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 "studentnumber" 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**.

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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").

B is the correct answer.

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.

D is the correct answer.

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).

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: 8 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."

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."

Answer

Statement 1 – This relates to the concept of COMI to be found in Article 3(1) of the EIR Recast.

Statement 2 – Relates to the concept of Secondary Proceedings to be found in Article 3 (2) of the EIR Recast. [This is incorrect – it relates to Article 36 of the EIR Recast, which deals with "synthetic proceedings". This is where, in order to avoid secondary proceedings, which can sometimes hamper efficiency of the overall process, an insolvency practitioner of the main proceedings gives an undertaking to creditors. See also Article 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.

Answer

(a) Article 41 (1) of the EIR Recast. This Article imposes an obligation on the Insolvency Practitioner in main proceedings and that in secondary proceedings to co-operate with each other provided the proceedings concern the same debtor.
(b) Article 42 (1) oblige courts before which a request to open proceedings is pending or has been opened to co-operate with any other court that has been asked to open insolvency proceedings or has already opened such.
(c) Under Article 43 an Insolvency practitioner in main proceedings must co-operate with and communicate with a court in which a request to open secondary proceedings have been made or in which such has been opened.

Question 2.3 [maximum 3 marks] 2

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.

Answer

The following provisions in the EIR Recast supports the view that it is a more rescue-oriented Regulation than its predecessor the EIR 2000:

(a) Article 1 extends the applicability of the EIR Recast to proceedings aimed at rescuing companies that are economically viable but in financial distress. The EIR 2000 did not provide for the restructuring of such entities.
(b) Article 2(4) refers to Annex and provides a wide list of 112 procedures covered by Annex A. This list covers insolvency proceedings in all 27 countries [Explain how this is an improvement compared to the EIR 2000]
(c) The language of the EIR Recast places a lot of emphasis on restructuring as opposed to liquidation – Recital 10.

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.

Answer

Two examples of instruments aimed at controlling the opening, conduct and closure of secondary proceedings are:

(a) One of the options contained in the EIR Recast aimed at avoiding secondary proceedings is that of the right to give undertaking in Article 38(2) of the EIR Recast. If the insolvency practitioner in the main proceedings gives an undertaking in accordance with Article 36, the court in which the request to open secondary proceedings is made should not do so if the insolvency practitioner makes such a request if satisfied that the undertaking is sufficient to protect the general interest of local creditors as was decided in the Case of Re Collins &Aikman Europe SA and other companies (2006) EWHC 1343 (Ch). Such an undertaking only covers the assets in the Member State in which the secondary proceedings may be requested and guarantees treatment as if secondary proceedings have been opened. There are a number of requirements to be met for such undertakings to be valid for example it must specify the factual assumption on which it is based and must be in writing.
(b) There is a stay on individual enforcement measures once main proceedings have been opened. This provides the opportunity for the debtor to negotiate restructuring deals with its creditors. The EIR Recast gives the court the power to stay the opening of enforcement proceedings where a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings under Recital 45 EIR Recast. Such a stay is not automatic, a request should be made by the insolvency practitioner or the debtor in possession. There is a time limit of three months for such stays and suitable measures should be in place to protect the interest of local creditors.

    There are three circumstances in which such a stay can be lifted (i) if negotiations between the debtor and its creditors results in a restructuring plan (ii) if the continuance of the stay is detrimental to the rights of creditors and (iii) if the insolvency practitioner or the debtor in possession has infringed on the prohibition on disposal of the debtors assets or on removal of them from the Member State where the stay was given. In comparism to undertaking dealt with above, a stay is a weaker form of protection of the integrity of the main proceedings.

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] 3

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

Answer

The adoption of the new European regulation was needed and recommended by the European Commission in 2012 for a number of reasons. Firstly, it can be said that this was anticipated under Article 46 of EIR 2000 which provides for a presentation of a report on the application of the EIR 2000 and a proposal for its adoption if necessary. Some of its provisions needed adjustment and in other areas new rules were required. This led to EIR Recast.

It can be said that the EIR Recast broadened the scope for restructuring proceedings to ensure that it was responsive to the need of modern insolvency practice. Unlike the EIR 2000 the EIR Recast applies to group of companies. The scope of insolvency proceedings has been widened to deal with pre insolvency proceedings, hybrid proceedings and personal insolvency proceedings.

The revised meaning of COMI under the EIR Recast should be noted, although it is similar to that under EIR 2000, it goes a step further by imposing a three months restriction on the transfer of the debtor's registered place of business upon the commencement of main proceedings. This serves the purpose of dealing with forum shopping which was used by debtors trying to gain a more favourable outcome.

