



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

This is the summative (formal) assessment for Module 2B of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 2. Please read instruction 6.1 on the next page very carefully.

If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
4. ***You must save this document using the following format: [studentID.assessment2B]. An example would be something along the following lines: 202223-336.assessment2B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.***
5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.***
- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 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.**

The correct answer was D.

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.*

The correct answer was B.

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.

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 *lex 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 *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.**
- (c) 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 *lex causae*.**

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.

Statement 1 is addressed in Article 3 which discusses “International Jurisdiction”

Statement 2 is addressed in Article 1 which discusses “Scope”

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.

Several provisions highlight this approach the first is discussed in Article 3(2) (“International jurisdiction”) it discusses the ability to open secondary proceedings after proceedings have commenced in the debtor’s COMI.

Article 19(2) (“Principle”) discusses that any judgment by a court of a Member State which has jurisdiction shall be recognised in other Member States.

Article 34 (“Opening of proceedings”) also sets out the opening of secondary proceedings in other Member States

All these 3 examples set out how the EIR Recast uses modified universalism

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 “Cooperation and communication between insolvency practitioners

Article 42 “Cooperation and communication between courts”

Article 43 “Cooperation between insolvency practitioners and courts”

Question 2.4 [maximum 2 marks] **2**

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide two (2) examples of such instruments and briefly (in one to three sentences) explain how they operate.

The entirety of Chapter 3 of the EIR Recast discusses secondary proceedings.

Article 34 which discusses opening of proceedings. States that the court which has jurisdiction may open secondary insolvency proceedings. The secondary proceedings are restricted to the assets located in that Member State.

In Article 38(2) discusses the decision to open secondary insolvency proceedings following on from Article 36. Stating that if the insolvency practitioner has given an undertaking allows the court at the request of an insolvency practitioner to not open secondary insolvency proceedings, if it is seen to be in the best interest of the local creditors.

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] **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 European Commission addressed several issues that they felt needed to be revised under the new framework. Firstly, they addressed the issue of scope by extending it, and broadening the definition of insolvency proceedings to include pre-insolvency proceedings as well as debt discharge proceedings they also included personal insolvency issues.

The Recast also seeks to add clarity to the issues of international jurisdiction. The Recast further codifies the rulings made by the Court of Justice. It clarifies the issue of recognition and what is needed for COMI. It does add to what is needed for COMI to avoid forum shopping and COMI shifting, only allowing COMI to apply if the principal place of business hasn't moved in three months and six months for the habitual residence.

Following on from the issue of international jurisdiction the EIR Recast also tries to provide more efficient administration of secondary insolvency proceedings. It acknowledges that a court can allow or refuse secondary proceedings, if it is not seen as being in the best interest of the creditors. Chapter 3 explains the details of secondary insolvency proceedings.

The EIR Recast does address the issues of cooperation and communication between IPs and courts during insolvency proceedings. This is to maximise the benefits to stakeholder and

provide more efficient and cost-effective insolvency proceedings. Cooperation is also aimed at providing what is in the best interest of the creditors. It also sought to improve creditor information and modernise the legal rules. several elements that need to be revised.

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.

Some critics have criticised the voluntary nature of the communication and cooperation, saying that it is more of a guideline and recommendation rather than it being enforceable under the Regulation. This means that Member States where main proceedings have commenced can still make rulings that and undertakings that may advantage main proceeding creditors while disadvantaging creditors in secondary proceedings.

Some have criticised the attempt to improve the co-ordination of insolvency proceedings, due to it not being sanctioned by the EIR Recast. Insolvency practitioners can object against the inclusion within group co-ordination proceedings. They also do not have to give a reason as to why they want to object to these proceedings as it is believed that they are well advised.

Yes but you were also meant to explain how they could be corrected.

Question 3.3 [maximum 5 marks] **1.5**

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.

One way that the EIR is different from the Directive is that the EIR is focused on private international law, focusing on the steps that need to be taken to commence international insolvency proceedings. The Directive seeks to make a standard for preventative restructuring procedures across the Member States and improve its efficiency. This differs from the main point of the EIR which seeks to harmonise international insolvency amongst member states. The Directive complements the EIR rather, it can be implemented where procedure do not satisfy conditions under the Recast. **Not exactly as they do not deal with the same issues (procedural versus substantive).** Therefore, Member States as long as they are compliant with the EIR they don't necessarily need to be compliant with the Directive. **This is legally incorrect.**

The Directive is doesn't provide harmonisation and is territorial allowing member states to apply principles that are suitable to their national context rather than collective group proceedings that have been commenced in other Member States.

