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).***
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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 2023***. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023***. If you elect to submit by 1 March 2023, you*** may not

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages**.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

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

Select the correct answer from the options below:

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

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

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

Question 1.2

According to Article 1(1) of the EIR 2015, proceedings fall within the scope of the EIR if:

(a) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; are collective.

(b) they are based on laws relating to insolvency for the purpose of liquidation; are public; are collective.

(c) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public.

(d) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are collective.

Question 1.3

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

Question 1.4

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

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive

provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 40 EIR Recast ("Advance payment of costs and expenses").

(c) Article 7 EIR Recast ("Applicable law").

(d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").

The correct answer was D.

Question 1.6

The EIR 2015 does not provide a definition of "insolvency" or "likelihood of insolvency". What are the consequences of this?

(a) The ECJ has provided a definition of "insolvency" in recent case law.

(b) The European Commission has provided a definition of "insolvency" in its Recommendation on a "New Approach to Business Failure" published in 2014.

(c) Each Member State will define "insolvency" in national legislation.

(d) Deciding whether a debtor is "insolvent" or not is a matter for the ECJ to determine.

Question 1.7

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

(a) "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.

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

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

(d) "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.

Question 1.8

The EIR Recast kept the concept of the "centre of main interests" (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

(a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

The correct answer was D.

Question 1.9

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

(a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.

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

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

(d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an equivalent in the law of the jurisdiction in which recognition is sought.

The correct answer was A.

Question 1.10

In a cross-border dispute, the main proceedings before the German court concerns Schatz GmbH (registered in Germany) and Canetier SARL (registered in France). The case deals with an action to set aside four contested payments that amount to EUR 900,000. These payments were made pursuant to a sales agreement dated 29 December 2021, governed by Italian law. The contested payments have been made by Schatz GmbH to Canetier SARL before the former went insolvent. The insolvency practitioner of the company claims that the contested payments should be set aside because Canetier SARL must have been aware that Schatz GmbH 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 /ex concursus, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

(b) The contested transactions cannot be avoided if Canetier SARL can prove that the /ex 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) The contested payments will not be avoided if Canetier SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of Italian law (Article 16 EIR Recast).

(d) To defend the contested payments Canetier 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 /ex causae.

The correct answer was C.

Total marks: 6 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

The following two (2) statements relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. The presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests need to be rebuttable.

Statement 2. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Answer

Statement 1 is about the presumption of the place of centre of main interests as addressed under Article 3(1) of EIR Recast.

Statement 2 is about the public collective proceedings as addressed under Article 1 of 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.***

Answer

Under the pure universalism, the insolvency proceedings would be decided by one court, applying one set of procedural and substantive rules. The following provisions of EIR Recast show the concept of modified universalism, creating a harmonized framework towards laws of Member States:

1. ***Article 3 of EIR Recast states that the courts of the Member State within the territory of which the centre of debtor's main interests is situated (/ex concursus), shall have the jurisdiction to open the main insolvency proceeding. At the same time, opening of secondary proceedings is allowed where the debtor has an establishment (/ex concursus secundarii), which run in parallel to main insolvency proceedings and produce effects only on assets situated within a state of secondary proceedings. The complex system with one main proceeding dominating the course of the debtor's insolvency and a number of secondary proceedings demonstrates the modified universalism.***
2. ***Article 8 of EIR Recast states that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets, both specific assets and collections of indefinite assets as a whole, belonging to the debtor and which are situated within the territory of another Member State at the time of opening of proceedings, insulating from the effect of the opening of main proceeding.***

3. ***Article 16 of EIR Recast introduces an exemption to the applicable /ex concursus under Article 7. The law of the state of opening of main proceeding relating to the voidness, voidability or unenforceability of legal act detrimental to the creditors shall not apply if the creditor can prove that the act is subject to the law of a Member State and the law of that Member State does not allow any means of challenging that act in the relevant case.***

Question 2.3 [maximum 3 marks] 3

Because pure universalism has not been adopted under the EIR 2015, main and secondary insolvency proceedings can be opened at the same time against the same debtor. In light of this, it is seminal that proper co-operation between the actors involved in concurrent proceedings takes place. It is therefore not surprising that co-operation has been introduced as an obligation on several actors in the EIR 2015. List three (3) provisions ***(recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.***

Answer

Under Article 41, the insolvency practitioner in main insolvency proceeding and that in secondary proceedings concerning the same debtor shall co-operate with each other.
Under Article 42, the court before a request to open insolvency proceedings is pending or which has opened such proceedings shall co-operate with any other court faced with the same.
Under Article 43, an insolvency practitioner in main insolvency proceedings must co-operate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings; an insolvency practitioner in secondary proceedings must co-operate and communicate with the court before which a request to open main or other secondary insolvency proceedings is pending or which has opened such proceedings.

