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 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (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

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.

The answer would have been A, B or D.

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.

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.

The answer was C.

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").

The answer was D.

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.

Total : 7/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1/2

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. 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. The concept of court-to-court communication and co-operation between courts and insolvency practitioners address this statement in Article 42 and Article 57 of the EIR Recast that may be implemented to promote and facilitate the rescue of financially distressed but economically viable debtors and which provide a second chance.
[Not quite relating to the statement. You could have mentioned Article 1, Article 3, Recital 10]

Statement 2. It is the lex concursus concept on the applicable law of the State of the opening of proceedings and the effects of the insolvency proceedings thereof, on the persons and legal relations concerned. Article 7(2)(f) of the EIR Recast is relevant to this statement and the exception is dealt with and covered in Article 18 EIR Recast.

Question 2.2 [maximum 3 marks] 3/3

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.

Territorial and secondary insolvency proceedings concerning the same debtor or group of companies Articles 34 and 35 EIR Recast
The secondary proceedings are inextricably linked to a debtor's establishment, cost extra money, take extra time and may result in less efficient solutions.
The synthetic secondary proceedings in Chapter 3 of the EIR Recast will be given official standing as a so called 'undertaking'.
Secondary insolvency proceedings created an exemption from the extension of lex concursus of main proceedings. However, promote effective administration of complex insolvency estates and mitigate difficulties arising from divergent national laws (Recital 40).The territorial proceeding applies its national law mainly protecting interests of local creditors in the respective Member State (Recital 12 EIR) and there is no diversity of interests as considered in universality.

Question 2.3 [maximum 3 marks] 2/3

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.

There has to be clarity and in terms of Article 1 and 2 of EIR Recast – which lists the proceedings covered by the EIR Recast in Annexure A as, 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. Therefore, any action outside of the scope would not enjoy the benefit of automatic recognition.
The element of private international law, which govern a Member State and overall position in the international jurisdiction for opening insolvency proceedings and actions that directly derive from them will determine whether it triggers the application of the EIR Recast.

Because the EIR Recast based on Article 19 – provides the elements of immediate and automatic recognition of judgements in other Member States without scrutiny but mutual trust and favor recognitionis only regarding insolvency proceedings that fall within its scope (Recital 65 of the EIR Recast) as we note the Regulation (EU) No. 1215/2012 of 12 December 2012 (Brussels I Recast), which handles jurisdiction.
Therefore, it also contains provisions on recognition and enforcement of judgments issued in such proceedings, and norms governing law applicable to insolvency matters (Recital 6 EIR Recast).
The objective is to ensure the efficiency and effectiveness of the national insolvency proceedings between Member States, maximize on better return for creditors and which is predictable approach to increase investments.
[Some of these elements do not relate to the material scope. You could have mentioned Annex A or Recital 9].

Question 2.4 [maximum 2 marks] 2/2

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

The EIR recast regulation proposes that the secondary insolvency proceedings need not be liquidation proceedings in order to still support if applicable, the debtor's restructuring. Secondly, the recast regulation provides for two specific situations in which the court explains of a request to open secondary insolvency proceedings should be able, at the request of the insolvency practitioner in the main proceedings to postpone or refuse the opening of such proceedings (Recital 41) if satisfied that the undertaking adequately protects the general interests of the local creditors.
The insolvency practitioner in the main proceedings may give an undertaking that local creditors will be treated as if secondary proceedings had been opened (virtual secondary proceedings) (Article 36).

Total: 8/10

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] 5/5

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. Article 1 of EIR Recast - the proposal to extend the scope of the Regulation by revising the definition of insolvency proceedings to include pre-insolvency proceedings which did not fit the definition. That the EIR 2000 should widen the proceedings which provide for restructuring of a debtor company which has the likehood of insolvency and proceedings that will leave the debtor fully or partially in control of its assets and affairs (Recital 10) and provides the debtor with the right to propose a restructuring plan.

2. The above also prompts the provisions needed to clarify the jurisdiction rules, improving the procedural framework for determining jurisdiction and recognition following the applicable law in the area or Member States which must be binding.

3. Secondary proceedings cannot be seen as a given but will require independent scrutiny and a more active role of the court to promote efficiency. Thus, in Article36 EIR Recast enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors. Also abolishing the requirement that secondary proceedings must be winding-up proceedings. Article 41 of the EIR Recast which entails improving the communication between main and secondary proceedings including cooperation between courts.

4. Lodging of claims and ensuring that insolvency proceedings are made public knowledge. Member States are required to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims.

5. Articles 42 and 57 EIR Recast – with group of companies the lack of specific provisions for group insolvency often diminished the prospects of successful restructuring of the group as a whole. Therefore, coordination of the insolvency proceedings concerning different members of the same group of companies is necessary by imposing the liquidators or insolvency practitioners and courts involved in the different main proceedings to cooperate and communicate with each other. The proposal provides or empowers for the liquidators involved in such proceedings the procedural instruments to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

If applied by courts with the central objective of both the EIR and the EIR Recast to operate more efficiently and effectively in mind, this will likely lead to less secondary proceedings, less costs and higher recovery rates.

The basic premise of the Insolvency Regulation is that separate proceedings must be opened for each individual member of the group of companies and that these proceedings are entirely independent of each other.

Question 3.2 [maximum 5 marks] 5/5

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.

Since the EIR Recast allows for "The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties"

The shortcoming of the concept of COMI, is that it has an autonomous meaning and must be interpreted by statutory law, uniformly and independently of national legislation based on objective

and ascertainable elements by third parties to prove the existence of a real situation different from the location that the registered office is supposed to reflect.
In the Eurofood case the CJEU emphasized the importance of legal certainty, which included jurisdictional questions relating to a company based in different jurisdictions and set out the objective criteria ascertainable to third parties as well as the registered office presumption which was very important in determining jurisdiction.

