INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) RESIT ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) resit assessment** for **Module 2A** of this course and must be completed by all candidates who **qualify for a resit exam for this module**.

The mark awarded for this assessment will determine your final mark for Module 2A. 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. Once you have submitted your assessment, you may not substitute your uploaded assessment for another. If you do, only the earliest submitted assessment will be marked.

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 (where this must be done is indicated under each question).

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3. No limit has been set for the length of your answers to each question. More often than not, one fact / statement will earn one mark, but it is also possible that half marks are awarded (this should be clear from the context of the question, or in the context of the answer).

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6. The final submission date for this assessment is **27 September 2021**. This assessment must be submitted to David.Burdette@insol.org via e-mail no later than 23:00 (11 pm) on **Monday 27 September 2021**.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] Total marks received on this question: 6

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

Which of the following statements **most accurately** reflects the main purpose of the Model Law?

(a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.

(b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency – it promotes a uniform approach to cross-border insolvency and aims to provide a procedural framework for co-operation between jurisdictions.

(c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.

(d) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protect the interests of all creditors and other interested persons, but not including the debtor.

The correct answer is B

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

(a) The “universal effect” of the insolvency laws and rules of State A in the jurisdiction of State B.

(b) The difficulty of agreeing multilateral treaties dealing with insolvency law.

(c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of the use of protocols in practice.

(d) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.

The correct answer is D

Question 1.3

Which of the following challenges to a recognition application under the Model Law is **most likely** to be successful?

(a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened.

(b) The foreign proceedings do not have a close equivalent in the jurisdiction of the enacting State where recognition is requested.

(c) There are already domestic insolvency proceedings opened in the enacting State in respect of the debtor of the foreign proceedings.

(d) The foreign representative is tasked with primarily looking after the interests of secured creditors.

The correct answer is D

Question 1.4

Which of the following statements **best illustrates** the so-called "safe conduct rule"?

(a) The foreign representative has standing in the courts of the enacting State without the need to meet any formal requirements such as a licence or consular action.

(b) Foreign creditors are entitled to individual notification of, *inter alia*, the commencement of local proceedings in respect of the debtor under the insolvency law of the enacting State, and of the time-limit to file claims in those proceedings.

(c) The enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for the recognition of a foreign proceeding.

(d) Foreign creditors have the same rights as creditors domiciled in the enacting State in respect of the commencement of (and participation in) local proceedings regarding the debtor under the insolvency law of the enacting State.

Question 1.5

For a debtor with its COMI in the UK and an establishment in Brazil, foreign main proceedings are opened in the UK and foreign non-main proceedings are opened in Brazil. Both the UK foreign representative and the Brazilian foreign representative have applied for recognition before the relevant court in South Africa. Please note that the UK has implemented the Model Law, Brazil has not implemented the Model Law and South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation). In this scenario, **which of the following statements is the most correct one**?

(a) The foreign main proceedings in the UK will be recognised in South Africa, but the foreign non-main proceedings in Brazil will not, because Brazil has not implemented the Model Law.

(b) Both the foreign main proceedings in the UK and the foreign non-main proceedings in Brazil will be recognised in South Africa because the debtor's COMI is in the UK and the debtor has an establishment in Brazil, while the Model Law does not contain a principle of reciprocity.
(c) Neither the foreign main proceedings in the UK nor the foreign non-main proceedings in Brazil will be recognised as a result of the principle of reciprocity adopted in South Africa.

(d) None of the statements in a, b or c are correct.

Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law is **false**?

(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(b) In the case of a foreign main proceeding, no automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(c) The commencement of domestic insolvency proceedings does not prevent or terminate the recognition of a foreign proceeding.

(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted and based on Article 21 of the Model Law, shall be either adjusted or terminated if inconsistent with the domestic insolvency proceedings.

Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State **primarily consider**?

(a) The court must strike an appropriate balance between the relief that may be granted and the persons that may be affected thereby.

(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors.

(c) The court should consider both a) and b).

(d) Neither a) nor b) should be considered by the court.

Question 1.8

Which of the statements below regarding the Centre of Main Interest (COMI) and the Model Law is **correct**?

(a) COMI is not a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

(c) While – for purposes of the Model Law - the COMI can move, the closer in time such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) All of the above.

Question 1.9

Which of the following types of relief have been declared beyond the limits of the Model Law?

(a) Enforcement of insolvency-related judgments.

(b) The indefinite continuation of a moratorium.

(c) Both a) and b).

(d) Neither a) nor b).

The correct answer is C

Question 1.10

When for the interpretation of the Model Law "its original origin" is to be considered (in accordance with article 8 of the Model Law), which of the following texts is likely to be of the **least relevance**?

