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**.

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

6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 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).

Very good.

Total: 10 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."

1) Statement 1 is in relation to the concept of "synthetic" secondary proceedings. Article 36 of the EIR Recast provides that the insolvency practitioner in the main insolvency proceeding may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realization, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. Article 36 is based on the concept of party autonomy and centralization of the insolvency forum in the main proceeding.

   If such undertaking in accordance with Article 36 is given and at the request of the insolvency practitioner, the court seised with a request to open secondary insolvency proceedings shall not open the secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors (Article 38(2) EIR Recast).

2) Statement 2 is in relation to the harmonization of cross-border insolvency proceedings. It is reflected in Preamble (3) of the EIR Recast and provides for the need for the EIR Recast to be adopted in order to achieve the objective in the statement. This falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union.

   While the EIR Recast as a whole is for the purpose of harmonizing cross-border insolvency proceedings, cooperation and communication between courts is expressly set out in Article 42 of the EIR Recast.

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.

Under the EIR Recast which is modelled upon modified universalism, there is one main insolvency proceedings but secondary insolvency proceedings can also be opened throughout the EU.

Article 3(1) of the EIR Recast provides that the main insolvency proceedings shall be opened in the Member State of which the centre of the debtor's main interests (COMI) is situated. Nevertheless, Article 3(2) of the EIR Recast then provides that secondary insolvency proceedings can be opened against the same debtor in another Member State only if that debtor possesses an establishment within the other Member State. There is no limitation as to the number of secondary insolvency proceedings that can be opened.

Article 19 of the EIR Recast generally provides that any judgment opening insolvency proceedings shall immediately and automatically be recognised in all other Member States. Article 19(2) nevertheless makes it clear that recognition of the main insolvency proceedings does not preclude the opening of secondary insolvency proceedings.

Article 7 of the EIR Recast provides that the law applicable to insolvency proceedings and their effects will be that of the Member State in which the proceedings are opened (lex concursus). However, there are exceptions to the application of lex concursus, such as Article 8 which provides that opening of insolvency proceedings shall not affect rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets, belonging to the debtor which are situated within another Member State. Other exceptions to lex consursus includes Article 16 of the EIR Recast which provides that lex concursus shall not apply where a person who benefitted from an act detrimental to all creditors can prove that the act is subject to the law in another Member State and the said law does not allow any means of challenging that act, and Article 13 of the EIR Recast which excludes lex concursus from employment contracts.

These provisions show the modified universalism approach incorporated by the EIR Recast.

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 of the EIR Recast recognises that there can be efficient administration of the debtor's insolvency estate if there is proper cooperation by the parties in the main insolvency proceedings and secondary insolvency proceedings. There is a need for cooperation among the insolvency practitioners as well as the courts in these concurrent proceedings. Best practices for cooperation in cross-border insolvency cases including relevant guidelines by the United Nations Commission on International Trade Law (Uncitral) should be taken into consideration by courts and insolvency practitioners.

Article 41 of the EIR Recast provides for cooperation and communication between insolvency practitioners in the main insolvency proceeding and in secondary insolvency proceedings, provided not contrary to the rules in the respective proceedings. The cooperation may be by agreements or protocols. Article 42 then provides for cooperation and communication between the courts in the relevant proceedings and courts may even request information or assistance directly from each other. Some matters which the courts may cooperate on are set out in Article 42(3) and includes coordination of administration and supervision of debtor's assets and affairs, communication of information, coordination in conduct of hearing etc. Article 43 provides for cooperation and communication between insolvency practitioners and courts provided the cooperation is not contrary to the rules in the respective proceedings and there is no conflict of interest.

Articles 56 to 58 of the EIR Recast are similar to the provisions in Articles 41 to 43, but applies to insolvency proceedings involving members of a group of companies.

Question 2.4 [maximum 2 marks] 3

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.

One example is "synthetic" secondary proceedings. Article 36 of the EIR Recast provides that the insolvency practitioner in the main insolvency proceeding may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realization, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

If such undertaking in accordance with Article 36 is given and at the request of the insolvency practitioner, the court seised with a request to open secondary insolvency proceedings shall not open the secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors (Article 38(2) EIR Recast).

The second example is the power of the court, at the request of the insolvency practitioner or debtor in possession, to temporarily stay the opening of secondary insolvency proceedings when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings (Article 38(3) EIR Recast). This stay shall be for a period not exceeding 3 months and is subject to there being suitable measures in place to protect the interests of local creditors.

