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").

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).

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).

C was the correct answer.

Marks awarded: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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."

Statement 1: Article 3(1) of EIR Recast 2015, Related concepts: registered office presumption, suspect period and forum shopping. Related Case: Case C-106/16, Polbud-Wykonawstwo sp. z o.o, ECLI:EU:C:2017:804 (Oct 25, 2017) In this case CJEU held that change of registered office to a favourable legislation enjoy the protection of freedom of establishment and is not constituted as abuse.

Statement 2: Synthetic Proceedings, Article 38(2) and Article 36 of EIR Recast. It originated from judicial innovation in the case of Collins & Aikman Europe SA and other companies [2006] EWHC 1343 (Ch)

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.

1. Cooperation and communication between insolvency practitioners, Article 41(1) EIR Recast
2. Cooperation and communication between courts, Article 42(1) EIR Recast
3. Cooperation and communication between insolvency practitioners and courts, Article 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 provides the scope. Compared to EIR 2000, the scope of EIR Recast extends to proceedings aiming at rescuing economically viable but financially distressed companies.
2. Right to give an undertaking (Synthetic Proceedings) under Article 38(2) and Article 36 EIR Recast and temporarily staying the opening of secondary proceedings under Article 38(3) EIR Recast promotes the process of negotiation and business rescue.

3. Absence of requirement of Secondary proceedings as winding-up proceedings under Article 3(4) EIR Recast vis-à-vis the requirement contained in Article 3(3) EIR 2000. This requirement prevented the attempts of rescuing the companies having establishments in multiple Member States.
4. Comparing Article 31 EIR 2000 and Article 41 EIR Recast, EIR Recast emphasises the need to communicate the information related to measures concerning debtor's rescue and restructuring.

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.

1. Right to give an undertaking (synthetic secondary proceedings) under Article 38(2) EIR Recast: Where the insolvency practitioner in the main insolvency proceeding gives an undertaking in accordance with the Article 36 EIR Recast, the court does not open the secondary proceeding given that it is satisfied that the undertaking adequately protects the general interests of local creditors. The undertaking has to be approved by the known local creditors and the distribution of the secondary asset pool takes place in accordance with the national law of the Member State of secondary insolvency proceeding if it would have opened.
2. Staying the opening of secondary insolvency proceedings under Article 38(3) EIR Recast: Upon a request from insolvency practitioner or debtor in possession, the Court can impose stay on the secondary insolvency proceeding for not exceeding three months on condition that the interests of local creditors are taken care of. The stay can be lifted when an agreement has been made between the parties or the stay is resulting in damaging the creditors' interests.

Marks awarded: 10 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] 5

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

Article 46 EIR 2000 provided that the Commission should, no later than 1 June 2012 and every 5 years thereafter, submit a report in application of the Regulation and put forth a proposal for adaptation of it if it finds necessary. In 2012 European Commission reviewed the Regulation. EIR was considered successful in its operating cross-border insolvency proceedings in the European Union. However, in its long years of application it was felt that the Regulation was not able to suffice the present EU needs and priorities in insolvency law. The most critical were rescuing and reorganisation of the financially distressed firms, which were not dealt adequately with in the EIR 2000.

EIR 2000 did not contain the provisions related to the pre-insolvency proceedings. Companies could not be restructured at a pre-insolvency stage. Under the Regulation, company could not be left with the existing management in place. EIR 2000 did not contain a definition of Centre of Main Interest (COMI) which raised difficulties in determining the jurisdiction for opening main insolvency proceedings. In Eurofood IFSC Ltd (Case C-341/04, ECLI:EU:C:2006:281), CJEU (then ECJ) while interpreting the Regulation held that there should be an autonomous meaning given to the COMI that should be both objective and ascertainable by the third parties. Lack of clarity in the Regulation allowed for abusive forum shopping and a lot of difficulties in applying the concept in practice.

No provisions to check the opening of secondary insolvency proceedings hampered the efficient administration of the debtor's estate and made the sale of the debtor as going concern more difficult. EIR 2000 required secondary proceedings to be winding up proceedings that acted as an obstacle to successful restructuring of a debtor. In Collins & Aikman Europe SA and other companies [2006] EWHC 1343 (Ch) the group operated through 24 legal entities spread over 10 jurisdictions. In absence of any framework and to avoid secondary proceedings oral assurances were given by joint administrators to local creditors to take care of their interests.

