefore, foreign debtors often use schemes of arrangement (and the recently introduced restructuring plan) to restructure their debt.

According to section 899 of Companies Act 2006, a scheme requires approval by majority in number and 75% in value of each class of creditors. On the other hand, under section 901F and 901G of Companies Act 2006, a restructuring plan needs approval of 75% (in value) of each class of creditors. However, a cross-class cram down (i.e., plan may be imposed on a dissenting class of creditors) may be allowed provided the following conditions are met:

* + If court is satisfied that none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (i.e., if the restructuring plan was not approved); and
  + If a class who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative has approved the plan by 75% in value.

*UK scheme of arrangement/restructuring plan for Efwon Group’s debt which is governed by English law*

In Efwon Group’s case, to the extent any of the group companies’ debt is governed by English law, it may need to undergo a simultaneous UK insolvency proceeding, especially if there is a risk of a dissenting creditor challenging the Chapter 11 plan on the basis of Gibbs rule in the UK (such as the Monaco based lender). If any of its non-UK based entities debt is also governed by English law, then it may be best to utilise a scheme of arrangement or restructuring plans (if a cross-class cramdown is required) in the UK, as they have lower eligibility threshold for foreign debtors.

Therefore, terms of the US Chapter 11 plan could be included in a UK scheme or restructuring plan which is run in parallel.

However, to the extent that a English-law governed debt has been extended from one group company to another (i.e., debt from Efwon Trading to Efwon Romania), you may not necessarily need to bring it under a UK insolvency proceeding as there may not be a risk of challenge (based on Gibbs rule) from a group company.

1. Recognition of Chapter 11 proceedings in Romania under UNCITRAL Model Law on Cross Border Insolvency OR a preventive restructuring procedure in Romania

Efwon Romania is a critical part of the Efwon Group. The license and the F1 team are held by Efwon Romania and it is the operating subsidiary which generates revenues (including through broadcasting revenues) for loan repayments to Efwon Trading (onwards to Efwon Investments and to the US creditors).

However, there is a pending insolvency proceeding and a freezing injunction over Efwon Romania’s assets and income. Moreover, potential liability may also arise from the safety and management defect related claim by the Romanian drivers which is currently before Romanian courts.

Therefore, ensuring that Efwon Romania is a part of the global restructuring is critical.

The manner in which this may be achieved is by either seeking:

* + recognition of the Chapter 11 proceedings in Romania;
  + in case obtaining reliefs (i.e., staying the proceedings initiated by the Romanian drivers) through recognition of the Chapter 11 proceeding or by relying on the worldwide stay under Chapter 11 proceedings is becoming difficult then you may consider undergoing a ‘*concordatul preventiv*’ (i.e., a preventive agreement) in Romania.

*Recognition of Chapter 11 proceedings in Romania*

Romania adopted the UNCITRAL Model Law on Cross-Border Insolvency (UMLCBI) through International Insolvency Act No. 637/2002. Therefore, the Efwon Group may seek recognition of the Chapter 11 proceedings under UMLCBI.

Given the pending insolvency proceedings in Romania, there may be additional issues to consider before seeking recognition. As further discussed in paragraph II(i) below, reliefs granted upon recognition will need to be consistent with any domestic proceeding.

However, to the extent possible, you could try to bind the Romanian drivers to a US Chapter 11 restructuring itself. As mentioned above, a Chapter 11 proceeding provides the benefit of a worldwide stay. Therefore, the application to initiate insolvency proceedings and proceeding against Efwon Romania for claims relating to defects in safety and management would technically violate such stay.