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 one to three sentences) explain how they operate.***

Answer

1. ***Right to give an undertaking "synthetic" secondary proceedings***

According to Article 38, where the 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 open them if it is satisfied that the

undertaking adequately protects the general interest of local creditors. Such undertaking covers the assets located in the Member State where secondary proceedings may be requested and guarantees treatment as if secondary proceedings have been opened, such as complying with the distribution and priority rights under the national law that creditors would enjoy if secondary proceedings had been opened in that Member State.

2. <u>Stay of the opening of secondary insolvency proceedings</u>
The EIR Recast allows the court to temporarily stay the opening of secondary proceedings when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, upon a request from the insolvency practitioner. The court may decide to order protective measures such as not to remove or dispose of assets situated at that Member State except for ordinary course of business.

Total marks: 10 out of 10.

QUESTION 3 (essay-type questions) [15 marks in total]

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] 0

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

Answer

During the reform process of the EIR 2000, the European Commission identified the following elements that were considered desirable for a harmonized approach:

1. ***To introduce flexibility in national preventive restructuring procedures by limiting the need for court formalities to where they are necessary and proportionate;***
2. ***To provide for a stay of individual enforcement actions;***
3. ***To protect the interests of dissenting creditors where the court should reject any restructuring plan that would likely reduce the rights of dissenting creditors below what they could reasonably expect to receive when the debtor's business is not restructured;***
4. ***To ensure that the preventive restructuring process be on a debtor-in-possession model;***
5. ***To include the possibility of cross-class cram-down provisions; and***
6. ***To protect new and interim financing.***

This was mostly discussed for the introduction of Directive 2019/1023. Your answer should have focused on issues such as: COMI; groups of companies; information and publication; extended scope; synthetic proceedings; extended duties of communication and co-operation.

Question 3.2 [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.***

Answer

Insolvency of corporate groups under EIR Recast

The voluntary nature of group co-ordination proceedings under Recital 56 of EIR Recast and the possibility of an easy opt-out without explanation or good cause (Article 64 of EIR Recast) make group co-ordination proceedings a toothless instrument. Even if such proceedings have been instituted, the insolvency practitioners are not obliged to follow the co-ordinator's recommendations or the group co-ordination plan in whole or in part (Article 70 of EIR Recast). The system is non-committal.

On the other hand, the EIR Recast only applies to cross-border insolvency cases in EU. If the corporate group has members located in non-Member States, meaning that the EIR Recast will not bind courts and insolvency practitioners in such non-Member State proceedings, and that the latter will not form part of the group co-ordination proceedings. Their exclusion from the group proceeding may significantly limit the effectiveness and usability of the group provisions in the EIR Recast. Perhaps but in any case the EU does not have the competence or jurisdiction to enact instruments for countries which are not part of the EU.

Co-operation obligation among Member States and non-EU jurisdiction should be comprehensively considered in order to harmonize insolvency case. For example, the domestic court may be allowed to recognize the insolvency case of main proceeding and open an examination of secondary insolvency practitioner by that of main proceeding and make a direction if it thinks fit as another way of co-ordination.

Lack of a comprehensive preventive restructuring framework

The EIR Recast primarily focuses on the handling of cross-border insolvency cases. It does not provide a comprehensive framework regarding preventive restructuring for the rescue of viable companies.

Directive on Preventive Restructuring Frameworks 2019 is therefore raised. Yes, but that is the nature of the instrument. It was also the case for the EIR 2000. It would have been good here to focus on specific concepts which have been criticized, such as the concept of COMI for example and its presumption. Or the concept of "synthetic proceedings".

Question 3.3 [maximum 5 marks] 3

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List two (2) ***ways in which the Regulation and the Directive differ.***

Answer

The Directive emphasizes the involvement of stakeholders in restructuring process, requiring the debtor to engage with creditors and other stakeholders in developing a restructuring plan. Whilst, the EIR Recast does not address the stakeholder involvement in the same way.

The policy and technical choices of Member States in the implementation of the Directive will likely result in different restructuring models, leading to the different systems that are located at different points of the spectrum. The introduction of minimum standards means that the scope of the Directive caters to a jurisdiction's status quo, the national law of Member States will be implemented. Compared to EIR Recast, Article 7 lays down the general rule and Article 18 provides for automatic recognition of certain insolvency proceedings across EU.

Yes but you cannot compare specific concepts of either instruments. They are not comparable as the objective of each instrument is very different. Rather, your discussion could have focused on:

- The difference between a Regulation and a Directive, as an instrument of EU law;
- The EIR 2015 is a choice-of-forum instrument which harmonised the procedural aspects of cross-border insolvency law / the Directive aimed to harmonise substantive aspects of insolvency law across the EU;
- The EIR 2015 is a conflict of law instrument focusing on most aspects of cross-border insolvency law / the Directive, while substantively harmonising insolvency law across the EU, has focused on a narrow aspect of insolvency, i.e. preventive restructuring;
- Due to the nature of the Regulation, all Member States must comply with its provisions / the Directive is a minimum standard instrument, which means that it merely establishes a threshold under which the Member States cannot legislate. However, this minimum harmonisation approach also leaves the Member States with substantive leeway in how they want to adopt the provisions of the Directive.

