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: **[studentID.assessment2B]**. An example would be something along the following lines: 2021122-526.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (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 substantively harmonised the national insolvency law of the Member States.

(a) False. The objective of an EU regulation is not legal harmonisation.

(b) True. Since the entry into force of the EIR 2000, the insolvency laws of the Member States are similar.

(c) False. The objective of the EIR 2000 was not to harmonise aspects of national insolvency laws but to provide non-binding guidelines only.

(d) False. While the EIR 2000 attempted to harmonise national insolvency laws, its focus was on procedural aspects of insolvency law, not substantive ones.

Question 1.2

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

(a) 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.

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

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

(d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

Question 1.3

The EIR Recast was urgently needed because the EIR 2000 was considered dysfunctional and ineffective.

(a) True. The EIR 2000 proved to be inefficient and incapable of supporting the effective resolution of cross-border cases over the years.

(b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

(c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.

(d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

Question 1.4

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

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

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 all domestic rescue procedures fall within its scope.

(b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.

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

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

Question 1.6

During the reform process of the EIR 2000, what main elements were identified as needing to be revised within the framework of the Regulation (whether adopted or not)?

(a) The scope of the Regulation was to be expanded to cover pre-insolvency and hybrid proceedings; the concept of COMI was to be refined; secondary proceedings were to be extended to rescue proceedings; rules on publicity of insolvency proceedings and lodging of claims were to be amended; provisions for group proceedings were to be added.

(b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.

(c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.

(d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

Question 1.7

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

(a) "Synthetic proceedings" means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(b) "Synthetic proceedings" means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) "Synthetic proceedings" means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

(d) "Synthetic proceedings" means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

Question 1.8

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

(a) 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.

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

(c) 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.

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

Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema SrL (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the

contested payments shall be set aside because Lacroix SARL must have been aware that Fema SrL was facing insolvency at the time 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 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).

(b) The contested transactions cannot be avoided if Lacroix SARL 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.

(c) To defend the contested payments Lacroix SARL 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*.

(d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

Question 1.10

The French Social Security authority asserts to have a social security contribution claim against an Irish company, Cupcake Cottage Ltd. Cupcake Cottage is subject to the main insolvency proceeding (Examinership) in Ireland. In addition, a secondary insolvency proceeding (*Concurso*) relating to the same company has been opened in Spain.

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 Spanish law, the period within which creditors must file their claims is one month, as set in the order opening secondary insolvency proceedings against Cupcake Cottage.

The French tax authority intends to file its claim in the Spanish 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 one month, 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 Spain.

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

C was the correct answer.

Total: 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. "This article introduces a legal regime for the avoidance of secondary insolvency proceedings, based on the unilateral promise given by the main insolvency practitioner to local creditors that they will receive treatment 'as if' secondary proceedings had in fact been open.'

Statement 2. "The proper functioning of the internal market requires that cross-border insolvency proceedings should operate effectively. This requires judicial cooperation."

Statement 1 refers to Recital 42 EIR Recast. It relates to one of the options found in the EIR Recast to avoid the opening of secondary insolvency proceedings, namely the right to give an undertaking in order to avoid secondary insolvency proceedings ("synthetic" secondary proceedings) – Article 36 EIR Recast (see also Article 38(2) EIR Recast)

Statement 2 refers to Recital 3 EIR Recast: "*The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty*" (i.e. Treaty on the functioning of the European Union). Recital 48 further stresses the importance of cooperation and communication, and also refers to best practices as set out in authoritative texts such as UNCITRAL. The provisions in the EIR Recast addressing the issue of cooperation and communication are: Article 41 EIR Recast ('insolvency practitioner-to-insolvency practitioner cooperation and communication'), Article 42 EIR Recast ('court-to-court cooperation and communication') and Article 43 EIR Recast ('court-to-insolvency practitioner cooperation and communication'); see also Articles 56-58 EIR Recast regarding cooperation and communication in case of insolvency proceedings of members of a group of companies.

Question 2.2 [maximum 3 marks] 3

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide **three (3) examples** of provisions from the EIR Recast, which highlight this modified universalism approach.

Article 3(1) EIR Recast provides for the opening of main insolvency proceedings in one Member State, when the debtor's centre of main interests ('COMI') is in that Member State. Such main proceedings have 'universal' scope encompassing all debtor's assets and (unsecured) creditors throughout the EU. The main insolvency proceedings are (i) primarily governed by the law of that Member State (Article 7, subject to the exceptions in Articles 8-18 EIR Recast); (ii) afforded automatic recognition in the other Member States (Article 19 EIR, subject to the public policy exception in Article 33 EIR), and (iii) produce the same effects in any other Member State as under the law of the Member State of the opening of the main proceedings (Article 20(1) EIR Recast); except to the extent the EIR Recast otherwise provides.

The universalist model is however a "modified" one, as Article 3(2) EIR Recast provides for the possibility of opening secondary (territorial) proceedings in a Member State where the debtor has an 'establishment' in the meaning of Article 2(10) EIR Recast. However, such secondary proceedings are restricted in scope to local assets.

