INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

This is the **summative (formal) assessment** for **Module 2B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **10 pages**.

ANSWER ALL THE QUESTIONS

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in**

yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

Select the correct answer from the options below:

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

Question 1.2

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

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

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

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

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

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] 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: This statement relates to the scope of the EIR Recast for the purpose of Article 1 ("Scope") of the EIR Recast. This statement is directly lifted from recital 10 to the EIR Recast.

Statement 2: This statement addresses Article 18 "Effects of insolvency proceedings on pending lawsuits or arbitral proceedings" and it is also addressed in recital 73 to the EIR Recast.

Question 2.2 [maximum 3 marks] 3/3

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

1. The provision allowing for the opening of secondary proceedings in Article 3 of the EIR Recast – International jurisdiction. This is an important exception to the universalist approach of the EIR Recast since the secondary proceedings are restricted to the assets of the debtor located in the territory of the Member State in which they are opened.

2. The provision in Article 11 which addresses contracts relating to immoveable property in insolvency proceedings. This article makes an express choice of law which may differ from the law in which the insolvency proceedings were opened, as the choice of law is to be the law of the Member State in which the immoveable property is situated.

3. The provision in Article 13 which addresses contracts of employment in insolvency proceedings. This article also makes an express choice of law which may differ from the law in which the insolvency proceedings were opened, as the choice of law is to be the law of the Member State applicable to the relevant contract of employment.

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.

1. Evident from Article 1 of the EIR Recast is that the EIR Recast extends not only to traditional liquidations, but also to rescue procedures which are aimed to assist economically viable companies in distress, e.g. Article 1(1) of the EIR Recast notes that the Regulation "*shall apply to public collective proceedings…for the purpose of rescue*…" This really broadens the scope of the application of the EIR Recast beyond liquidations;

2. Under Article 1(1) of the EIR Recast, only proceedings listed in Annex A fall within the Scope of the EIR Recast. This means that the list of proceedings which are subject to the EIR Recast is exhaustive;

3. There is a further carve out in Article 1(2) of the EIR Recast in that the Regulation will not apply to those proceedings which are referred to in paragraph 1 of Article 1 but which concern any of: insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC, or collective investment undertakings. This is about the personal 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.

1. **The right of give an undertaking ("Synthetic" secondary proceedings)**
   In order to prevent the opening of secondary insolvency proceedings, an insolvency practitioner involved in the main insolvency proceedings can provide an undertaking to creditors in other member states, that when the insolvency practitioner is dealing with the assets located in the member state other than the member state in which the main proceedings have been opened, the insolvency practitioner will apply the laws of the member state of the foreign country, especially with regard to their rules for preferential creditors and priority. This can be a hugely beneficial cost-saving measure. That provision is provided for in Article 36 of the EIR Recast. Under Article 38, if such an undertaking has been so provided, a court that is asked to open secondary proceedings should not do so at the request of the insolvency proceedings, as long as the court is satisfied that it is in the best interests of the creditor or creditors concerned.

2. **Stay of the opening of secondary insolvency proceedings.**
   Sometimes, the opening of secondary insolvency proceedings can frustrate negotiations with creditors and jeopardise the rescue of the company. Recital 45 of the EIR Recast provides that the court should be able to grant a temporary stay so long as the court is satisfied that satisfactory measures are in place for the protection of the intertest of local creditors. Under Article 38(3) of the EIR Recast codifies recital 45 in that it provides that the court may, at the request of the insolvency practitioner or of the debtor in possession, stay the opening of secondary proceedings for a period not exceeding 3 months, so long as suitable measures to protect the creditors are in place.

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] **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)?

The European Commission published a proposal for the amendment of the EIR 2000 on 12 December 2012(https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0744_/com_com(2012)0744_en.pdf).

