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.

The answer was D.

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 : 9/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2/2

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
Article 1 of the EIR Recast[1] (the "Scope) finds enhanced application to rescuing financially distressed entities which could be saved and turned around via a moratorium (stay of legal proceedings) to ensure the rights of all creditors are protected. The extended coverage and application of the EIR 2015 is in aligned with a general trend in Europe to offer options for a viable restructure in order to preserve value for creditors, protect jobs and encourage investment.

Statement 2
Article 7 of the EIR Recast deals with the law applicable to an insolvency proceedings and its effects and in particular Article 7(2)(f) outlines the exception pending lawsuits which is thought dealt in Article 18 of the EIR Recast under "Pending lawsuits and arbitral proceedings". Pending lawsuits are exclusively governed by the law of the Member State where the lawsuit is pending.

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.

In terms of **Article 3(2)** of the EIR Recast, secondary insolvency proceedings can be instituted (opened) in any Member State where the debtor has an establishment. This is further to the concept in Article 3(1) where main insolvency proceedings is determined on the debtor's "centre of main interest" (COMI) whereby there can only be one main insolvency proceeding but several / multiple secondary proceedings (maximum of 26).

Under **Article 20** of the EIR Recast determines that a judgment in the main proceedings will be recognized without any procedural requirement or further processes in the jurisdictions where secondary proceedings have been opened.

Article 32 of the EIR Recast outlines the grounds for insolvency related judgements, handed down in different courts for the court where the main proceedings was opened. This includes judgment rendered due to actions falling under Article 6 of the EIR Recast being "Related Actions" and will be in scope of Article 32.

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.

Article 1 of the EIR Recast (the "Scope") outlines the application to extend to proceedings based on insolvency law relating to rescues (not only entities in liquidation with no hope to be turned around), adjustment of debt (restructures), reorganisation or liquidation (winding up). This entails that the EIR Recast will be available for -

(i) Debtors divested of its assets (in whole or in part) where an insolvency practitioner have been appointed;

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency proceedings (redact)

(ii) Debtor's assets under the control or supervision of the court by court orderl or
(iii) Debtors where enforcement proceedings are stayed by a court order, for debtors to negotiate (compromise) with its creditors.

Article 2 lists the various insolvency proceedings for all 27 Member States governed by the EIR Recast the (national insolvency proceedings). Annex A prescribes that the EIR Recast applies to all the Member States without further scrutiny by the courts of the Member States and automatically shares in the benefits of the EIR Recast. As the same instance, where national insolvency proceedings not included in Annex A will not be subject to the application of the EIR Recast.

The ultimate objective and aim being to ensure effectiveness of extraterritorial proceedings in Member states with cross-border cases. This is ultimately achieved by principles of recognition as detailed in Article 19(2) of the EIR Recast where recognition of main proceedings doesn't prevent opening of secondary proceedings. Furthermore Article 32 of the EIR Recast explains that any insolvency related judgements are recognized (even if not in the same court where insolvency proceedings where opened) which is in line with Article of the EIR Recast that defines "Related actions". [This is not about the material scope].

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 recognition of insolvency-related judgement are governed by Article 32 of the EIR Recast. It specifically outlines judgements on the course and closure of insolvency proceedings. Whereas Article 32 also refers to preservation measure taken after the request for the opening of insolvency proceedings, it warrants the success of future insolvency proceedings. In a scenario where a preservation order constitutes a provisional injunction, preventing the insolvency practitioner to realise the assets of the debtors, the injunction will extend to the secondary proceedings and could be critical to protect the rights and interest of local creditors if the secondary insolvency proceedings are pending.

As part of the rationale to control the opening, conduct and closure of random secondary proceedings, Article 36 of the EIR Recast allows for the insolvency practitioner in the main insolvency proceedings to provide a unilateral undertaking in relation to assets located in the Member State where secondary insolvency proceedings could be opened. With such an undertaking, the insolvency practitioner promise to adhere to the distribution and priority rights under national law, which creditors would have enjoyed, if secondary proceedings have indeed been opened in that Member State. This concept achieves two great outcomes (1) controlling major decisions pertaining to the debtor, the insolvent estate and the development of a restricting plan, in one (single) jurisdiction and (2) the rights and prospects of local and preferential creditors are protected under the relevant local insolvency laws.