(a) The UNCITRAL Guide to Enactment.

(b) The UNCITRAL Legislative Guide on Insolvency Law – Parts One, Two, Three and Four.

(c) The Practice Guide.

(d) The Judicial Perspective.

QUESTION 2 (direct questions) [10 marks in total] Total marks received on this question: 8

Question 2.1 [maximum 4 marks] 2

The chosen format of the Model Law is that of a model law that each State can decide on its own to adopt, in whole or in part, in its own legislation. Please provide **two (2) advantages** and **two (2) disadvantages** of this chosen format.

[The Model Law is not a convention or treaty, but a form of soft law aimed at providing procedural rules on access, recognition, relief and coordination in cross border insolvencies.

The advantages of this are that the Model Law is a flexible form of legislation that takes into account different approaches in national insolvency laws and the varying propensity for States to cooperate and coordinate in insolvency matters. The Model Law does not specify how the

cooperation and coordination is to be achieved, rather this is left to each jurisdiction to determine by application of its own domestic laws and practices.

The disadvantages are that the Model Law lacks the legal authority of a treaty and therefore the Model Law must be integrated as part of the existing insolvency law of the enacting State. Additionally, because a State can adopt the law in whole or in part, the unintended outcome has been that States have included the reciprocity provisions when enacting the Model law. These reciprocity requirements significantly undermine the effectiveness of the Model Law.

For full marks on this question it should also be mentioned, that the *format* of the model law makes it easy for the states to adopt, yet this also reduces the pressure for States to adopt it.

Question 2.2 [maximum 2 marks] 2

The following **two (2) statements** relate to particular provisions / concepts to be found in the Model Law. Indicate the name of **two** of these provisions / concepts, as well as the relevant article(s) of the Model Law, addressed in each statement.

Statement 1: "This Article imposes a duty on the court when it applies certain other articles of the Model Law that [….] the interests of the creditors and other interested persons [….] are adequately protected."
Statement 2: "This Article provides a non-exhaustive list […] of appropriate means by which one of the key four concepts of the Model Law can be implemented."

[Statement 1 – Balancing interests - Article 22 – Protection of creditors and other interested parties
Statement 2 – Means of cooperation – Article 27 – Forms of cooperation]

Question 2.3 [2 marks] 2

Explain what is meant by the so-called "hotchpot rule" and mention in which Article of the Model Law it is captured.

[The hotchpot rule is captured in Article 32 of the Model Law and is intended to avoid situations in which a creditor might gain more favourable outcomes than other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.]

Question 2.4 [2 marks] 2

Where more than one foreign insolvency proceeding has been opened against the same debtor, but not a domestic insolvency proceeding in the enacting State, there is an information duty on the foreign representative and a co-operation duty on the court in the enacting State. List the two (2) most relevant Articles in the Model Law that deal with these duties and briefly explain each duty.

[*Article 30 - Coordination of more than one foreign proceeding*, requires the Court to seek cooperation and coordination of foreign proceedings under articles 25, 26 and 27. The Court may modify or terminate any reliefs granted in order to achieve consistency and coordination of proceedings.

Article 18 – Subsequent information requires the foreign representative to inform court promptly of any change in status of the recognised foreign representative or status of their

appointment. The foreign representative shall also inform court of any foreign proceeding regarding the same debtor that becomes known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] Total marks received on this question: 9,5

The foreign representative of a foreign proceeding opened in respect of a corporate debtor in State B is considering whether or not to make a recognition application under the Model Law adopted and implemented in State A. The foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

Write brief essays under each of the following three questions:

Question 3.1 [3 marks] 2

What access rights are immediately available to the foreign representative in State A before he makes a recognition application? Why might these rights be beneficial to the foreign representative?

[Under Article 9, the a foreign representative is entitled to apply directly to a Court in State A. This frees the foreign representative from formal requirements such as licenses or consular action.

Article 11 gives the foreign representative a right to commence a local proceeding in State A on the conditions applicable in State A, no prior recognition of the foreign proceeding is required for this type of access.

Article 23 entitles an insolvency practitioner to initiate in State A an action to avoid or otherwise render ineffective acts detrimental to creditors. Article 24 entitles an insolvency practitioner to intervene in any local proceeding in which the debtor is a party.

These access rights are essential to the foreign representative because they will enable the foreign representative seek temporary "breathing space" and other reliefs necessary for optimal disposition of the insolvency.]

For full marks on this question, you should also mention the access rights in context of cooperation.

