



**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.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 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] 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: Article 41 EIR Recast titled “Cooperation and communication between insolvency practitioners” promotes communication between insolvency practitioners of main and secondary proceedings to ensure agreement of a restructuring plan at the early stages. [No, possible answers included Article 1, Article 3, Recital 10]

Statement 2: Article 18 EIR Recast titled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings” states that the effects insolvency on a pending lawsuit is subject to the law of the Member State (lex fori processus).

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

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.

Article 3 of the EIR Recast, specifically Recital 23, states that secondary proceedings may be opened where a debtor has an establishment. Secondary proceedings are territorial in nature as they relate to specific assets in the jurisdiction of the establishment which subsequently limits the scope of the main proceedings and departs from a universal approach.

Article 19 of the EIR Recast states that recognition of main proceedings does not prevent the opening of secondary (territorial) proceedings thus departing from the concept of universalism.

The EIR Recast does not include clear rules related to geographical jurisdiction. Where secondary proceedings are outside of the EU, national conflict of laws rules should be applied to determine the outcome. In certain scenarios, national insolvency laws prevail and this departs from the universalistic approach of the EIR Recast.

**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 titled “Scope” states that the EIR Recast applies to public collective proceedings, which are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation or liquidation.

Articles 41, 42 and 43 of the EIR Recast provide a framework for communication between insolvency practitioners, courts and courts/insolvency practitioners respectively. This helps to govern and regulate national insolvency proceedings in Member States as cross-border communication and co-operation is more effective and efficient. [This is not about the material scope]

Article 24 of the EIR Recast states that Member States must maintain insolvency registers which contain specific information regarding the insolvency proceedings in that Member State. This provides a publicly available source of information regarding insolvent debtors for creditors enabling them to lodge claims by deadlines that may be applicable.

Article 72 of the EIR Recast states that in the insolvency of a group, a group co-ordination plan has to be produced. This relates to the reorganisation of the group and helps to rescue viable parts of the

group thus relating to the rescue/reorganisation scope of the EIR Recast. [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.

Article 41 of the EIR Recast provides for the co-operation between insolvency practitioners (of main and secondary proceedings). The EIR Recast states that the co-operation can take any form, such as agreements or protocols, requiring negotiation between the insolvency practitioners and therefore the insolvency practitioner of the main proceeding has the ability to control the conduct of the secondary proceedings.

Article 36 of the EIR Recast allows for the insolvency practitioner to provide an undertaking in respect of local assets in other jurisdictions (providing certain assumptions are met). Providing the undertaking adequately protects the interests of local creditors, the insolvency practitioner of the main proceeding may request the court to not open secondary proceedings. This is known as "synthetic proceedings".

**Total 7/10**

**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)?

After 15 years of existence, the European Commission presented a report outlining the fact that the EIR 2000 needed revising. The EIR Recast incorporated adjustments to provisions as well as entirely new rules.

One element which was identified by the European Commission as requiring revision was determining the Centre of Main Interests (COMI). The EIR Recast made COMI more predictable by introducing presumptions regarding the location of COMI rather than making the definition stricter. The main presumption was that the COMI was the registered office for a company or legal person (providing the registered office had not moved in the three months' prior).

In addition to this, another element that was identified as needing provision was the accessibility and availability of debtor information for creditors. The EIR Recast requires Member States to establish and maintain insolvency registers which contain information regarding insolvency proceedings. The EIR Recast also includes the minimum amount of information which must be included in the registers and states that information must be published as soon as possible after the commencement of proceedings.



Furthermore, it was identified that secondary proceedings were limited to liquidation proceedings under the EIR 2000. Whereas, the EIR Recast is aimed at restricting the opening of secondary proceedings by introducing the concept of “synthetic secondary proceedings” through the provision of an undertaking by the insolvency practitioner of the main proceedings. This reduced the administrative burden of opening secondary proceedings and lack of co-operation between concurrent proceedings.

When secondary proceedings are opened, the insolvency practitioners and courts in cross-border jurisdictions must co-operate. The EIR Recast introduced a entirely new framework for co-operation and coordination of group and concurrent proceedings as it was identified that the EIR 2000 did not sufficiently provide guidance to insolvency practitioners and courts for co-operation during proceedings.

Finally, it was identified that the EIR 2000 was limited in its scope of application and the EIR Recast extended the material scope. This included the inclusion of restructuring proceedings where there is a likelihood of insolvency.

**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 European Commission has praised the use of centre of main interests (COMI) concept as it is thought that the debtor has a genuine connection with the jurisdiction in which it has its centre of main interests. Therefore, this ensures that the applicable legal framework to the insolvency matches the law applicable to creditors of the debtor. This enables creditors to foresee legal risks as they are familiar with the legal system as they are likely to be located and reside in the same jurisdiction as the COMI.

However, some EU institutions believe that the concept of COMI can be vague and difficult to determine as there is limited guidance available which provides a practical test to assert the COMI. Further to this, a debtor’s COMI is also at risk of manipulation as it can be changed to be perceived as an alternative jurisdiction.

