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).
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**.
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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.

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.

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.

Total: 10/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

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 Scope of the EIR Recast is addressed in Article 1, which is entitled "Scope". Unlike the predecessor EIR 2000, the EIR Recast applies to rescues of financially distressed businesses as well as straight liquidation. A major innovation of the EIR Recast is to focus on restructuring as opposed to liquidation. In fact, Recital 10 provides that the EIR Recast extends to restructuring proceedings even where there is only a likelihood of insolvency and also allows for debtors to retain control of their assets. These changes reflected in EIR Recast were designed to maximize return to creditors and to increase trade and investment in the marketplace.

Statement 2 – The test for the pending lawsuit exception to lex concursus is contained in Article 7(2)(f) and the detail regarding the exception is contained in Article 18. Essentially, Article 18 states that the law of the Member State where the lawsuit is pending (the lex fori processus) shall govern as to the effect of the insolvency proceeding on such pending lawsuit. This Member State law will decide the various procedural issues, including whether the lawsuit will be suspended or terminated. Article 18 applies if, at the time that an insolvency proceeding is commenced, the lawsuit (1) is pending; (2) relates to an asset or right of the Debtor; (3) is not simply an enforcement proceeding; and (4) is pending in a Member State.

Question 2.2 [maximum 3 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.

The EIR Recast, like the EIR 2000, is still based on modified universalism. However, neither was purely universal, most notably illustrated by the allowability to open secondary (territorial) proceedings when the Debtor has an establishment in that Member State. In such event, the Member State opening the secondary proceeding can apply its own Member State laws to assets and creditors within its borders. This is a major exception to universalism.

Also, Article 7 of the EIR Recast contains multiple other exceptions to application of lex concursus, which by definition limits the principle of universalism. One exception is detailed in Article 8 for "in rem" rights of creditors with respect to assets belonging to a Debtor which are situated in another Member State at the time of the main case commencement.

Another exception is in Article 13 with regard to contracts of employment which are governed by the law of the Member State applicable to the contract (lex contractus)

Question 2.3 [maximum 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.

Article 1, Article 2 and Annex A are the provisions of the EIR Recast that deal with the material scope of the Regulation.

Article 1, entitled "Scope", delineates that the EIR Recast applies to public, collective proceedings that are based on insolvency laws wherein one or more of the following 3 events occur in order for the Debtor to liquidate, reorganize or adjust its debts: (1) the debtor partially or entirely turns over its assets to an insolvency practitioner; (2) the Court supervises or controls the debtor's assets/affairs, or (3) the Court or applicable law grants a stay of individual enforcement proceedings.

The EIR Recast applies to liquidation and/or reorganization situations and is for the purpose of applying modified universalism to insolvency proceedings and to protect the general body of creditors rather than the actions of individual creditors. It is also designed to maximize value for creditors, to increase predictability in the marketplace and to reduce the cost and length of time involved in restructuring procedures.

Annex A lists the particular names of insolvency proceedings that are covered by the EIR Recast. If the proceeding is not listed in Annex A, it is not within the scope of EIR Recast.

Question 2.4 [maximum 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.

Two (2) examples of legal instruments used to avoid or otherwise control the opening, conduct and/or closure of secondary proceedings are (1) the right to give an undertaking and (2) the stay of the opening of secondary proceedings.

Undertaking Article 38(2) of the EIR Recast provides that a Court should not open a secondary proceeding if the main proceeding insolvency practitioner has provided an undertaking that adequately protects the Member State creditors. Essentially this means that the insolvency practitioner promises that he will comply with the distribution and priority rights under national law that creditors would otherwise have if the secondary proceeding was opened in that Member State. This safeguards the rights and expectations of the Member State creditors but still allows for centralized control over the estate by the insolvency practitioner. The undertaking must specify with particularity how the promise will be realized, must be in the official language of the proposed secondary proceeding Member State, must be in writing, must comply with the main proceeding form/approval requirements and must be approved by the known local creditors.

Stay of Opening Article 38(3) of the EIR Recast provides that the insolvency practitioner or debtor in possession can request a stay of the opening of the secondary insolvency proceeding. The stay cannot exceed 3 months and must include measures to protect the creditors of the secondary proceeding Member State. The stay can be lifted if (1) debtor and creditors reach an agreement; (2) continuation of the stay negatively affects creditors rights, or (3) if the IP or DIP has disposed of Debtor's assets or removed them from the Member State.