If the drivers have assets or presence in the US, then any action taken by them which is contrary to the worldwide stay impose under the Chapter 11 process could result in contempt proceedings in the US. A helpful precedent in this regard is the case *Nakash v. Zur[[7]](#footnote-7)*, where the US court held that an involuntary bankruptcy petition initiated by an Israeli receiver in Israel was in violation of the automatic stay under the US bankruptcy proceeding.[[8]](#footnote-8)

*If obtaining reliefs (i.e., staying the proceedings initiated by the Romanian drivers) through recognition of the Chapter 11 proceeding or by relying on the worldwide stay under Chapter 11 proceedings is becoming difficult then a ‘concordatul preventiv’ (i.e., a preventive agreement) could be initiated in Romania.*

If seeking necessary reliefs:

* binding Efwon Romania along with its creditors and the Romanian drivers;
* using the worldwide stay or recognition of US Chapter 11 in Romania to stay the proceedings filed by the Romanian drivers

proves to be difficult, the you may also consider undergoing a ‘preventive agreement’ procedure in Romania.

Romania followed the EU’s Directive (EU) 2019/1023 on preventive restructuring frameworks by Law No 216/2022.

Under a ‘preventive agreement’ proceeding, the debtor may retain possession of the company and a restructuring plan is drafted with the help of or by an administrator. The debtor may include the terms under the US Chapter 11 proceedings into the restructuring plan under the ‘preventive agreement’ process.

1. Efwon Hong Kong related considerations

*Potential need for recognition of US Chapter 11 proceedings in Hong Kong*

From the given facts, Efwon Hong Kong’s direct debt liabilities are unclear. However, the sponsorship agreement with Kretek (sponsoring till 2020) has been entered into with Efwon Hong Kong.

If the money being generated by Efwon Hong Kong under the sponsorship agreement, is forming a security for any of the Efwon Group’s debt, then the Chapter 11 restructuring plan may also need to be recognized in Hong Kong to protect the cash at Efwon Hong Kong and Efwon Hong Kong may be made a part of the Chapter 11 restructuring in the US.

Hong Kong has not adopted the UMLCBI. Therefore, common law principles for recognition of foreign insolvency proceedings will need to be relied upon.

Hong Kong courts have laid down the following principles[[9]](#footnote-9) for recognition of foreign insolvency proceedings:

* + The foreign insolvency proceedings should be a collective insolvency proceeding which is based on the principle of collective action by creditors and pari passu distribution and originate in the debtor’s place of incorporation;
  + The assistance granted to a foreign representative cannot grant powers that she does not have under the law under which she was appointed; and
  + Such assistance must be in line with the substantive law and public policy of Hong Kong

*Ipso facto clause in sponsorship agreement*

The sponsorship agreement with Kretek will also need to be reviewed to check if there is an *ipso facto* clause allowing Kretek to terminate the agreement with Efwon Hong Kong on account of insolvency of the Efwon Group (i.e., any of its entities). If there is an *ipso facto* clause then it may also need to undergo a restructuring under Chapter 11 to ensure that sponsorship agreement is not terminated.

1. **whether one or more insolvency proceedings are required to achieve the goal of selling a stake in the group to KuasaNas (should the intended contract receive Government clearance);**

Yes, as discussed under paragraph II(a), more than one insolvency proceedings may be required to achieve the goal of selling a stake in the group to KuasaNas, given the group’s international presence. One or more insolvency proceedings may be required on the basis of the following factors:

1. Chapter 11 proceedings in the US: Given the presence of security (i.e., Benedict Maximov’s homes) across the world, it will be useful for the group to undergo Chapter 11 proceedings which provides the benefit of a worldwide automatic stay (further discussed in paragraph II(e)). The facts are not clear on whether the F1 racing machines of the Efwon Group form security for any of its debts. However, given the fact that F1 races are held across jurisdictions, protecting the group’s assets (i.e., racing machines that are taken across the world) against any potential creditor action or action by the Romanian drivers) through a Chapter 11 proceeding may also be useful.
2. Parallel restructuring process in the UK (in case of English law governed debt): If any of the debt of the Efwon Group (including any Efwon UK Debt) being restructured is governed by English law then it may be necessary to initiate a parallel restructuring process in the UK to protect against challenges based on the Gibbs rule (as discussed in paragraph II(a) above).
3. Potential restructuring in Romania: As discussed in paragraph II(a) above, in case seeking recognition of Chapter 11 proceedings in Romania or relying on the worldwide stay under Chapter 11 is not sufficient to obtain a stay on the proceedings by the Romanian drivers then a ‘preventive agreement’ may be relied upon in Romania.
4. **where these proceedings will take place;**

