INSOL INTERNATIONAL
FOUNDATION
CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

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: **[student number.assessment2B]**. An example would be something along the following lines: 202021IFU-314.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 "student number" 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**.

6.1 If 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **9 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.

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) 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

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

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

Question 1.3

The EIR Recast is an instrument of 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?

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 31 EIR Recast ("Honouring of an obligation to a debtor").

(c) Article 40 EIR Recast ("Advance payment of costs and expenses").

(d) Article 7 EIR Recast ("Applicable law").

Question 1.4

Why can it be said that the EIR Recast is more "rescue-oriented" than the EIR 2000?

(a) The EIR Recast is more rescue-oriented because it harmonises substantive aspects of domestic proceedings.

(b) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(c) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.

(d) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily focused on rescue.

Question 1.5

The EIR Recast introduced the concept of "synthetic proceedings". What are "synthetic proceedings"?

(a) Where 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.

(b) Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) Synthetic proceedings mean 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.

(d) Synthetic proceedings mean that for the case at hand, several main insolvency proceedings can be opened, in addition to several secondary proceedings.

Question 1.6

The EIR Recast kept the concept of the "centre of main interests" (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

(a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.7

Which one of the following claims **does not** fall within the definition of a "related action" under the EIR Recast?

(a) Claim to hold a director of the insolvent company liable for causing its insolvency.

(b) Claim of the insolvent company against its contracting party, arising from non-performance of the (pre-insolvent) contractual obligations by the latter.

(c) *Actio pauliana* claim filed by the insolvency practitioner.

(d) Claim of the advance payment for the costs of the insolvency proceedings.

Question 1.8

The dispute in the main proceedings, pending before the Spanish court, is between Abogados SA (Spain) and Fema GmbH (Germany), concerning an action to set aside two payments ("contested payments") in the amount of EUR 800,000, made pursuant to a sales agreement of 10 September 2019, governed by English law. The contested payments had been made by Abogados SA to Fema GmbH before the former went insolvent. The insolvency practitioner of Abogados SA claims that under applicable Spanish law the contested payments shall be set aside. This is due to the fact that Fema GmbH must have been aware that Abogados SA was facing insolvency at the time that the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

(a) The contested payments shall not be avoided if Fema GmbH proves that such transactions cannot be challenged on the basis of the insolvency provisions of English law (Article 16 EIR Recast).

(b) To defend the contested payments Fema GmbH can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.

(c) The contested transactions cannot be avoided if Fema GmbH can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.

(d) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

The correct answer was C.

Question 1.9

In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?

(a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

(d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.

Question 1.10

The French tax authority asserts to have a tax claim against a Spanish, LPZ Corp (debtor). The debtor is subject to the main insolvency proceeding (*Concurso*) in Spain. In addition, a secondary insolvency proceeding (Examinership) relating to LPZ Corp has been opened in Ireland.

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.

- Under Irish law, the period within which creditors must file their claims is 15 days, as set in the order opening secondary insolvency proceedings against LPZ Corp.

The French tax authority intends to file its claim in the Irish proceedings. Within which time period can the French tax authority do so?

(a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).

(b) Within 15 days, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).

(c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Ireland.

(d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Spanish law).

Marks awarded: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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. "The possibility for companies to move their COMI is a legitimate exercise of the freedom of establishment."

COMI Presumptions;
Article 3(1) EIR Recast; Recital 30 EIR Recast

Statement 2. "This concept provides an instrument which makes allowance for special, domestic privileges while maintaining the procedural integrity of the main proceeding, thus preserving the principle of unity."

Secondary proceedings and Establishment;

Article 2(10) EIR Recast; Article 3(2) EIR Recast; Recital 23 EIR Recast
[This was relating to Articles 36 and 38]

Question 2.2 [maximum 3 marks] 3

Where several insolvency proceedings have been opened against the same company, there should be proper co-operation between the actors involved in these proceedings. The EIR Recast has introduced co-operation and communication obligations. List **three (3) provisions** (articles) of the EIR Recast, which mandate co-operation and communication in the context of main and secondary insolvency proceedings.

Cooperation and Communication between Insolvency Practitioners; Article 41 EIR Recast
Cooperation and Communication between courts; Article 42 EIR Recast
Cooperation and Communication between Insolvency Practitioners and courts; 43 EIR Recast

Question 2.3 [maximum 3 marks] 3

The EIR Recast is more rescue-oriented than its predecessor the EIR 2000. Name **three (3) provisions** (articles) of the EIR Recast which explain why this statement is true.