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] 5

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.

The European Commission's report and proposal for reforms on the EIR 2000[1] found that the EIR 2000 was generally operating well in facilitating cross-border insolvency proceedings within the European Union (EU), but identified some shortcomings. Very good reference to the report.

[1] Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings COM (2012)743 and Proposal for a new Regulation COM (2012) 744 final

One issue identified was that the scope of EIR 2000 was focussed on traditional liquidation proceedings and did not cover pre-insolvency restructuring proceedings. However, the EU Member States had introduced restructuring proceedings to resolve indebtedness and moved towards harmonising restructuring and insolvency national laws. The EIR Recast therefore not only applies to liquidation proceedings but extended its scope to certain proceedings aimed at restructuring or rescuing financially distressed debtors including pre-insolvency restructuring proceedings, proceedings where debtor remains in control of its assets and affairs, and proceedings for stay of individual action to protect the general body of creditors as a whole (see Article 1 of EIR Recast and Appendix A which sets out the specific proceedings).

The second issue identified was that there was difficulty in determining which Member State is competent to open insolvency proceedings and applying the concept of the debtor's centre of main interests (COMI). COMI was not defined in the EIR 2000, although there was guidance in the recital. The EIR Recast incorporated the guidance in the recital as well as settled European case law (including in the interpretation in the case of *Eurofood IFSC Ltd)*[2] on the meaning of COMI and provided a definition for COMI in Article 3(1).

The European Commission had also noted the abuse of the concept of COMI by shifting the COMI for purposes of forum shopping. The EIR Recast introduced various provisions and presumptions on the application COMI for both companies and individuals with the purpose of curbing this issue, such as the presumption that COMI follows registered office will only apply if the registered office has not been moved to another Member State within the three months preceding the request to open insolvency proceedings. The same presumption and test applies to opening of secondary proceedings.

Thirdly, the European Commission identified problems relating to the opening of secondary proceedings hampering efficient administration of the debtor's estate. Further, under the EIR 2000, secondary proceedings are limiting to winding-up proceedings and this also may hamper the successful restructuring and rescue of a debtor with assets and affairs in multiple Member States. The EIR Recast provides that secondary insolvency proceedings are no longer limited to winding-up proceedings.

The EIR Recast also introduced "synthetic" proceedings where secondary insolvency proceedings may be avoided based on the unilateral undertaking (in accordance with Article 36) given by the main insolvency practitioner to local creditors that they will receive treatment as if the secondary proceedings had been opened and the court is satisfied the undertaking adequately protects the general interests of local creditors (Article 38(2)).

The fourth issue identified by the European Commission is with the rules on publicity of insolvency proceedings and lodging of claims. Under the EIR 2000, there is no requirements for publication or registration of decisions in Member States to open insolvency proceedings. There was therefore no avenue for courts or creditors to be aware if insolvency proceedings have been opened in another Member State. The EIR Recast thus provided for Member States to establish national registers of insolvency proceedings with core information about the proceedings (Article 24), and thereafter for a system to be created to connect all the Member States' registers (Article 25). The EIR Recast also obliges insolvency practitioners or debtor in possession to request for publication of notice on opening of insolvency proceedings (Article 28) as well as the provisions for notification to foreign creditors (Article 54).

Lastly, the European Commission identified that the EIR 2000 did not provide for the insolvency of multiple companies which are part of the same corporate group. As such, the EIR Recast introduced a new Chapter V for voluntary "group coordination proceedings". Under this regime, an independent insolvency practitioner may be appointed as a group coordinator

[2] Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006).

to propose a group coordination plan and may mediate disputes, request information and ask for a stay if necessary for the implementation of the plan and if for the benefit of creditors.

Good answer.

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.

Although the main insolvency proceeding is intended to have universal scope in dealing with the debtor's assets and affairs, the right to open secondary insolvency proceedings waters down the scope and impact of such main insolvency proceeding and results in the creation of separate insolvency estates. Secondary insolvency proceedings therefore complicates and frustrates the efficient administration of the debtor's estate, increase costs and resources for insolvency practitioners and the courts as well as often lengthen the proceedings to the disadvantage of creditors as a whole. Further, as the scope of secondary proceedings under the EIR 2000 was limited to winding-up proceedings, the opening of secondary proceedings would disrupt and defeat efforts to restructure and rescue the business of the debtor to the benefit of all creditors, while local creditors where the secondary proceedings are opened would enjoy greater treatment.