The proceedings will take place in:

1. the United States;
2. the UK (if there is any English-law governed debt with dissenting creditors); and
3. Romania (if necessary reliefs become difficult to obtain through only a recognition of the Chapter 11 process).
4. **what impediments may exist to proceedings taking place;**

Potential impediments that may exist to these proceedings taking place:

* Establishing jurisdiction of the US court and the UK court to utilise their restructuring process (although this is not very difficult to establish as discussed in paragraph II(a)). However, dissenting creditors (possibly the Monaco based lender or the Romanian drivers (if they end up getting an order in their favour for the defects in safety related claim) may challenge the jurisdiction of these courts. For example, in the US, section 305 of the US Bankruptcy Code states that a bankruptcy petition may be dismissed if such dismissal is in the best interest of creditors and the debtor and section 1112 allows dismissal of a bankruptcy petition for ‘cause’;
* Seeking necessary reliefs (i.e., binding Efwon Romania along with its creditors and the Romanian drivers, using the worldwide stay or recognition of US Chapter 11 in Romania to stay the proceedings filed by the Romanian drivers) may be difficult if the Romanian drivers do not have a US presence or assets; and
* If the Romanian insolvency proceeding is admitted, then reliefs granted to the foreign representative seeking recognition of the Chapter 11 process in Romania will need to be consistent with the domestic insolvency proceedings.

1. **what advantages/disadvantages may exist in relation to proceedings being organised in the way you propose;**

Organising proceedings in this manner has the following advantages:

1. Advantages

*Worldwide stay against creditor actions under Chapter 11 proceedings*

Under section 362 of the US Bankruptcy Code, once a debtor is admitted into bankruptcy, an automatic stay come into effect which protects the debtor’s property from any claim or creditor actions. Section 541 of the US Bankruptcy Code provides that the debtor’s estate consists of all property “*wherever located*”. The combined effect of these provisions is that the debtor has the benefit of a worldwide stay against once a Chapter 11 proceeding is initiated which bars actions against the debtor’s property even if it is located outside the US.

However, do note that whether the worldwide stay will be respected in another jurisdiction may depend on factors such as: whether the creditor or party taking legal action in another jurisdiction has a presence or assets in the US. This is because taking action which violates the automatic stay may leave such a creditor or party open to the risk of contempt proceedings in the US.

In the restructuring of the Efwon Group, a worldwide stay will be of critical importance given the fact that the Efwon US Debt is secured by homes of Benedict Maximov across the world.

*Debtor-in-possession under both Chapter 11 proceedings in the US and scheme of arrangement in the UK*

Both, under the Chapter 11 process as well as scheme of arrangement in the UK, the existing management continues to be in control of the debtor. Therefore, restructuring under these regimes may be favourable for Benedict Maximov.

*UK scheme of arrangement/restructuring plan can ensure no challenges pursuant to Gibbs rule and reduced impact of Brexit*

By relying on a UK scheme of arrangement or restructuring plan for English law governed debts, the restructuring will be protected against challenges based on the Gibbs rule (as discussed in paragraph II(a) above).

*Cramdown of creditors*

Under a Chapter 11 process too, a plan can be approved even if a class of creditors reject it, as long as it passes the ‘fair and equitable’ test and the ‘best interests of creditor’ test (in case of a dissenting creditor). As long as one impaired class has approved the plan and the plan does not discriminate unfairly and is fair and equitable to the dissenting class, then a cram-down of a class may be permitted.[[10]](#footnote-10)

As discussed in paragraph II(a) above, UK schemes and restructuring plans allow for cram-down of minority creditors (the restructuring plan further allows a cross-class cramdown).

1. Disadvantage

*UK scheme/restructuring plan does not benefit from automatic recognition under European Insolvency Regulation (even prior to Brexit)*

UK scheme of arrangement/restructuring plan does not benefit from automatic recognition under EU’s Recast Insolvency Regulation (EU) 2015/848 (RIR) recasting Regulation 1346/2000 (even prior to Brexit)

Therefore, if Efwon Group decides to use any of the two processes, it will not benefit from automatic recognition.

