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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**

**THE EUROPEAN INSOLVENCY REGULATION**

This is the **summative (formal) assessment** for **Module 2B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 2B**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment2B]**. An example would be something along the following lines: 2021122-336.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.1If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **10 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

Select the correct answer from the options below:

1. True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
2. False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
3. False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.
4. False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

**Question 1.2**

Article 1(1) of the EIR 2015 relates to the scope of the Regulation. Choose the correct statement from the options below:

1. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
2. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
3. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are public.
4. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are collective.

**Question 1.3**

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

1. Through its case law, the CJEU had gone against the literal meaning of several provisions of the EIR 2000. A new Regulation was needed to codify the new rules created by the CJEU.
2. The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.
3. The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etcetera). A new Regulation was therefore needed to meet their expectations.
4. The EIR 2000 was generally considered a successful instrument, but areas of improvement had been identified over the years by practitioners and academics.

**Question 1.4**

Why can it be said that the EIR Recast did not overhaul the *status quo*?

1. The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.
2. Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.
3. The EIR Recast has not added any new concept to the text of the EIR 2000.
4. It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

**Question 1.5**

Article 3 of the EIR 2015 deals with jurisdictional matters. Which statement below is accurate in relation to Article 3?

1. Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open main insolvency proceedings.
2. Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest (COMI) shall have jurisdiction to open main insolvency proceedings.
3. Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest shall have jurisdiction to open secondary insolvency proceedings.
4. Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open territorial insolvency proceedings.

**Question 1.6**

The EIR 2015 does not provide a definition of “insolvency” or “likelihood of insolvency”. What are the consequences hereof?

1. The ECJ has provided a definition of “insolvency” in recent case law.
2. The European Commission has provided a definition of “insolvency” in its Recommendation on a “New Approach to Business Failure” published in 2014.
3. Each Member State will define “insolvency” in national legislation.
4. Deciding whether a debtor is “insolvent” or not is a matter for the ECJ to determine.

**Question 1.7**

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

1. Article 18 EIR Recast (entitled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).
2. Article 40 EIR Recast (entitled “Advance payment of costs and expenses”).
3. Article 7 EIR Recast (entitled “Applicable law”).
4. Article 31 EIR Recast (entitled “Honouring of an obligation to a debtor”).

**Question 1.8**

What are some of the main criticisms which have been voiced against the concept of the “centre of main interest”?

1. The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.
2. The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.
3. The concept is too similar to that of an “establishment” which makes it difficult for a court to know whether to open main or secondary proceedings.
4. The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.

**Question 1.9**

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

1. “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.
2. “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.
3. “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
4. “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

**Question 1.10**

Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.

In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala’s centre of main interest presumed to be located?

1. Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.
2. Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.
3. Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.
4. Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 2. Pending lawsuits are not covered by the effects of the *lex concursus* in insolvency proceedings.

Statement 1 refers to the fact that the EIR Recast extends beyond traditional liquidation procedures (as was the scope of the EIR 2000) to restructuring tools that aim to maximize value for creditors by rescuing viable businesses (Article 1 and Recital 10).

Statement 2 refers to an exception to the general rule that the *lex concursus* (law of the insolvency forum) determines the effect of insolvency on proceedings brought by individual creditors (Article 7(2)(f)). In the case of pending lawsuits, the effect of the insolvency proceedings is governed by the law of the Member State in which the lawsuit is pending (*lex fori processus*) (Article 18). Broadly speaking, the Article 18 exception will not apply to enforcement proceedings brought by individual creditors (as compared to proceedings which only serve to determine the rights and obligations of the debtor).

**Question 2.2 [maximum 3 marks]**

The EIR Recast’s objective remains, as much as possible, the universality of proceedings. However, several exceptions to this universal vision exist throughout the Regulation. Provide **three (3) examples** of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency.

One of the key features of the EIR Recast, which points to it being a model of "modified universalism" rather than entirely universal, is the fact that there can be both main and secondary proceedings in relation to the same debtor. The fact that the Court of a Member State can open secondary/territorial proceedings in relation to the debtor's assets in that State (Article 1 and 19(2)) even when main proceedings have already been opened elsewhere, is an overarching exception to the universal approach.