The EIR Recast introduced the concept of "synthetic" proceedings where secondary insolvency proceedings may be avoided based on the unilateral undertaking (in accordance with Article 36) given by the insolvency practitioner in the main insolvency proceedings to the local creditors in the Member State where secondary proceedings could be opened. The undertaking is that when distributing assets located in the Member State in which the secondary proceedings could be opened or the proceeds received as a result of their realization, the main insolvency practitioner undertakes it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

If such undertaking in accordance with Article 36 is given and at the request of the main insolvency practitioner, the court seised with a request to open secondary insolvency proceedings shall not open the secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors (Article 38(2) EIR Recast).

The EIR Recast also provides that secondary insolvency proceedings are no longer limited to winding-up proceedings, unlike under the EIR 2000. The EIR Recast further provides that the court may temporarily stay the opening of secondary insolvency proceedings when there is granted a temporary stay of individual enforcement action in the main insolvency proceedings. The purpose of the stay is to provide time to enable negotiations between the debtor and creditors.

The objective of these changes is to limit the cases in which secondary proceedings will be opened so as to address the issue of secondary proceedings being disruptive to an efficient realization strategy or administration of the debtor's estate, or an impediment to a rescue plan for the debtor.

Despite attempts to limit the opening of secondary proceedings, generally the EIR Recast still allows for concurrent insolvency proceedings in multiple Member States against the same debtor. There must therefore be proper cooperation and communication between the courts

and insolvency practitioners in these multiple concurrent proceedings in order to effectively and efficiently administer the debtor's estate. Under the EIR 2000, there was only provision requiring the insolvency practitioner in main and secondary proceedings to communicate information to each other.

The EIR Recast recognises that there can be efficient administration of the debtor's insolvency estate if there is proper cooperation by the parties in the main insolvency proceedings and secondary insolvency proceedings (Recital 48). There is a need for cooperation among the insolvency practitioners as well as the courts in these concurrent proceedings. Best practices for cooperation in cross-border insolvency cases including relevant guidelines by the United Nations Commission on International Trade Law (Uncitral) should be taken into consideration by courts and insolvency practitioners.

Article 41 of the EIR Recast provides for cooperation and communication between insolvency practitioners in the main insolvency proceeding and in secondary insolvency proceedings, provided not contrary to the rules in the respective proceedings. In particular, insolvency practitioners must communicate any information relevant to the other proceedings, in relation to the lodgement and verification of claims and plans at rescuing or restructuring of the debtor. The cooperation may be by agreements or protocols. One prominent case law example of the use of protocols in facilitating the efficient administration of a debtor's assets and affairs in concurrent proceedings in different jurisdictions is the the case of *Re Maxwell Communications Corporation plc*.

Article 42 provides for cooperation and communication between the courts in which a request to open insolvency proceedings is pending or which has opened such proceedings, and any other court facing the opening of insolvency proceedings or which has opened such proceedings. This is intended to improve co-ordination and to address forum shopping. Courts may cooperate as they consider appropriate and may request information or assistance directly from each other. Some matters which the courts may cooperate on are set out in Article 42(3) and includes coordination of administration and supervision of debtor's assets and affairs, communication of information, coordination in conduct of hearing etc.

Finally, Article 43 provides for cooperation and communication between insolvency practitioners and courts provided the cooperation is not contrary to the rules in the respective proceedings and there is no conflict of interest. These requirements ensure cooperation and coordination between courts and insolvency practitioners in main proceedings and secondary proceedings, as well as between secondary proceedings and other secondary proceedings.

EIR 2000 did not provide for the insolvency of multiple companies which are part of the same corporate group. As such, for example in the case of Eurofood IFSC Ltd, corporate groups' insolvency is treated on an entity-by-entity approach where each debtor constitutes a distinct legal entity subject to its own court jurisdiction and the COMI of each entity must be determined separately from the COMI of any related entity within the same corporate group.