*Equitable subordination of shareholder loans under US Chapter 11 proceedings*

The inter-company loans between (i) Efwon Investments and Efwon Trading, and (ii) Efwon Trading to Efwon Romania are shareholder loans. In a Chapter 11 process, these shareholder loans may be subordinated on the grounds of equitable subordination under section 510(c)(1) of the US Bankruptcy Code.

1. **the factors that will allow** **you to determine the above;**

The factors that are relevant to determining where and under what law the Efwon Group should be restructured are:

1. Governing law of the debt of different entities in the Efwon Group;
2. Where are the assets/security given by the Group located?
3. Relevant connection of stakeholders to the US jurisdiction (to determine whether Chapter 11 is a feasible option); and
4. Possibility of dissenting creditors – to assess whether a parallel proceeding in the UK is required to protect against challenges based on the Gibbs rule.
5. **any further facts or information that may be needed to answer the question;**

Further facts or information that may be necessary to answer the question are:

1. Governing law of the debt;
2. Location of Benedict Maximov’s homes;
3. Details of any debt at Efwon Hong Kong level – to assess whether it needs to be included as a part of the Chapter 11 restructuring;
4. Whether there is an *ipso facto* clause in the contract between Efwon Hong Kong and Kretek?
5. **where you envisage the application of the European Insolvency Regulation and/or UNCITRAL Model Law in achieving** **this**?

Yes, the UNCITRAL Model Law on Cross Border Insolvency will be applied in the recognition of Efwon’s US Chapter 11 proceedings in Romania (as further discussed in paragraph II(a) and II(i))

Since European Insolvency Regulation: EU’s Recast Insolvency Regulation (EU) 2015/848 (RIR) recasting Regulation 1346/2000 did not cover scheme of arrangement or restructuring plans (pre or post Brexit), it will not be useful in seeking automatic recognition of the Efwon’s UK restructuring process in Romania.

1. **in particular, how the provisions of these texts may assist or impede the strategy you propose to implement?**

Romania implemented the UNCITRAL Model Law on Cross-Border Insolvency (UMLCBI) through its International Insolvency Act No. 637/2002.

The key provisions of the UMLCBI which will be relevant to and assist the recognition process for the US Chapter 11 proceedings in Romania are:

1. Article 15: Under Article 15, a foreign representative can seek recognition of a foreign proceeding in which she has been appointed and such application needs to be accompanied by: (i) certified copy of the decision commencing the foreign proceeding; (ii) certification from the foreign court affirming existence of the foreign proceeding and of appointment of the foreign representative; (iii) if (i) and (ii) is not available then any other evidence acceptable by the court, of the existence of the foreign proceeding and appointment of the foreign representative. Such application will also need to be accompanied by a statement identifying all foreign proceedings in relation to the debtor that are known to the foreign representative.

Therefore, the Efwon Group can submit the US court decision initiating the Chapter 11 proceedings, certification regarding existence of the foreign proceeding and of appointment of the foreign representative to apply for recognition of the Chapter 11 process before the Romanian court.

1. Article 17: Subject to any exceptions (such as policy policy) a foreign proceeding may be recognized (provided that the foreign proceeding and the foreign representative meet the definition under Article 2(a)[[11]](#footnote-11) and Article 2(d)[[12]](#footnote-12) of the UMLCBI) if: the evidence required under Article 15 (mentioned in the paragraph above) is provided and the recognition application is submitted to the court identified for this purpose.

The foreign proceeding may be recognized as a foreign main proceeding if it is taking place in a State where the centre of main interest of the debtor lies or as a foreign non-main proceeding if it is taking place in a State where an establishment[[13]](#footnote-13) of the debtor lies. Under Article 16(3) of the UMLCBI, a debtor’s registered office is presumed to be the debtor’s centre of main interest.

