



**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.**

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: 7 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-**

**Name: Registered office presumption  
Article 3(1) EIR Recast**

**Statement 2-**

**Name: Scope  
Article 1 EIR Recast Recital 10**

**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. Main Insolvency proceedings and COMI**

*The EIR 2000 did not contain a definition of COMI and had some guidance in a recital 13 but the EIR Recast mandates that the COMI shall be where the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties which is found in article 3(1) of the EIR Recast. This assists as the definition is now included in the law and is now enforceable and provides the court with guidance for interpretation which is also backed by CJEU case law.*

**2. COMI presumptions**

*The EIR Recast did not change the COMI definition, it only included it in the main law, but it did also provide for presumptions indicating its location. For example- where is the registered office located. This is also found in Article 3(1) of the EIR Recast*

**3. Secondary insolvency proceedings and establishment**

*The EIR recast now allows for the opening of one or more secondary proceedings against a debtor in any member state where it possesses an establishment, this is found in Article 3(2) of the EIR Recast.*

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.**

*The EIR Recast introduces:*

*Article 41 EIR Recast- a comprehensive framework for cooperation and communication between insolvency practitioners.*

*Article 42 EIR Recast - a comprehensive framework for cooperation and communication between courts.*

*Article 43 EIR Recast- a comprehensive framework for cooperation and communication between insolvency practitioners and courts.*

Question 2.4 [maximum 2 marks] **1**

**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.**

**1. Right to give an undertaking (Synthetic Secondary proceedings)**

*This avoids the opening of a secondary insolvency proceeding, Oral assurances are given by the joint administrator to local creditors that their claims would be dealt with by the relevant insolvency law and their ranking of creditors. This allows them to get the benefits of secondary proceedings while the proceeding does not formally exist.*

**2. Stay of the opening of the secondary insolvency proceedings**

*This follows the opening of main insolvency proceedings and allows for the integrity of the insolvency estate and gives breathing space for the debtor to negotiate restructuring deals with its creditors. Therefore, not allowing the opening of the secondary insolvency proceedings. This is a requested stay by the insolvency practitioner or the debtor in possession.*

**Yes, but you have not provided the provisions.**

**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 2000 was a great success and was in existence for 15 years. It was noted that after 15 years, that some of its provisions needed to be adjusted and new rules were needed. This brought in the EIR Recast. The new EIR Recast has 89 Recitals and 92 Articles and 4 Annexes.*

*The EIR 2000 was the first major binding instrument dealing with cross border insolvencies in the EU. The adoption of the unified rules was determined by the need to improve the efficiency and effectiveness of the insolvency proceedings having cross border effect, ensure equal treatment of creditors and protect legitimate expectations and the certainty of transactions. It was used to continue the idea of modified universalism.*

*This recast assisted and brought in:*

- *The need for insolvency practice to broaden the scope to restructuring proceedings and stronger rules for cooperation between insolvency practitioners and the courts. As well as possibility of proceedings with regards to members of the same group of companies.*
- *Improvement of creditors information and the interconnectivity of insolvency registers.*
- *Modernizing the legal rules to also include data protection.*

*The European commission had to present a report for the application of the proposal for its adaptation no later than 1 June 2012. The EIR recast was then adopted in 2015 and responded to the above matters.*

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.**

*With the intention to improve and modernize the EIR Recast, there were some flaws and shortcomings of the EIR Recast of the expected improvements. The EIR Recast introduced a whole chapter V dedicated to group insolvencies with over 20 articles.*

### Cooperation and communication in group insolvencies flaw

*Under Article 56 EIR Recast, it appears less prescriptive. There is no main proceeding, each proceeding remains separate which does not mandate cooperation if the cooperation does not make commercial sense and it is not necessary for the effective administration of each insolvency proceedings. This imperative to avoid any conflict may also be a significant deterrent to effective communication and co operation in the case of corporate groups. This creates risk of loose interpretation and ample grounds for refusal of cooperation.*

### Group Co-ordination proceedings flaw

*There were views of improving the coordination of insolvency proceedings of members of a group of companies and to allow for the coordinated restructuring of the group which was introduced by the 2015 EIR Recast. This introduces procedural rules on the coordination of the insolvency proceedings of members of the enterprise group which was to assist with efficiency of the coordination whilst at the same time respecting each group members separate legal personality, but this led to modest results.*

*The new rules had a mixed reception in legal literature with majority of the authors expressing doubts as to their effectiveness and practical value and the high costs the group coordinating proceedings may bring with them and their complex character.*

*The EIR recast will also not bind courts and insolvency practitioners in such non-member state proceedings and that the latter cannot form part of the group coordination proceedings.*

*The EIR Recast also gives right of every insolvency practitioner concerned to object against the inclusion within group coordination proceedings of the insolvency proceedings in respect of which they have been appointed. And also, no reason is needed for their objections.*