The EIR Recast also brought about an improvement of creditor information by interconnecting creditors registers and created a more modernised set of legal rules such as in the area of data protection.

For the above reasons, it can be said that the new EIR Recast was not only anticipated under the EIR 200O but was also needed to modernised European insolvency practice.

[You failed to mention the issue of corporate groups and the new emphasis on communication and cooperation.]

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.

Answer

The three major improvements and or innovations of the EIR Recast are as follows:

(a) Under the EIR 2000 the duty to publish information on the opening of the insolvency proceedings in other Member States was left to the discretion of the liquidator. Under

Article 28(1) of the EIR Recast, the insolvency practitioner or debtors in possession are obliged to request publication of the notice on the opening of insolvency proceedings. This applies to both main and secondary proceedings.

This innovation concerning publicity should ensure the smooth handling of cross-border insolvency.

(b) Under the EIR 2000 every Member State had its own insolvency registration system and such registration systems were not necessarily interconnected. This has considerably improved by the EIR Recast, Under Article 24 of the EIR Recast, Member States are obliged to establish and maintain in their country one or more registers in which information concerning insolvency proceedings are published. Such information must be published as soon as possible after the opening of insolvency proceedings.

The EIR Recast goes further by determining the minimum information that such "insolvency registers" should contain. This includes the date of opening of proceedings, the court where such is opened, whether a main, secondary or territorial insolvency proceedings, debtor's name, reregistration number, registered office, the name, postal address and email of the insolvency practitioner. Under Article 25 if the EIR Recast there is now a search engine to information on the system.

Such publicity of information is of great importance to creditors both local and foreign especially if they are required to file claims within a prescribed period of time under the lex concursus rules.

(c) The EIR 2000 only contained one provision in Article 31 that mandates insolvency practitioners in main and secondary proceedings to communicate information with each other. In contrast the EIR Recast introduces a comprehensive system of co-operation and communication between insolvency practitioners under Article 41, between courts under Article 42 and between insolvency practitioners and courts under Article 43.

This improved framework for communication and co-operation should result in a more efficient and effective deployment of the debtor's asset and protection of the rights of the creditors. Under Articles 56 to 59 of the EIR Recast similar provisions are to be found in relation to members of a group of companies.

Question 3.3 [maximum 5 marks] 3.5

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.

Answer

(a) The extension of insolvency to cover group insolvency proceedings is a much welcomed modernisation of insolvency in this area. However, it can be argued that such regulation will miss the desired effect of securing the efficient administration of group insolvency proceedings including the co-ordinated restructuring of the group for the following reasons:

- Under Recital 56 EIR Recast such group co-ordination is not mandatory but voluntary. There is a possibility of opting out without having to show good cause. Insolvency practitioners are not obliged to follow any such co-ordinated activities under Article 70 of the EIR Recast.
- Such group proceedings lack creditor involvement as creditors of the group of companies are not obliged to be informed of the opening or joining of such

proceedings. Under Article 63 right to be heard is given to the insolvency practitioner but not to the affected creditors in the court where the request to open group proceedings is dealt with.
- Group proceedings can result in the complexity of proceedings and likely to result in increased cost. Such disadvantages outweigh any potential benefit.
- There is the possibility of the corporate group having members in non - Member states, this can result in such members not being bound by the EIR Recast. Such exclusion can limit the effectiveness of the group proceedings.

(b) The EIR Recast should have been an opportunity to get rid of the multi-layered system that allows for the opening of several insolvency proceedings against the same debtor in different member states. This results in additional costs and complications. [A more thorough answer would have been necessary to support this claim.]

Both of the above flaws identified in the EIR Recast can be dealt with by the introduction of soft laws in the above areas.

Marks awarded: 11.5 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] 5

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.

Answer
Having considered the facts of the case in the question above it is my position that the Strasbourg Court has international jurisdiction to open the requested insolvency proceedings for the following reasons:

Under the EIR 2000 the COMI of an entity is that of where its registered office is and any such insolvency proceedings should be opened in a court in the debtor's COMI. From the information we have been given, we have been told that the company was registered in France, therefore insolvency proceedings can be opened at the Strasbourg Court that is within the territory of France.