However, this is a rebuttable presumption on the basis of certain factors such as: where the central administration of the debtor takes place and which is readily ascertainable by creditors.[[14]](#footnote-14) Additional factors such as: “*location of the debtor’s books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor’s principal assets or operations are found; the location of the debtor’s primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited”* may also be considered.[[15]](#footnote-15)

A foreign main proceeding enjoys the benefit of automatic reliefs upon recognition (as further discussed below).

You may try to argue that Efwon Romania’s COMI lies in the US, as the benefits/reliefs granted in case of recognition of a foreign main proceeding outweigh that of a non-main proceeding. The factors that could be relied upon to argue that Efwon Romania’s COMI lies in the US are:

* + Location of the primary financing of the group is based out of the US
  + Governing law of its main contracts (to the extent they are governed by US law, this information has not been provided)
  + Location of the cash management system (to the extent it can be shown to be in the US)

However, in Efwon Romania’s case, it may be a challenge to rebut the presumption that its COMI lies in Romania. This is because the factory, assets, its employees, operations and license of Efwon Romania are based in Romania.

1. Article 19, 20 and 21: These articles lay down pre-recognition and post-recognition reliefs that can be sought by the foreign representative.

*Pre-recognition reliefs (Article 19)*

Article 19 provides certain interim reliefs that may be granted between the time of filing of application for recognition till and till it is decided. If such reliefs are urgently required to protect the debtor’s assets or its creditors’ interests, then it may be granted by the court at the request of the foreign representative. These reliefs include:

* stay on execution against the debtor’s assets, or
* entrusting the foreign representative with the administration or realisation of all or part of the debtor’s assets located in the State where recognition is being sought to protect and preserve the asset’s value which are perishable, or susceptible to devaluation or in jeopardy;
* suspension of right to transfer, encumber or otherwise dispose of the debtor’s assets;
* examination of witnesses, taking evidence, or information delivery relating to the debtor’s affairs, rights, obligations or liabilities;
* additional reliefs that are available to domestic liquidator or insolvency office holder under the laws of the state where recognition is being sought.

The court will also need to be satisfied that the interests of the creditors and other interested persons (including the debtor) are adequately protected, according to Article 22 of UMLCBI. These reliefs are terminated once the recognition application has been decided (unless it is extended later).

*Post-recognition relief (for foreign main proceeding) under Article 20*

When a foreign insolvency proceeding is recognised as a ‘foreign main proceeding; the following automatic reliefs are granted under Article 20(1) of UMLCBI:

* Stay on commencement or continuation of individual actions or proceedings relating to the debtor’s assets, rights, obligations or liabilities;
* Stay on execution against the debtor’s assets; and
* Suspension of right to transfer, encumber or otherwise dispose of the debtor’s assets;

Do note that according to Article 20(4) of UMLCBI the automatic reliefs granted under Article 20 do not affect the right to commence domestic insolvency proceedings in the State where recognition is being sought.

*Post-recognition relief (for foreign main and foreign non-main proceeding) under Article 21*

Article 21(1) provides the court in the State where recognition is being sought, the discretion to grant appropriate reliefs where necessary to protect the debtor’s assets or in its creditors’ interest, at the request of the foreign representative. These reliefs include:

* stay on commencement or continuation of individual actions or proceedings relating to the debtor’s assets, rights, obligations or liabilities;
* stay on execution against the debtor’s assets;
* suspension of right to transfer, encumber or otherwise dispose of the debtor’s assets;
* provide for examination of witnesses, taking evidence, or information delivery relating to the debtor’s affairs, rights, obligations or liabilities;
* entrusting the foreign representative to administer or realise all or part of the debtor’s assets in the enacting State;
* extension of interim reliefs granted under Article 19 of the UMLCBI;
* grant of additional reliefs that are available to domestic liquidator or insolvency office holder under the laws of the State where recognition is being sought.

Article 21(2) also provides that the court of the State where recognition is being sought, may at the request of the foreign representative, at its discretion entrust the distribution of the debtor’s assets in the State to the foreign representative, provided that it is satisfied that the interests of all domestic creditors are adequately protected.

