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).

Well done.

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."

Statement 1 – "Undertaking", Article 36

Statement 2 – "cooperation and communication between courts", Article 42

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.

The EIR Recast allows for main insolvency proceedings to be raised in the place of the debtor's Centre Of Main Interests (Article 3(1), EIR Recast). These proceedings have universal scope and cover the debtor's assets across the EU. This universalist approach is modified by the right to open secondary proceedings where the debtor has an establishment (Article 3(2)).

The effect of a judgment opening main insolvency proceedings must be recognised without further formalities and may not be challenged in other Member States (Article 20). However, this does not extend to jurisdictions in which secondary proceedings have been raised (Article 20(2)).

An insolvency practitioner appointed to main proceedings may use all their powers in any other member state. This is limited by the fact that this does not apply where secondary proceedings have been raised (Article 21(1)).

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 sets out that cooperation is desirable and particularly sets out that courts should share information.

Recital 49 allows for Courts to enter agreements and protocols for the purpose of facilitating cross-border cooperation.

Article 42 governs cooperation and communication between courts.

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.

Article 36 allows insolvency practitioners to grant undertakings to creditors to, in essence, treat them as though secondary proceedings had been raised in their jurisdiction (including for the ranking of claims). Per Article 38(2), where the court is satisfied that an undertaking adequately protects creditors' interests, the court should not open secondary procedures (if the insolvency practitioner requests this).

Courts may grant a stay of secondary proceedings, in circumstances where a stay has been granted in main insolvency proceedings. This must be at the request of the insolvency practitioner or the debtor (Article 38(3)). The stay may be lifted either where a restructuring plan has been agreed; if it is detrimental to creditors' rights; or the insolvency practitioner or debtor has disposed of assets or removed them from the territory in which the stay was granted.

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 identified that the scope of the EIR 2000 did not cover pre-insolvency proceedings, or those which left the existing management in place ("hybrid proceedings"). To resolve this, the scope of the EIR recast (Article 1) was broadened to include cases where a temporary stay of individual enforcement proceedings is granted, and where proceedings are commenced where there is only a likelihood of insolvency, with the purpose of avoiding the debtor's insolvency.

Second, the Commission identified that there were difficulties in practice in identifying an entity's COMI, and that the EIR 2000 allowed for forum-shopping. This was addressed by improving the definition of COMI and clarifying the circumstances in which the presumption that the COMI of a legal person is located at the place of its registered office may be rebutted.

Third, the Commission determined that the opening of secondary proceedings could hamper the administration of the main proceedings; in particular, secondary proceedings could harm the ability of an IP to rescue a distressed business as a going concern. This was remedied by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors (such as where an undertaking has been granted in line

with Article 36), by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved.
Fourth, in order to improve the rules on publicity of insolvency proceedings and improve access to cross-border insolvencies, the Commission proposed requiring Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and allowed for the interconnection of national insolvency registers. It also introduced standard forms for the lodging of claims which could be used in foreign insolvencies.

Finally, the Commission recognised that the EIR 2000 did not specific rules for handling the insolvency of a multinational group of companies. To this end, Chapter V of the EIR Recast was introduced, setting out specific requirements for cooperation and communication between courts and practitioners.

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 a 3-month "suspect" period in relation to the presumption that an entity's COMI is the place where its registered office is located. This means that, if the entity has moved its registered office within three months of the raising of insolvency proceedings, the court will disregard the change in registration and proceed as though no change had been made. This helps to prevent a company "forum-shopping" by moving its COMI to a member state with favourable insolvency laws.

The EIR Recast introduced the right for an insolvency practitioner to give an undertaking in order to avoid secondary proceedings. This was an adoption of judicial innovation in Collins & Aikman Europe SA. Where an insolvency practitioner gives an undertaking to creditors which sufficiently protects their interests, a court may refuse an attempt to open secondary proceedings. This helps to control the opening of secondary proceedings which can undermine the main proceedings.

The EIR Recast introduced a whole chapter (Chapter V) relating to group insolvencies, which were previously not dealt with in EIR 2000. Courts may now open proceedings relating to a group in one jurisdiction, and appoint the same insolvency practitioner, provided the COMIs of those companies are located in a single Member State. This can help to reduce the costs required in multiple insolvency proceedings and improve the chances for a favourable outcome.

Question 3.3 [maximum 5 marks] 2.5

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.