There was a need of stronger rules for cooperation amongst and between insolvency practitioners and courts. There was no mandatory publication or registration of the decisions in the Member States where a proceeding had opened nor in the Member States where there is an establishment. For good functioning of cross-border insolvency proceedings proper cooperation and communication is required between the stakeholders.
Regulation also did not contain specific rules dealing with the insolvency of multinational group enterprises. It diminished the prospects of successful restructuring of the group as a whole.

Considering the above shortcomings, the European Commission recommended for the adoption of the new regulation which should encompass scope for rescue and restructuring, more certainty in predicting COMI, provisions to check on secondary proceedings, stronger rules for cooperation, improvement of creditor information and rules for group insolvency.

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.

While the EIR 2000 left it to the discretion of the liquidator to publish information on the opening of the insolvency proceedings in other Member States (as per Article 21 EIR 2000), EIR Recast made it compulsory for Insolvency Practitioners or Debtor in possession to request publication of the notice on the opening of the insolvency proceedings at the place of debtor's establishments. IP or the debtor in possession may request publication in other Member Sates also, if they consider it necessary for the proper administration of the estate. Article 54(3) EIR Recast provides that the information of opening of insolvency proceedings must be published in the European e-Justice Portal. Apart from these rules, individual notices are also be sent to the known foreign creditors by insolvency practitioner. To improve the publicity of insolvency proceedings, Article 25 EIR Recast prescribes the creation of a decentralised system for the interconnection of national insolvency registers. It is also composed of European e-Justice Portal which is a central public access point. All these improvements in publicising the information are necessary for efficient administration of the insolvency estate.

EIR 2000 included only traditional liquidation-oriented procedures, mentioning only proceedings entailing partial or total divestment of debtor and appointment of a liquidator. EIR Recast adopted the new trend of promoting effective restructuring tools. For effective restructuring, EIR Recast provided for a stay on individual creditors' actions to not only genera insolvency proceedings but also extended to proceedings attempting the restructuring of the debtor likely to be insolvent, which leave the debtor fully or partially in control of its assets and affairs. The mechanisms promoting restructuring are the most important innovations in EIR Recast. Apart from the stay on creditors' actions, the Regulation also provided for the stay on secondary insolvency proceedings (Article 38(3)) and the right to insolvency practitioner to give an undertaking to the Court to not open secondary insolvency proceedings (Article 38(2)). These instruments allow the centralised control over the debtor's estate and enables the development of cohesive restructuring plan.

Another innovation which stimulates an efficient administration of the insolvency proceedings by preventing forum shopping and fraudulent manipulation of the insolvency forum is the introduction of suspect period in the EIR Recast. EIR 2000 did not contain any definition of COMI vis-à-vis EIR Recast not only provided stricter definition rather it offered several presumptions indicating its location (Article 3(1)). The place of registered office is presumed to be the place of COMI (though rebuttable). To avoid manipulations a condition is added, according to which the place of registered office is presumed to be COMI if the registered office has not been moved to another member state within 3-month period prior to the request of for the opening of insolvency proceedings. Debtor may want to move the place of COMI, seeking to obtain a more favourable legal position in insolvency which could be to the detriment of the creditors.

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 permits the opening of several insolvency proceedings against the same debtor. Creditors are free to lodge their claims in the main insolvency proceeding and as well as in any secondary insolvency proceedings (Article 45). The manner and ranking of distribution are determined in main insolvency proceeding according to *lex concursus* and in secondary insolvency proceedings according to *lex concursus secundarii*. Article 23(2) aims to rebalance the creditors' returns in a situation where any creditor receives a part of distribution in multiple insolvency proceedings. However, in a case where the Member Sates have differing rankings of creditors complications may arise. Some creditors can have greater satisfaction rate than others. Also, in a case where a creditor has satisfied partial claim by virtue of right in rem or set-off, the Regulation does not provide for satisfaction of the remaining claim. Although it is difficult to achieve harmonisation in the first case, but it is possible in the second by providing in the Regulation. Better outcomes could be achieved in the first case if all the creditors would be able to file their claim in all the insolvency proceedings of the same debtor. This can be achieved through Insolvency Practitioner filing claims in the remaining proceedings.

