



**39.5/50 = 79%**

**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**

**RESIT ASSESSMENT: SEPTEMBER 2023**

**THE EUROPEAN INSOLVENCY REGULATION**

***This is the summative (formal) assessment for Module 2B of this course.***

***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: 2021122-336.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. The final submission date for this assessment is 21 September 2023. Please provide the completed assessment back to Sanrie Lawrenson via email at [Sanrie.Lawrenson@insol.org](mailto:Sanrie.Lawrenson@insol.org) by no later than 23:00 (11 pm) GMT on 21 September 2023. No submissions can be made after this time, no matter the circumstances.**
- 6. When submitting your assessment you are required to confirm / certify via email 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.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] **8 marks**

**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

**Article 1(1) of the EIR 2015 relates to the scope of the Regulation. Choose the correct statement from the options below:**

- (a) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.**
- (b) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.**

**(c) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are public.**

**(d) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and 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 gone against the literal meaning of several provisions of the EIR 2000. A new Regulation was needed to codify the new rules created by the CJEU.**

**(b) The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.**

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

**(d) The EIR 2000 was generally considered a successful instrument, but areas of improvement had been identified over the years by practitioners and academics.**

#### 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.**

#### Article 3

#### Question 1.5

**Article 3 of the EIR 2015 deals with jurisdictional matters. Which statement below is accurate in relation to Article 3?**

- (a) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open main insolvency proceedings.**
- (b) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest (COMI) shall have jurisdiction to open main insolvency proceedings.**
- (c) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest shall have jurisdiction to open secondary insolvency proceedings.**
- (d) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open territorial insolvency proceedings.**

Question 1.6

**The EIR 2015 does not provide a definition of “insolvency” or “likelihood of insolvency”. What are the consequences hereof?**

- (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 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 (entitled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).**
- (b) Article 40 EIR Recast (entitled “Advance payment of costs and expenses”).**

**(c) Article 7 EIR Recast (entitled "Applicable law").**

**(d) Article 31 EIR Recast (entitled "Honouring of an obligation to a debtor").**

Question 1.8

**What are some of the main criticisms which have been voiced against the concept of the "centre of main interest"?**

- (a) The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.**
- (b) The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.**
- (c) The concept is too similar to that of an "establishment" which makes it difficult for a court to know whether to open main or secondary proceedings.**
- (d) The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.**

Question 1.9

**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 1.10

**Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.**

**In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam 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 Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala's centre of main interest presumed to be located?**

- (a) Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.**
- (b) Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.**
- (c) Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.**
- (d) Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.**

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks] 1 mark**

**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. 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 2. Pending lawsuits are not covered by the effects of the *lex concursus* in insolvency proceedings.**

*Statement 1: Article 1 of the EIR 2015 extends not only to “traditional” liquidation-oriented procedures, but also to proceedings seeking to promote the rescue of economically viable but financially distressed business.*

**Recital 10 EIR 2015.30 and Article 3 EIR 2015.**

*Statement 2: as described in the Guide Text, the lex concursus provides the effects of insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits (Article 7(2)(f) EIR Recast). The exception is dealt with in Article 18 EIR Recast, which provides that that the effects of insolvency proceedings on pending lawsuits or pending arbitral proceedings concerning an asset or a right which forms part of the debtor’s insolvency state shall be governed solely by the law of the member State in which the lawsuit is pending or in which the arbitral tribunal has its seat. **Recital 73 EIR 2017.***

Question 2.2 [maximum 3 marks] **2 marks**

***The EIR Recast’s objective remains, as much as possible, the universality of proceedings. However, several exceptions to this universal vision exist throughout the Regulation. Provide three (3) examples of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency.***

*As indicated in the guide text, article 3(1) of the EIR Recast provides that the courts of the Member State within the territory of which the debtor’s COMI is situated shall have the jurisdiction to open insolvency proceedings. This will be the main insolvency proceeding, which will result in the extra-territorial application of the law of the member State where such proceeding has been opened (lex concursus). The EIR Recast also provides the opening of secondary proceedings, which will produce effects only on assets situated within a state of secondary proceedings (Recital 23). There might be only one main insolvency proceeding (which will be in the debtor’s COMI), but as many secondary proceedings as there are establishments of the debtors across Member States (article 3(2) of the EIR Recast). The opening of secondary proceedings leads to the creation of a separate insolvency estate and the application of a separate lex concursus, namely the law of the Member State where the establishment is located (lex concursus secundarii).*

**Article 34 / 35 / 36 / 37**

Question 2.3 [maximum 3 marks] **3 marks**

***The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List three (3) elements of the EIR Recast that deal with this matter and explain how they relate to this.***

*The 3 (three) elements are:*

- 1) Definition of insolvency proceedings.*
- 2) Territorial Scope.*



**3) Main Insolvency proceedings and Secondary Insolvency Proceedings.**

*These elements constitutes the material scope of the EIR Recast, by providing the rules of which insolvency proceedings might apply in different scenarios involving different debtors.*

