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.

D was the correct answer.

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.

A was the correct answer.

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 : 7 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 relates to Article 38(2) "Decision to Open Secondary Insolvency proceedings" which states that a court that has been asked to open secondary insolvency proceedings, should not do so at the request of the insolvency practitioner involved in the main proceedings if they are satisfied it protects interests of local creditors.

- Statement 2 relates to Article 42(1) "Co-operation and communication between courts" which obliges courts to co-operate with one another both in the application stage of insolvency proceedings and during proceedings between main and secondary proceedings providing more time for co-operation

Question 2.2 [maximum 3 marks] 51

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 idea that secondary proceedings were permitted to be opened up for the same company in different jurisdictions went against the traditional universalist approach and is adopted in the EIR recast as prescribed under Recital 23
- EIR Recast states that the Courts of the Member state in which insolvency proceedings are commenced shall be the governing law. I.E. the domestic law of insolvency proceedings being the debtors COMI will dictate how the liquidation is run as laid out in Article 8
- Under the EIR recast there are an unlimited number of secondary proceedings to be commenced against a company, should the proper circumstances arise which against the theory of universalism
- The Recast allows for an insolvency case to be taken out for several companies in different jurisdictions under Recital 51 to allow for a more efficient and cost-effective

method of dealing with group company liquidations contrary to what was previously in place. There is no longer a requirement to open proceedings using an entity-by-entity approach

- EIR Recast provided a mechanism and guidance to conduct Group insolvencies where two or more insolvency practitioners are involved in member states under Article 56.

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.

- The EIR Recast now obliges a court that has been requested to take out an insolvency proceeding or has an insolvency proceeding underway to co-operate with other courts facing the same issue with the same company or related company in a different jurisdiction as dictated in Article 42
- Courts may co-operate with each-other by appointing the same insolvency practitioner in both jurisdictions provided its compatible with the rules and domestic of laws of each proceeding with particular reference to ensuring the insolvency practitioner meets the relevant professional qualifications and licences in each of the jurisdictions involved as laid out in Recital 50.
- The courts are enabled to co-ordinate and oversee the handling of the debtors assets, synchronise the conduct of hearings in both, or multiple jurisdictions relevant to the proceedings and liaise with other courts for the approval of protocols as laid out in Article 42(3).

Question 2.4 [maximum 2 marks] 1.5

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.

- The EIR recast has allowed for the implementation of synthetic proceedings under Article 38(2) which means where an insolvency practitioner has given an undertaking, the court in that has been requested to open secondary proceedings should not proceed to do so on the basis that it is in the general interest of the wider body of creditors, regardless of what jurisdiction they reside with the member states. This is intended to save time as secondary proceedings can often draw out the timeline of a liquidation and professional costs of the liquidators that will accrue as a result.

- The EIR recast now allows for a stay on the opening of secondary proceeding at the request of the liquidator involved in the main proceedings. This can be for a period of up to three months and is intended to allow for the potential for the liquidator to potentially restructure the estate before being placed into liquidation. This may also ensure the integrity of the insolvency estate with reference to the Company's assets, increasing the likelihood of the insolvency practitioner creating maximum realisations to creditors in the future. This is only permissible where a temporary stay of individual enforcement has been granted by the courts involved in the main proceedings. The

liquidator is then permitted to request other courts put a stay on proceedings. Which article is this?

Total : 9.5 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.

According to Article 46 of EIR 2000, by no later than 1 June 2012, the European Commission was tasked to present a report that contained recommendations for how the instrument could be improved namely:

- To broaden the scope of restructuring procedures. This mechanism was previously limited in nature. Addressing this subject would increase the possibility of companies being successfully restructured providing a viable alternative to an entity being placed into insolvency upon the appointment of an administrator over the estate. This was introduced to the EIR Recast an outlined in Article 1 which provides a much more rhobust narrative on the options available to a liquidator when dealing with a possible restructuring.
- The European Commission recommended stronger co-operation between insolvency practitioners ("IP's") in different states, co-operation between Ips and courts in different states and greater co-operation between courts themselves in different states where proceedings exist with related or group companies. This was introduced to the The rules that govern these situations have been laid out in Article 41, Article 42 and Article 43 of the EIR Recast.
- The idea that a framework could be introduced where group companies could be consolidated into one proceeding rather than using an entity by entity approach based on the jurisdiction in which the group company was incorporated. This was introduced in the EIR Recast and has been covered considerably in Chapter V. This outlines that branches from a debtor can brought under one insolvency proceeding even if they exist in different member states. It also outlines mechanisms whereby multiple proceedings in different members states can form an agreement with the appointment of a Group co-ordinator overseeing the group proceedings.
- The European Commission advised there should be improvement in information provided to creditors with reference to interconnectivity of insolvency registers. This was introduced to the EIR Recast by standardising creditors claim forms. According to Article 55 of the Recast a creditor of any member state can lodge a claim in a proceeding using a standard claim form established in accordance with Article 88.

