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.

The correct answer was C.

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: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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.

Article 3(1) EIR Recast, the centre of main interest (COMI)

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.

Article 1 EIR Recast, Recital 10 ***what is the concept?***

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.***

Article 3(1) states that courts of Member States may within the territory of which the COMI of the debtor's main assets is situated, shall have jurisdiction to open insolvency proceedings, but at the same time Recital 23 allows for secondary proceedings which run in parallel, impacting only those assets in that territory.

Recital 40 therefore protects the diversity of interests, promotes effective administration of complex insolvency estates and mitigates the divergence of different national laws.

The opening of main insolvency proceedings results in extra-territorial (universal) application of the law of the Member State where such proceedings have been opened (lex concursus). The opening of secondary insolvency proceedings leads to the creation of a separate insolvency estate and the application of a separate lex concursus , which effectively limits the otherwise universal scope of the main proceedings in order to protect the local/secondary interests.

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.***

According to Article 41(1), insolvency practitioners in main and secondary concerning the same debtor shall co-operate with each other as long as it is compatible with the rules applicable to the respective proceedings.

Article 42(1) codifies some of the best practices in the area of co-operation and communication and obliges the court before which a request to open

insolvency proceedings is pending, or which has opened such proceedings, to co-operate any other court faced with the issue of opening insolvency proceedings or which has already opened such proceedings.

Article 42(3) courts are empowered to co-ordinate the administration and supervision of the debtor's assets and affairs, synchronise the conduct of hearings and the approval protocols , where necessary.

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.***

The right to give an undertaking (synthetic secondary proceeding). According to Article 38(2) where the insolvency practitioner has given an undertaking in accordance with Article 36 , the court asked to open secondary proceedings should not, if asked, open secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

The EIR Recast also introduces the possibility to temporarily stay the opening of secondary proceedings. This stay is granted in the main proceedings and can not exceed three months and on condition that it suitable measures are in place to protect the interests of local creditors.

Total marks: 9 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

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 EIR Recast responded to 15 years of practice and covered broadening the scope of restructuring proceedings, stronger rules for cooperation between insolvency practitioners and courts, the possibility of proceedings between members of the same group companies and improvement of creditor information (inter-connectivity of insolvency registers), as well as generally modernisation of the legal rules (data protection). According to Article 1 the Recast attempts to extends not only to traditional 'liquidation-oriented procedures' but also to proceedings aimed at

rescuing economically viable but financially distressed businesses. This is an earlier identified stage of a debtor aimed at preserving bother creditor's rights and leaving the debtor partially or fully in control of their assets – where there is only a likelihood of insolvency.

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.***

The Recast devotes a chapter to group insolvencies, dealing with insolvency of cross-border multi-nationals in the EU. While the Recast attempts to improve the co-ordination of insolvency proceedings of members of a group of companies and to allow for co-ordinated restructuring of the group by offering a mechanism called the "group co-ordination proceeding" – these group co-ordination proceedings are voluntary in nature (for the member of the group to be included or not) and further these proceedings lead to non-binding actions – which result in a mixed uptake of such proceedings. I would recommend that such proceedings are not at the election of the group member and further that such actions are binding on the group.

One of the weakest points in the EIR Recast group co-ordination regime is the right of every insolvency practitioner concerned to object against the inclusion with group co-ordination proceedings of the insolvency proceedings in respect of which he or she has been appointed. Although the insolvency practitioner does not have to provide a substantiated statement in his/her objection – a simple objection is merely required to opt-out of the group proceedings. This can be improved upon by dropping the simple 'opt-out' system to one that requires a court decision – possibly the CJEU – to make the final decision.

Question 3.3 [maximum 5 marks] 3.5

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.***

The Directive is the first instrument that aims to substantively harmonises insolvency law across the EU albeit only a narrow aspect, compared to the EIR's broader scope, with the latter adopting a modified universal approach. However the Directive will not result in a harmonisation of this narrow aspect as it does not actually harmonise core

aspects of substantive insolvency laws – but rather acknowledges that the diverse laws in each Member State is too large to harmonise.

Secondly the Directive gives Member States the flexibility to achieve the objectives by applying the principles and targeted rules in a way that is suitable in their national contexts, which effectively means Member States will continue to apply their current systems. ***What is the difference with the Regulation? You were required to specifically name the differences.***

Total marks: 13.5 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] 1.5

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.

The EIR 2000 defines international jurisdiction for insolvency cases within the EU i.e. it designates the Member State the courts of which may open insolvency proceedings. However territorial jurisdiction within that Member State is not a matter for EU law but is established by national law of the Member State concerned. The EIR 2000 prescribes that (main) insolvency proceedings can be initiated at the place of the debtor's center of main interest (COMI) (Article 3(1)). The EIR 2000 did not contain a definition of COMI but rather some provided guidance in Recital 13.

In one of the most important cases of the EIR 2000, Eurofoods IFSC Ltd, the court stressed that the concept of COMI is peculiar to the regulation. THE CJEU highlighted that the COMI must be both objective and ascertainable by third parties.

The issue of COMI presumptions was further dealt with by the CJEU in Interedil Srl v Fallimento Interedil Srl. In this case the CJEU ruled that when the bodies responsible for the management and supervision of the debtor are in the same place as its registered office, and the management decision of the company are taken in that same place in a manner that is ascertainable by third parties, the registered office presumption is irrefutable. The presumption can be rebutted when, from the third parties' view, the place in which the company's central administration is located, does not coincide with the jurisdiction of its registered office.

From the above cases it is not clear that the COMI is the registered office in France or that Bella SARL's main assets are situated here – therefore it is not clear if the Strasbourg High Court has jurisdiction to open proceedings.

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 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.

Determination of the EIR Recast's scope required answering the following questions;

1. *When does it apply in time,*
2. *To whom does it apply?*
3. *Which proceedings are covered by it? And*
4. *What are its geographical limitations?*

The following steps are;

1. *The debtor has COMI in a Member State of the EU, except Denmark? Yes – it could be France*
2. *The debtor is not a bank, insurance company or another excluded undertaking? Yes*
3. *The proceeding opened against the debtor is listed in Annex A to the EIR Recast? Yes – it is Spain*
4. *The proceeding is opened after 26 June 2017? Yes 30 June 2017.*

Thus it appears as if the EIR Recast is applicable.

Question 4.3 [maximum 5 marks] 1.5

An Italian bank files a petition to open secondary insolvency proceedings in Italy with the purpose of securing an Italian insolvency distribution ranking.

Given the facts of the case, can such proceedings be opened in Italy under the EIR Recast?

Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Article 3(1) EIR Recast enables main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests (COMI). At the same time the EIR Recast allows for the opening of secondary proceedings, which run

parallel to main insolvency proceedings (Recital 23). Secondary proceedings being territorial in nature, protect the diversity of interests, promote effective administration of complex estates and mitigate difficulties arising from divergent national laws (Recital 40). Hence it appears that a secondary proceeding can be opened in Italy. However the effects of secondary proceedings are restricted to the assets of the debtor situated in the territory of the Member State where secondary proceedings have been opened.

The prevalence of main insolvency proceedings and their lex concursus has been confirmed by the CJEU in the case of ENEFI Energiahatekonysagi Nyrt. In this case the CJEU was asked to clarify whether lex concursus could provide for the forfeiture of a creditor's right to pursue a claim if such a creditor had not taken part in the main insolvency proceedings.

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: 8 out of 15.

*** END OF ASSESSMENT ***

Total marks: 38.5 out of 50.