Total: 9/10

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] 3/5

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)?

Matters of international jurisdiction is dealt in Article 2 and 3 of the EIR Recast. A Member State is designated as the court where secondary insolvency proceedings may be opened under the national law (local law). In instances where the debtor's centre of main interest is in the Member States, that Member State will have jurisdiction to open main insolvency proceedings. As secondary proceedings are determined on territorial basis, its main aim is to protect the distinct rights and interest of local creditors and minimize the complications from conflicting national laws.
This already existed in the EIR 2000. What is different with the EIR Recast?

Article 7(1) of the EIR Recast provides the general rule for "**the law applicable to insolvency proceedings and their effects"** to be that of the specific Member State (in the territory) where such proceedings are opened (lex concursus). The uniform rules of "conflict of laws" substitutes national rules of private international law and allows for expected treatment and outcome of cross-border insolvencies, having regard for the prospects of parties by constraining forums shopping which is an abuse of process.

Judgments in relation to the opening, conduct and closure of insolvency proceedings are immediately recognized, save for the ones not listed on Annex A which will then not share in the benefit of the EIR Recast and its automatic recognition. **Enforcement and recognition** is premised on mutual trust and therefore the first court where proceedings are opened must be recognized (automatically) in other Member States. In particular section 19(2) of the EIR Recast determines that despite the recognition of main proceedings a court in another Member State can open secondary proceedings. Article 32 of the EIR Recast focuses on judgements handed down during insolvency proceedings which will be recognized without formal process, in the secondary insolvency proceedings.

Protection of creditor's rights with regard to treating all creditors equally, administrative matters of running (managing) the insolvent estate and securing optimal returns (recovery) for creditors. Article 45(1) details the process to lodge a claims in the main and secondary insolvency proceedings. With Article 23 of the EIR Recast addressing the equal treatment of creditors in insolvency proceedings and the potential scenario of return and assertion, explained in the Virgos-Schmit Report[2]. The obligation of the insolvency practitioner or the debtor-in-possession to publish the necessary notices on the opening of main and/or secondary insolvency proceedings, as provided for in Article 28(1) of the EIR Recast. Maintaining and publishing an insolvency registered as governed in Article 24 of the EIR Recast to encourage the sharing of information in cross-border proceedings between insolvency practitioners, courts and creditors.

The comprehensive framework for **co-operation and communication** between all parties involved in the concurrent proceedings; insolvency practitioners in Article 41 of the EIR Recast, courts under Article 42 of the EIR Recast and between insolvency practitioners and courts in Article 43 of the EIR Recast. Principles on transparency and communication are imperative to ensure the most effective and efficient realisation of the assets in the insolvent estate and distributions to creditors.
+ expanding the scope of the Regulation to include rescue procedures.

Question 3.2 [maximum 5 marks] 5/5

[2] Virgós-Schmit Report, para 172.

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.

In order to determine the jurisdiction in which main insolvency proceedings will commence, the centre of main interest (COMI) is critical. Main insolvency proceedings are opened in the insolvent debtor's COMI. One of the improvements of the EIR Recast on the EIR 2000[3] is the inclusion of a definition for COMI and despite the wording being similar to that of the EIR 2000 it now brings certainty, authority and enforceability under the EIR Recast, for the of determination of COMI and have been confirmed by case law of the Court of Justice of the European Union (CJEU).