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.

- Creditors are now more easily able to lodge a claim in an insolvency proceeding in any member state using a claim form established in accordance with Article 88.
- Insolvency practitioners can apply for a stay in secondary proceedings in foreign jurisdictions to enable the possibility of a quick and efficient restructuring of a company for a period of up to 3 months which would be cost effective for the wider body of creditors.
- The recast prescribed the formation of a decentralised system for insolvency registers. This is composed of all national registers on the European E-Justice Portal giving readily available information to potential creditors in proceedings across all members states which was not previously in place
- There is strong emphasis placed on the restructuring of a company, not previously included in EIR 2000 which is in line with the European trend of promoting this process to increase return to creditors, minimise job loss in the European market and increase investment should an opportunity arise.
- The EIR recast now states that its rules should apply to all member states without the requirement for examination of the provisions by national courts, the EIR recast should be a pre-requisite or starting point for dealing with insolvency cases in all member states.
- There was a lack of provisions for dealing with multinational insolvencies in EIR2000 was perceived to be a considerable weakness. This is now addressed at length.
- Another improvement brought into force through the EIR recast is the abolition of a secondary proceeding required to be a winding up proceeding. Secondary proceedings are now permitted engage in a restructuring process not previously allowed under Article 3(3) of the EIR 2000.

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.

- 1. The EIR Recast only applies to member states who have adopted the legislation. Once an entity involved in an insolvency proceeding is in a jurisdiction that has not adopted the EIR Recast, national insolvency laws apply and there is no scope for the implementation of the provisions contained therein.

- There may be scope to introduce binding international global law for a limited number of rules contained in EIR Recast to harmonise some of the processes carried out by insolvency practitioners worldwide.

- This would only apply to those states willing to adopt these rules but could streamline some processes in drafting agreements between insolvency practitioners. This would go beyond the guidance outlined in UNCITRAL and introduce binding legislation across states who agree to adopt this mechanism for cross border insolvency.

- 2. The framework outlined for dealing with group insolvency proceedings contains a narrative for how insolvency practitioners should co-operate with one-another in

formulating a group insolvency agreement. This is based on one of the insolvency practitioners in group proceedings, be it the main proceeding or secondary proceeding, formulating a plan and appointing a group co-ordinator to deal with cross border issues and consolidate matters which is meant to streamline proceedings in multiple jurisdictions relating to the related or group companies or the same company with creditors located elsewhere (Article 72).

- These provisions are only suggested steps insolvency practitioners should take when formulating a group plan. There is no binding legislation, and any party can choose to opt out of said agreement should they choose to do so. An insolvency practitioner is also not required to provide a reason for choosing to opt out Article 64(1). The lack of any binding legislation in this space has outlined how the ineffectiveness of this approach. Many people have expressed doubts over the effectiveness and practical value as well high costs as they are voluntary in nature.

- As many of the legislation introduced relating to the insolvency space has shown, there will always be a reluctancy to adopt unless it is brought into law. If group co-operation of insolvency practitioners amongst members was compulsory, this would drastically improve its effectiveness and streamline the process. This process should be binding to those who qualify

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.

- The Dublin High Court has International Jurisdiction as we can assume that the company was incorporated in Ireland with a registered office in the same jurisdiction.

- Once of the criteria in understating where insolvency or examinership proceedings of a company exists is illustrating where the company's registered office is based. In this case its Ireland which means in most circumstances, the main insolvency proceeding

of a company like Cardinal Home will be under the supervision of the Dublin High Court.

