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 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: 10 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

In principle, the location of the COMI is presumed under Article 3(1) of the EIR Recast. However, such presumption is rebuttable under Recital 31 of the EIR Recast if the same had been relocated within 3 months or 6 months (as the case may be) prior to the request of the opening of insolvency proceedings for the purpose of preventing fraudulent or abusive forum shopping.

Statement 2

According to Article 1 of EIR Recast, it was extended to the effect that insolvency proceedings for the purpose of "rescue" are also covered thus not only traditional liquidation-oriented procedures are included under the ambit of the law. Such extension is also provided in Recital 10 of the EIR Recast which provides that "the scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.

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.***

1. ***Article 3(2) : Although the main proceedings would be opened in the COMI of the debtor, the courts of another Member State shall have jurisdiction to open a secondary proceedings if the debtor has an "establishment" within its territory and such proceedings shall only cover the debtor's assets located in that territory.***

2. ***Article 19(2) : For recognition of insolvency judgment, EIR Recast's approach has been relying on the principles of mutual trust and it is a general principle under Article 19 that recognition is immediate and automatic. However, it is provided in Article 19(2) that such recognition of main proceedings does not preclude the opening of proceedings under Article 3(2), i.e. secondary proceedings.***

3. ***Article 42 : A court before which a request to open insolvency proceedings is pending (or already opened) is obliged to co-operate with other courts which are facing the same issue. Such co-operation may be taken in various form via an independent person or body acting on its instructions.***

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 <u>three (3) provisions</u> ***(recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.***

It is provided in Recital 48 of EIR Recast that "(m)ain insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings". Such co-operation can be found in 3 provisions in EIR Recast :

1. ***Article 41(1) : Insolvency practitioners in main insolvency proceedings and secondary insolvency proceedings in relation to the same debtor shall co-operate as much as not incompatible with rules applicable to the proceedings. Co-operation can be taken in any form including conclusion of agreements or protocols. Such co-operation was exceptionally vital to large scale cases like insolvency of Lehman Brothers Group.***

2. ***Article 42(1) : A court before which a request to open insolvency proceedings is pending (or already opened) is obliged to co-operate with other courts which are facing the same issue. The EIR Recast extended the co-operation to time before insolvency proceedings are opened. Better co-ordination between parties would be ensured and abusive forum shopping by debtor could be precluded.***

3. ***Article 43(1) : Other than court-to-court and insolvency practitioner-to-insolvency practitioner co-operation, EIR recast extends the scope to co-operation between insolvency practitioners and courts. An insolvency practitioner (whether in main or secondary insolvency proceedings) is obliged to co-operate with courts before which a request is made to open insolvency proceedings (whether main, secondary or another secondary insolvency proceedings).***

Question 2.4 [maximum 2 marks] 2

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

<u>(1) "Synthetic" Secondary Proceedings</u>

According to Article 36 of EIR Recast, insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the debtor's assets located in a Member State which secondary insolvency proceedings may be opened. Effect of

such undertaking is that upon realization of such assets, distribution would be made according to priority of national law of that Member State (but not the COMI). Under Article 38(2) of EIR Recast, in the presence of such undertaking, court of that Member State shall not open secondary insolvency proceedings if general interest of local creditors is protected.

(2) Stay of Opening of Secondary Insolvency Proceedings

When a temporary stay of individual enforcement proceedings is granted in the main insolvency proceedings, EIR Recast provides for possibility that the court to stay the opening of secondary insolvency proceedings if there are suitable measures to protect general interest of local creditors (Recital 45). Such stay (of not exceeding 3 months) arises at the request of insolvency practitioner or debtor-in-possession to allow for negotiations between the parties (Article 38(3)).

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)?

1. ***Scope of the Regulation : EIR 2000 covered only proceedings entailing liquidation of the debtor which was not in line with the modern trend which emphasizes on promoting restructuring to maximize value for creditors and protect employment. According to Recital 10 and Article 1 of EIR Recast, proceedings covered include also those for the purposes of rescue, adjustment of debt and reorganisation.***

2. ***Information Available and Insolvency Register : Under EIR 2000, each Member State maintained its own insolvency registration system and the interconnectedness of the same was always in doubt. Under Article 24 of EIR Recast, Member States must establish and maintain one or more registers which information concerning insolvency is published as soon as possible upon opening of such proceedings. Interconnection of the registers is ensured under Article 25 of EIR Recast such that a decentralized system composing of the registers and European e-Justice Portal shall be maintained.***

3. ***Prevention of Secondary Proceedings : Parallel insolvency proceedings are not beneficial to parties due to the uncertainty created and raise in costs. The strategy***

of "synthetic" secondary proceedings was not available in EIR 2000 and it was merely used as court practice, as in the case of Collins & Aikman Europe SA. By operation of Article 36 and 38(2) of EIR Recast, undertaking could be given to prevent secondary insolvency proceedings while general interest of creditors (those in location where the debtor has an establishment) would not be affected.