In terms of specific derogations from the universal approach, Articles 8-18 EIR Recast contain a number of exceptions to the rule at Article 7 that the *lex concursus* has universal application (in some cases by simply excluding the application of the *lex concursus* and in other cases providing for an explicit choice of law). These exceptions are in recognition of the fact that certain areas of law are particularly sensitive to national policy considerations. Three examples are:

1. Article 8 (Recital 68), whereby the opening of insolvency proceedings does not affect the rights *in rem* of creditors or third parties over *"tangible or intangible, moveable or immoveable assets".* The EIR Recast does not contain a definition of "*in rem*" and this would therefore be a matter of national law (although Article 8(2) does provide a list of examples of rights *in rem*);
2. Article 11, relating to contracts relating to immoveable property. Such contracts are governed solely by the law of the Member State where the immoveable property is situated; and
3. Article 13 (and Recital 72) relating to contracts of employment (which are governed solely by the law of the Member State applicable to the contract of employment).

**Question 2.3 [maximum 3 marks]**

The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List **three (3) elements** of the EIR Recast that deal with this matter and explain how they relate to this.

Article 1(1) of the EIR Recast provides the overarching rule as to the material scope of the Regulation. It applies to "*public collective proceedings… based on laws relating to insolvency.*" Article 1(1) then lists at a)-c) the types of proceedings that are captured by this definition. However, the impact of this provision is lessened by Annex A.

Annex A contains a definitive list of the proceedings that are captured by the Regulation. As per Recital 9, the Regulation "*should apply [to proceedings listed in Annex A] without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met.*" In contrast, if a proceeding is not listed in Annex A it is not captured by the EIR Recast.

The EIR Recast also sets out particular cases where the Regulation does not apply – this includes proceedings relating to insurance undertakings, credit institutions, investment firms and collective investment undertakings (Article 1(2)).

**Question 2.4 [maximum 2 marks]**

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor’s estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in one to three sentences) explain how they operate.

The EIR Recast contains provisions for the stay of the opening of secondary proceedings where a temporary stay of individual enforcement proceedings has been granted in the main proceedings (Article 38(3)). The insolvency practitioner for the debtor must make a request for the stay (it does not happen automatically). The stay is at the discretion of the Court where the stay is sought and can only be imposed for a maximum of three months on the condition that suitable measures are in place to protect the interests of local creditors.

Another measure to avoid the opening of secondary proceedings is the undertaking provisions of Article 36. In this case, the insolvency practitioner in the main proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened *"that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State"* (creating so-called "synthetic" secondary proceedings.As long as the substantive and procedural requirements for the undertaking are met, the Court in the potential "secondary proceeding" Member State must not open secondary proceedings (if it is satisfied that the undertaking adequately protects the general interests of local creditors) (Article 38(2)).

**QUESTION 3 (essay-type questions) [15 marks in total]**

*In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.*

**Question 3.1 [maximum 5 marks]**

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

On 12 December 2012, the European Commission published a Report (COM (2012) 743) on the application of EIR 2000 (the "**Report**"). It was accompanied by a Proposal for amendments to EIR 2000.

The Report, broadly, identified the following as issues with EIR 2000: "*Essentially, problems have been identified in relation to the scope of the Regulation, the rules on jurisdiction, the relation between main and secondary proceedings, the publicity of insolvency-related decisions and the lodging of claims. In addition, the absence of specific rules for the insolvency of members of a group of companies has been criticised"* (para 1.2 of the Report).