- The EIR Recast 2000 dictates where insolvency proceedings should be opened through an analysis of where an entities centre of main interest ("**COMI**") is located. Although Cardinal Home operates from a number of locations throughout Europe (having warehouses located in a number of EU member states as well as Milan) the company began operations in Ireland and one can only assume this business line is still fully operational.

- It would also appear that Cardinal Homes conducts the administration of the Company in Ireland. This would lead one to assume that the COMI of Cardinal is in Ireland which is laid out in Article 3(1).

- With reference to International jurisdiction, Dublin High Court has power to exert authority only over proceedings or matter within members states that have signed up to EIR Recast 2000. All other countries outside of this group are dictated by their own national laws. Separate separate individual agreements would have to be drawn up to deal with courts outside this jurisdiction.

- National insolvency laws must be adhered to when dealing with cross border issues inside the EU however since the adoption of the EIR Recast 2000 by member states, these laws have been largely harmonised and the regulation contained in the EU recast 2000 is mandatory for member states. That is not to say the EIR Recast Supersedes national law. Recital 26 outlines the law the proceedings will be governed by i.e. the jurisdictional law for the opening of the main insolvency proceeding however, like in the case of Cardinal Homes, it is Irish national law that dictates the court to open proceedings.

- The CJEU, when dealing with the case of a companies COMI in the case of "*Eurofood IFSC Ltd"* stated a companies COMI must be decided by reference to criteria that are objective and is possible to corroborate using third party information which they stated was an autonomous meaning that should be adopted for all COMI considerations. The debtor or insolvency practitioner must provide proof that the administration and principle place of business in this case, is in Ireland using third party proof.

Question 4.2 [maximum 5 marks] 2.5

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.

- With a few small exceptions, the EIR Recast applies to all insolvency proceedings in member states from 26 June 2017 (Article 92). In the case of Cardinal Homes, the EIR Recast will be applicable

- This will provide more scope for creditors to enter into repayment agreements or adjustments to balances payable which is laid out in Recital 10. This is a lot less scope for restructuring and negotiations in debt adjustment in EIR 2000.

- There is now a lot more scope for a restructuring of Cardinal Homes, which may give the company the opportunity to close down loss-making subsidiaries and restructure

their debt facility with the Italy Bank to allow the business to continue to trade as laid out in Article 1.

- All provisions within the EIR Recast must be upheld by the insolvency practitioner in tandem with all other applicable laws relating to proceedings that might apply to the matter (e.g. Brussels I Recast).

- In the case of Cardinal Homes, the EIR Recast will apply to proceedings opened in all member states where proceedings are commenced with the exception of Denmark

You failed to tackle all the scopes with the relevant provisions -

- The EIR Recast will be applicable. The logical order of the steps to be taken is the following:
- Article 3(1) EIR Recast. COMI of Cardinal Home is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES
- Article 1(2) EIR Recast. Cardinal Home is not a credit institution, insurance undertaking or any other 'excluded' entity. YES
- Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding '*Examinership*' is listed in Annex A to the EIR Recast. YES

Article 2(7), 84(1), 92 EIR Recast. The proceeding in question was opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (22 June 2017) is not determinative for the temporal scope. YES

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.

- Insolvency proceedings can be opened up in Italy although only secondary proceedings would be allowable in this instance.

- When dealing with proceedings in Italy, the claim made by the bank would only be able to recover assets that are based in Italy. This would be proceeds from the sale of assets associated with the company warehouse and other assets solely located in Italy. The bank however may achieve a distribution ranking in Italy only.

- The bank is also permitted to lodge a claim in the main proceedings and would be entitled to assets of the estate based on Ireland should a creditors distribution arise but would more than likely be paid on a parri passu based in the unsecured creditors claims bracket.

- If recoveries were made in Italy, this balance would also have to be taken off the claim lodged in the main insolvency proceeding in Ireland.

- Recital 48 points out that insolvency practitioners, based in Italy and Ireland (members states) must work together to ensure the effective administration of the insolvency proceeding.

- The EIR Recast now makes specific reference to courts working together in members states. The CJEU notes that the insolvency practitioners assigned to the administration of secondary proceedings should take into accounts the objective of the main proceedings when taking into consideration any recovery actions made by creditors in terms of next steps as laid out Article 42 of the EIR Recast.

Sound reasoning, however –

- 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 : 10.5 out of 15.

*** End of Assessment ***

Total : 42 out of 50.