The modified universalism approach is also highlighted in Article 8(1) EIR Recast law applicable to the main insolvency proceedings and its effects is that of the Member State within the territory of which those proceedings were opened. This provision lays down an exception to the rule that the law applicable to the main insolvency proceedings and its effects is that of the Member State within the territory of which those proceedings were opened (an exception the application of the *lex concursus*).

Finally, reference can be made to Article 19(2) EIR Recast as an example of how the EIR Recast uses a "modified universalism" model in relation the debtor's assets. This provision states that the recognition of the main proceedings (Article 3(1) EIR Recast) shall not preclude the opening of the secondary proceedings (Article 3(2) EIR Recast) by a court in another Member State.

You could also have discussed articles 34-38.

Question 2.3 [maximum 3 marks] 3

Cross-border co-operation and communication between courts is now an obligation under the EIR Recast. This was not the case under the EIR 2000. List **three (3) provisions** (recitals and / or articles) of the EIR Recast that deal with this newly introduced obligation.

Recital 48 EIR Recast: *"(…) Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information. (…). When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)."*

Article 42 EIR Recast on court-to-court cooperation and communication.

Article 57 EIR Recast on court-to-court cooperation and communication when insolvency proceedings relate to two or more members of a group of companies.

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.

As mentioned in Recital 41 EIR Recast, the EIR Recast "*sets out two specific situations in which the court seised of a request to open secondary insolvency proceedings should be able, at the request of the insolvency practitioner in the main insolvency proceedings, to postpone or refuse the opening of such proceedings*", namely:

(1) Article 36 EIR Recast provides for so-called 'synthetic secondary proceedings', whereby the insolvency practitioner may give a unilateral undertaking (a promise) to

the effect that local creditors, when it comes to distributing the assets located in the Member State in which secondary insolvency proceedings could be opened or the proceeds as a result of their realisation, will be treated as if secondary proceedings have been opened. The insolvency practitioner is required to assess the "factual assumptions (value of the assets and available options to realise them) on which his undertaking shall be based. "Known local creditors" must approve the undertaking, whereby such approval must be obtained in line with the local rules on the adoption of a restructuring plan. Article 38(2) contains the mandatory refusal to open secondary proceedings if the court is satisfied that the undertaking adequately protects the general interests of the local creditors. The objective of this instrument is thus to avoid the opening of 'real' secondary insolvency proceedings (see also Recitals 42-44 EIR Recast).

(2) Pursuant to Article 38(3) EIR Recast the insolvency practitioner or the debtor in possession may request a stay of the opening of secondary insolvency proceedings for a period not exceeding 3 months. The text of this provision, taken literally, means that is only applicable in the event of a temporary stay of individual enforcement proceedings which has been granted in order to allow for negotiations between the debtor and the creditors. The option to stay the opening of the secondary proceedings is well embedded by the right to order protective measures for protection of the interests of local creditors (see also Recital 45 EIR Recast).

Total: 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] 0

In 2012, the European Commission recommended that the European Insolvency Regulation be amended by focusing on specific aspects of the instrument. Explain what these aspects were and how they have been introduced in the EIR Recast.

(see H. Eidenmüller and K. van Zwieten, "Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency", 18 december 2015, ecgi.global).
You did not answer the question,

Question 3.2 [maximum 5 marks] 5

While the EIR 2000 was considered to work well overall, several innovative concepts and rules were introduced in the EIR Recast to improve the manner in which the Regulation supports the administration of a cross-border case in an efficient manner. Describe **three (3)** improvements / innovations that made their way into the EIR Recast.

The EIR Recast introduced several improvements aimed at increasing clarity and simplifying the procedure concerning the lodgement of claims. Two innovations in this regard are: (1) the standardized procedure to file and lodge claims (any foreign creditor may now lodge claims in insolvency proceedings by any means of communication, which are prescribed by the law of the Member State of the opening of proceedings, thereby using standard claim forms – Articles 53 and 55 EIR Recast), and (2) the reinforcement of the publicity of information relating to

insolvency proceedings (as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the insolvency practitioner appointed by that court shall immediately inform the known foreign creditors – Article 54(1) EIR Recast).

Another innovation of the EIR Recast includes the introduction of duties for different insolvency practitioners and courts involved to cooperate and communicate in various ways (Articles 41-43 EIR Recast).

Question 3.3 [maximum 5 marks] 5

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a "missed opportunity" and "modest". List **two (2) flaws** or shortcomings of the EIR Recast and explain how you consider they could be corrected.

(see M.-T. Epeoglou, "The Recast European Insolvency Regulation: a missed opportunity for restructuring business in Europe", 2017, discovery.ucl.ac.uk).
You did not answer the question.

Total: 5 out of 15.

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

Cardinal Home is an Ireland-registered furniture company. The company opened its first store in Cork, Ireland in 2009 and has warehouses across Europe, including in Milan, Italy. In 2010, Cardinal Home entered into a credit agreement with an Italian bank since it was planning to expand its reach to the Spanish luxury furniture market, expected to grow by over 8% annually. It opened a bank account with the bank and started negotiating with local distributors, thus signing some (non-binding) memoranda of understanding with them.