4. ***Insolvency of Groups of Companies : It is a common economic practice that businesses operated across national borders are carried out by related companies under the same group. Those companies usually operated as a single unit with one common goal. However, those entities used to be viewed as independent legal persons with separate estates. Complexity would arise in case of insolvency of one of (or all of) the entities. EIR 2000 did not concern with such issue but a new Chapter (Chapter V) was added to the EIR Recast to cover group insolvencies by enhancing co-operation and communication as well as introducing the group co-ordinating proceedings.***

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.

(1) Limitation on Scope of EIR Recast

Unlike EIR 2000 which focused mainly on liquidation-oriented proceedings, the EIR Recast extended to proceedings aiming at rescuing economically viable debtors who were in financial distress. This can be seen from the revamp of Article 1 of the Regulation ("Scope") which expanded the proceedings covered.

However, the choice of proceedings covered is still limited by Annex A to the EIR Recast, which covers 112 procedures available in the 27 EU members. As a result, the EIR Recast has no effect on procedures not covered in the Annex A. Simple interpretation of Article 1 could give people a misunderstanding that all relevant procedures are covered but that is not the reality. This would not be beneficial to parties as new procedures shall be invented to adapt to modern economic environment.

Such flaw may be improved by taking those Annex A procedures as examples only and other procedures, if considered by courts (or other competent bodies) as appropriate, shall be included in the ambit under the EIR Recast (or its later version).

(2) Limitation in Insolvency of Groups of Companies

In response to a popular shortcoming of the EIR 2000, the EIR Recast introduced a new regime of "group co-ordination proceedings" as suggested in Recital 54. An insolvency practitioner appointed may request for opening of such proceedings (Recital 55 and Article 61 of the EIR Recast). By appointing an independent insolvency

practitioner as "group co-ordinator", a plan would be proposed for the purpose of conducting the proceedings smoothly.

However, it was criticized for its inherent optionality. As initiation of the group co-ordination proceedings is optional and parties cannot be compelled to participate in the same. In addition, the recommendations made by the "group co-ordinator" do not have a binding effect. As a result, the power and effectiveness of such proceedings would be extremely limited and passive.

Such flaw may be improved by compulsory nature of engagement in the "group co-ordination proceedings" and unless certain conditions are met, those recommendations should have binding effect on all relevant parties.

Question 3.3 [maximum 5 marks] 2

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.***

(1) Legal Status

The EIR, as a regulation and EU-measure, binds its Member States directly. Regulations are legal acts which apply automatically and uniformly to all EU countries once entering into force and no transposition is required. Accordingly, failure of previous effort such as the EU Convention which required unanimity (which UK refused to sign) was not repeated. I am not sure I understand the link between the Regulation having direct effect and the convention requiring unanimity.

On the other hand, the Directive is not applicable to Member States directly. It has to be incorporated (implemented) by Member States into their national legislation (within a prescribed period) through a process which is known as transposition before it can be implemented.

While this is correct, it does not speak specifically of the European Insolvency Regulation and Directive 2019/1023.

(2) Objects of Instrument

Originally, the EIR 2000 focused on insolvency proceedings which were liquidation-oriented (Article 1 of EIR 2000). It was not until the EIR Recast that insolvency proceedings for the purposes of rescue, adjustment of debt and reorganisation were added to the Regulation in reply to the call for more focus on the restructuring end of the business. Accordingly, both businesses which are already hopeless and merely in financial distress are objects of the Regulation.

On the other hand, the Directive was created for the purpose of creating harmonised restructuring frameworks throughout Member States. The objects of the Directive are those viable enterprises in financial difficulties with a view to improve their recovery rates.

You could have discussed:

- The EIR 2015 is a choice-of-forum instrument which harmonised the procedural aspects of cross-border insolvency law / the Directive aimed to harmonise substantive aspects of insolvency law across the EU;

- The EIR 2015 is a conflict of law instrument focusing on most aspects of cross-border insolvency law / the Directive, while substantively harmonising insolvency law across the EU, has focused on a narrow aspect of insolvency, i.e. preventive restructuring;

- Due to the nature of the Regulation, all Member States must comply with its provisions / the Directive is a minimum standard instrument, which means that it merely establishes a threshold under which the Member States cannot legislate. However, this minimum harmonisation approach also leaves the Member States with substantive leeway in how they want to adopt the provisions of the Directive.