Broadly, the European Commission was of the view that the EIR 2000 did not accurately reflect either the priorities of the EU or national practices in insolvency law (particularly with regard to the promotion of the rescue of companies in distress). The Commission identified five main elements that needed reform:

1. **Broadening the scope of the Regulation to include restructuring proceedings**
   The scope of the EIR 2000 did not include national procedures which provided for the restructuring of an enterprise before it might be said to be formally insolvent but is in financial distress (so-called "pre-insolvency proceedings") or proceedings in which the existing management of a company may remain in situ (so-called "hybrid proceedings"). The Commission acknowledged the introduction both of these types of proceedings in many member states (that the processes were seen to increase the success of company restructuring) well as the introduction of personal insolvency proceedings in many member states, which necessitated their inclusion within the scope of the Regulation.

2. **The difficulty in ascertaining which member state may be competent to open insolvency proceedings**
   The European Commission was of the view that, in respect of the opening of main insolvency proceedings, while there was wide support for granting jurisdiction to the member state where the debtor's centre of main interests was located, there were serious issues with applying that concept in practice. The Commission acknowledged that the jurisdiction rules of the EIR 2000 had been criticized for allowing forum shopping by companies and natural persons by way of relocating their COMI.

3. **Problems with secondary proceedings**
   The European Commission acknowledged that there had been problems identified with the opening of secondary proceedings. The Commission had seen examples in which the efficient administration of the debtor's estate had been hampered by the opening of secondary proceedings. The issues related to the fact that the liquidator in the main proceedings no longer had control over the assets located in the Member State in which secondary proceedings had been opened, which made a sale of the debtor company on a going-concern basis more problematic. Further, at the time of the publication of the report by the European Commission, secondary proceedings had to be winding-up proceedings. The Commission was of the view that this constituted an obstacle to the successful restructuring of a debtor.

4. **Issues with the rules in relation to the publicity of insolvency proceedings and the lodging of claims**
   The Commission highlighted what it deemed to be an issue regarding the lack of mandatory publication and registration of decisions and judgments both in the Member States where a proceeding is opened and in Member States where there is an establishment. The Commission also highlighted the issue with there being no "European Insolvency Register" which would permit searches across national registers. The Commission was of the view that for the effective functioning of cross-border insolvency proceedings, the publicity of the relevant decisions relating to an insolvency procedure was paramount. The view expressed was that it was vital that judges be made aware whether or not proceedings had already been opened in another Member State and similarly creditors needed to be aware that proceedings had commenced. Finally, the Commission was aware of difficulties faced by creditors (particularly small creditors and SMEs), regarding the costs associated with lodging claims under the Insolvency Regulation.

5. **Lack of specific rules dealing with the insolvency of multi-national enterprise groups**
   Finally, the Commission highlighted the issues regarding the lack of specific rules which deal with the insolvency of large multi-national enterprise groups. This was despite the fact that a significant number of cross-border insolvency cases involved groups of companies. The issue seen with this was that the lack of specific procedures for a group-insolvency frequently

diminished the success of restructuring the group as a whole, and sometimes led to the destruction of the family group.

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.

1. **The autonomous meaning of COMI facilitates legal certainty across the EU**
   In principle, due to the autonomous meaning of COMI, the application of the concept of COMI should be uniform across all member states. The registered office presumption contained in Article 3 of the EIR Recast makes the concept of COMI especially predictable. The registered office presumption in Article 3 can only be rebutted if certain objective factors indicate that the administration of the debtor company's business seems to be in a state other than that of the state in which the debtor company's registered office is located.
   Central to the ascertainability of a company's COMI by creditors is the prevention of forum-shopping by a debtor in order to get the benefit of the laws of a member state which may result in a more favourable result for the debtor company but at the same time, to the detriment of the debtor company's creditors. This makes the concept of COMI a fair, as well as a transparent, concept.