Although one of the stated aims of the EIR Recast was to avoid forum-shopping, the scope of the EIR Recast did not take into consideration certain types of insolvency proceedings, such as the Scheme of Arrangement available in England [this is not completely accurate. It is up to the jurisdictions to include the domestic procedures or not – it is not that the EIR Recast did not include the Scheme but rather, that the UK did not want the Scheme included]. As a result, the new provisions for establishing a person's COMI (and thereby minimising opportunities for

forum-shopping) did not apply to these new types of proceedings. Had they been considered and brought into the scope of the EIR Recast, it would have helped to achieve the aim of avoiding forum-shopping.

Article 16 of the EIR Recast provides an exception to Article 7(2)(m), which allows for the lex concursus to apply in determining whether a transaction which is detrimental to the general body of creditors (for example, if it is at an undervalue). Article 16 provides that the lex concursus will not apply where the act is subject to the law of a Member State other than that of the state of the opening of proceedings (the "lex causae"), and the law of that Member State does not allow any means of challenging that act in the relevant case. This was introduced in order to uphold the legitimate expectations of creditors or third parties about the validity of the transfer. However, it leaves itself open to abuse. It applies to limitation periods or time-bars, whether procedural or substantive (Hermann Lutz v Elke Bäuerle). As such, a debtor attempting to alienate assets before insolvency can, effectively, "forum-shop" to a lex causae which best allows the debtor the possibility of a defence. This could be resolved by removing Article 16, but that does seem draconian. A more palatable option may be to overrule Hermann Lutz such that the time-bar provisions of the lex concursus continue to apply.

Total: 12.5 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.

The appropriate forum for these insolvency proceedings is the jurisdiction in which the entity's Centre Of Main Interests (COMI) is located (Article 3(1)). Absent proof to the contrary, the place of the registered office shall be presumed to the COMI (Article 3(1)). This presumption may be rebutted if, from the viewpoint of a third party, the company's central administration does not take place in the jurisdiction in which it is registered (Interedil Srl v Fallimento Interedil Srl).

On the facts as presented, we have no information to rebut the presumption that the COMI is the same place as the registered office. In addition, Ireland remains a member state of the EU and therefore subject to the EIR 2000 (in these circumstances). As such, the High Court in Dublin does have international jurisdiction to raise the relevant proceedings.

Question 4.2 [maximum 5 marks] 2

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.

The EIR Recast entered into force on 26 June 2017 (subject to some minor exceptions which do not affect the reasoning here) (Article 92). It applies only to insolvency proceedings opened after 26 June 2017 (Article 84(1)). Insolvency proceedings are considered "open" at the time at which the "judgment opening insolvency proceedings" becomes effective (Article 2(8)). The "judgment opening insolvency proceedings" includes "the decision of any court to open insolvency proceedings" (Article 2(7)(i)). If the Dublin High Court opens the insolvency proceedings on 30 June 2017, this falls within the scope of Article 84(1) (as it is after 26 June 2017) and therefore the EIR Recast will be applicable.

You should have discussed all the relevant scope (individual, material, etc.)

Question 4.3 [maximum 5 marks]

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.

The ability of courts of a Member State to open secondary proceedings is set out in Article 3(2) of the EIR Recast. Secondary proceedings may only be opened where the debtor possesses an establishment within the territory of that Member State (Article 3(2)). An "establishment," for the purposes of that Article, means any place of operations where a debtor carries out or has carried out a non-transitory economic activity with human means and assets, within the 3-month period prior to the request to open main insolvency proceedings (Article 2(10)). A minimum level of organisation and a degree of stability are required. The presence of goods in isolation, or a bank account, will not meet the requirements for an "establishment" (*Interedil Srl v Fallimento Interedil Srl*).

From the facts of the case, we know that CH has a warehouse in Milan, and a credit agreement with an Italian bank. We also know that it has been entering into non-binding memoranda with local businesses. The warehouse is presumably subject to a commercial lease, unless it is owned by CH. These factors point towards its presence in Italy being non-transitory. The question, therefore, is whether CH carries out these economic activities with "human means and assets." There is no evidence which explicitly states that CH employs any staff or otherwise deploys human resources in Italy. The warehouse may be unstaffed, or it may be that CH has engaged the services of a local fulfilment and warehousing company. A bank account alone is not enough. It is submitted that non-binding memoranda would, similarly, be insufficient.

In conclusion, secondary proceedings cannot, therefore, be opened in Italy under the EIR Recast.

Total: 12 out of 15.

*** End of Assessment ***

Total: 44.5 out of 50