Total marks: 12 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

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.

Under Article 3 of the EIR 2000, courts of a Member State has jurisdiction to open insolvency proceedings if the debtor's COMI (centre of main interests) is situated in its territory. In the case of a company, the place of its registered is presumed to be its COMI in the absence of evidence in contrary.

The definition of COMI was not provided in body of the EIR 2000. Certain guidance was provided in non-enforceable Recital 13 instead, i.e. "a place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".

In the case of Eurofood IFSC Ltd, it was held by CJEU that COMI of a debtor must be identifiable by reference to criteria that are objective and ascertainable by third parties. To make COMI more predictable to ensure legal certainty and foreseeability, the COMI presumption can only be rebutted with objective factors indicating that administration of the debtor is conducted in another state.

Despite having its business across Europe (also a main warehouse in Ireland), there is no objective evidence to rebut the COMI presumption, i.e. administration of Bella SARL's business is conducted in somewhere else on regular basis and ascertainable by third parties. Bella SARL's COMI should be located in its registered country, i.e. France (which is a Member State).

Accordingly, the Strasbourg High Court should have jurisdiction to open the requested safeguard proceedings (which is included in Annex A of the EIR 2000 as "Sauvegarde").

While your reasoning is sound, this answer is incorrect:

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

- ***Students are 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.

According to Article 1 of the EIR Recast, it applies to "public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation" and proceedings covered are provided in Annex A thereto. As in the EIR 2000, safeguard proceedings ("Sauvegarde") is included in Annex A.

The EIR Recast "applies only to proceedings in respect of a debtor whose centre of main interests is located in the Union" (Recital 25). Under the COMI presumption provided in Article 3, Bella SARL's COMI should be in France (a Member State) in the absence of contrary evidence therefore the geographic scope should be satisfied.

According to Recital 9, the EIR Recast "apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual". It is no doubt that Bella SARL, as a French registered company, is qualified to be an object of the EIR Recast given it is not a bank or other excluded entities.

Furthermore, the EIR Recast applies from 26 June 2017 (Article 92 and relevant exceptions are not applicable in this case) and only to insolvency proceedings opened after the date (Article 84(1)). As the French High Court "opens" the proceedings on 30

June 2017 ***(i.e. after the EIR Recast came in force), the requirement for "time of the opening" of insolvency proceedings with respect to "judgment opening insolvency proceedings" (as defined in Article 2(7) and 2(8) respectively) had been met. The petition filing date of 20 June 2017 should not be given any weight in considering the temporal scope of application of the EIR Recast.***

Having considered the facts provided in the case, I am of the view that the EIR Recast is applicable to the proceedings.

Question 4.3 [maximum 5 marks] 4

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.

Under Article 3(2) of the EIR Recast, opening of secondary insolvency proceedings is allowed if the debtor possesses an "establishment" within the territory of the Member State (which is not its COMI) and such proceedings cover only those assets situated in the territory of that Member State.

In the fact of the case, it was provided that Bella SARL has warehouses in Italy therefore we have to consider whether such warehouses can be classified as "establishments".

Under Article 2(10) of the EIR Recast, an 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".

In Interedil Srl v Fallimento Interedil Srl, CJEU held that mere presence of goods in isolation or bank accounts does not satisfy the requirement of being an "establishment". It has to be connected to economic activity in the presence of human resources with minimum level of organisation and certain degree of stability. These factors are important to ensure legal certainty and foreseeability.

To be ascertainable by third parties, the "establishment" should satisfy objective factors of being "non-transitory economic activity with human means and assets". In the case, it is only mentioned that Bella SARL has warehouses in Italy but no further information. It is unclear whether those factors are fully satisfied. Should there be presence of human means and assets (which should be the case of "warehouse") with certain degree of organisation which is ascertainable by third party, the condition of

having an "establishment" should stand and secondary insolvency proceedings can be opened in Italy (a Member State).

Lastly, time of opening of the secondary insolvency proceedings should also be considered as it may only be opened prior to the opening of the main insolvency proceedings in exceptional situation according to Article 3(4) of the EIR Recast.

Good reasoning.

- ***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, nor Spain.***

Total marks: 10 out of 15.

*** END OF ASSESSMENT ***

Total marks: 42 / 50