Question 3.2 [maximum 6 marks] 4,5

Summarise the **three key considerations the foreign representative** must weigh before he makes a decision to file for a recognition application and what are the **three key considerations by the court** in State A before it makes a decision on the recognition application?

[Key considerations for foreign representatives
A foreign representative should be guided by the provisions of Article 15 which sets out the evidential requirements for recognition of a foreign proceeding. Article 15 provides that:

(a) A foreign representative may apply to court for recognition of the foreign proceeding to which the foreign representative has been appointed.
(b) An application for recognition shall be accompanied by:
    (i) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(ii) A certificate from the foreign court affirming the existence of the foreign proceeding and appointment of the foreign representative; or
(iii) In the absence of the above two, any other evidenced acceptable to court of the existence of foreign proceeding and appointment of a foreign representative

(c) The application for recognition should be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
(d) The Court may require a translation of documents supplied in support of the application for recognition into the official language of State A.

Key considerations by the Court
In deciding whether the foreign proceeding should be recognised, the Court in State is limited to the jurisdictional pre-conditions in the definition of "foreign proceeding" as set forth in Article 2(a) of the model law.

Article 17 requires that the application for recognition of a foreign proceeding must be decided upon at the earliest possible time and recognition can be modified or terminated if it is shown that grounds for granting it were fully or partially lacking or have ceased to exist.

Except where there are policy grounds for denying a request (*Re: Dalnyaya Step LL, Cherkasove & Ors vs Olegovoch (2017) EWHC 756 (Ch)* the request shall be granted as a matter of course if the requirements of Article 15(2) of the Model Law are met.re

The Court of State A should not embark on a consideration of whether the foreign proceeding for which recognition is requested was correctly commenced under the applicable law of the foreign State.

The Court will determine whether:
(i) The foreign proceeding meets all the required characteristics;
(ii) Based on Article 6 of the Model Law, the relief application is not manifestly contrary to public policy of State A; and
(iii) The requirements in Article 17(1)(c) and (d) are met; and
(iv) Based on Article 3 of the Model Law, there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition a andf requested relief under the implemented Model Law in State A.

The foreign representative will have to demonstrate to the court that pre-recognition relief is urgently needed to protect the assets of the debtor or the interests of the creditors. If the foreign proceedings are non-main proceedings, the court may refuse to grant interim relief if it would interfere with the administration of a foreign main proceeding (Article 19(4) of the Model Law).

For full marks on this question, you should mention that the foreign proceedings must not be subject to a special insolvency regime based on Art. 1 (2) and also that the foreign representative must fulfill the requirements of art. 2 (d)

Question 3.3 [maximum 6 marks] 3

Summarise the **three key considerations the foreign representative** must weigh before he makes a decision to file for a relief application and what are the **three key considerations by the court** in State A before it makes a decision on the relief application?

[Key considerations for foreign representatives
Relief in available in two instances, on an interim basis and as a result of recognition.

Interim relief is available at the discretion of the court between the making of the application and a decision on that application (article 19).

Specified reliefs are available on recognition of main proceedings (article 20) and discretionary reliefs available for both main and non-main proceedings (article 21).

The principle is that relief granted to recognised insolvency proceedings should be consistent with the relief available to local proceedings.

Key considerations by the Court
Article 19 provides for the relief that may be granted upon application for recognition of a foreign proceeding. Interim reliefs may be granted when it is urgently needed to protect the assets of the debtor or interests of the creditor. The Court may refuse to grant relief where such relief would interfere with the administration of the foreign main proceeding.

Article 21 gives the court, in main or non-main foreign proceedings, discretion to grant appropriate relief necessary to protect the interest of the assets of debtor and interests of the creditor. In granting relief under this Article, court must be satisfied that the relief relates to assets that, under the law of the State, should be administered in foreign non-main proceedings or concerns information required in that proceeding.**]**

For full marks on this question, you should also address the following:

1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of he Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. Public policy exception: The court in State A should based on Article 6 of the Model Law also again verify that the relief application is not manifestly contrary to public policy of State A

QUESTION 4 (fact-based application-type question) [15 marks in total] Total marks received on this question: 8,5

Colombia Global Shipping (CGS) is a shipping company incorporated under the laws of Colombia. It has long-term English law governed shipping contracts with a company in Singapore (S) and a company in South Korea (SK). Each of these contracts contains a so-called *ipso facto* clause, allowing early termination of the contract upon one of the parties entering into insolvency proceedings. CGS has so-called “representative offices” in Argentina, Peru and Brazil, but these offices are mainly “letter boxes” and there are no employees stationed in these countries.