2. **COMI can result in several proceedings being opened in relation to the same debtor which can be complex and expensive**
   The concept of COMI is intrinsically connected to the concept of secondary proceedings and establishment. The purpose of COMI is to ensure that there is only one set of "main" proceedings that can be opened, but secondary proceedings may be opened if the requirements for the company having an "establishment" in the other member state have been satisfied. "Establishment" was first defined in the Article 2(h) of the EIR 2000 as "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods*".
   There are pros and cons to this element of the COMI concept.
   A negative result of this element of the concept of COMI is that there can be multiple sets of proceedings live in relation to the same debtor but running under different national insolvency las. This can create a complex system which can be expensive.
   However, secondary proceedings also serve to protect local interests of creditors. The Virgós-Schmidt Report was approving of the process of the opening of secondary proceedings to the main proceedings in which the debtor's COMI is located. The Virgós-Schmidt Report supported the process for the protection of local creditors' preferential rights under local insolvency laws.

Question 3.3 [maximum 5 marks] 4/5

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.

1. **Wider scope of EIR Recast versus the stronger emphasis on preventative restructuring in the Directive**

   At its core, the EIR 2015 is a revision of the previous insolvency regulation which was the first major binding piece of legislation in respect of insolvency law in the EU. The EIR Recast of 2015 governs the international jurisdiction for the opening of insolvency proceedings as well as any actions deriving from those proceedings. The overall objective of the EIR Recast is to ensure efficiency and of cross-border insolvency proceedings.

   On the other hand, the Directive on Preventative Restructuring Frameworks has been compared time and time again to the United States Bankruptcy Code ("Chapter 11).[1] This is obviously narrower in scope to the EIR Recast Regulation. Debtors now have access to tools that will enable them to detect at an early stage whether the company is in financial distress, which will result in the early engagement of restructuring processes. Examples of these tools in the Directive are those in Articles 3 and 4 of the Directive, "*Early warning and access to information"* and "*Availability of preventative restructuring frameworks*".

2. **The Directive goes further than the EIR Recast with regard to harmonisation of the laws of Member States**

   The EU has promoted the harmonisation of Member States' restructuring and insolvency law for many decades but this approach intensified after the Global Financial Crisis of the late 2000s. The first step on the EU's agenda for harmonisation was a revision of the EIR 2000. Notwithstanding the EU agenda for harmonisation of insolvency laws, a notable aspect of the EIR Recast is the provision allowing for the opening of secondary proceedings under Article 3(2). This provision essentially allows for the concurrent running of two separate sets of insolvency proceedings in different jurisdictions with differing insolvency legislation. While the "main" insolvency proceedings are linked to the "COMI" – the centre of main interests – of the insolvent debtor, secondary proceedings may be opened in any other member state in which the debtor has an establishment. As a result, it is often the case there are several separate proceedings that relate to the same debtor but all under differing insolvency laws.

   While the EIR Recast co-exists with the more recently introduced Preventative Restructuring Directive, the Directive sets out minimum standards for the preventative restructuring procedures across the Member States to allow debtors to restructure at an early stage of financial distress. The Directive is specifically aimed at created harmonisation in the early restructuring frameworks of the Member States. It is the first instrument that has truly harmonised elements of insolvency law within the EU, even if it is only applicable to a narrow aspect of it.

   The Directive is a minimum standards harmonization (i.e. substantive harmonization) instrument whereas the Regulation is a conflict-of-law/choice-of-forum instrument (i.e. procedural harmonization)

Total: 14/15

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

Scenario

[1] McCarthy, J. (2020) '*A class apart: The relevance of the EU Preventive Restructuring Directive for small and medium enterprises*', European Business Organization Law Review, p. 8

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.

While the EIR 2000 applies to this case, it is does not strictly apply to the opening of safeguard proceedings.

France is a member state of the EU that opted in to the EIR 2000 and France is the country in which Dinosaurus SARL has its COMI, therefore it has jurisdiction to hear the petition filed by Dinosaurus SARL in June 2023.