### Corrections:

*To assist with the Flaws listed above, the added group laws could consider adding a group COMI definition or presumptions to assist with the guidance and understanding. They can also add application case law that has been used and use these as guidance.*

Question 3.3 [maximum 5 marks] **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 EIR Recast exists with the Directive on preventive restructuring. The Directives establishes a set of minimum standards for preventive restructuring procedures across Member states to enable debtors in financial difficulty to restructure at an early stage to avoid insolvency. It aims to:*

- *Enhance the efficiency of early restructuring.*
- *Improve the negotiations process.*
- *Facilitate the continuation of the debtor's business while restricting.*
- *Prevent dissenting minority creditors and shareholders from jeopardising the restructuring effort, while also safeguarding their interests.*
- *Reducing the costs and length of restructuring procedures.*

*The directive:*

- *Debtors will have access to early warning tools that enable them to detect the deterioration of the business, resulting in the engagement of restructuring processes at an early stage.*
- *It is aimed to create harmonised restructuring frameworks throughout the member states. It introduced concepts and provisions associated with successful restructuring frameworks. But it does not harmonise the core aspects of substantive insolvency law.*

*The Directive has a lot of compromise due to the negotiations and modifications of legal text. Most of the changes in the negotiation process watered down the harmonisation effect of the directive and introduced a greater scope for derogation than might be expected of a full harmonising instrument.*

*Policy and technical choices of member states in the implementation of the Directive will likely result in different restructuring models, which will result in the availability of systems that are located at different points of the spectrum. The introduction of the minimum standards means that the scope of the Directive caters to a jurisdictions status quo, permitting in some respects only minor or incremental adjustments to the procedures already present in the legal system, rather than introducing something entirely new that align with the frameworks introduced in other member states.*

*Where the EU insolvency regulations are the major binding instrument dealing with cross border insolvencies with harmonised regulations. This is an unified rules on matters such as international insolvency jurisdiction, applicable law and the recognition and enforcement of foreign insolvency judgments.*

**Total marks: 15 out of 15.**

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks] **2**

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

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

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

***Bella SARL is a French registered company. They entered a loan agreement with a Spanish Ban. In June petition for safeguard proceedings in France. The EIR 2000 is applicable.***

***Main insolvency proceedings are intrinsically connected to the debtors COMI. EIR 2000 established that the main proceedings could be initiated at the place of the debtor's main centre of interest or COMI. Article 3(1) EIR 2000. The law of state of the opening of the opening of insolvency proceedings, the lex concursus, determines the effects of such proceedings (Article 4 EIR 2000)***

*Such proceedings can only be opened in a jurisdiction of the Debtors COMI. Guidance is available in Recital 13, which is not enforceable. Case EIR 2000, EUROFOOD IFSC Ltd.*

*The main warehouse is in Ireland, but the company is registered in France and store is in France and warehouse in France, Therefore France is assumed to be COMI and therefore, Strasbourg High Court in France would therefore have jurisdiction to open proceedings.*

**While your reasoning is sound, the answer is incorrect.**

- **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 Recasts scope requires answering the following questions:*

- *When does it apply to time (Temporal scope)*
- *To whom does it apply (Personal Scope)*
- *Which proceedings are covered by it (Material scope)*
- *What are its geographical limitations (Geographical Scope)*

**COUNTRIES OF THE EUROPEAN UNION which are applicable in this scenario:**

- **France**
- **Germany**
- **Ireland**
- **Italy**
- **Portugal**
- **Spain**

**Bella SARL is a French registered company. They entered a loan agreement with a Spanish Bank. In June, a petition for safeguard proceedings in France.**

**A step-by-step assessment:**

- **The debtor has COMI in a member state of the EU except Denmark - YES, they are registered in France, and this is assumed to be the COMI. Of which the high court filing is in France.**



- *The debtor is not a bank, insurance company or another excluded undertaking*  
- *YES, they are a cosmetics company.*
- *The proceeding opened against the debtor is listed in Annex A to the EIR recast-*  
*YES*
- *The proceeding is opened after 26 June 2017- YES, the petition was filed on 30*  
*June 2017*

*Therefore, all are yes. Then EIR Recast should be applied.*

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.***

*The EIR Recast allows for the opening of one or more secondary insolvency proceedings against a debtor in any member state where it possesses an establishment (Article 3(2) EIR Recast) In opposition to main insolvency proceedings which have universal scope (Recital 23), the effects of secondary proceedings are restricted to the assets of the debtor situated in the territory of the member state where the secondary proceedings have been opened.*

*Italy is a location of the warehouses of Bella SARL. They are a member state and have an establishment.*

*Therefore, a secondary proceeding can be opened by the Italian Bank in Italy.*

***This is quite slim and not the correct answer.***

- ***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, nor Spain.***

**Total marks: 8.5 out of 15.**

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

**Total marks: 39.5 / 50**