Some more specific issues identified by the Report were:

* That a substantial number of pre-insolvency and hybrid proceedings were not covered by EIR 2000 and therefore their effects were not recognised throughout the EU. This concern was ultimately reflected in EIR 2015 in the form of provisions aimed at restructuring and corporate rescue.
* Debtors abusing the COMI provisions by relocating their place of incorporation prior to the commencement of insolvency proceedings. The Report noted a particular issue with German and Irish debtors taking advantage of the discharge opportunities of English law which provides for a debt release within only one year. However, the Report also acknowledged that where companies relocate to another Member State to benefit from a more sophisticated restructuring regime, it will not necessarily be abusive "bankruptcy tourism".
* National courts taking different approaches to whether they had jurisdiction under EIR 2000.
* The Report concluded that "*disadvantages of secondary proceedings are more significant than their advantages*." The disadvantages included: that secondary proceedings had to be winding-up proceedings, the absence of specific rules for the opening of secondary proceedings, and the lack of clarity about whether liquidators in main proceedings can give undertakings to creditors in potential secondary proceeding jurisdictions (a point which is now clearer in EIR Recast).
* The lack of rules dealing with cross-border, enterprise group insolvencies (now dealt with by an entire Chapter in EIR Recast dedicated to group insolvencies).
* Three quarters of respondents to the public consultation on EIR 2000 considered that the absence of mandatory publication and registration of the decision opening insolvency proceedings was a problem.

The Report also acknowledged some issues surrounding the interaction with proceedings in non-Member States (such as the non-recognition of EU insolvency judgments) but noted that this could not be solved by an EU instrument – only by international, bilateral instruments.

 **Question 3.2 [maximum 5 marks]**

The concept of the “centre of main interest” has been both praised and criticised by EU institutions, academics, and practitioners. List **two (2) praises and / or shortcomings** and explain why they are considered praises / shortcomings.

One of the benefits to the COMI approach is that it means main insolvency proceedings take place in the Member State where the debtor has a genuine connection, rather than relying on a (potentially) arbitrary choice of incorporation. This should, in theory, make it easier for creditors to ascertain the risks in lending (as they are better able to gauge where main insolvency proceedings would take place). It is also a benefit to weaker creditors, who may not be sophisticated users of legal services. For example, employees in particular, are more likely to reside where the debtor has its COMI, and so it will be easier for them to participate in main insolvency proceedings in their own jurisdiction (due to greater familiarity with the legal system and a lack of language barriers).

On the other hand, the concept of COMI (particularly before the EIR Recast) was criticised as being vague and, accordingly, open to manipulation. Whilst the EIR Recast addresses this to a degree by introducing the "suspect" period (where the registered office presumption does not apply where the corporate debtor's registered office has moved to another Member State within the three months prior to the request for opening of insolvency proceedings) it has not completely alleviated concerns about forum shopping and the uncertainty this brings to creditors. Despite the fact that other jurisdictions (such as the New York Courts in *In re Ocean Rig UDW Inc,* 570 B.R. 687 (Bankr SDNY 2017)) have acknowledged that forum shopping can be done in good faith, within the EU, the public perception of such conduct tends to be negative.

**Question 3.3 [maximum 5 marks]**

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List **two (2)** ways in which the Regulation and the Directive differ.

The Directive harmonises substantive law across Member States in relation to the issues within its scope, something which (as the question notes), the EIR Recast does not (generally speaking) do. However, the Directive is much narrower in scope than EIR Recast, as the Directive only addresses preventative restructuring through early access to restructuring procedures for viable businesses.

Another difference between the Directive and EIR Recast arises by virtue of their respective statuses as Directive and Regulation. The Regulation had binding force throughout Member States from the date it came into effect, without the need for national implementation. The Directive, on the other hand, is reliant on Member States transposing its provisions into national law. The Directive contained a significant number of derogations (i.e. areas that allowed Member States to diverge from its provisions) and so it is much more susceptible to the uncertainty caused by the differences in implementation efforts across Member States.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

**Scenario**

Dinosaurus SARL is a company selling children stuffed animals. It is incorporated in France and has opened its first store in La Flèche in 2015 and another 10 stores across France since. 80% of its employees work in France. It also has an office in Cork, Ireland, as well as three stores around Ireland. 20% of its employees are located in Ireland. Its main warehouse is in Spain. Most of its customers come from France, and some online purchases are coming mainly from the United Kingdom.

