



**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”).

The answer was D.

#### Question 1.8

What are some of the main criticisms which have been voiced against the concept of the “centre of main interest”?

(a) The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.

(b) The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.

(c) The concept is too similar to that of an “establishment” which makes it difficult for a court to know whether to open main or secondary proceedings.

(d) The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.

#### Question 1.9

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

(a) “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

(b) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

- (c) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
- (d) “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

### Question 1.10

Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.

In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala’s centre of main interest presumed to be located?

- (a) Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.
- (b) Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.
- (c) Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.
- (d) Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

Total : 9/10

### QUESTION 2 (direct questions) [10 marks]

#### Question 2.1 [maximum 2 marks]

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 2. Pending lawsuits are not covered by the effects of the *lex concursus* in insolvency proceedings.

[Statement 1

As per Article 1, EIR Recast (entitled “Scope”) relates to the public collective proceedings as well as interim proceedings with the aim to rescue viable but financial distressed entities, adjustment of debt, help companies to go through a reorganisation or liquidation.

Statement 2

As the *lex concursus* decide on the effect of the insolvency proceedings, there is an exception as per Article 18 of the EIR Recast whereby if there is any pending lawsuits or any pending arbitral proceedings in respect to a company’s asset or right which should be part of the insolvency estate, the law of the member state of the lawsuit or arbitral tribunal case is pending shall prevail but Article 8 shall not prevail if the right is acquire after the opening of the insolvency proceeding.]

**Question 2.2 [maximum 3 marks]**

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

[There are several exceptions in the EIR recast which is not in line with the universality of proceeds as mention below:

1. Article 8 prevent the effects of international insolvency proceedings in the third parties rights in rem for example security in immovable property, liens held by third parties or creditors on assets of the debtor which are found in other Member States at the time of the opening of the insolvency proceedings. The creation, scope of rights and the validity rights in rem are administered by their Member state applicable law where the right and assets are found. The holder of the right in rem shall continue to benefit of the right of segregation and payment in respect to the collateral security.
2. As per Article 13, another exception would be rules governing where the contracts of employment whereby upon opening of insolvency proceedings, the law of the Member state shall govern the contact of employment (*lex contractus*) to secure the employees and employment.
3. Article 16 states that detrimental acts in respect of voidness, voidability and enforceability of legal acts shall not enforce if the creditor is able to prove that the act was subject to the law of the Member State (*lex causae*) and not the law of the country of the main insolvency proceeding and the local law prevent any means of challenging the law.]

**Question 2.3 [maximum 3 marks]**

The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List **three (3) elements** of the EIR Recast that deal with this matter and explain how they relate to this.

[The material scope under the new regulation are as follow:

The EIR recast is not in relation to traditional liquidation procedure but also aims at helping economically viable entities which are in financial distress to be able to rescue their businesses. The EIR recast provide for stay of actions from individual creditors and hence protecting all the creditors. It also helps debtors which are facing likelihood on insolvency to proceed with a restructuring process, leaving the debtors in full or partial control of the assets and the affairs of the company.

**Where is this regulated in the Regulation?**

Annex A also provide a list of names of insolvency proceedings for 27 countries which are regulated by the EIR recast. Hence proceedings which are found under Annex A cannot open insolvency proceeding but if the proceeding is listed under Annex A, the law provide that there should be a further examination by courts of other members and shall be automatic. Annex A covered not less than 112 procedures. For example, proceeding under the UK's scheme of arrangement is not listed in Annex A and hence, no proceeding can be open under the UK's scheme for international insolvency procedure in Member States.

The definition of insolvency proceeding under Article 1 is not more salience with the application of Annex A as the latter provide guidance to policy makers to include new national insolvency proceeding and to court for judgement. ]

**Question 2.4 [maximum 2 marks]**

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

[1. "Synthetic" secondary proceedings will avoid the opening of secondary proceeding. The Insolvency practitioner of the main insolvency proceeding need to provide to the court an undertaking that there shall be adequate protection of the local creditors interest as per Article 36 in respect of the assets in the Members State where the secondary insolvency proceeding would have opened.