Total: 10/10

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)?

It's not clear whether this question is asking for the elements identified as needing change from the earlier reforms to the EIR 2000 or from the EIR 2000 to the EIR Recast. I have answered first the former question and then the latter.

The main elements identified by the European Commission as needing revision during the adoption process of the EIR 2000 were (1) improvement in efficiency and cross-border effectiveness; (2) better results with respect to equal treatment of creditors and (3) protection of the expectations of participants in the marketplace.

The main elements identified by the European Commission as needing revision in the adaptation report of 2012 (for implementation in EIR Recast) were (1) the need to broaden the scope to restructuring proceedings, (2) stronger rules for cooperation between professionals and the Courts of the various Member States, (3) application of the Regulation to members of the same group of companies; (4) implementation of insolvency registers; and (5) general modernization of the applicable rules.

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.

The Centre of Main Interest (COMI) is praised because it enable creditors generally to predict the legal risks of transacting with the debtor so that they can accurately price their products in the marketplace. Given the significant connection to the Debtor that COMI anticipates, most creditors will likely reside in the same Member State and be familiar with the applicable law.

COMI is criticized, however, based on its vagueness; a debtor may have more than one significant connection. When this is so, the predictability of COMI does not come to pass and the marketplace suffers with higher capital costs. COMI also can be manipulated by debtor or asset movement.

Question 3.3 [maximum 5 marks] 1/5

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 EU Insolvency Regulation (the "Regulation") and the EU Directive on Preventive Restructuring Frameworks (the "Directive") differ in that the Directive is focused on providing a business friendly environment for debtors, as opposed to the more creditor friendly philosophy of the Regulation (This is not the issue here. The Regulation is neither debtor not creditor friendly). The Directive's objective is to maximize value to the economy as a whole, purportedly to create large gains to the EU gross domestic product (GDP) over the long term (This is not the objective of the Directive – the only objective of the Directive was to create a rescue-friendly environment within the EU by encouraging

Member States to include rescue tools within their national insolvency frameworks). The idea is that a stronger rescue culture will help businesses flourish to the gain of the culture as a whole.

Second, the Directive is focused only on pre-insolvency proceedings, whereas the Regulation only deals with insolvency proceedings themselves. The Directive focuses on early warning systems and information for debtors so they can perform preventive measures and hopefully restructure their debts at an early stage. Unlike the Regulation, it does not focus on harmonization of insolvency laws (This is the contrary – the Directive actually harmonized, albeit with minimum standards, the laws of the Member States. The Regulation did not harmonize the substance of insolvency law across the EU).

Total: 11/15

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] 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.

Based on the facts of the hypothetical (and using the revised timeline), the EIR 2000 does not apply. Ordinarily, the EIR 2000 is applicable in all Member States of the EU except Denmark and is binding in its entirety. The European Council adopted the EIR 2000 on May 29, 2000 and it was effective on May 31, 2002. Based on the facts presented that the Company was incorporated in France (which creates a presumption of COMI in France) and as well that most of its stores, employees and customers are in France, the Centre of Main Interests (COMI) is France pursuant to Article 3(1) of the EIR 2000 and Recital 13, and so the main proceeding would be in France. In fact, the CJEU in Interedil Srl v Fallimento Interedil Srl, ruled that when the registered office and management decisions of a company are in the same Member State, the presumption of COMI is irrefutable. See Case C-396/09, ECLI:EU:C:2011:671

(Oct 20, 2011). The EIR 2000 also would command automatic recognition of the insolvency proceeding in all Member States. As to whether the Commercial Court in Le Mans, France is the correct court within France, that would be determined by French national (domestic) law.

However, the hypothetical refers to the opening of a "safeguard proceeding" which is a legal device used in France to save a company. It resembles a chapter 11 bankruptcy in the United States. Consequently, the EIR 2000 would not apply because it only applied to traditional liquidation oriented procedures (See Article 1 of the EIR 2000). Good. Procedure was not listed in Annex A of the EIR 2000.

Question 4.2 [maximum 5 marks] **1.5/5**

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.