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

***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.***

*As described in the guide text, the EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings (recital 45 EIR Recast).*

*Article 38(2) provides that where the 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 it is satisfied that the undertaking adequately protects the general interests of local creditors.*

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] **3.5 marks**

***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)?***

*In general, the main elements identified were related to cross-border matters, for example, establishment of unified rules on international jurisdiction, recognition/enforcement of foreign insolvency decisions, efficiency/effectiveness of cross-border proceedings, equal treatment of creditors, protection of legitimate expectations and transactions, communication between insolvency courts and insolvency practitioners. These issues were mainly adopted by the EIR Recast, which brought new / modern rules seeking to improve these issues of the EIR 2000, for example the ones described below:*

*Definition of COMI: the definition of COMI has been provided by article 3 of the EIR Recast. Article 3(1) also included a "suspect period" in order to supplement the rule and grant more legal certainty to the concept of COMI / avoid abusive forum shopping.*

*Groups of Companies: the EIR Recast introduced provisions regarding insolvency proceedings of groups of companies (rules not provided by the EIR 2000). In short, 2 specific provisions on this matter: (i) articles 56-60 establish the cooperation and communication in a group setting; and (ii) articles 61-77 provide the group coordination proceeding.*

*Information and Publication: the EIR Recast established the compulsory establishment of national insolvency register (Article 24) and the creation of interconnection of insolvency registers via the e-Justice Portal (Article 25).*

**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,**

Question 3.2 [maximum 5 marks] **5 marks**

**The concept of the "centre of main interest" has been both praised and criticised by EU institutions, academics, and practitioners. List two (2) praises and / or shortcomings and explain why they are considered praises / shortcomings.**

*The new concept of COMI, which provides a suspect period, deserves a praise, since it creates a safeguard against fraud manipulation of the insolvency forum. The new concept also contains some presumptions (e.g., the registered office presumption), which intends to bring more certainty to the concept, which is usually criticized as being vague.*

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

**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.**

*As described in the guide text, the Directive does not harmonise core aspects of substantive insolvency law, such as: common definition on insolvency, the condition for opening insolvency proceedings, the ranking of claims, avoidance of actions and the indemnification and tracing of assets belonging to the insolvency state. The harmonising effect of the Directive is limited. It is also important to note that the*

*Directive “sets common objectives, in the form of principles. These are the 2 main ways that the Regulation and the Directive differ.*

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

Scenario

***Dinosaurus SARL is a company selling children stuffed animals. It is incorporated in France and has opened its first store in La Flèche in 2015 and another 10 stores across France since. 80% of its employees work in France. It also has an office in Cork, Ireland, as well as three stores around Ireland. 20% of its employees are located in Ireland. Its main warehouse is in Spain. Most of its customers come from France, and some online purchases are coming mainly from the United Kingdom.***

***In 2020, Dinosaurus SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish children toys 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 Dinosaurus SARL, the timing of this initiative coincided with the Covid-19 pandemic which hit the world in 2020. By 2021, the company was in financial difficulty, yet managed to keep afloat for another two years. On 20 June 2023, it filed a petition to open safeguard proceedings in the Commercial Court in Le Mans, 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 EIR 2000 apply to this case and to the opening of safeguard proceedings?***

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

***The assumption provided in the question is that the EIR 2000 applies to this case (i.e., “Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000”).***

***Misinterpretation of question = assume a different timeline where EIR 2000 was the applicable law.***

Question 4.2 [maximum 5 marks] 5 marks

***Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 23 June 2023.***

*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.**

*It will be applicable, according to the following steps:*

- 1) Article 3(1) of the EIR Recast: the COMI of the Company is located in the EU and not in Denmark;*
- 2) Article 1(2) of the EIR Recast: the Company is not a credit institution, insurance undertaking or any other excluded entity;*
- 3) Article 2(4), Recital 9, Annex A of the EIR Recast: the opened proceeding (i.e., safeguard) is listed in Annex A to the EIR Recast; and*
- 4) Article 2(7), 84(1) and 92 of the EIR Recast: the Court opened the safeguard on June 23, 2023, i.e., after the EIR recast entered into force.*

*The steps above demonstrate that the EIR Recast will be applicable.*

Question 4.3 [maximum 5 marks] **5 marks**

***A Spanish bank files a petition to open secondary insolvency proceedings in Spain with the purpose of securing a Spanish 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.**

*In short, according to the provisions of the EIR Recast, the Spanish Bank might not open the secondary proceedings. The reasons for this is: the Company does not have an establishment in Spain and, therefore, the secondary proceeding might not be opened according to article 3(2) of the EIR Recast. This article establishes that the courts of another Member State shall have jurisdiction to open insolvency proceedings against the debtor only if it possesses an establishment within the territory of that other Member State. Although its main warehouse is located in Spain, it does not qualify as an establishment according to the concept provided in article 2(10) of the EIR Recast. The relevant case law that dealt with this discussion are: *Interedil SRL, in Liquidation v Falimento Interedil SRL*; and *Burgo Group SpA v Illochrom SA*.*

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