The facts and decision in the case of Interedil Srl v Fallimento Interedil Srl is of significance here as the facts are somehow similar. In the Interedil Case, Interedil Srl was a legal entity

registered in Italy but subsequently relocated to London and registered in the UK as a foreing company. Bankruptcy proceedings were opened in Italy and the decision to open bankruptcy in Italy as opposed to the UK was challenged by Interedil Srl arguing that because its registered office has been transferred to the UK only courts in the UK have jurisdiction to open insolvency proceedings. The Italian court argued that such a presumption has to be rebutted by the following factors i.e. the existence of a lease agreements, contract with a bank and the fact that Italian registrar was not notified of the change of the company's registered office.

The CJEU held that where the bodies responsible for the management and supervision of the company are in the same place as its registered office and this is ascertainable by third parties the presumption concerning the registered office is irrefutable. The presumption can be rebutted if third parties take the view that the place where the debtor is managed is not the same as where its registered office is. The mere presence of some assets will not be sufficient to rebut the registered office presumption.

From the facts we have been given concerning this Question 4.1 although PAJ has assets in Spain such as its warehouses, a credit agreement and a bank account in Spain this is not sufficient to rebut the presumption of France being its COMI. The question/guidelines as laid down in the Interedil Srl case and repeated in Recital 30 of the EIR Recast should be followed. There is no evidence from the facts we have been given to suggest that the management and supervision of the company has been transferred to Spain, thereby causing third parties to take the view that the place where the company is managed is not the same as the jurisdiction where its registered office is.

In conclusion the registered office presumption is unlikely to be rebutted and Strasbourg Court has jurisdiction to open the requested insolvency proceedings.

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.

Answer

Yes the EIR Recast will apply if the Strasbourg Court opens proceedings on the 29th of June 2017. This is because the EIR Recast applies after the 26th of June 2017 under Article 92 of the EIR Recast. In determining the EIR Recast's scope the first point to consider is its temporal scope i.e. when does it apply in time. This is satisfied as we are told proceedings commenced on the 29th of June 2017. Secondly the question of personal scope should also be addressed i.e. to whom does it apply, followed by the material scope i.e. which proceedings are covered by it and lastly the geographical scope i.e. what are the geographical limitations.

A step by step plan for the above scenario is as follows:

1. Does the debtor in this case PAJ have a COMI in an EU Member State other than Denmark. The answer to this is yes as we have been told that the company is registered in France.
2. Is the debtor an excluded entity? The answer to this is no as the debtor is a toy company not a bank, insurance company or any other excluded entity.
3. Is the proceedings listed in Annex A to the EIR Recast? Yes Annex A includes pre insolvency proceedings.
4. Was the proceedings opened after 26th June 2017? Yes the proceedings commenced on the 29th of June 2017.

In this case the EIR Recast is applicable as all four steps above have been met.

Question 4.3 [maximum 5 marks] 3

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.

Answer

Article 3 (2) of the EIR Recast allows for the opening of one or more secondary proceedings against the debtor in any Member State where the debtor has an establishment. Secondary proceedings are restricted to Member States in which the debtor has assets. We have been provided with information that confirms that the debtor PAJ holds assets such as a warehouse, leases and a bank account in Spain on the face of it therefore the Spanish bank will be able to open secondary proceedings in Spain.

The definition of establishment in Article 2 (10) of the EIR Recast should be noted as this is important as mentioned above in the opening of secondary proceedings. Establishment means "any place of operations where a debtor carries out or has carried out in the three-months period prior to the request to open main proceedings a non -transitory economic activity with human means and assets".

From the facts we have been given, it seems as if the debtor's activities in Spain have some degree of continuity and stability, this is not just a purely occasional place of operations. There is no requirement for any official form such as a branch office or representative office. In the case of Brugo Group SpA v Illochroma SA ECLI:EU:C:2014:2158 [Good] the EJEU decided that there main proceedings have been opened in a Member State other than that of it's registered office. It should be possible to open secondary insolvency proceedings in the Member State of its registered office. This is not the case in this Question 4.3 as the main proceedings are likely to be opened in France where the COMI is located.

It should be noted that the EIR Recast will only be applicable if such secondary proceedings commence after the 26th of June 2017. Article 7 of the EIR Recast sets the general rule the applicable law to such secondary insolvency proceedings and their effect will be that of where the proceedings are opened. In this case the applicable law will be that of Spain where secondary proceedings are opened.

The Spanish bank will therefore be able to successfully open secondary proceedings in Spain thereby taking advantage of the Spanish distribution ranking provided an undertaken is not successful applied for by the insolvency practitioner in France.

[Your answer is incorrect.
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.

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: 13 out of 15

*** End of Assessment ***

Marks awarded: 41.5 out of 50