INSOL INTERNATIONAL

# GLOBAL INSOLVENCY PRACTICE COURSE (ONLINE)

2021 / 2022

## Module B: Session 11 Materials – Case Study II

# CONTENTS



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GLOBAL INSOLVENCY PRACTICE COURSE

**<u>INSOL International Global Insolvency Practice Course 2021-22</u>**

**<u>Case Study II – Part II</u>**

*Preparation of a Briefing for In-Class Discussion*

Please limit your analysis to a brief note (maximum of 2 sides of A4 paper). The intention is that you come to the session scheduled to exchange views on the legal situation and the steps you and your interlocutors might take.

*Introduction and Facts*

A group of university friends decided to set up a company in early 2014 selling "authentic British" products, specialising in baked goods and fruit preserves by mail order. Following a number of appearances by the entrepreneurs on early morning talk shows and weekend cookery programmes, the company, named "Let them Eat Cake" does tremendously well, particularly after one of their number competes in a televised show focusing on traditional fruit preserve recipes. The exposure sends orders rocketing and the company experiences a spectacular rise in sales (and consequent profits), leading Baking Weekly to nominate them for the Flour Power Awards, at which the company wins the prize for baking goods entrepreneur of the year.

By late 2014, the entrepreneurs have noted a strong rise in internet orders from European customers. Thinking this might be an exploitable trend, they contemplate expansion into the European market and set out to obtain finance, which eventually comes from a consortium of non-traditional lenders. The company offers the usual guarantees with cross-guarantees being provided by the subsidiaries, which with the finance, have been set up by the company in Austria and France. These countries have been chosen for their reputation as centres of culinary excellence and as convenient locations from which to service orders in Eastern and Western Europe respectively. The company invests heavily in premises and machinery at each of these locations, where, at the outset, the operating model relies on British-sourced ingredients being shipped out to the outlets and finished according to standard recipes developed at the parent company.

By late 2015, after a second year of meteoric success, including the company winning the prestigious French Brioche d'Or in the foreign viennoiserie category, the company notices that customers in the United Kingdom are placing internet orders for goods from their Paris and Austrian outlets due to the quality of the finished products being notably high. At the same time, the costs of production in the United Kingdom, having risen year on year, lead the entrepreneurs to suggest moving operations entirely to one of the Continental outlets and servicing orders in the United Kingdom from there. While British-sourced ingredients and recipes will continue to be used, production would take place in Europe. As this seemed a good idea at the time, the company immediately put it into operation, closing down their United Kingdom manufacturing operations in Spring 2016. Sensitive to public opinion, however, orders from British internet addresses are routed to an order page that does not disclose from where orders are serviced.

In June 2016, the Brexit Referendum takes place. Overnight, the costs of exporting British ingredients drops, leading to a reduction in costs in the European operations. Conversely, the costs of servicing British customers rises by about 20%, which the company reluctantly agrees to absorb in the short term so as not to risk the company's reputation as a producer of "authentic British" goods. They cross-subsidise this by not reducing prices for European customers, despite the fall in ingredient prices. For the next 40 months of operations (till September 2019), despite continuing uncertainty, things are more or less on an even keel because of this. The length and roughness of the Brexit negotiations as well as the strong language of British politicians and adept media have damaged the brand "Britain" amongst Europeans, and this had shown in a steady, moderate reduction in sales. However, a quick reaction of the management of the Company, including a new type of cake in their catalogue, featuring only its Scottish origin, has been able to control the fall in sales. It seems unlikely, though, that this will continue to be the case as things get rougher on the political arena and hence on the reputational front.

In the latter quarter of 2019, a number of things occur to put the company's fortunes at risk.