**Question 3.3 [maximum 5 marks] 3/5**

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 Directive on Preventive Restructuring (Directive) which came into effect in 2019 was aimed at harmonizing national insolvency laws on preventive restructuring of EU member states whereas the European Insolvency Regulation (EIR) was focused at harmonizing the core national insolvency laws of EU member states **(no, the Regulation does not harmonize the substance of insolvency law. It is a conflict-of-law instrument only)**. The Directive was introduced to provide debtors with access to tools

to identify the warning signs of insolvency and apply preventive restructuring measures to promote the rescue of viable businesses.

The Directive set common objective, in the form of principles or targeted rules, which were aimed at achieving coherence between EU insolvency frameworks. The principles would be applied in the relevant contexts and gave EU member states flexibility on their application. Whereas, the EIR was a set of unified rules on international insolvency applicable to certain aspects of cross-border restructuring to ensure efficiency and effectiveness of insolvency proceedings.

**Total: 13/15**

#### **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.

The EIR 2000 has jurisdiction over insolvency proceedings opened in France as France is an EU member state. Dinosaurus SARL also carries out its business throughout the EU so any insolvency proceedings would have cross-border issues. Where the EIR 2000 applies, a main proceeding would have universal scope of the debtor's assets throughout the EU.

The EIR 2000 only applies to proceedings where there was a total or partial divestment of a debtor and the appointment of a liquidator (Article 1 of the EIR 2000). Safeguard proceedings allow companies that are experiencing financial difficulty, but not yet in a state of cessation of payments, to obtain a stay on payments and the suspension of judicial proceedings.

The commencement of safeguard proceedings does not involve the appointment of a liquidator and is aimed at rescuing an economically viable business where there is a likelihood of insolvency.

Therefore, the EIR 2000 will not apply to the safeguard proceedings as they are not a “traditional” insolvency proceeding; do not involve the appointment of a liquidator; and instead are a preventive restructuring measure which does not fall under the scope of the EIR 2000.

**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.

The scope of the EIR Recast applies to “public collective proceedings which are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganization or liquidation.”

Safeguard proceedings allow companies that are experiencing financial difficulty, but not yet in a state of cessation of payments, to obtain a stay on payments and the suspension of judicial proceedings.

Therefore, the proceedings that have been opened by the French High Court fall under the scope of the EIR Recast. Article 1 states that qualifying insolvency proceedings may involve “a temporary stay of individual enforcement proceedings that is granted by the court or by operation of law” and the safeguard proceedings would fall into this category.

Furthermore, France is an EU member state so therefore the EIR Recast would apply to qualifying proceedings opened in the jurisdiction.

The EIR Recast extends to proceedings which are aimed at rescuing economically financial businesses which are experiencing financial distress. It is clear that Dinosaurus SARL is experiencing financial distress, and the opening of safeguard proceedings will allow them to negotiate with creditors regarding outstanding debts without the risk of insolvency proceedings or other arbitration being brought against them. The proceedings are aimed at restructuring where there is a likelihood of insolvency which the EIR Recast notes its application to under Article 1, Recital 10.

Additionally, the EIR Recast applied to proceedings which commenced after 26 June 2017. All proceedings which fall under the scope of the EIR Recast are listed in Annex A of the framework.

In summary, the EIR Recast would apply to the safeguard proceedings opened by the French High Court on 23 June 2023.

**Question 4.3 [maximum 5 marks] 2.5/5**

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.

In accordance with Article 2 (10) of the EIR Recast, secondary insolvency proceedings can be opened in an EU Member State where a debtor has an establishment. Under the EIR Recast, an establishment is defined as a “place of operations where a debtor carries out or has carried out non-transitory economic activity with human means and assets.” The establishment must also have been opened for longer than three months prior to the petition being filed.

Dinosaurus SARL has its main warehouse in Spain which for the purposes of opening secondary insolvency proceedings would meet the criteria of an establishment. This is because the warehouse was opened longer than three months prior to the petition and there are human means at the warehouse.

Therefore, secondary proceedings can be opened in Spain. The secondary proceedings in Spain would be limited to the assets located in Spain and therefore do not take a universal approach like the main proceedings would. The secondary proceedings would protect the interests of local creditors in Spain and create a second insolvency estate to enhance the handling of dealing with the complex insolvency of Dinosaurus SARL by supporting the main proceeding.

Ordinarily, secondary proceedings would be opened after main proceedings as they offer a supportive function however pursuant to Article 3 (4) of the EIR Recast it can be permissible in some scenarios for secondary proceedings to be opened prior to main proceedings.

If a petition to open insolvency proceedings is filed in Dinosaurus SARL’s COMI (France) then the insolvency practitioner of the main proceedings can provide an undertaking in accordance with Article 38 (2) of the EIR Recast to the creditors situated in Spain to prevent the opening of secondary proceedings, there. This is known as “synthetic proceedings”.

While some of your reasoning is correct, your answer is not.

- 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: 12.5/15

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

**Total: 42.5/50**