INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2023**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023**. If you elect to submit by 1 March 2023, you **may not** submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **10 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

Select the correct answer from the options below:

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

Question 1.2

According to Article 1(1) of the EIR 2015, proceedings fall within the scope of the EIR if:

(a) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; are collective.

(b) they are based on laws relating to insolvency for the purpose of liquidation; are public; are collective.

(c) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public.

(d) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are collective.

Question 1.3

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

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.

The correct answer was B

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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.

The correct answer was C.

Question 1.7

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

(a) “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

(b) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(c) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

(d) “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

Question 1.8

The EIR Recast kept the concept of the “centre of main interests” (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

(a) The COMI of the debtor is not presumed to be “at the place of the registered office” anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

(b) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company’s COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.9

In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?

(a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

(d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an equivalent in the law of the jurisdiction in which recognition is sought.

The correct answer was A.

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*.

The correct answer was C.

Total marks: 4 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.

Ans:-

Statement 1: Article 3(1) gives the definition of Centre of Main Interest (COMI).

Statement 2: Article 1 states that the EIR Recast extends not only to "traditional" liquidation-oriented procedures, but also to proceedings aiming at rescuing economically viable but financially distressed businesses, including those providing for a stay of individual creditors' actions for the sake of protecting the general body of creditors. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency

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.

Ans: -

First example, the EIR Recast defines international jurisdiction for insolvency cases within the EU, that is to say, it designates the Member State the courts of which may open insolvency proceedings (Recital 26).

Second example would be, Article 3(1) EIR Recast states that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated, shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings")

And lastly, while main insolvency proceedings are linked to the COMI of an insolvent debtor, secondary proceedings can be opened in any country in which this debtor has an establishment (Article 3(2) 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.

Ans:-

i) Article 41 of EIR Recast: insolvency practitioner-to-insolvency practitioner co-operation and communication obligations.
ii) Article 42 of EIR Recast: court-to-court co-operation.
iii) Article 43 of EIR Recast: court-to-insolvency practitioner obligations.

Above given 3 provisions are example of an obligation on actors in the EIR 2015.

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.

Ans:-

Following would be 2 examples of such instruments in my view :-

i) Article 36 EIR Recast - Right to give an undertaking in order to avoid secondary insolvency proceedings:

According to this article, in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

Thus, the judicial innovation of Collins & Aikman Europe SA has now been institutionalised. This approach works two-ways. Firstly, it allows for the centralisation of control over the major decisions affecting the debtor and the insolvency estate, such as the development of a cohesive restructuring plan, in one jurisdiction. Secondly, it safeguards the rights and legitimate expectations of local and preferential creditors by ensuring compliance with the priority rights guaranteed under the relevant local insolvency laws.

ii) Article 38(3) EIR Recast - Stay of the opening of secondary insolvency proceedings:

It requires a request from the insolvency practitioner or the debtor in possession. The stay may be imposed for a period not exceeding three months and on condition that suitable measures are in place to protect the interests of local creditors. The stay of the opening of secondary proceedings, therefore preserves the efficiency of the stay granted in the main insolvency proceedings.

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] **0.5**

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)?

Ans:-

In my view, the system of the EIR 2000 was not purely universal, as it provided for the possibility of opening secondary (territorial) proceedings in a Member State where the debtor had an establishment, and for coordination between main and secondary proceedings.

Further, to have better co-ordination between IPs, courts etc.

This answer is quite slim. There were other points to be discussed and more in-depth.

- ***COMI. Despite the fact that the essence of the concept of COMI has not changed in the EIR Recast (compared to the EIR 2000), some important additions were made. First of all, the definition of COMI has been codified in Article 3 EIR Recast (in the EIR 2000 a similarly worded indication of COMI appeared in Recital 13). Secondly, a 'suspect period' was added in Article 3(1) EIR Recast, supplementing the rule on the registered office presumption in a fight against abusive forum shopping. These changes should improve predictability of the international insolvency jurisdiction, ensure maximization of estate value and material efficiency.***

- ***Groups of companies. The EIR 2000 did not contain any rules dealing with insolvencies of enterprise groups. The basic premise of the EIR 2000 was that separate proceedings must be opened for each individual member of the group and that these proceedings are entirely independent of each other (entity-by-entity approach). The EIR Recast introduced two specific sets of provisions to promote the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. These are: 1) cooperation and communication in a group setting (Articles 56-60) and 2) group coordination proceeding (Articles 61-77). These novelties should streamline group insolvencies and make them more coordinated.***

- ***Information and publication. Access to information is indispensable for effective exercise of creditors' rights. Under the EIR 2000, there were no mandatory EU-level publication requirements concerning decisions opening insolvency proceedings. There was also no European insolvency register which would permit searches in several national registers at the same time. The EIR Recast provides both for the compulsory establishment of national insolvency registers (Article 24) and creation of the interconnection of insolvency registers via the e-Justice Portal (Article 25). The resulting improved access to information should enhance the***

degree of creditor participation and lower the monitoring costs, thus making the European insolvency regime more cost-efficient.