The first part of your answer is correct but the second part suggests that you have not understood the Directive nor how it dovetails with the Regulation.

Total marks: 9 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] **3**

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 Strasbourg High Court would have jurisdiction to open safeguard proceedings. As according to Article 3 under EIR 2000 "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings." As mentioned above Bella SARL is French-registered company, therefore it would pass the COMI test giving it jurisdiction to open the proceedings.

In the case of Eurofood IFSC Ltd. (C-341/04) the courts ruled that the registered office was the COMI and main proceedings should be opened in that Member State. In the judgment ruling Article 3(1) was referenced and can only be rebutted if there is no business that is not carried out in the Member State with the registered office.

Later, in the ruling the Court did also reference Article 16(1) where once insolvency proceedings are opened it shall be recognised in all other Member States and insolvency proceedings cannot be brought against the debtor.

The rulings from this case show that if Strasbourg were to open the requested proceedings under EIR 2000 they would have jurisdiction to do so. This is because their registered address is in France and there isn't evidence to rebut this considering, they have a store located in France where they do business.

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] **3**

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.

The temporal scope was for the EIR 2000 to be repealed and replaced from 26 June 2017. This means that it would apply to the proceedings since they were commenced on 30 June 2017.

The EIR Recast COMI is the location of the company's registered office. Article 3(1) clearly describes what is required for a debtor to have COMI. Unlike the EIR 2000 it is included in the main text giving it authority. This is in contrast to the EIR 2000 where it was in a Recital which is not enforceable and only provides a guidance for the courts to interpret it however, they see fit. The definition in the EIR Recast is also backed by settled case law of the CJEU. Similar to the EIR 2000 COMI can only be rebutted if their objective facts that running of the debtor's business and assets are located in another state and the state with the registered office is only that of registered office (known as a letterbox company).

Safeguard proceedings under French law would fit under the scope of rescue proceedings as per the EIR Recast. A stay will be granted once proceedings commence to allow the debtor to negotiate with its creditors.

The main issue of scope for the safeguard proceedings would be prevent the debtor from going insolvent, as the debtor had only entered proceedings due to the financial difficulties that they faced however managing to stay afloat. The EIR Recast states that if a debtor enters proceedings where there is only a likelihood of insolvency their purpose should be to avoid insolvency or the halt of business activities. Under French safeguard proceedings, it allows for the business to continue while reorganizing its debts.

Yes but some references to the law missing.

- **The logical order of the steps to be taken is the following:**
- **Article 3(1) EIR Recast. COMI of Bella SARL is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES**
- **Article 1(2) EIR Recast. Bella SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES**
- **Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Safeguard' is listed in Annex A to the EIR Recast. YES**
- **Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (20 June 2017) is not determinative for the temporal scope. YES**

Question 4.3 [maximum 5 marks] 1

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

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

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

The EIR Recast includes a chapter on secondary proceedings laying out what needs to be followed if they are commenced.

Secondary proceedings can be opened under EIR Recast where the debtor has an establishment which is defined as a place of operations where a debtor carries out or has carried out a non-transitory economic activity with human means and assets”, however, there are certain consideration that the Italian bank would have to consider first. The Italian bank must only restrict themselves to the assets of the debtor which are situated within Italy.

Secondary insolvency proceedings seek to protect the local interests and improve the administration of the insolvency estate. Commencing secondary insolvency proceedings safeguard the expectations of creditors with respect to the applicable insolvency law including their position in creditor’s ranking.

In insolvency proceedings the Member State with the *lex concursus* shall determine the rules that govern the distribution of proceedings for the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off.

In the case of Collins & Aikman Europe SA the High Court of Justice authorised joint administrators to give assurances to creditors that were located in other Member States. Secondary proceedings were allowed by other countries, but oral assurances were given to reassure creditors. Ultimately the term synthetic proceedings were coined, allowing the main proceedings to properly administer the proceedings without the need to open multiple proceedings. The case of Bella SARL is similar as there are several different entities with different locations.

I think you have misunderstood the issue at stake here. You were supposed to discuss the concept of “Establishment”.

- **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: 6 out of 15.

***** END OF ASSESSMENT *****

Total marks: 31 out of 50