CGS does have a “proper” US office in Texas, where 20 employees work. Everything in the representative offices is done remotely from either the headquarters in Colombia or from the US office in Texas. While most of CGS’s assets are located in Colombia, CGS also has assets in the US and the UK. CGS further has bank accounts with local banks in the US, the UK, Argentina, Peru and Brazil, but its global operations are primarily financed by a number of bilateral loans in US dollars (USD) by a small number of local Colombian banks, with whom

CGS has a very close relationship. The total amount of CGS's bank debt is USD 50 million. In addition, CGS recently managed – through the savvy assistance of a well-connected Swiss banker – to issue private placement notes (PPNs) for a total amount of USD 10 million to three sophisticated Swiss private investors. The Swiss investors insisted that the PPNs be governed by English law.

Please Note:

For the purposes of this question it must be accepted that Colombia, Singapore, South Korea, the US and the UK have adopted and implemented the Model Law without any relevant modifications and that Argentina, Brazil and Peru HAVE NOT adopted the Model Law.

Question 4.1 [maximum 3 marks] 2

When CGS is informed that SK has filed for local insolvency proceedings in South Korea, CGS wishes to exercise its contractual right to terminate its shipping contract with SK early. However, the Korean liquidator explains that under Korean insolvency law *ipso facto* clauses are considered null and void. In addition, as the agreement is governed by English law, the Korean liquidator decides to apply before the relevant English court, under the Model Law as implemented in the UK, for recognition of the Korean insolvency proceedings as foreign main proceedings, and for appropriate relief so as to avoid an early termination by CGS of its shipping contract with SK.

How do you think the appropriate relief application by the Korean liquidator will be addressed by the English court, assuming that the Korean insolvency proceedings will be recognised as foreign main proceedings?

[Recognition of foreign main proceeding has the following three automatic effects:
(a) A stay of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
(b) A stay of execution against the debtor's assets; and
(c) A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

In *Fibria Celulose S/A v Pan Ocean Co Ltd (2014) EWHC 2124 (Ch)* court denied grant of appropriate relief as:

(a) It did not consider the intention of "appropriate relief" to include allowing the recognising court to go beyond the relief it would have granted in a domestic insolvency'
(b) In *Belmond Park Vs BNY Corporate Trustee Services (2011) UKSC 38 court clarified that ipso factor clauses are in principle valid and enforceable in UK Insolvency;*
(c) The parties should not have expected that under the chosen English law, the Court would apply Korean insolvency law;
(d) Accepting or rejecting ipso facto clauses is a policy decision and there is no good reason for court to prefer the policy decision in Korea over the policy decision in the UK.

It follows that English court would be reluctant to grant reliefs to the Korean liquidator that would not be available to a domestic liquidator. Further court would be reluctant to accept ipso facto clauses merely because a policy decision in Korea.

For full marks on this question it art. 21 (1) (a) should also be addressed since the judge in the Pan Ocean case mentioned that the service of a notice to terminate the shupping

contract on the "ordinary and well understood meaning of a phrase such as "the commencement or continuation of individual actions or individual proceedings"", as also supported by certain English precedents, is not the commencement or continuation of an individual action or proceeding within Article 21(1)(a) of the Model Law.

Question 4.2

When the general financial distress in the shipping sector globally also starts to affect CGS, it decides to open domestic insolvency proceedings in Colombia in which it was able to reach a restructuring agreement with all its creditors, except for the three Swiss holders of the PPNs who decided to completely refrain from participating at all in the Colombian insolvency proceedings of CGS. Since the restructuring agreement in Colombia meets the required thresholds of creditor support it is – according to Colombian (insolvency) law – binding on all the creditors of CGS, including the non-participating Swiss PPN holders.

The reason the Swiss PPN holders have not participated in the Colombian insolvency proceedings of CGS is because they would like to enforce their rights against CGS under English law and obtain full repayment of their claims under the PPNs instead of any amounts they would receive in terms of the compromise reached under the Colombian restructuring agreement of CGS. They are hopeful that the so-called "Gibbs Rule" under English law will help them in this respect.

Please Note:

The "Gibbs rule" is derived from an English case of 1890 and stands for the proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.

In view of these additional facts, please address the following questions:

Question 4.2.1 [maximum 4 marks] 2

What (if anything) can the Colombian liquidator do to avoid a situation where the assets of CSG outside of Colombia are available to the Swiss PPN holders?

[In *the Matter of OJSC International Bank of Azerbaijan and CIBR 2006 (2018*] *EWHC 59 (Ch)* (IBA case) an application was made to prevent challenging creditors from enforcing their English law claims while at the same time allowing the English court to recognise (pursuant to the Gibbs Rule) that the English law claims of the challenging creditors still exist and were not discharged. Court denied relief requested in the application because a permanent stay cannot be deployed a way around the Gibb's Rule.