The concept of COMI was however criticized as unusual to the regulation contained in Article 3(1) of the EIR Recast in the *Eurofood IFSC Ltd*[4] case. As COMI has an autonomous meaning, it should have a uniform interpretation which should not be reliant on the meaning of a similar term in national legislation. The Italina court held in *Eurofood* that the Italian COMI had international jurisdiction to decide on the company's insolvency. A few months late the Irish High Court confirmed Eurofood's COMI to be in Ireland and rejected recognition of the Italian judgement. In adjudication on the jurisdictional dilemma, the CJEU (at the time called the European Court of Justice or ECJ) confirmed the autonomous meaning of COMI and underlined that principles to determine COMI are (i) objective and (ii) discoverable. In addition to confirming COMI's legal standing in the European Union and its application in all Member States to be unvarying. To enhance the determination of COMI the EIR Recast contains a registered office presumption, being that the insolvent company's COMI is presumed to be the jurisdiction of the country where the company has been registered. This is linked to an aspect of timing. To curb any abuse of processes where companies move their "registered address or jurisdiction" to a more beneficial jurisdiction in the wake of financial distress, this principle is important to identity potential abuse. However, opting to change the venue of the insolvency for (i) the benefit of a successful restructure (benefit to creditors) or (ii) to facilitate sale process with enhanced results is not restricted.

Furthermore; the EIR Recast didn't narrow down the definition of COMI but introduced some presumptions to determine actual location. This is firstly subject to the concept of timing, the company not moving its registered address for a period of 3 months before the commencement of insolvency proceedings. The second assumption is based on the same people managing the debtor are in the same location than the registered office. This relates to decision making, where main administrative functions are performed. Assets (bank accounts, movable and immovable assets) being in the same location is not necessarily satisfactory proof to invalidate the registered office presumption.

In summary the view held is that insolvency matters will be handled in a jurisdiction where the debtor "has a genuine connection rather than in the one chosen by the incorporators" and both jurisdiction and applicable law should be the same than what creditors would expect. As outlined in the Virgos-Schmit Report[5] it assists creditors to foreknow the legal risk and ramifications of the debtor's insolvency.

Question 3.3 [maximum 5 marks] 2/5

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.

[3] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000R1346

[4] Case C-341/04,ECLI:EU:C:2006:281: (May 2,2006).

[5] Virgós-Schmit Report, para 75.

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.

Although the Directive on Preventative Restructuring[6] (the Directive) hailed the harmonisation of insolvency frameworks in the European Union around aspects of restructuring, the Directive does not harmonise principles of substantive insolvency law like shared definitions of insolvency, term for opening / commencing insolvency proceedings, ranking of claims, actions on avoidance and the process of tracing and tracking assets of the insolvent estate. Instead, it recognized that the diversity of the legal systems in Member States regarding insolvency proceedings where too disparate based on insolvency law and related areas of national law, including tax, employment and social security law.

Secondly, the Directive envisaged the unison of frameworks across the European Union but ultimately allows Member States to adopt principles and rules that are appropriate for their respective national contexts, thereby recognizing the well-functioning frameworks for certain Member States.

These differences are premised on the fact that the final text of the Directive mirrored a compromise on issues of governance of restructuring proceedings, treatment of creditors in the ranking of their claims and varied regulatory traditions. The negotiations introducing these changes limited the harmonisation envisaged in the Directive. By promoting minimum standards, the scope of the Directive provides for a for a jurisdiction's status quo, allowing minor modifications to the frameworks introduced in other Member States. Yes, but what are the differences with the Regulation?

Total: 10/15

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.

[6] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventative restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring insolvency and discharge of debt and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

Question 4.1 [maximum 5 marks] **0/5**

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.

The centre of main interest (COMI) determines the law of the Member State (lex concursus) where the main insolvency proceedings will be commenced. Under the EIR 2000 there was no definition for COMI. In the *Eurofood IFSC Ltd*[7] case the CJEU (then still rerefer to as the European Court of Justice (ECJ)) court held that COMI had an autonomous interpretation and had to be interpreted in a uniform way with a view to promoted legal certainty for creditors and don't find application to the case study.

Only under the EIR Recast where the definition of COMI was intentionally not narrowed down to ensure the application of COMI to remain predictable but instead introduced presumptions indication location and in particular in relating to COMI and the company's registered address, the EIR Recast would find application to the case study insofar that it relates to safeguard proceedings. Under Article 3(1) of the EIR Recast introduces a "suspect period" which creates a safeguard for creditors against debtor companies trying to manipulate the insolvency forum when insolvency proceedings seems eminent. If the debtor company changes it registered address in the 3 months "suspect period" the court could disregard the change in registration to confirm the COMI as this could prejudice certain creditors. This COMI presumption was unpacked in the *Interedil Srl v Fallimento Interedil Srl*[8] where the Court of Justice of the European Union (CJEU) found that where employees responsible for management and decision making are at the same registered office, that is then presumed the registered office. Having assets in the in a certain jurisdiction is not adequate proof for presumption of registered address under COMI.

