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").

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.

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.

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: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

***Statement 1*. 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.**

Statement 1 relates to Recital 31 and Article 3 of the EIR Recast. These provisions codified the CJEU's guidance establishing a rebuttable presumption of the Debtor's COMI in order to protect third parties' reasonable expectations and prevent abusive forum shopping.

Statement 2 relates to Recital 10 and Article 1 of the EIR Recast. These provisions refer to the expanded scope of the EIR Recast (as compared to the EIR 2000) which now includes not only traditional liquidation proceedings, but also encompasses restructuring and rescue proceedings.

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 provides for a main insolvency proceeding (Article 3(1)) which, ideally, would operate universally to administer all the Debtor's assets and liabilities, wherever located. The concept of modified universalism supports the EIR's provisions related to secondary proceedings (Article 3(2)). A court's recognition of the main proceeding, however, does not prevent a court from opening a secondary proceeding to administer local assets in a jurisdiction where the debtor has an establishment, even though this would render the main proceeding no longer universal (Article 19(2)). To facilitate the potential network of cases, the EIR Recast provides for cooperation between insolvency practitioners (Article 41), between courts (Article 42) and between practitioners and courts (Article 43). Similarly, the EIR Recast provides a framework for administration, communication, and cooperation when a group of companies becomes insolvent (Articles 56, 57, 58, 59).

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.***

Article 41 provides for communication and cooperation between insolvency practitioners. Specifically, Article 41 allows for such cooperation to take the form of a protocol for administering two (or more) cases.

Article 42 provides for communication and cooperation between courts administering main and secondary proceedings. In fact, Article 42(1) obliges courts to communicate with other courts which have opened insolvency proceedings for the same debtor.

Article 43 provides for communication and cooperation between insolvency practitioners and courts.

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

First, the EIR provides for synthetic proceedings in Article 36, which can prevent the opening of a secondary proceeding (Article 38(2)). A synthetic proceeding allows the main insolvency practitioner to give foreign creditors the effect of a secondary proceeding without actually opening one. This is accomplished when the insolvency practitioner gives a unilateral undertaking regarding the foreign assets and agrees to comply with the priority of distribution which would have been established by the secondary proceeding.

Second, an insolvency practitioner or debtor in possession may request a temporary stay of secondary proceedings. A court may grant such a request in order to provide a debtor time to negotiate a business reorganization. After granting the request, a court may impose measures to protect the interests of creditors in jurisdictions where secondary proceedings would have been opened but for the stay. The stay can last up to three months, but may be lifted when the debtor and its creditors reach a consensual restructuring plan, when the stay would be detrimental to creditors' rights, or if the debtor or insolvency practitioner has removed or disposed of assets in the state where the stay has been imposed. ***[You must provide the legal reference.]***

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

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)?

The Commission found the need to broaden the scope of the Regulation to include not only liquidation-type proceedings, but also business rescue and reorganization proceedings. Additionally, the Commission improved and strengthened rules for cooperation among insolvency practitioners and courts (See EIR Recast Articles 41-43). The EIR 2000 provided for cooperation between insolvency practitioners overseeing main and secondary proceedings. The EIR Recast included this requirement and strengthened it, while also adding provisions providing a framework for cooperation between courts and between courts and insolvency practitioners. Finally, the Commission found the need to improve the information available to creditors. Under the EIR 2000, the insolvency practitioner had discretion as to whether and where they published notice of an insolvency in member states. In contrast, the EIR Recast obliges the insolvency practitioner (or debtor in possession) to publish notice where the debtor has an establishment using the member state's local notice procedures. Additionally the EIR Recast provides for a standard notice procedure to be published to the e-justice portal.

Question 3.2 [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.***

First, the EIR Recast attempted to include provisions to facilitate the insolvency of a group of companies. However, the framework for cooperation and communication falls short of what's needed to efficiently administer a group of companies, especially as it relates to reducing costs. I propose the incorporation of procedures for substantive and/or procedural consolidation akin to those currently present in the insolvency system of the United States. For example, when the group of companies have operations so intimately connected that they're truly operating as one company with many "departments," substantive consolidation, including pooling assets and creditors, may better recognize the economic reality of the operations and protect the expectations of creditors, while also reducing costs and increasing efficiency of administration. Similarly, when a group of companies are operating with more independence but share certain features (for example, a group of companies which each hold a single piece of real estate managed by one developer), procedural consolidation may be appropriate to efficiently administer assets without pooling them or combining creditor pools.

Second, the EIR Recast provides for a stay of secondary proceedings in certain instances, especially where a Debtor in Possession is attempting negotiate a consensual reorganization with its creditors. However, Courts are not obligated to

honour the stay and may opt to institute a second proceeding regardless. In order to give needed breathing room and increase the likelihood of reorganization, I propose this provision should be re-written to reduce or remove the discretion of courts with potential secondary proceedings and require the courts to honour the stay.