Do note that there may some limitations on the reliefs available under this provision. For example, *Rubin v Eurofinance SA[[16]](#footnote-16),* the English court held that enforcement of insolvency related default judgment is not covered under UMLCBI.

Article 21(3) further provides that in case of reliefs granted in relation to foreign non-main proceeding, the court also needs to be satisfied that the relief relates to assets (that under the law of the State where recognition is being sought) should be administered in such foreign non-main proceeding and relates to information required under that proceeding.

1. Article 24 of the UMLCBI: Upon recognition of a foreign proceeding, the foreign representative also gets a standing to intervene in any proceedings in the State where recognition has been granted, to which the debtor is a party, as long as requirements under local laws are met.

Therefore, the foreign representative of Efwon Group’s US Chapter 11 proceeding could seek the above discussed reliefs which will vary depending on whether it is recognised as a foreign main or non-main proceeding. Importantly, the foreign representative could seek to stay the proceedings filed by the Romanian drivers in relation to the defects in safety and management. It could also make itself a party to those proceedings by relying on Article 24.

1. Co-operation and co-ordination related provisions: The foreign representative may also rely on articles that provide for co-operation and co-ordination between the foreign courts and proceedings under Chapter IV of UMLCBI.

The following provisions that may impede the abovementioned strategy:

1. Article 29: In case there is a pre-existing domestic proceeding relating to the debtor, then the reliefs granted upon recognition of the foreign proceedings has to be consistent with the domestic proceedings.

Importantly, If the foreign proceeding is recognized as a foreign main proceeding and there is also a pre-existing domestic proceeding, then the automatic reliefs under Article 20 will not be applicable.

As discussed above in paragraph II(a), Romanian drivers may be required to withdraw the insolvency proceedings in Romania on the grounds that it violates the worldwide automatic stay under Chapter 11.

However, if you fail to bind the Romanian drivers and if the pending insolvency application in Romania is admitted and there is a freeze on its assets which restricts the restructuring of Efwon UK Debt and Efwon US Debt, then as mentioned in paragraph II(a) above, you may consider undergoing a ‘preventive agreement’ proceeding in Romania.

**European Insolvency Regulation: EU’s Recast Insolvency Regulation (EU) 2015/848 (RIR) recasting Regulation 1346/2000**

The RIR will largely not be applicable to the given strategy because it did not cover scheme of arrangements and restructuring plans (even prior to Brexit). However, to the extent that you end up having to use a ‘preventive agreement’ (Concordatul preventive) in Romania then it could enjoy the benefit of automatic recognition in other States in the EU under Article 19 and 32 of Regulation (EU) 2015/848.

1. **In December 2019, Brexit finally happened. Advise as to the possible effect, if any, of Brexit on your solution.**

*No impact under EU’s Recast Insolvency Regulation as it did not cover schemes of arrangement or restructuring plans before or after Brexit*

Post Brexit, EU’s Recast Insolvency Regulation (EU) 2015/848 (RIR) recasting Regulation 1346/2000 ceased to apply to UK. However, insofar as RIR is concerned, Brexit would not have an impact on the proposed strategy as RIR did not cover schemes of arrangement or restructuring plans (it was not listed in Annex A of RIR) even prior to the prior to Brexit.

*Impact on recognition of UK court judgements (i.e., UK court judgment approving the UK scheme)*

As discussed earlier, a foreign debtor seeking to use an English scheme of arrangement/restructuring plan will need to show that it would have international effectiveness.

Post Brexit, UK no longer enjoys the benefit of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EU Judgments Regulation) under which English court judgements could be recognised and enforced in the EU without any special procedure.

Under Article 36 of the EU Judgments Regulation, a judgment given in a member state should be given automatic recognition in other EU member states. Therefore, prior to Brexit, debtors would sometimes rely on the EU Judgments Regulation to argue that the scheme would have international effectiveness (given its automatic recognition in other EU member States). However, even prior to Brexit, such recognition was not always simple or straightforward and there were debates on whether schemes were in fact covered under EU Judgments Regulation.[[17]](#footnote-17)

Moreover, the change in applicability of the EU Judgments Regulation may not have a significant impact in establishing international effectiveness because generally, if an agreement is governed by English law then alteration of rights under it using an English scheme or restructuring plan should be recognized in other jurisdictions.[[18]](#footnote-18)

Moreover, the debtor (i.e., the Efwon Group entities) could rely on Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (‘Rome I’) to seek recognition of a judgment in other jurisdictions.