2. A stay of proceeding whereby the debtor will try to reach an agreement with the creditors on the settlement of their dues and hence the court may provide a temporary stay of individual enforcement proceeding upon application of the insolvency practitioner or the debtor in possession for a period not exceeding three months. The stay will be conditional that necessary measures are taken for the protection of the local creditors and the court may request the main insolvency practitioner not to remove or sell any asset except if require to conduct the ordinary course of business.]

**Where is this regulated in the Regulation?**

**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]**



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)?

[Although the EIR 2000 was a success, the European Commission recognized that there was a need to adopt a new regulation to address the following issue:

1. A wider scope to the restructuring proceeding was required to address the need of the insolvency practice.
2. More Strict regulations were required to government co-operation between insolvency practitioners and courts.
3. Rules in respect to group members within the same group of companies
4. Better information should be provided to the creditors, especially a connected insolvency registers to inform creditors about the insolvency of company.
5. New modern regulations to address the new need for example data protection.
6. The EIR recast also provide for restructuring and that secondary proceedings should not be only winding up proceeding, but secondary proceedings can be open for restructuring proceedings to maximise return to creditors, save jobs and encourage investment.]

**Question 3.2 [maximum 5 marks]**

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.

[One main praise of the centre of main interest “COMI” is that it provides guidance to court in term of interpretations as it stipulates that the COMI shall be the registered office located where the debtor manage its administration on a regular basis and the third parties should be able to ascertain that the place is the COMI except if the registered office is not where the entity is manage and cannot be ascertained by third parties. The principles were first backed by CJEU (which was at tis time ECJ) in Eurofood IFSC Ltd whereby the court stated that the COMI should be recognized by criteria that are objective and third parties should be able ascertain same. It was also backed in In Interedil Srl v Fallimento Interedil Srl as the court verdict was that although the entity has some assets (lease agreement of two hotels) bank account and the entity was still on the Italian register, the COMI shall be were the debtor is managed and supervised and same can be confirmed by third parties.

The concept o the COMI was also approved by the EU commission which stated that cases should be governed by a jurisdiction where the debtor has a bona fide connection and not where the board decide the place of the registered office. The COMI interpretation is as per creditors expectation and are familiar with.

The Virgo-Schmit Report express that the COMI help creditors to better anticipate the risk of insolvency and will get a more appropriate return from the risk. Weak creditors like employees will also benefit from the COMI concept as theses creditors will be more familiar with the prevailing laws.

One shortcoming of the COMI is inexplicit and does not provide a clear practical test. It may put at risk the legal certainty and predictability which is not in adherence of the objectives of the COMI. The COMI concept was publicly criticized as a “real seat theory” within the international law of companies. It may decrease the value of the return of creditors and there will be uncertainty upon insolvency. The COMI interpretation can be manipulated and open to arbitrage.

In Susanne Staubitz-Schreiber, the court stated that the COMI should be where the debtor has requested for the opening of the insolvency proceeding even if a debtor has shifted the COMI before the proceeding was opened. This order has developed in a “suspect” or “safeguard” period as per Article 3 of the EIR recast preventing the COMI presumptions application.

**Question 3.3 [maximum 5 marks]**

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 has not harmonized the substantive insolvency laws as was targeted in 2014. The reasons are as follow:

The Directive does not define insolvency, what was required to open insolvency proceedings, how would the creditors be ranked in term of preference, what are the avoidance actions and how would the assets of the insolvency estate be recognized and tracked down. The Directive recognized that the current diversity which are embedded in the legal systems of the different member States were so big to bridge as the insolvency law and the national law of the member states such as tax, employment and social security were connected.

The objectives of the Directive are in form of principles and only where required, provided some rules to achieve the aim of restructuring. The Directive provides more flexibility by introducing both principles and targeted rules which are applicable to the national law prevailing in the Member States.]

You did not explain the differences between the Directive and 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.

**Question 4.1 [maximum 5 marks]**

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 scope of application was more toward a traditional concept of insolvency. As per Article 1 of the EIR 2000, it is mentioned that the regulation will only apply to proceeding which entailed the partial or full divestment of the debtor and a liquidator will be appointed.