In 2020, Dinosaurus SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish children toys market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Dinosaurus SARL, the timing of this initiative coincided with the Covid-19 pandemic which hit the world in 2020. By 2021, the company was in financial difficulty, yet managed to keep afloat for another two years. On 20 June 2023, it filed a petition to open safeguard proceedings in the Commercial Court in Le Mans, France.

**Question 4.1 [maximum 5 marks]**

Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.

***Does the EIR 2000 apply to this case and to the opening of safeguard proceedings?***

You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The EIR 2000 would not appear to apply to the opening of safeguard proceedings, as these are not within the material scope of the EIR 2000. Under Article 1(1), the EIR 2000 applies to "*collective insolvency proceedings* *which entail the partial or total divestment of a debtor and the appointment of a liquidator.*" Article 2 defines "*insolvency proceedings*" as "*the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A."*

Safeguard proceedings are not listed in Annex A. This appears to be in line with the EIR 2000 being concerned with liquidation, not restructuring (my understanding being that safeguard proceedings are a form of restructuring proceeding). As noted in *Bank Handlowy w Warszawie SA v Christianapol sp. Z o.o.* (CJEU Case C-116/11, 22 November 2012), Annex A is decisive as to whether proceedings fall within EIR 2000.

For the avoidance of doubt, if "safeguard" proceedings are one of the proceedings listed at Annex A (i.e. it is merely a point of translation that they do not appear to be so on the face of it), the other criteria for the application of the EIR 2000 are met:

1. In terms of territorial/geographical scope, the EIR 2000 applies where the debtor's COMI is in a Member State (Recital 14 EIR 2000). The EIR 2000 does not formally define "COMI", but at Recital 13, it states that: *"The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."* The meaning of COMI is autonomous to the EIR 2000 (that is, it is not subject to any definition within national legislation), a point emphasised in the case of *Eurofood IFSC Ltd* (Case C-341/04, 2 May 2006).

Article 3(1) of EIR 2000 also contains the registered office presumption: *"In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."*

For reasons outlined in more detail below in relation to EIR 2015, the COMI here appears to be France.

1. In terms of personal scope of EIR 2000, Dinosaurus is not one of the excluded undertakings under Article 1(2) EIR 2000 (insurance undertaking, credit institution, investment undertaking which provides services involving the holding of funds or securities for third parties, or collective investment undertaking).
2. In terms of temporal scope, the EIR 2000 came into force on 31 May 2002, so would apply to any proceedings commenced between then and 26 June 2017 (when the EIR Recast came into force).

**Question 4.2 [maximum 5 marks]**

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 23 June 2023.

***Will the EIR Recast be applicable to the proceedings?***

Your answer should address the EIR Recast’s scope and contain **all** steps taken to answer the question.

Yes, the EIR Recast would be applicable for the following reasons:

1. Firstly, the proceedings are within the EIR Recast's geographical/territorial scope, as the debtor's COMI is a Member State (Recital 25 EIR Recast). In this particular case, the COMI, overwhelmingly, appears to be France. Under Article 3(1) EIR Recast, the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (i.e. the wording that was previous in the recitals to EIR 2000 now features in the body of EIR Recast).

The same registered office presumption as in EIR 2000 applies to the EIR 2015 (Article 3(1)). This would mean a presumption of French COMI (if we assume that a company incorporated in France must have its registered office in France – although the facts do not explicitly state where the Dinosaurus registered office is).

There does not seem to be enough on the facts given to rebut the registered office presumption: most of the company's stores and employees are based in France, as are most customers. Even if it could be argued successfully that another country is the COMI, Dinosaurus' other activities appear to be in Spain and Ireland (i.e. other Member States) so even if one of these countries was the COMI, the EIR Recast would still apply to main proceedings commenced in those jurisdictions in the alternative.

1. Secondly, Dinosaurus would be within the personal scope of EIR Recast as it is not one of the excluded undertakings under Article 1(2) (e.g. insurance undertaking, credit institution, investment firm, or collective investment undertaking).
2. Thirdly, French "sauvegarde" proceedings are within the EIR Recast's material scope as they are listed within Annex A of the Regulation (compare this to Annex A of EIR 2000 where they do not feature). This is determinative of the question of whether the proceedings fall within the material scope of the Regulation, as noted in Recital 9 to EIR Recast (confirming the position previously taken by the CJEU in respect of EIR 2000 in *Bank Handlowy,* referred to above).
3. Finally, the proceedings fall within the temporal scope of the EIR Recast as they were opened after 26 June 2017.