- ***You could also focus on a) new rules on 'as if' (or otherwise called 'synthetic') proceedings (Article 36 EIR Recast), b) the extended scope of the EIR Recast to include, for example, pre-insolvency proceedings and hybrid proceedings, so that they could benefit from the system of automatic recognition of judgments (which has been maintained, see Article 32 EIR Recast), c) extended duties of communication and cooperation. In addition to the existing duties between 'liquidators' (insolvency practitioners), these duties are introduced in relations between courts and between insolvency practitioners and courts, etc.***

Question 3.2 [maximum 5 marks] 1

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.

Ans:-

i) The regulation of group co- ordination proceedings (Chapter V, Section 2) will probably miss the desired goal of securing the efficient administration of group insolvency proceedings, including co-ordinated restructuring of the group and

ii) The voluntary nature of group co-ordination proceedings (Recital 56 EIR Recast) and the possibility of an easy opt-out without explanation or good cause (Article 64 EIR Recast) make group co-ordination proceedings a toothless instrument.

You were also required to explain how these things could be corrected.

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.

Ans:- Why is your answer in a box?

i) Scope and purpose:-
The European Insolvency Regulation primarily deals with cross-border insolvency cases within the EU. The regulation aims to facilitate the management of insolvent cross-border companies and protect the interests of creditors in different jurisdictions. It establishes the rules for determining which country's laws apply in cross-border insolvency proceedings and ensures that such proceedings are coordinated effectively across different EU member states.

In contrast, the Directive on Preventive Restructuring Frameworks focuses on preventive measures for companies facing financial distress, with the goal of facilitating early restructuring to avoid formal insolvency proceedings. The directive promotes the

establishment of national frameworks for preventive restructuring and aims to provide viable companies with the tools and protection necessary to restructure their debts and operations before they reach the point of insolvency.

2. Procedural Aspects:
The European Insolvency Regulation primarily deals with the recognition and coordination of insolvency proceedings in cross-border cases. It sets out rules for determining the competent court and applicable law for such proceedings and establishes procedures for cooperation between insolvency practitioners and courts in different EU member states.

On the other hand, the Directive on Preventive Restructuring Frameworks focuses on the procedures and requirements for preventive restructuring within individual EU member states. It lays down common principles and standards for preventive restructuring frameworks, which should allow viable companies to restructure their debts and operations effectively. The directive also introduces safeguards to ensure the interests of various stakeholders, including creditors and shareholders, are adequately protected during the restructuring process.

Total marks: 6.5 out of 15.

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks] 0

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.

Ans:-

Generally, the main proceedings are opened in the member state where the debtor has its "center of main interests" (COMI). The COMI is the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties.

But as given in example, loan documents processed and subsequently disbursed in Spain. So, a High Court which is not located in Spain but in France will not have jurisdiction as in the given case.

In the given case, though COMI of the debtor is France and Strasbourg High Court do have jurisdiction but as the lender is situated Spain and loan agreement got executed for Spain territory, In my view, only court based in Spain will have jurisdiction in it.

Unfortunately, this is not the right line of reasoning.

- ***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] 0

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.

Ans:-

Yes. EIR Recast will be applicable in this case.

If the concerned bank files for recovery proceedings in Spain, the same will be recognised in France too wherein, the company's COMI is situated. The said proceedings will also get necessary recognition across the EU except Denmark.

Unfortunately, you have not discussed the right elements.

- ***The EIR Recast will be applicable. 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] 0

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.

Ans:-

AN Italian bank can file for to open secondary insolvency proceedings in Italy. But it has to co-relate with other ongoing insolvency proceedings, if any, in EU.

Filing in Italy or opening secondary insolvency proceedings will not give ay priority to Italy based bank over other banks, lenders claim.

This is not the correct line of reasoning.

- ***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: 0 out of 15.

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

Total marks: 20.5 / 50