1. Article 1 EIR Recast extends traditional liquidation-oriented procedures to proceedings aiming at rescuing economically viable but financially distressed businesses where only a likelihood of insolvency exists and to proceedings which have the debtor in full or partial control of its assets and affairs as debtor-in-possession Recital 10 EIR Recast whereas in Article 1 EIR 2000 and Recital 10 EIR 2000 seeks for partial or total divestment of the assets of the debtor and an appointment of a liquidator only.

2. Article 47 (1) Power of the main proceeding Insolvency practitioner to propose restructuring plans for the secondary insolvency proceedings where Article 3(3) of the EIR 2000 had limited insolvency proceedings of the second proceedings to only liquidation (winding-up proceedings)

3. Article 41 EIR Recast mentions the need to communicate information on measures related to the debtors' rescue and restructuring between the Insolvency practitioners as against its

predecessor Article 31 EIR 2000 which was silent on it. References to such measures in EIR Recast indicates its widened scope and policy preferences towards saving economically viable and financially distressed businesses.

Question 2.4 [maximum 2 marks] 2

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 1 to 3** sentences) explain how they operate.

Recital 41 EIR Recast sets out two specific situations in which the court seised with jurisdiction and requested to open secondary proceedings may not open such proceedings.
Undertaking at Article 36 EIR Recast; Recital 42-44 EIR Recast and
Stay of Secondary Proceedings at Recital 45 EIR Recast.

The Undertaking and Stay of Secondary Proceedings operate by allowing the Insolvency Practitioner in the main insolvency proceedings several possibilities to intervene in the secondary proceedings by proposing restructuring plans, composition or apply for suspension of the realisation of assets in the secondary proceedings. By cooperation, the Insolvency Practitioners and the courts may take into account best practices for cooperation adopted by European and International organisations active in the area of insolvency law as for example, the UNCITRAL Legislative Guide on Insolvency Laws.

Marks awarded: 9 out of 10.

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] 4

Explain why the adoption of the new European regulation was needed and recommended by the European Commission in 2012.

After 15 years of the existence of EIR 2000, it became clear that scope of its provisions needed adjustment, while other developments required totally new rules. EIR Recast responded to the need of insolvency practice (broadening its scope to restructuring proceedings), stronger rules for cooperation between insolvency practitioners and between courts and between practitioners and courts and possibility of proceedings with regard to members of the same group of companies, improvement of creditor information (interconnectivity of insolvency registers) as well as general modernization of the legal rules (data-protection)
[Good but reference to policy documents produced before the drafting of the EIR Recast 2015 would have made your answer stronger.

Question 3.2 [maximum 5 marks] 5

Compare the EIR Recast with the EIR 2000: choose **three (3)** major improvements and / or innovations of the EIR Recast. Explain how these improvements and / or innovations should

stimulate a more efficient administration of insolvency proceedings spanning across several EU Member States.

Three of the several improvements that the EIR Recast made to the EIR 2000 include the following:

Firstly, EIR 2000 left it to the discretion of the liquidators to publish information on the opening of insolvency proceedings in other Member States Article 21 EIR 2000. Article 20 EIR Recast requires no further formalities but production of the same effects of the insolvency proceedings in the opening State in all the other Member States. Article 28 EIR Recast obliged the Insolvency Practitioners or the debtor-in-possession to request publication of the notice on the judgment opening of insolvency proceedings and where appropriate the decision appointing the insolvency practitioner to be published whether main or secondary proceedings at the place of the debtor's establishment in accordance with the publication procedures provided for in that Member State. Article 28 EIR Recast also requires that the Insolvency Professional or the debtor-in-possession publish in any Member State, if they consider it necessary or beneficial for the proper administration of the insolvency estate.