In the IBA case Court posited that a foreign liquidator may apply for orders remitting the English assets to the foreign liquidation and therefore circumventing the Gibbs Rule.

The IBA case also noted that there are precedents for making a distinction between the strict definition of legal rights and their enforcement, when applying the Gibbs Rule.

Therefore in this case, the Colombian liquidator can promote a parallel scheme of arrangement to bring the assets CSG outside Colombia under the control of the Colombian liquidator.

Correct, but you first need to address whether the Columbian liquidator could apply in each jurisdiction for recognition of the Columbian insolvency proceedings of CGS as foreign main proceedings, as the COMI of CGS seems to be in Columbia (See Article17(2)(a) *juncto* Article 16(3) of the Model Law.)

Following recognition, the Columbian liquidator could – based on Article 21(2) of the Model Law – request the relevant court in the US and the UK to entrust the distribution of CGS's assets located in the US and the UK, respectively, to him/her as the foreign representative so that these assets could be transferred to Columbia and form part of the insolvency estate there.

Question 4.2.2 [maximum 4 marks] 2

What do you expect the considerations of an English court to be if the Colombian liquidator decides to request such appropriate relief under the Model Law as implemented in the UK which, in effect, prevents the Swiss PPN holders from enforcing their English law claims against CGS under the PPNs?)

[Article 21 gives the Court power to grant post recognition relief. Article 20 grants automatic mandatory relief in case the recognised foreign proceeding qualifies as foreign main proceeding.

Article 22 requires that in granting pre or post recognition relief, the interests of the debtor's creditor and other stakeholders must be considered and adequately protected.

The foreign representative will have to demonstrate to the court that such relief is urgently needed to protect the assets of the debtor or the interests of the creditors. If the foreign proceedings are non-main proceedings, the court may refuse to grant interim relief if it would interfere with the administration of a foreign main proceeding (Article 19(4) of the Model Law).

Based on Article 3 of the Model Law, the English Court will also verify that there are no existing international obligations (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.

The English court should, based on Article 6 of the Model Law, verify that the relief application is not contrary to public policy of the UK.]

For full marks onthis question, you should address the IBA case that has a similar pattern more detailed, i.e. how a request for indefinite stay would be tacled.

Question 4.2.3 [maximum 4 marks] 2,5

Assuming CGS is able to open domestic insolvency proceedings in the US and Brazil, discuss whether it is likely that a Colombian court would recognise the US and Brazilian foreign proceedings respectively under the Model law as implemented in Colombia?

[Article 17(2) of the Model Law requires the court to determine whether the foreign proceedings are recognised as either main or non-main. Determining COMI is central to whether foreign proceedings are recognised as main or non-main.

The term COMI is not defined in the Model Law, however, the UNCITRAL Guide to Enactment provides guidance and follows the interpretation of the COMI concept under the European Insolvency Regulation.

There are two key factors for determining COMI:

(a) The location where the central administration of the debtor takes place; and
(b) Which is readily ascertainable as such by creditors of the debtor

If the COMI of the debtor is in the jurisdiction where the foreign proceedings were opened, the foreign proceedings should be recognised as main (article 17(2)(a) of the Model Law). If the debtor only has an establishment (as defined in article 2(f) of the Model Law) in the jurisdiction where the foreign proceedings were opened, the foreign proceedings should be recognised as non-main.

There is a rebuttable presumption in article 16(3) of the Model Law that the debtor's registered office corresponds with its COMI.

The presumption of the COMI as the registered office in Colombia can be rebutted because the facts state that CGS had a "proper" US office in Texas, where 20 employees work. Most operations are carried out from either the headquarters in Colombia or from the US office in Texas. CGS has assets in the US and its global operations are primarily financed by a number of bilateral loans in US dollars (USD). It would thus appear the CGS's COMI is in the US where the central administration is conducted. At the very least there is an establishment in both the US and Brazil.

It is not likely that the presumption will be rebutted in this case. There is not an establishment in Brazil, but however one in the US.

Based on the facts in this case it can be argued that that the US may be recognised as a foreign main proceeding and the proceedings in Brazilian foreign proceedings as non-main.

Generally the date of commencement of the foreign proceedings is held to be the appropriate date for determining the debtor's COMI or the existence of an establishment. However, the US courts may take a slightly different approach based on the Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd) *(2nd Cir Appeals April 16, 2013)*]

*** End of Assessment ***

Total marks received: 32 out of 50