**Question 4.3 [maximum 5 marks]**

A Spanish bank files a petition to open secondary insolvency proceedings in Spain with the purpose of securing a Spanish insolvency distribution ranking.

***Given the facts of the case, can such proceedings be opened in Italy under the EIR Recast?***

Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The response to this question assumes that "Italy" in this question is a typographical error and it should refer to "Spain". In the event that the question did mean to refer to Italy, the same theory explained below would apply – however, the facts presented suggest Dinosaurus has no presence in Italy at all, meaning there would be no "establishment" there for the purposes of secondary proceedings.

Firstly, it should be noted that once main proceedings have been opened in France, by virtue of Article 20 EIR Recast the judgment opening those main proceedings must be automatically recognised across Member States (subject to a public policy exception) and may not be challenged. However, the courts of a Member State can open secondary proceedings in respect of a debtor where the debtor has an "establishment" in that Member State (Article 3(2)). "Establishment" is defined at Article 2(10) of the EIR Recast as, *"any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets."*

The Spanish court would scrutinise whether there is an establishment at the point of filing for secondary proceedings. The relevant "look-back" period is the three months prior to the opening of proceedings in France. The response below could, therefore, be different if Dinosaurus' activities in Spain from 23 March 2023 onwards are different to those in the fact pattern given.

Dinosaurus' activities/assets within Spain are as follows:

* Its main warehouse;
* 2020 loan agreement with a Spanish bank (and a bank account opened with the same bank); and
* Non-binding memoranda of understanding ("**MOU**") in place with three Madrid-based suppliers.

The concept of "establishment" was considered in the CJEU case of *Interedil* (Case C-396/09, 20 October 2011). The CJEU concluded that the requirement for there to be some form of human resource shows a need for a minimum level of organisation and stability. As suggested by the Virgos Schmit Report 1996, the decisive factor is how the activity appears externally to third parties. It is not necessary, under the EIR Recast, that there be some form of official branch or office in the Member State, any form of external business activity will suffice, as long as it is ascertainable by third parties and otherwise meets the Article 2(10) definition (see the decision of the CJEU in *Burgo Group* (Case C-327/13, 4 September 2014)).

In this case, the key factor that points to the fact Dinosaurus does have an establishment in Spain is the warehouse. This is an asset, presumably, operated through human means and would have the requisite degree of permanence to be considered "non-transitory". To any objective third party there would be an establishment in Spain, especially as we are told this is the company's "main" warehouse.

The other aspects of Dinosaurus business in Spain are helpful in proving an "establishment" although by themselves may not have been enough. A bank account in the jurisdiction, alone, would not be sufficient. The current status of the MOU are unclear. If either party had started to act on the MOU in commencing business activity (perhaps unlikely given they are non-binding), then this might point to an establishment. However, it is unnecessary to consider further as the bank account, loan, MOU and (most importantly) warehouse together suggest Dinosaurus does have an establishment in Spain and the Spanish court can therefore open secondary proceedings. The secondary proceedings would, of course, only apply to Dinosaurus' assets in Spain.

A potential "block" to the opening of secondary proceedings in Spain is if the insolvency practitioner in the main proceedings in France (the "**French IP**") has made use of the unilateral undertaking provisions at Article 36 EIR Recast. If the French IP has given an undertaking in respect of Dinosaurus' Spanish assets that, when distributing those assets or their proceeds, it will comply with the distribution and priority rights under Spanish law, then the Spanish court must not open secondary proceedings if: a) the undertaking meets the procedural and substantive requirements of Article 36 and b) the Spanish court is satisfied that the undertaking adequately protects the general interests of local creditors) (Article 38(2)).

**\*\*\* END OF ASSESSMENT \*\*\***