Although the EIR Recast does not depart from entity-by-entity approach, EIR Recast did introduce a new Chapter V to address group insolvencies. The EIR Recast introduced a voluntary mechanism called "group coordination proceedings", on the condition that the group coordination proceedings is appropriate to facilitate the effective administration of insolvency proceedings relating to different group members, and no creditor expected to participate is likely to be financially disadvantaged by the proceedings. Under the group coordination proceedings, an independent insolvency practitioner will be appointed as a group coordinator to propose a group coordination plan and may mediate disputes, request information and ask for a stay if necessary for the implementation of the plan and if for the benefit of creditors (Articles 61 to 77).

Articles 56 to 58 of the EIR Recast provides for cooperation and coordination between courts and insolvency practitioners in main and secondary insolvency proceedings of distinct debtors within the same group of companies, which are similar to the provisions in Articles 41 to 43.

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.

The EIR Recast has introduced the mechanism of "group coordination proceedings" to address group insolvencies. However, the group coordination proceedings is voluntary in nature and has an opt-out model, where an insolvency practitioner appointed for any group member may object to its inclusion in the group coordination proceedings within 30 days of notice without having to give any reason (Article 64 of EIR Recast) and this will result in the relevant insolvency proceeding not being included.

It is interesting to note that while there is a requirement for the insolvency practitioners to be given the opportunity to be heard and to opt-out, creditors of the relevant group members may not be consulted on the decision. The opt-in or opt-out of the relevant insolvency proceedings may not be supported by the creditors involved.

Further, even if group coordination proceedings have been opened, the insolvency practitioners in the respective group member insolvency proceedings are not obliged to follow the group coordinator's recommendations or the group coordination plan (Article 70 of EIR Recast). This voluntary arrangement may render futile the whole purpose of the group coordination proceedings.

In order for such group coordination proceedings to be meaningful, there should be requirements that creditors' input be obtained. Any decision by the insolvency practitioner for of any group member to opt-out should be supported by good cause and creditor majority.

Another flaw is that group members may also be located outside the EU. Although Articles 56 to 58 of the EIR Recast provides for the obligation to cooperate and coordinate between courts and insolvency practitioners in main and secondary insolvency proceedings relating to the group members, such duty does not extend to courts and insolvency practitioners in non-Member States.

For practical purposes, the duty to cooperate and coordinate between courts and insolvency practitioners ought to extend to insolvency proceedings in non-Member States. Although group coordination proceedings do not include non-Member States as well, cooperation and coordination with courts and insolvency practitioners in non-Member States could be achieved through cross-border agreements or protocols. For example, cooperation and coordination by way of cross border agreement and protocols in insolvency proceedings can already be seen from the case of *Re Maxwell Communications Corporation plc* involving insolvency proceedings in the UK and the US.

Total: 15 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.

On the assumption that the EIR 2000 applies, the Dublin High Court shall have the jurisdiction to open insolvency proceedings if the centre of main interests (COMI) of Cardinal Home is located in Ireland. COMI is not defined in the EIR 2000 but Recital 13 notes that COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties. For companies, there is a presumption that the jurisdiction of the registered office is where the COMI is located in the absence of proof to the contrary (Article 3(1) EIR 2000).

The CJEU is an EU institution to ensure that EU laws are interpreted and applied consistently in every Member State. Therefore, in interpreting the EIR 2000 provisions on COMI in this case, regard must be made to the jurisprudence of the CJEU and CJEU case law on COMI in the EIR 2000.

In *Eurofood IFSC Ltd*,[3] the CJEU held that COMI must be identified by reference to criteria that are both objective and ascertainable by third parties. The presumption that the COMI of the debtor company is where the registered office is located can only be rebutted if the objective factors, as ascertainable by third parties, show that the administration of the debtor's interest happens in a Member State different from the registered office. To be ascertainable by third parties, the activity of the debtor company is the relevant Member State must be regular and lasting for COMI to be there.

Another relevant case law to consider in determining the COMI is the case of *Interedil Srl v Fallimento Interedil Srl*.[4] In *Interedil*, the registered office was registered in Italy but later moved to the UK. The issue was whether the registered office presumption was rebutted, among others, because there was immovable property in Italy, existence of lease agreement of hotel complexes, contract with a banking institution and the Italian register of companies was not notified of the transfer of the registered office. The CJEU held that when the bodies responsible for the management and supervision of the debtor are in the same jurisdiction as the registered office and management decisions are taken in the same place as ascertainable by third parties, the registered office presumption is irrefutable. The presence of some assets in another Member State will not be sufficient to rebut the registered office presumption.