Secondly, Article 31 of EIR 2000 required that the Brussel Convention's provision be referred to mandating the declaration of enforceability from the court in a state where enforcement is sought. Article 32(1) EIR Recast establishes that the judgment covered by it must be enforced in accordance with Articles 39-44 and 47-57 of Brussels 1 Recast. According to Article 39 Brussels 1 Recast, a judgment given in a Member State which is enforceable in that Member State shall be enforceable in other Member States without any declaration of enforceability being required. The Recast ensures that same laws are automatically enforceable and leaves no state with an option to declare mandation of the laws of the community

Thirdly, EIR 2000 did not mention arbitrational proceedings which practice led to contradictory judgments. EIR Recast explicitly equates arbitration with state court litigation in the matter of assigning the law determining the effect of insolvency on them. Article 18 EIR Recast subjects the effects of insolvency to the law of the Member State in which the law suit is pending (lex fori processus) or in which the arbitral tribunal is seated (lex loci arbitri). The law will decide on various procedural measures, such as suspension or termination of a lawsuit, representation by Insolvency Professional and the award of litigation or arbitral costs. In this instance, the enforcement of arbitral laws was brought in parity to legal laws.

In all the three improvement provisions uniformity in application of the community laws is enforced rather than an optional state mandates for enforcement of the community laws.

Question 3.3 [maximum 5 marks] 5

Select **two (2)** major flaws and / or omissions of the EIR Recast. Explain why you consider them to be flaws and / or omissions and how they can be corrected or remedied.

The EIR Recast first major flaw is its handling of the enterprise group insolvency proceedings as it does not sanction substantive, procedural or jurisdictional consolidation of group insolvency proceedings. It instead offers coordination mechanism called group coordination proceeding which is a voluntary mechanism It leads to non-binding actions of the group coordinator. It has received mixed reception in legal literature, with the majority of authors expressing doubt as to their effectiveness and practical value as well the high costs it may bring with their complex character. Additional problem in this regard is envisaged if the corporate group member is located in a non-Member State, meaning the EIR will not bind courts and insolvency proceedings in such non-Member State proceedings and that the latter cannot form part of the group coordination proceedings. The EIR Recast also does not mention the concept of group (or enterprise) COMI and does not otherwise indicate the main

court, which is decisive in performing the tasks of coordination. One of the yet weakest points of the EIR Recast group coordination regime is the right of every insolvency practitioner concerned to object to its inclusion within the group coordination proceedings of the insolvency proceeding in respect of which he or she has been appointed. And furthermore, the Article 64(1) EIR Recast does not explicitly require insolvency practitioners to give substantiable reasons for their objection to inclusion in the group coordination insolvency proceedings.
These lapses in the EIR Recasts' enterprise group insolvency laws need to be corrected in the next review of the regulation to make the rule more efficacious for the enterprise group insolvency proceedings. The coordination activity of the group coordinator must be tightened to make it binding on their insolvency practitioners subject to the courts oversight, the problem with non-Member State involvement in the insolvency with other Member State companies within an enterprise group also ought to be resolved in the regulation to bring into the proceeding all the members of the enterprise to make their insolvency proceeding of the enterprise wholesome. There ought to be a COMI centre for the enterprise group insolvency proceeding for a lex concursus to be available to handle the proceeding of the enterprise insolvency and finally the insolvency proceeding among an enterprise group must have the insolvency practitioners who opt out of the proceedings firmly declare their reasons for opting out to give a finality to the proceedings.

Recital 22 EIR Recast captures another flaw of the Regulation and acknowledges that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union.
The application without exception of the law of the State of the opening of proceeding would against this background, frequently lead to difficulties. This applies, for example to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases completely different.

At the next review of the Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at the European level. This Regulation should take account of such differing national laws in two different ways. On the one hand, provision should be made for special rules on the applicable law in the case of particularly significant rights and legal relationships (rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of the opening of proceedings should be allowed alongside main insolvency proceedings with universal scope.

Marks awarded: 14 out of 15.

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

Prêt A Jouer (PAJ) is a France-registered toy shop company. The company opened its first store in Strasbourg in 2011. One of PAJ's warehouses is in Madrid (Spain) and PAJ rents out this warehouse to other toy companies. In 2013, PAJ concluded a line of credit agreement with a Spanish bank where it maintains a bank account. During the same year, PAJ announced that it had plans to expand to the Spanish adult gaming market, as the latter was expected to grow annually by over 10%. As a result, PAJ started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed.

However, like many other toy businesses, PAJ has faced the challenges of increased fixed costs and it has underestimated competition with web-based companies and an increasing preference for video games. For a few years now, PAJ has been beset by financial difficulties and, having witnessed the ongoing demise in revenue and fall in profits, it decided to file a petition to open safeguard proceedings (*procédure de sauvegarde*) in France. The petition was filed with the Strasbourg Court on 23 June 2017.