In Eurofood IFSC Ltd (Case C-341/04, ECLI:EU:C:2006:281), Court relied on entity-by-entity approach, while adjudicating on the place of COMI. Eurofood, which was wholly owned subsidiary of Parmalat group, had its registered office in Ireland and Parmalat incorporated in Italy. Court looked though the narrow prism of single entity and overlooked the fact that the entity's economic choices could be made by parent entity in another Member State. The same approach of the Court was adopted in EIR Recast. For a complex multinational enterprise, experiencing financing difficulties in multiple jurisdictions, the concept of "group COMI" can be

of great use. Through a single COMI an enterprise can try to pursue a restructuring in a single point of entry. Moreover, pooling of assets and liabilities and procedural consolidation of insolvency proceedings can better promote restructuring of group of companies.

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] 2

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.

[EIR 2000 does not contain the deficition of COMI in the main text of the regulation. However, Recital 13 provides some guidance over it but is not enforceable. 33 Recitals are integral part of the EIR 2000. Courts use recitals for interpretations and proceedings. Recital 13 states that the centre of main interest should be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In Eurofood Case (Case C-341, ECLI:EU:C:2006:281), CJEU held that COMI should be interpreted in a uniform way and independent of meaning in national legislation. COMI must be identified by reference to criteria that are both objective and ascertainable by third parties. To be ascertained by the third parties, time factor plays an important role. The long time period and regular activity of a debtor in a particular state helps to ascertain its COMI.

In the following case, PAJ opened a warehouse and a bank account, and availed a credit facility in 2013 in Spain. PAJ also negotiated with local distributors. PAJ in June 2017 filed the petition for safeguard proceedings. So not only the creditors but local distributors can also ascertain the COMI of PAJ as in Madrid. Thus, Strasbourg Court does not have the international jurisdiction to open the requested insolvency proceeding.
]
The COMI in this scenario is definitely in France, this was not the issue. The issue was around whether the *sauvegarde* procedure would be applied. It is not listed in Annex A of the EIR 2000 since it does not meet the Article 1 requirement of total divestment of the debtor.

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.

[As per Article 92 EIR Recast, it entered into force on 26 June 2017 and it replaced the original EIR 2000.
Article 84(1) EIR Recast provides for the applicability of the EIR Recast that it shall apply only to insolvency proceedings opened after 26 June 2017. Proceedings opened before this date are to be governed by the EIR 2000.
Article 2(8) defines the 'time of the opening' of insolvency proceeding as the time at which the judgement opening insolvency proceedings becomes effective, regardless of whether the judgement is final or not.
Article 2(7) describes the 'judgement opening insolvency proceedings' as the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings or the decision of the court to appoint an insolvency practitioner.

Apart from the temporal scope of EIR Recast, it applies to insolvency proceedings which meet the conditions as set out in it. There are certain exceptions to its applicability like insurance undertakings, credit institutions, investment firms covered under Directive 2001/24/EC. EIR Recast is a binding legislation and applies in Member States except Denmark.

Provided that the insolvency proceeding is opened by the Strasbourg Court (France) on 29 June 2017, makes the insolvency proceeding fall under the scope of EIR Recast.]

Question 4.3 [maximum 5 marks] 2

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.

[Assuming main insolvency proceeding opened in Strasbourg as valid, a secondary insolvency proceeding can be opened under in Spain under the EIR Recast. Article 3(2) EIR Recast states that secondary proceeding can be opened in any country in which the debtor has an establishment. Secondary insolvency proceeding can open after the opening of main insolvency proceeding. Only in exceptional situation under Article 3(4) EIR Recast secondary insolvency proceeding can open prior to main insolvency proceeding.

Article 2 EIR Recast defines 'establishment' 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.

CJEU in Interedil Srl v Fallimento Interedil Srl (Case C: -396/09, ECLI:EU:C:2011:671)] stated that connection of the pursuit of economic activity to the presence of human resources highlights a minimum level of organisation and a degree of stability are required to validate establishment. Presence of good alone or bank account in isolation does not satisfy the classification as an establishment. Human resources make it ascertainable by the third parties.
Link this back to your question. You say in your first paragraph that it is possible to open secondary proceedings in Spain but you here cast some doubt.
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: 9 out of 15.

*** End of Assessment ***

Marks awarded: 43 out of 50