(i) The drop in the value of sterling has also meant that the costs of servicing the company's borrowings (denominated in Euro) have risen. The company projects to be able to meet its obligations due through till early 2020, but that, unless matters improve considerably, the June 2020 payments may be at risk.
(ii) Despite the company absorbing the increased costs in servicing the company's British client base, UKIPV (UK internet produce vendors), a trade pressure group, have discovered that the company's goods are no longer being produced in the United Kingdom. They query the "authentic British" label on produce and launch a public campaign to denounce the company, which leads to a further drop in orders and considerable negative publicity for the brand.
(iii) While European sales appear to be steady, the company is aware of a hardening of attitudes and the reluctance of certain of their larger customers (retail bakery outlets and supermarkets in particular) to commit to supply contracts for more than 3 months at a time. Sales to individual customers continue to have a limited rise, accelerated by the televisual phenomenon, which is being replicated in particular across Poland and Hungary. However, on line and individual sales to other European customers are starting to decrease.
(iv) The further uncertainty in the Brexit process and whether cross-Channel supplies of produce will be affected in the event of a No-Deal or a Bad Deal started to impact on forward planning.

It is now January 2020; the quarterly loan repayments due in March 2020 will be made. After a number of suspensions of the Article 50 notice period took place, Brexit has now been confirmed. While a Deal was struck, it was an incomplete one, since it is still uncertain what the commercial relationship will be. Both sides have agreed, in principle, to agree on a new framework during 2020, but there are doubts as to the feasibility of this possibility. The entrepreneurs have a meeting to discuss the way forward. The three main concerns are the loss of brand value in the United Kingdom, the risk of not being able to meet the loan repayments due at the end of June 2020 and the overall impact of Brexit on their operations.

The entrepreneurs ask your advice about the options available to them. Ideally, they would like to keep the company's overall business going, but perhaps relaunch the brand in the United Kingdom if this is feasible. They are also contemplating the possibility of capitalising on the increase in consumer sales in Europe by expanding to other countries where the televisual phenomenon is targeted to occur.

The entrepreneurs are also concerned at the lack of clarity in Brexit solutions, and in particular on how it might affect their restructuring plans. In particular, they are worried at the likely impact on their supply chains, if there was eventually no stable, adequate commercial deal between the United Kingdom and the European Union-27. They are worried that they might be required to effectively duplicate their structures in order to service what will become two separate markets or face the possibility of massive import costs if production took place outside the intended market. Furthermore, as the exit date has only been briefly postponed, they are very worried that their customers might continue to only commit to short-term supply contracts.

**The Substance of Your Analysis**

The case study represents a scenario with which any practitioner in Europe might be confronted as a result of the Brexit crisis. You are therefore asked to formulate your view as to the prospects for a single rescue procedure or multiple procedures requiring coordination. You should also envisage how the number of type of procedures might affect the likelihood of a successful conclusion by means of a restructuring plan (whether via a sale or a continuation of the current business of the survivable group companies). You should address how and where you envisage the application of the Recast EIR being necessary/useful and how the provisions of this text might enable or prevent the implementation of the restructuring strategy you propose to follow.

In formulating your analysis, you may wish to consider the following questions:

(i) The type of procedure envisaged (consensual/court supervised, out of court/in court, formal/informal; insolvency/non-insolvency);
(ii) The type of restructuring (financial and/or operational);
(iii) The location of that procedure and a rationale for why this is the optimal jurisdiction;
(iv) Alternatively, whether multiple proceedings would achieve a more satisfactory outcome;
(v) Whether the choice of jurisdiction(s) would influence the type or number of procedure(s) chosen;
(vi) What the likely views of the stakeholders might be and how their cooperation with the optimal outcome might be secured;
(vii) How the Recast European Insolvency Regulation might assist or hinder in the determination and/or use of that jurisdiction;
(viii) Depending on whether single or multiple proceedings are the choice, how the Recast EIR will enable cooperation and communication taking place with respect to the conclusion of a plan?

(ix) Whether there is any particular methodology to such cooperation and communication you would advise? In particular, what difficulties can you anticipate in such a process?
(x) Whether and how Brexit could be a consideration in the timing of the initiation of a procedure;
(xi) Any assumptions on the basis of which the advice is given as well as any further facts it would be useful to ascertain.

**<u>A Note on Structuring your Analysis</u>**

Overall, the intention behind this case-study is to enable you to develop your responses to the facts and your grasp of the applicable framework of European insolvency law within which you as practitioners might be called upon to operate in Europe. Some knowledge of the domestic legal systems referred to may be required, but this is not the primary object of this exercise. Please note that there is no right or wrong answer. The outcome is entirely dependent on your assessment of the facts and the approach you choose to deal with the facts as stated.