There it is a praise herein because the activity of the debtor in a particular Mamber State should be regular and lasting to create COMI which will determine how long the debtor has been there and third parties such as creditors are able to verify and ascertain the principal place of business which eliminates the practice of abusive forum shopping. Further, to be able to ascertain COMI there will not be conflicts when opening insolvency proceedings as to the competent court under obligayion to examine of its own motion whether the centre of the debtor's main interest is indeed located within its jurisdiction contained in Recital 27.

The (rebuttable) presumption for companies (that COMI is located in the same place as its registered office) cannot be applied to individuals. In the case of individuals, the COMI shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This might be seen as a shortcoming as we note that previously, the French Supreme Court had already decided that the COMI of a German individual was not in France given the facts that the debtor rented a room in France but worked in Germany and was a Swiss national but only had German creditors.

Question 3.3 [maximum 5 marks] 2.5/5

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 Insolvency Directive seeks to offer more certainty and create a common minimum standard of insolvency regimes across Member States, encouraging more effective cross-border investment. It aims to harmonise three key areas of EU insolvency law: the recovery of assets. the efficiency of proceedings, and the distribution of recovered assets among creditors. Mostly it aims at preventing insolvency by encouraging Member States to have an efficient rescue system in place.

1. Through the EU Directive on Restructuring and Insolvency of 20 June 2019 (EUR 2019/1023, "Directive"), is not included in the Annex A EIR Recast by way of a regular legislative procedure.

2. Therefore, under the Directive recognition and enforcement of a case of the authority's decision is sought in other Member States and does not enjoy automatic recognition in other Member States compared to the EIR Recast

The EIR Recast is more rescue-oriented however (this is incorrect – the Directive has in its name "preventive restructuring" - it is all about rescue), although Article 1 serves to broaden the scope of the Regulation it applies to inter alia public collective proceedings (which includes insolvency or pre insolvency proceedings). Although this allows creditors to become aware of these proceedings, member states can still maintain confidentiality in their own national proceedings and in terms of their state laws.

Total: 12.5/15

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] 0.5/5

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.

Yes, the opening of safeguard proceedings is in accordance with European Insolvency Regulation (EIR).
Art. 3 para 1 of the EIR. The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The Commercial Court in Le Mans, France does retain and have jurisdiction to the opening of safeguard proceedings since the entity – Dinosaurus SARL, has not moved its COMI to a different Member State from where it has its registered office located in France.
Therefore, the reasoning for the CJEU to consider a request for such proceedings would need not raise any concerns for "suspect "periods or shopping forum which means – to obtain a more favourable legal position to the detriment of the general body of creditors as per the Regulation CJEU jurisprudence.
Article 4 of EIR specifies the examination as to jurisdiction. The timing when the Dinosaurus SARL lodges the request is also important, a court seised of a request to open the proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3.

While some of your reasoning is correct, the answer is not. The Commercial Court in France does not have international insolvency jurisdiction to open insolvency proceedings.

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. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary = France.
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] **2.5/5**

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.

In order to determine whether the recast applies it must follow the following steps in order to determine when does it apply in time (temporal), to whom does it apply (personal scope), which proceedings are covered by it (material scope) and what is the geographical limitations (scope) thereof.

1. The first step involves the question does the debtor have COMI in a member state of the EU? – Yes it does as the company is registered in France, which is a member state of the EU.
2. The second step involves asking whether the debtor is not a bank, insurance company or other excluded undertakings? – Yes, the debtor is neither a bank nor any other excluded entity.
3. The third step one must ask whether the proceeding opened against the debtor is listed in Annex A to the EIR recast – no, the procédure de sauvegarde is not listed in Annex A therefore it does not fall within the material scope. It is under the EIR Recast.
4. Lastly, the last question that must be asked is whether the proceeding is opened after 26 June 2017? The answer is yes as the respective proceeding was opened on 23rd June 2023.

Therefore, due to the fact that the proceeding is a restructuring proceeding and not an insolvency proceeding which does not form part of Annex A to the EIR Recast, it therefore does not fall within the scope and the EIR Recast would not apply.

Question 4.3 [maximum 5 marks] **4/5**

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.

No, the proceedings cannot be opened in Italy, given the facts of the case there in no mention of an establishment in Italy. According to Article 3(2) of the EIR Recast which states:
"Where the centre of a debtor's main interests 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 he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."
As per Articles 37 EIR Recast – Spain Bank has the right to request the opening of secondary proceedings in Spain. Although, both Italy and Spain are full member countries of the European Union (EU), It is not empowered under the national law following the opening of the main insolvency proceedings in the Member State where the debtor has an establishment, in this case it would legible to open the secondary proceedings in France. However, the decision to open the secondary proceedings contains some provisions in Article 38, 39,42,43 provisions for the courts considering such a request.
The court should be satisfied that the undertaking to open secondary proceedings adequately protects the general interests of the local creditors. Therefore, the CJEU only considers the courts discretion in the decision to open secondary proceedings – which would be a matter governed by national law in France. However, the CJEU provides that this must comply with the EU law, in particular with its general principles, such as that of sincere cooperation and nondiscrimination between main and secondary proceedings and the EIR. In applying its national law, the court must take into account the objective mentioned by Spanish bank which is to secure a Spanish insolvency distribution ranking and whether the possibility of opening such proceedings it will protect the interests of locals (Recital 12 EIR) but such opening may serve different purposes as well (Recital 19 EIR).

- While some of your reasoning is correct regarding Spain, the facts of the case do not support the finding of an establishment of Dinosaurus SARL in Spain. 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.

Total: 7/15

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

Total: 34.5/50