Question 4.1 [maximum 5 marks] 1

Assume that the EIR 2000 applies. Does the Strasbourg Court have international jurisdiction to open the requested insolvency proceeding? (Explain why it does or does not have jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

No, the Strasbourg Court does not have jurisdiction to open the requested insolvency proceeding which allows debtors that though still solvent, face difficulties that they cannot overcome, to be restructured at a preventive stage under the court's supervision. Under EIR 2000 to open an insolvency proceeding the court in the Member State must have temporal, material personal and territorial scopes. The Strasbourg court being in France and thus a Member State of the Union has territory jurisdictional scope to open the proceedings. The entity for which it is opening the insolvency proceeding is a company and thus it satisfies the personal scope. The proceeding is an insolvency but it must be for a company with financial distress which is absent in the Annex A of EIR 2000 and thus does not qualify for the material scope under Article 1 EIR 2000 which is for only collective proceedings entailing partial or total divestment of debtor for liquidation of companies only, and finally the date for judgment on its open is 23rd of June 2017 which falls under the jurisdiction of EIR 2000. But for the failure of the material scope which is absent in the Annex 1 of the EIR 2000, the proceeding cannot be open under EIR 2000.

The Material Scope of the issue involved here is an insolvency proceeding as found in Article 1 EIR Recast (Scope) and not Article 1 EIR 2000 which applies to public collective proceedings which are based on laws relating to insolvency and which are for the purposes of liquidation only and appointment of a liquidator and not for reorganisation of financially distressed companies as under the EIR Recast

[This is incorrect. The Strasbourg court will have jurisdiction to open proceedings.
To address the question of whether the Strasbourg Court has international jurisdiction to open the requested insolvency proceeding, we should look at the debtor's centre of main interest, or COMI. The relevant provision is Art. 3(1) of the EIR 2000.
Both France and Spain are Member States that are covered by the EIR 2000. In this case, we are told that PAJ is registered in France and opened its first store in Strasbourg in 2011. Although the EIR 2000 did not have a fixed definition of COMI, Recital 13 of the EIR 2000 and relevant CJEU jurisprudence provided some guidance on how to determine the COMI.
For example, in the *Eurofood IFSC Ltd* case, Eurofood IFSC Ltd was registered in Ireland and was a wholly owned subsidiary of Parmalat SpA, which was incorporated in Italy. The District Court in Parma, Italy first held that it had jurisdiction on Eurofood's insolvency, but subsequently, the High Court in Ireland then decided that the COMI was in Ireland and refused to recognise the earlier Italian judgment. The CJEU was asked to decide on the case. It held in its decision that the concept of COMI should be interpreted in a uniform way rather than according to definitions in national legislation (para 31). In addition, the COMI should be identified by reference to criteria that are objective and which are ascertainable by third parties (para 33). This is so that there is legal certainty and foreseeability across the EU.
Looking at the objective criteria, the facts of this current case show that PAJ was registered in France, opening its first store in Strasbourg in 2011. As for its connection to Spain, PAJ has a warehouse in Madrid, Spain, renting it out to other toy companies. In addition, PAJ also concluded a line of credit agreement with a Spanish bank where it maintains a bank account, and has also signed some non-binding memoranda of understanding with local distributors. Taking into account these facts, it would appear that in this case, its connections with Spain are more tenuous e.g. having only signed exploratory, non-binding MOUs. Therefore, the COMI would likely be considered France.
For COMI, under the EIR 2000, there was a registered office presumption, which means that the state of the registered office is presumed to be the state for the COMI, although there was

somewhat limited guidance on how the registered place presumption could be rebutted. However, the facts of the case suggest that the links with Spain in this case would unlikely be sufficient to rebut the presumption of the registered place (France).
In contrast, with France, PAJ has shown regular and lasting activity to establish COMI, such as opening its first store there since 2011. The reason for the existence of this criterion for determining COMI and the presumption of COMI is to combat forum shopping, which is where an entity moves to a different Members State for the purpose of obtaining a more advantageous legal position in insolvency.
Based on an application of the facts above to the EIR 2000 and relevant CJEU case law, it would appear that the Strasbourg Court does have international jurisdiction to open the insolvency proceeding.]