Based on the facts available, the registered office of Cardinal Home is in Ireland, and there is nothing to show that the management and supervision of Cardinal Home or where management decisions are taken are in another Member State. The presence of assets such

[3] Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006).
[4] Case C-396/09, ECLI:EU:C:2011:671 (October 20, 2011).

as a warehouse and bank account, and the credit agreement with the Italian bank, would not be sufficient to rebut the registered office presumption.

Cardinal Home is a furniture company and does not fall within the entities excluded in Article 1(1) of the EIR 2000. Finally, the company examinership proceedings requested to be opened against Cardinal Home is listed as an insolvency proceeding in Annex A and therefore would fall within the scope of the EIR 2000.

Based on the above, the Dublin High Court does have international jurisdiction under the EIR 2000 to open the examinership proceedings as the main insolvency proceedings against Cardinal Home.

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.

First, for the EIR Recast to be applicable, the COMI of Cardinal Home must be located in an EU Member State (aside from Denmark). Article 3(1) of the EIR Recast states that the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. For companies, the presumption is that the place of the registered office is the COMI in the absence of proof to the contrary, and provided the registered office has not been moved to another Member State within the 3-month period prior to the request for opening of insolvency proceedings.

In this case, the registered office of Cardinal Home is in Ireland and does not appear to have been moved elsewhere. As such, the presumption is that the COMI of Cardinal Home is in Ireland. As already discussed in Question 4.1 above, on the available facts, there is nothing to rebut the registered office presumption. The presence of assets such as a warehouse and bank account, and the credit agreement with the Italian bank, would not be sufficient to rebut the registered office presumption. As such, the geographical scope for EIR Recast to apply has been satisfied as the COMI of Cardinal Home is in Ireland, which is an EU Member State.

Thereafter, we consider the personal scope of the EIR Recast. Cardinal Home is a furniture company and does not fall within the entities excluded in Article 1(2) of the EIR Recast. The personal scope for the EIR Recast is met as well in this case.

Next, the EIR Recast only applies to insolvency proceedings, as listed in Annex A of the EIR Recast. The examinership proceedings requested to be opened against Cardinal Home is listed as an insolvency proceeding in Annex A and therefore would fall within the material scope of the EIR Recast.

Finally, the EIR Recast only applies to insolvency proceedings opened after 26 June 2017 (temporal scope). In this case, the insolvency proceedings against Cardinal Home was opened on 30 June 2017, and therefore falls within the scope of the EIR Recast.

Based on the above, the EIR Recast would be applicable to the insolvency proceeding opened against Cardinal Home.

Question 4.3 [maximum 5 marks] 5

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.

Secondary insolvency proceedings may be opened in a Member State where it possesses an establishment within that Member State (Article 3(2) of EIR Recast). “Establishment” is defined as any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets (Article 2(10) of EIR Recast).

The concept of establishment was considered in the case of *Interedil*, where the CJEU held that an establishment would require a minimum level of organisation and a degree of continuity and stability. This is because the definition of establishment connects the pursuit of an economic activity to the presence of human resources. Accordingly, mere presence of goods or bank accounts in isolation does not satisfy the requirement of an establishment.

On the facts available, while the presence of a warehouse and bank account alone is not sufficient, Cardinal Home also had a credit agreement and was negotiating with local distributors although it is unclear whether this is ongoing or if there had been further developments by the 3-month period preceding the opening of the main insolvency proceedings in June 2017. If the activity in Italy is ongoing and continues to involve human resources and organisation, then secondary proceedings may be opened against Cardinal Home in Italy under the EIR Recast.

Nevertheless, even if the establishment requirement for secondary proceedings are met, the insolvency practitioner may give an undertaking (in accordance to Article 36 of the EIR Recast) to the Italian creditors that they will receive the same recovery in respect of assets located in their local jurisdiction, as such creditors would have received under the Italian national laws if secondary proceedings had been opened there. This would fulfil the purpose of the Italian bank which purpose is to secure an Italian insolvency distribution ranking.

If such undertaking in accordance with Article 36 is given and at the request of the main insolvency practitioner, the Italian court faced with the request to open secondary insolvency proceedings shall not open the secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors (Article 38(2) EIR Recast).

Through this “synthetic” secondary proceeding, the secondary insolvency proceedings in Italy can be avoided while still protecting the rights and interests of the local Italian creditors.

Total: 15 out of 15.

*** End of Assessment ***

Total: 50 out of 50.
Well done!!