Article 5 of the EIR 2000 provides an exception to the general rule of application of lex concursus. It determines that insolvency proceedings do not impact the rights of creditors or third parties relating to movable or immovable property assets belonging to the debtor and located in the Member State at the time insolvency proceedings are commenced. A rights in rem can be exercised regardless of the opening of insolvency proceedings by separate settlement of the collateral security. are not impact

Your answer is unclear. It was meant to be a yes or no answer.

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

[7] Case C-341/04,ECLI:EU:C:2006:281: (May 2,2006)
[8] Case C-396/09, ECLI:EU:C:2011:671 (Oct 20,2011).

2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) *redressement judiciaire* (rehabilitation).

Therefore, the EIR 2000 **would not** apply to safeguard proceedings.

Question 4.2 [maximum 5 marks] 5/5

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.

Only under the EIR Recast where the definition of COMI was intentionally not narrowed down to ensure the application of COMI to remain predictable but instead introduced presumptions indication location and in particular in relating to COMI and the company's registered address, the EIR Recast would find application to the case study insofar that it relates to safeguard proceedings. Under Article 3(1) of the EIR Recast introduces a "suspect period" which creates a safeguard for creditors against debtor companies trying to manipulate the insolvency forum when insolvency proceedings seems eminent. If the debtor company changes it registered address in the 3 months "suspect period" the court could disregard the change in registration to confirm the COMI as this could prejudice certain creditors. This COMI presumption was unpacked in the *Interedil Srl v Fallimento Interedil Srl*[9] where the Court of Justice of the European Union (CJEU) found that where employees responsible for management and decision making are at the same registered office, that is then presumed the registered office. Having assets in the in a certain jurisdiction is not adequate proof for presumption of registered address under COMI.

There are 4 elements of the scope that applies in determining application of the EIR Recast scope:

- Time (temporal scope)
- Person / company (personal scope)
- The proceedings it applies to (material scope)
- Limits in terms of geography (geographical scope)

First determine if the debtor's COMI is in a Member State of the European Union. In this instance France is a Member State.
Secondly the debtor is not excluded if is not a bank (financial institution) or insurance company. In this instance company sells soft toys.
Thirdly if insolvency proceedings commenced is on Annex A under the EIR, yes in this instance.
Fourthly if the insolvency proceedings commenced (initiated) after 26 June 217 then the EIR Recast scope applies.

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?

[9] Case C-396/09, ECLI:EU:C:2011:671 (Oct 20,2011).

Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The debtor has its main warehouse is in Spain. (asset)
It concluded a loan agreement with a Spanish bank. (business)
It opened a bank account with the bank. (asset)
It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers. (business)

Secondary proceedings are commenced in a Member State where the debtor company is believed to have an establishment which clearly defined in Article 2(1) of the EIR Recast as "the place of operations where a debtor carries on business or has a non-transitory economic activity with human means and assets". Secondary proceedings are territorial in nature and run in parallel with the main proceedings but with the limitation that their effects pertain to the assets found and located under the secondary proceedings in the Member State.

In this instance of Spain is not the place of operations but there is an element of assets and temporary business activity by way of the non-binding agreements / arrangements with third parties. It would therefore be possible to open secondary proceedings in Spain. In the matter of *Burgo Group SpA v Illochroma SA*[10] the CJEU held that if main insolvency proceedings were commenced in a Member State other than that of the registered address or office, it is possible to open the secondary proceedings in the Member State of the registered office on the premise that some economic activity is being conducted with human means and assets.

Your ultimate answer is unclear.

- 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: 8/15

[10] Case C-327/13, ECLI:EU:C:2014:2158 (Sep 4,2014)

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

Total: 36/50