Article 3(1) of Rome I provides that a contract should be governed by the law chosen by the parties and such law would govern the “*various ways of extinguishing obligations*”. However, “*questions governed by the law of companies*” are excluded from the scope of the regulations.[[19]](#footnote-19) However, some have argued that even though schemes are provided under Companies Act, this exclusion was intended to cover corporate governance issues.[[20]](#footnote-20) In the past, evidence has been provided by academic experts that a UK scheme would be capable of being enforced in Germany under Rome I.[[21]](#footnote-21)

1. See In re McTague 198 B.R. 428 (Bankr. W.D.N.Y. 1996), where the court stated that ‘*having a dollar, a dime or a peppercorn*’ may be sufficient to satisfy section 109 requirements. [↑](#footnote-ref-1)
2. In re Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015), Bank of America, N.T. S.A. v. World of English 23 B.R. 1015 (Bankr. N.D. Ga. 1982). [↑](#footnote-ref-2)
3. In re Global Ocean Carriers Limited, et al., 251 B.R. 31 (Bankr. D. Del. Jul. 5, 2000). [↑](#footnote-ref-3)
4. In re Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015), In Matter of Axona Int'l Credit & Commerce Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988). [↑](#footnote-ref-4)
5. (1890) 25 QBD 399 (Court of Appeal). [↑](#footnote-ref-5)
6. Re Rodenstock GmbH[2011] EWHC 1104, Re Drax Holdings [2004] 1 WLR 1049. [↑](#footnote-ref-6)
7. Nakash v. Zur, 190 B.R. 763, 766 (Bankr. S.D.N.Y. 1996). [↑](#footnote-ref-7)
8. Please note that the US court did not rule on the issue of sanctions and damages against the Receiver and left those issues for another time. [↑](#footnote-ref-8)
9. Re Joint Liquidators of Supreme Tycoon Ltd [2018] HKCFI 277 [↑](#footnote-ref-9)
10. Section 1129 of the US Bankruptcy Code. [↑](#footnote-ref-10)
11. Article 2(a) of UNCITRAL Model Law on Cross-Border Insolvency provides that a “Foreign proceeding” means *a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation*. [↑](#footnote-ref-11)
12. Article 2(d) of UNCITRAL Model Law on Cross-Border Insolvency provides that a “Foreign representative” means *a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding*. [↑](#footnote-ref-12)
13. Article 2(f) of UNCITRAL Model Law on Cross-Border Insolvency provides that an “Establishment” means *any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services*. [↑](#footnote-ref-13)
14. See paragraph 144 to 149 of the UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation. [↑](#footnote-ref-14)
15. Paragraph 147 of the UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation. [↑](#footnote-ref-15)
16. [2012] UKSC 46. [↑](#footnote-ref-16)
17. See In the Matter Of Dtek Energy B.V [2021] EWHC 1551 (Ch) and Payne, Jennifer, “Cross-border Schemes of Arrangement and Forum Shopping” 14 European Business Organization Law Review 2013, pp 577-580. [↑](#footnote-ref-17)
18. In the Matter Of Dtek Energy B.V [2021] EWHC 1551 (Ch), the court noted the “*generally accepted principle of private international law that a variation or discharge of contractual rights in accordance with the governing law of the contract will usually be given effect.*” [↑](#footnote-ref-18)
19. Rome I, Article 1(2)(f). [↑](#footnote-ref-19)
20. Payne, Jennifer, “Cross-border Schemes of Arrangement and Forum Shopping” 14 European Business Organization Law Review 2013, p583. [↑](#footnote-ref-20)
21. Re Rodenstock GmbH[2011] EWHC 1104 and Re Primacom Holding GmbH [2012] EWHC 164 (Ch). [↑](#footnote-ref-21)