However, while Article 36 of the EIR Recast provides provision for an insolvency practitioner to give an undertaking in order to avoid the opening of secondary insolvency proceedings, there was no such provision in the EIR 2000. This practice in fact originated from judicial innovation and has its origin in two English cases in which the insolvency practitioners in each case had successfully convinced certain creditors that the opening of secondary proceedings would be against their best interests.

The UK saw two cases on this point in 2006. In the case of MC Rover Belux SA/NV (in Administration) [2006] EWHC 1296, on the application of the insolvency practitioner involved, no secondary proceedings were opened. This was an administration case in the UK which is a form of rescue proceedings. The case was successful and realisations for creditors in fact surpassed initial estimations.

Collins & Aikman Europe SA [2006] EWHC 1343 (Ch) was another case which came before the English High Court on this point in 2006. The jointly appointed administrators involved were very aware that while main insolvency proceedings had been opened in England, creditors in several other different European jurisdictions were entitled to apply to open secondary proceedings so long as the relevant company had an establishment in the relevant jurisdiction. The jointly appointed administrators gave oral assurances to the local creditors that their claims would be dealt with under the relevant foreign laws, in order to avoid the opening of secondary proceedings. This meant that the creditors would

receive the benefit of secondary proceedings (on issues such as preferential payments) even though no secondary proceedings would in fact be opened.

Therefore, if the relevant French Court in applying the EIR 2000 were to apply the aforementioned English cases to the petition of Dinosaurus SARL, then the principle of safeguarding proceedings would apply. However, in only applying the EIR 2000 to the case in hand, the rule of safeguarding proceedings would not apply since there is no such provision in the EIR 2000.

Question 4.2 [maximum 5 marks] 0/5

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.

Yes, the EIR Recast will be applicable to the proceedings. As there are many cross-border elements to these insolvency proceedings, the EIR Recast applies. These cross-border elements relate to the fact that the company has creditors and/or establishments in France, Ireland, the United Kingdom and Spain.

France is the jurisdiction in which Dinosaurus SARL has its COMI (center of main interests), because most of the company's stores, employees and customers are in France. Therefore, France has jurisdiction to open the main insolvency proceedings.

Under Article 36 of the EIR Recast, in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner involved in the main proceedings can give an undertaking regarding the assets located in a member state in which secondary proceedings could have been opened. The undertaking should provide that when the insolvency practitioner is dealing with the assets of the creditors in another jurisdiction, the insolvency practitioner will apply the laws regarding distribution and priority of the law of the member state where secondary proceedings could technically have been opened.

Under Article 38(2) of the EIR Recast, where the insolvency practitioner involved in the main proceedings gives an undertaking in according with Article 36 of the EIR Recast, the court that has been asked to open secondary proceedings should not do so, as long as it that court is satisfied that the undertaking provided is in the general interests of the creditors concerned.

The insolvency practitioner here will, accordingly and assuming that an adequate undertaking has been provided to the creditors in the member states other than in France, be required to apply the laws of those other member states when dealing with those creditors located in Spain and Ireland (the UK is no longer a member state of the EU).

This was not the focus of this question. 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] 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.

Under Article 3(2) of the EIR Recast, secondary proceedings can be opened in any member state in which the debtor has an establishment. While a debtor can only have one "center of main interests", a debtor can have many establishments and therefore there can be multiple secondary proceedings opened.

On the facts that we are provided with, there is nothing to suggest that Dinosaurus SARL has an establishment in Italy.

The CJEU in the case of *Interedil SRL v Fellimento Interedil SRLC-396/09* looked at the concept of an establishment. The CJEU ruled that the definition of establishment requires the pursuance of an economic activity to a minimum level of organization.

As we have not been provided with any information that would suggest that Dinosaurus SARL has an establishment in Italy, such secondary proceedings cannot be opened in Italy under the EIR Recast.

Total: 10/15

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

Total: 43/50