Total marks: 5.5 out of 15.

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

Scenario

Bella SARL is a French-registered company selling cosmetic products. The company had opened its first store in Strasbourg, France in 2010 and has warehouses across Europe, including in Germany, Ireland, Italy, Spain and Portugal. Its main warehouse is located in Cork, Ireland. All of its employees are located in these countries and most of its customers are also located in these countries, yet some online purchases are coming mainly from the Netherlands and Poland.

In 2011, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish luxury cosmetic market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Great Economic and Financial crisis which hit Europe in the late 2000s. By 2014 the company was in financial difficulty, yet managed to keep afloat for another few years. On 20 June 2017, it filed a petition to open safeguard proceedings in the Strasbourg High Court in France.

Question 4.1 [maximum 5 marks] 2

Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.

Does the Strasbourg High Court have jurisdiction to open the requested safeguard proceedings under the EIR 2000?

You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Answer

Under EIR 2000, the court in which the insolvency proceedings are opened has the jurisdiction under the nation law of the Member State where proceedings opened. The court of which Bella SARL's centre of main interest ("COMI") located has the jurisdiction to open insolvency proceedings (Recital 13 of EIR 2000). Since Bella SARL is a French-registered company, it also has operation (stores, custmoers, employees, etc) in France, it is considered that France should be its COMI.

In the case *Eurofood IFSC Ltd*, the CJEU states that the autonomous meaning of COMI facilitates legal certainty across the EU, its application must be uniform in all Member States. Legal certainty and foreseeability for all stakeholders dealing with the debtor, if it goes insolvent, is further encouraged by the objectivity and ascertainability of the place of COMI. Where the ascertainability or visibility by creditors is closely related to the time factor. In this sense, the COMI of Bella SARL should be considered in France due to its long lasting regular activity.

Therefore, Strasbourg High Court has the jurisdiction to open the requested safeguard proceedings under EIR 2000.

While your reasoning is sound to some extent, this is incorrect.

- ***The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.***

- ***You were expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, 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 (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.***

- ***Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).***

- ***However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.***

- ***Article 2 EIR 2000 states that '"insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.***

- ***Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).***

- ***Therefore, the EIR 2000 would not apply to safeguard proceedings.***

Question 4.2 [maximum 5 marks] 5

Assume that the timeline is as explained in the <u>original scenario above</u> and that the French High Court opens safeguard proceedings on 30 June 2017.

Will the EIR Recast be applicable to the proceedings?
Your answer should address the EIR Recast's scope and contain <u>all</u> steps taken to answer the question.

Answer
Determination of the EIR Recast's scope requires considering 1. when does it apply in time (temporal scope), 2. to whom does it apply (personal scope), 3. which

proceedings are covered by it (material scope) and 4. what are its geographical limitations (geographical scope).

In this case, the proceeding is opened after 26 June 2017 (i.e. 30 June 2017); Bella SARL is a cosmetic product retailer but not a bank, insurance company or another "excluded" undertaking; the proceeding opened is safeguard proceedings in the Strasbourg High Court in France which is listed in Annex A to the EIR Recast; and it has COMI in a Member State of the EU (i.e. France).

EIR Recase [Recast] should be applicable to the proceedings.

Question 4.3 [maximum 5 marks] 2

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.

Answer

Under EIR Recast, the creditor may also file for secondary insolvency proceedings in another Member State where the debtor has an establishment (Article 3(2)). Establishment is defined as the "place pf operations where a debtor carries out or has carried out a non-transitory economic activity with human means and assets" (Article 2(10)). The purpose of secondary insolvency proceedings is to protect local interests and improve the administration of the insolvency estate (Recital 40). Its effects limited to the assets located in that Member State where the secondary proceedings opened (Recital 23).

In *Interedil*, the CJEU examined and concluded that the definition of establishment connects the pursuit of an economic activity to the presence of human resources. Non-transitory economic activity with human means and assets are assumed to be ascertainable by third parties before the concerning court authorized to open the secondary insolvency proceedings.

In this case, Bella SARL has customers, employees and warehouse(s) in Italy. It appears that Bella SARL has an establishment in Italy. Italian court therefore has a jurisdiction to open a secondary insolvency proceeding.

While your reasoning is sound to some extent, this is incorrect.

- ***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 Bella SARL 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 marks: 9 out of 15.

*** END OF ASSESSMENT ***

Total marks: 30.5 out of 50.