Question 4.2 [maximum 5 marks] 5

Assume that the Strasbourg Court opens the respective proceeding on 29 June 2017. Will the EIR Recast be applicable? Your answer should address the EIR Recast's scope and contain **all** steps taken to answer the question.

Yes, the request for the opening of the insolvency proceeding will meet the EIR Recast requirements. The Article 1 EIR Recast, states the Regulation applies to collective including interim proceedings which are based on laws relating to insolvency and in which for the purposes of rescue, adjustment, reorganisation or liquidation. The safeguard proceeding does not seem to be a liquidation proceeding but reorganisation proceedings It is defined as a proceeding which allows debtors that though still solvent, face difficulties that they cannot overcome, to be restructured at a preventive stage under the court's supervision. Thus, the proceeding qualifies under EIR Recast to be open under its material Scope Article 1 EIR Recast.
The EIR Recast is effective as from 26th June 2017 and since the opening of the safeguard proceeding is at 29th June 2017, it will qualify to be opened under the jurisdiction of EIR Recast Article 92 EIR Recast.
The proceeding shall also apply under the EIR Recast for the personal scope since it is company and as such a legal entity that can avail itself of the safeguard proceeding. Recital 9 EIR Recast
Finally, the safeguard proceeding qualifies for the territorial scope of the EIR Recast. Recital 25 of the EIR Recast contains a key provision under which the Regulation shall apply to proceedings in respect of a debtor whose centre of main interests COMI is located in the EU. In this particular case France where the company is registered and has its administrative and organisational headquarters at Strasbourg, France, a EU Member State.

Question 4.3 [maximum 5 marks] 2.5

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 Spain under the EIR Recast? Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

No, the Spanish bank cannot succeed in opening an insolvency proceeding in Spain for securing Spanish insolvency distribution ranking. To open any such proceeding, the debtor company must have at least an establishment in the EU Member State. From the facts of the case, there is only some bank accounts, a warehouse that it rents to others and some non-binding memoranda of understanding which does not amount to an establishment. Establishment is defined 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 Article 2 (10) EIR Recast. The bank in Spain thus does not qualify with the necessary requirement for an establishment of the debtor company in Spain to successfully open a secondary insolvency proceeding. It does not have a non-transitory economic activity in Spain to qualify for an establishment.

[You are correct in saying that the court will not have jurisdiction but your explanation is not thorough enough to get full points.
Based on the facts, it would seem that the finding of an establishment would not be made out in Spain, as these facts do not qualify as "non-transitory economic activity with human means and assets" (Article 2(10) of the EIR Recast). The EIR Recast does not have requirements as to form i.e. that there has to specifically be a corporate branch or representative office, in order for there to be an establishment. The EIR Recast places more importance on the substance, looking at both human resources and assets. Nevertheless, the facts of the case suggest that the threshold for there to be considered an establishment in Spain has not been reached, as there is only a bank account and intentions to expand into the adult gaming market in Spain, and the signing of some non-binding memoranda of understanding.
In the CJEU decision in *Interedil Srl v Fallimento Interedil Srl,* the Court stated at paragraph 64 that the term "establishment" under the EIR Recast requires the presence of a structure consisting of a "*minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition*." Although there is no explicit time limit on how long the activity has gone on for, an occasional place of operations would not be considered as an establishment. This assessment is an objective one, rather than viewed through the subjective lens of the debtor (see paragraph 71 of the Virgós-Schmit Report).
Applied to this case, this is significant because it cannot be said that because there was the intention to enter the Spanish market (by signing non-binding MOUs), that this demonstrated sufficient connection for there to be an establishment in Spain.
The same *Interedil* decision also held that if the bodies responsible for the management and supervision of the debtor are in the same place as its registered office, and the management decisions of the company are in fact taking place there, the registered office presumption (i.e. the COMI is presumed to be the same place as the registered office) cannot be refuted. In this case, the facts do not expressly say that the management takes place in France, although given that the first store was opened there, this is possible.
In this case, in consideration of the facts and the relevant case law, it appears that the minimum level of organization and stability has not been demonstrated for Spain. Therefore, it would not be possible to open secondary insolvency proceedings in Spain.]

Marks awarded: 8.5 out of 15

*** End of Assessment ***

Marks awarded: 40.5 out of 50