To be able to open a proceeding under the EIR 2000, Dinosaurus SARL can either open a main or secondary proceeding. The applicant will need to prove that the Centre of main interest “COMI” or an establishment is in France. From the scenario, we can presume to be the registered office is in France and Dinosaurus SARL will proceed with a main insolvency proceeding.

To be able to open the main proceeding, one of the most important case under the regulation of the EIR 2000, is Eurofood IFSC Ltd, the CJEU (which was at that time known as the European Court of Justice “ECJ”) stated that the COMI has an autonomous meaning and hence must be interpreted in the uniform way and not as may be defined in the national law. The CJEU stated that the COMI must be identified by criteria which are objective and can be ascertained by third parties. This should be uniformed to all State Members of the EU. Thus we can say that Dinosaurus SARL will be able to open a main insolvency proceeding in France as it is incorporated in France, most of the store are in France and 80% of the employees are in France which may determine that the central management and registered office is in France especially that Dinosaurus is not a “letterbox.

Another important factor is that most of the client come from France and hence, it can be ascertained by third parties that the registered office (COMI) is in France subject that the Court is agreeable to open a safeguard proceeding.

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

According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary = France.

**However**, Article 1 of the EIR 2000 states that ‘this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Article 2 EIR 2000 states that “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A. Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) *redressement judiciaire* (rehabilitation).

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

**Question 4.2 [maximum 5 marks]**

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.

[To be able to open a proceeding under the EIR recast, the following steps need to be considered as the EIR recast is applicable to public collective proceedings which also include interim proceedings governed by insolvency law on grounds for rescue, adjustment of debt, reorganization or liquidation:

1. Dinosaurus SARL must have the COMI in a Member State of the EU but the COMI must not be in Denmark.
2. The EIR Recast applies as from 26 June 2017.
3. The EIR recast only applies to proceedings which are listed in Annex A which list names of insolvency proceedings for 27 countries which was covered by the EIR recast.
4. EIR Recast does not cover proceedings related to insurance undertakings, credit institutions, collective investment undertakings, bank, investment entities or other entities and institutions which are covered by the Directive 2001/24/EC. ]

As the proceeding of Dinosaurus SARL shall be in France, the proceeding meets the above criteria and safeguard proceedings are permissible, the EIR recast shall be applied to the case.

**Question 4.3 [maximum 5 marks]**

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.

[Normally under secondary proceedings, distribution is made of the secondary asset pool in compliance with distribution and priority rights which prevail under the national law.

In respect of distribution, as per Article 8, the initiation of insolvency proceedings shall not affect the rights in rem of creditors (right to segregation or isolation settlement for collateral security) and rights of employees and detrimental acts.

We also need to consider that secondary proceedings can be prevented if the insolvency practitioner or debtors in possession make a request as per Article 38(3) of the EIR Recast if there is a "synthetic" secondary proceeding where the insolvency practitioner provides an undertaking in accordance to Article 36 and verdicts of the CJEU in *MG Rover Belux SA/NV* and *Collins & Aikman Europe SA*. ]

As secondary proceedings can only be opened in a territory where Dinosaurus SARL has an establishment. From the scenario, there is no mention that Dinosaurus SARL has any place of operations where it is any non-transitory economic activity with the support of any person and goods. Hence, we can say that the bank would not be able to open the secondary proceedings. **Good.**

In case the bank is able to proceed with the secondary proceedings, as per Annex A, insolvency proceedings can be opened in Italy (*fallimento*) but under the Italian law, mortgages inscribed over real estate are administered by a court-administered enforcement procedure. As a general rule, secured

creditors are not in a position to initiate individual enforcement actions to assets pertaining to the bankruptcy estate once an insolvency process has been initiated. No out-of-court individual enforcement of the financial institution for the bank's claim is possible under the Italian law.

We shall also need to consider the factors that may affect the distribution and virtual secondary proceeding as discussed above when considering the opening of the insolvency proceeding in Italy if Dinosaurus SARL is permitted to do so and how the distribution may be affected.]

**Total : 10/15**

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

**Total : 38/50**