The EIR Recast will be applicable to the proceedings. First, as mentioned in 4.1 above, the EIR 2000 only applied to liquidation type proceedings (See Article 1 of EIR 2000). However, Article 1 of the EIR Recast makes clear that the EIR Recast applies also to proceedings aimed at rescuing a business in financial distress in a Member State. A safeguard proceeding in France is a rescue proceeding and France is a Member State of the EU, so it would appear to quality under EIR Recast.

However, in order to qualify, the proceeding must specifically be listed in Annex A of the EIR Recast which contains a laundry list of insolvency proceedings covered by the EIR Recast. France added the safeguard proceeding to Annex A and so this proceeding would qualify for EIR Recast. SARL would also appear not to be excluded from the EIR Recast under Article 1(2) because it is not one of the types of entities listed therein.

Based on the facts of the hypothetical, the safeguard proceeding in France would appear to easily qualify as a main proceeding for SARL. This is because SARL's Centre of Main Interests (COMI) is France, based on the facts that France was the place of incorporation for SARL (this creates a presumption of COMI in France) as well as the location for the majority of its assets, employees and customers. (See Article 3(1) of the EIR Recast). COMI is uniformly applied by the EIR Recast (See Eurofood IFSC Ltd, Case C-341/04,ECLC:EU:C:2006:281 (May 2, 2006). The EIR Recast also would command the automatic recognition of the insolvency proceedings in all Member States, although secondary proceedings might also be permitted in Spain and in the Republic of Ireland if the Courts there determine that the Debtor has an "establishment" in those locations (See Recital 23). No other secondary proceedings should be permitted because the UK is no longer a Member State and likely the facts provided for the UK would not constitute an establishment in any event.

As to whether the French High Court is the proper court to hear the main proceeding (as opposed to another court in France), this will be determined by French national (domestic) law. (See Recital 26 of EIR Recast)

Some elements are missing. 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 Dinosaurus SARL is in the EU (and not in Denmark), i.e. in France (as stated in the answer to Question 4.1.). YES

- Article 1(2) EIR Recast. Dinosaurus 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 23 June 2023, i.e. after the EIR Recast has entered into force. The filing date is not determinative for the temporal scope. YES

Question 4.3 [maximum 5 marks] 3/5

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.

(It is assumed that the Assessment has a typo and that it was meant to say "can such proceedings be opened in Spain, not Italy. If it is meant to say Italy, a secondary proceeding should not be allowed because SARL does not maintain its COMI or an establishment in Italy)

The Spanish Bank may be able to open a secondary insolvency proceeding in Spain. The secondary or territorial insolvency proceeding is governed by Article 3(2) which allows a secondary proceeding where the Debtor has an "establishment". The opening of a secondary proceeding leads to a separate insolvency estate and application of the separate lex concursus of the secondary proceeding Member State for assets and matters within its borders. Article 2(10) of the EIR Recast defines establishment as any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

In Interedil Srl v Fallimento Interedil Srl, Case C-396/09, ECLI:EU:C:2011:671 (Oct 20, 2011), the CJEU analyzed the scope of the term establishment as requiring a level of organization and stability. As such, SARL's bank account alone would not suffice under this rulling. The Debtor must instead have a "non-transitory character" within the secondary proceeding Member State. As stated in the Virgos Schmit Report, the perception of third parties is a paramount factor. Also, the establishment must ordinarily be in existence more than three months prior to the filing to avoid improper forum shopping. And, the presence of human means is significant but a branch office is not necessarily required.

The hypothetical states that SARL entered into a loan agreement with the Spanish bank because it was hoping to expand its operations to Spain. It also negotiated prices with local suppliers and signed some non-binding memoranda. All of this happened three years prior to the filing of the safeguard proceeding.

Based on the perception of the creditors that the Debtor was expanding to operate in Spain and assumedly the presence of employees who signed the memorandums of understanding with the local suppliers, it seems that a secondary proceeding might be successful here. The presence of the bank account is not enough on its own, but given that the company started working with creditors 3 years

prior to the filing, the time restriction is met and the perception of creditors would weigh in favor of allowing the proceeding. An important factor might also be whether there is a choice of law provision in the loan documents and/or memorandums so as to indicate an expectation that any insolvency proceeding would take place in Spain. The above factors would need to be analyzed immediately upon the filing of the secondary proceeding (See Article 2(10) of EIR Recast)

You were correct in discussing Spain, rather than Italy.

A lot of your reasoning is correct. However:

- 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 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.

- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Spain.

Total: 9.5/15

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

Total: 40.5/50