Cardinal Home grew and performed well for several years. However, the impact of the economic and financial crisis of the late 2000s eventually hit the company who suffered financial difficulties from 2016. On 22 June 2017, it filed a petition to open examinership proceedings in the High Court in Dublin, Ireland.

Question 4.1 [maximum 5 marks] 5

Assume that the EIR 2000 applies. Does the Dublin High 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.

According to Article 3(1) EIR 2000 the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary (see also Recital 12 EIR 2000). In other words, (main) insolvency proceedings could be initiated at the so-called 'COMI' of the debtor, which should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties (Recital 13 EIR 2000).

Since Cardinal Home has its registered office in Ireland, its 'COMI' is presumed to be the jurisdiction of Ireland where Cardinal Home has thus been registered. It is a rebuttable presumption to the extent objective factors would indicate that Cardinal Home conducts the

administration of its interests in another state than the state of its registered office (for an example on the interpretation of the EIR 2000 regarding the concept of 'COMI': see Case C-341/04, *Eurofood IFSC Ltd*, ECLI:EU:C:2006:281 (May 2, 2006)).

While the EIR 2000 designates Ireland (as a Member State) for the opening of the proceedings, the territorial jurisdiction within Ireland itself is however not regulated by the EIR 2000, but by the national law of Ireland. It is Irish national legislation that defines the competent national court to open such proceeding.

Question 4.2 [maximum 5 marks] 5

Assume that the Dublin High Court opens the respective proceeding on 30 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.

Territorial scope – According to Recital 25 EIR Recast, the EIR Recast only applies to proceedings in respect of a debtor whose centre of main interests is located in the EU. It is up to the Dublin High Court, considering it to be the competent court to open the proceeding, to examine (before the opening) whether Cardinal Home's 'COMI' is actually located within its jurisdiction (Recital 27 EIR Recast).

To the extent that Cardinal Home's 'COMI' would be located outside the EU or in Denmark, the EIR Recast would not apply. In the present case however, Cardinal Home is – at least – presumed to have its 'COMI' in Ireland, based on the registered office presumption (Article 3(1) EIR Recast).

Personal scope – Furthermore, Cardinal Home is not excluded from the personal scope of the EIR Recast, seeing that it is not an entity as listed in Article 1(2) EIR Recast.

Material scope – The proceedings referred to in Article 1(1) EIR Recast ("Scope") are listed in Annex A. The national insolvency procedure of "examinership" in Ireland is mentioned in Annex A. Such procedure thus falls within the material scope of and is covered by the EIR Recast.

Temporal scope – According to Article 92 EIR Recast, the EIR Recast applies from 26 June 2017. The provisions of the EIR Recast apply to insolvency proceedings opened after this date (Article 84(1) EIR Recast). Article 2(8) defines "'the time of the opening of proceedings" as the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not, while Article 2(7) defines the "judgment 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 a court to appoint an insolvency practitioner.

Since the proceeding is opened after 26 June 2017, it will be governed by the EIR Recast (and not the EIR 2000).

Given all the above, the EIR Recast should be applicable to the opened examinership proceedings.

Question 4.3 [maximum 5 marks] 3

An Italian bank files a petition to open secondary insolvency proceedings in Italy with the purpose of securing an Italian insolvency distribution ranking. Given the facts of the case, can

such proceedings be opened in Italy under the EIR Recast? Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Article 3(2) EIR Recast permits for the opening of one or more secondary insolvency proceedings subsequently after a main insolvency proceeding has already commenced in another Member State.

It requires the debtor to have an "establishment" (Article 2(10) EIR Recast: "*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*") within the territory of the other Member State. In other words, it is possible to open secondary proceedings in another Member State not only if the debtor has an establishment in that Member State at the time of the opening of main insolvency proceedings, but also if the debtor had an establishment in that Member State in the three-month period prior to the request to open main insolvency proceedings.

The secondary proceedings only affect assets within the Member State in which the secondary proceedings have been opened. The requirements for the opening of secondary proceedings as well as their effects are largely governed by the *lex fori concursus secundarii*.

The opening of secondary proceedings may be requested by the insolvency practitioner in the main proceedings or by anyone empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested (Article 37(1) EIR Recast).

According to the CJEU the concept of "establishment" requires a minimum level of organisation and a degree of stability (see Case C-369/09, *Interedil Srl v Fallimento Interedil Srl*, ECLI:EU:C:2011:671 (October 20, 2011)).

In the present case question arises whether the 'warehouses' (in Milan, Italy) can be classified as an establishment. Therefore the following criterion should be met at the moment of the filing for the opening of secondary insolvency proceedings: Cardinal Home's activities in these warehouses must have a non-transitory character, and these activities were accompanied by the presence of human means and assets. It could be argued that Cardinal Home will have conducted its operations in Italy with the involvement of people and assets, so the Italian courts will most likely have jurisdiction to open secondary proceedings.

Sound reasoning but wrong conclusion. According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.
Under Article 2(10) EIR Recast, 'establishment' means 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.
Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).
The facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.

Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy.

Total: 13 out of 15.

*** End of Assessment ***

Total: 37 out of 50.