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.***

Unlike the EIR which, as noted above, is a choice-of-forum instrument, the Directive on Preventive Restructurings required member states to enact certain types of insolvency-related law. First, the Directive required a member state to enact some sort of law directed at early-stage restructuring. While not directly providing substantive law, this provision increases cross-border harmonisation by ensuring that early-stage restructuring systems are available to a debtor at their COMI and will hopefully reduce abusive forum shopping. This stands in contrast to the EIR, which simply adopts the law of a particular jurisdiction depending on the situation but does not mandate any legal tools be made available. Similarly, while still not a substantive law, the Directive requires member states to enact legislation to protect financing arrangements connected with the restructuring, which again harmonises the types of tools available to non-liquidating debtors regardless of their COMI and increases the availability of credit.

This is slightly too specific. You cannot compare specific concepts of either instrument as they are not comparable because each instrument's aim is completely 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;
- 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: 13 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.

As an initial matter, the EIR 2000 had a more limited scope which referenced only liquidation-type proceedings. A French *Sauvegarde* proceeding is a type of reorganization proceeding and not a liquidation proceeding. Baker McKenzie, "Global Restructuring and Insolvency Guide: France" http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2016/12/Global-Restructuring-Insolvency-Guide-New-Logo-France.pdf (Accessed February 4, 2023). However, *Sauvegarde* is listed in Annex A of the EIR 2000 and thus the EIR 2000 may apply. This is incorrect.

Pursuant to Article 3(1) of the EIR 2000, the courts of the member state where the Debtor has its COMI have jurisdiction to open insolvency proceedings. Under the same provision, the COMI is the place of the debtor's registered office absence proof to the contrary. Because the Debtor is registered in France, its COMI is presumed to be France. While the EIR 2000 does not provide any examples or definitions of "proof to the contrary" which might rebut the presumption that the debtor's registered office is in France, the CJEU did so in *Interedil Srl v Fallimento Interdil Srl* Case C-396/09,

ECLI:EU:C:2011:671 (Oct. 20, 2011). In that case the CJEU found that, when the bodies responsible for management are located in the same place as the registered office and when 3rd parties would understand that management decisions take place there, the presumption that the debtor's COMI is the place of the registered office is irrefutable.

Here, we know that the Debtor's COMI is presumed to be in France. We also know that the Debtor has offices and employees across Europe, including in France, but we do not know where management decisions take place. Given the facts above, it is logical to think a third party would assume management of the French company takes place in France. Therefore, it's highly unlikely that the presumption of the Debtor's French COMI would be rebutted and therefore it is similarly likely that the French Court would have jurisdiction to open insolvency proceedings so long as French Law provides that the Strasbourg High Court is the proper court.

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 original scenario above 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 all steps taken to answer the question.

Yes, the EIR Recast will be applicable to the proceedings. First, we must examine when the proceeding was opened. Here, because the proceeding was opened after June 26, 2017 (as it was opened on June 30, 2017) the EIR Recast (rather than the EIR 2000) may apply. Second, we must examine whether the proceeding was opened in an EU member state (besides Denmark). The Debtor's COMI is presumed to be in France because that is where the Debtor company is registered. While the presumption of COMI may be rebutted in some instances, including those mentioned above which were codified in the EIR Recast, here it is unlikely to be rebutted because the Debtor has operations in France in additional to operations across Europe, and the location of the head office is not provided. Therefore, the EIR Recast may apply. Third, we must ensure the proceeding is a kind listed in Annex A. Because a French Sauvegarde is listed in Annex A, the EIR Recast may apply. Finally, we must ensure the company is not the type that is excluded from the EIR. Because the company is not an excluded undertaking, such as a bank or insurance company, the EIR Recast may apply. Because all the criteria have been met, the EIR Recast will apply.

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.

Yes, it is likely that a court would find the Italian bank can open a secondary proceeding in Italy against the Debtor. Pursuant to Article 3(2), a secondary proceeding may be opened where the Debtor has an establishment. As establishment requires a debtor to carry out operations which are non-transitory and involve human means and economic assets. Pursuant to the CJEU's Interedil case, the mere presence of goods in a member state is not enough to meet the requirements for an establishment. Here however, the prompt suggests that the Debtor has both assets (a warehouse, perhaps an office) and human means (employees) in Italy (See Article 2(10)). The EIR Recast includes a three-month lookback period to ensure the Debtor's presence is not transitory and also focuses on the perception and expectations of third parties. Nothing in the prompt suggests that the Debtor's presence in Italy is new (within three months) or transitory. Therefore, the Debtor has an establishment and it is likely the Bank will succeed in opening a secondary proceeding under the language

of the EIR Recast. However, such secondary proceeding will be limited to the assets of the Debtor located in Italy.

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: 40.5 out of 50.