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).

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 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).

4. You must save this document using the following format: **[studentID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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6. 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 for 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.

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.

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.

The correct answer is C

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.

The correct answer is C

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).

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.

Testing

QUESTION 2 (direct questions) [10 marks in total] Total marks received for this question: 6

Question 2.1 [maximum 4 marks]

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.

[One of the advantages to adopting the Model Law is that it would provide helpful additions and upgrades to a state's domestic insolvency regime which will assist in resolving disputes in instances where there are disputes relating to cross border insolvency cases.

Another advantage adopting the Model Law is that it provides foreign representatives with the forum to engage in a multitude of actions which will allow them access to courts, recognition of a foreign proceeding and a transparent regime for foreign creditors.

One of the disadvantages is that the Model Law does not specify as to how co-operation and communication can be achieved. Therefore, such determination is left to the responsibility of each state to assess its own domestic laws on the determination of all co-operation and communications which could cause conflict if they have differing practices due to differing legislation.

Another disadvantage would be that should there be a conflict, the traditional procedures (eg: letters rogatory) are extremely time consuming and therefore possibly slow down the process of resolving the dispute as courts may not be able to communicate directly with foreign courts together with the necessary involvement of all the appropriate parties.]

The answer should relate to the *format* of the Model Law. Advantages of this format is that it is flexible and easy to adopt. Disadvantages are that contrary to a convention og treaty there is no pressure for the States to adopt it and the flexibility does risk the end result not to be as uniform.

Question 2.2 [maximum 2 marks]

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 - the article in question is concerned with the protection of creditors and other interested persons and can be found in article 22 of the Model Law. The enacting state court must find a balance between the relief granted to the foreign representative and the interests of the affected persons by the relief.

statement 2 - the article in question relates to means/forms of co-operation may be implemented by any appropriate means and can be found in article 27 of the Model Law.]

Question 2.3 [2 marks]

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 aimed to ensure that a certain creditor in the same class as other creditors, does not obtain more favorable treatment than any other creditor of the same class by obtaining payments of the same claim in different jurisdictions. the hotchpot rule can be found in article 32 of the Model Law.]

Question 2.4 [2 marks]

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 18 of the Model Law stipulates that a foreign representative has a duty inform the court of subsequent information such as any substantial change in the status of the recognized foreign proceeding and any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 30 of the Model Law deals with the co-ordination
of more than one foreign proceeding. Article 30(c) states that after recognition of another foreign non main proceeding, the court shall grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings.]

QUESTION 3 (essay-type questions) [15 marks in total] Total marks received on this question: 12

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]

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?

[One of the access rights immediately available to the foreign representative is legal standing in terms of article 9 of the Model Law. Auto tickle nine confers the right of direct access and allows the foreign representative to apply directly to a court in state A for recognition.

Furthermore, the foreign representative can open domestic insolvency proceedings in terms of article 11 of the Model Law. In terms of article 11, The foreign representative is entitled to apply to commence a proceeding in state A if the conditions for commencing such a proceeding or otherwise met.

These rights all beneficial to the foreign representative as if they are combined with articles 25 to 27 of the Model Law which relates to cooperation and the court in state A can assist a foreign representative without having to be concerned about the status in state B of the foreign representative. Another benefit of the access and cooperation provisions are that it saves time and costs whilst also ensuring that day is not too much of a value destruction and a value enhancement is promoted instead.]

Question 3.2 [maximum 6 marks]

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?

[the foreign representative must first verify whether he or she qualifies as a foreign representative in terms of the definition of "foreign representative" in article 2(d) of the Model Law. Article 2(d) states:

"Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

The foreign representative must also consider whether the foreign proceedings will qualify as such as per the definition of foreign proceedings in terms of article 2(a) of the Model Law.

Article 2(a) states:

"Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

The third key consideration that the foreign representative must weigh up is in terms of exclusions. Should the debtor be an entity subject to a special insolvency regime in state B, then the foreign representative must first check if the foreign proceedings are excluded in state A in terms of article 1(2) of the Model Law of state A.

A key consideration that the court in state A needs to take into account is firstly that it needs to check whether there are no existing international obligations of state A that may conflict with the granting of a recognition application under the Model Law of state A. This is based on article 3 of the Model Law which states that should the Model Law conflict with any treaty or other form of agreement to which it is a party with one or more other states, the treaty or agreement provisions will prevail.

another consideration is that the court in state A must take cognizance of the public policy exception based on article 6 of the Model Law. Article 6 states that the Court may refuse to take an action if the action would be contrary to the public policy of the state. Therefore the court in state A would need to verify that the relief is not contrary to public policy.]

For full marks on this question, you should also address the formal requirements in art. 15 and the judicial scrutiny in articles 16 and 17.

Question 3.3 [maximum 6 marks]

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?

[A foreign representative must consider both Pre recognition and post recognition relief. Pre recognition relief can be considered by a court should the foreign representative in its application request urgent interim relief under the terms of article 19 of the MLCBI if for example: it is in the interest of creditors to stay the execution against the debtor's assets (article 19(1)(a) of the Model Law) or entrusting the administration of the debtor's assets located in the State to the foreign representative in order to protect and preserve the value of assets of if the assets are perishable, susceptible to devaluation or in jeopardy (Article 19(10(b). It must be borne in mind that the court may refuse to grant the relief under this article

if the relief would interfere with the administration of the foreign main proceeding as per article 19(4).

Post recognition relief which can be considered by the foreign representative is in terms of article 21 of the MLCBI. The relief claimed in terms of this article is similar to article 19 in that the court may stay the commencement or continuation of individual actions concerning the debtor's assets (article 21(1)(a) and it can also stay the execution (Article 21(1)(b)) against the debtor's assets or suspend (Article 21(1)(c)) the right to transfer or dispose of any of the debtor's assets. The relief can also be extended to the providing of examination of witnesses and the collation of evidence and information relating to the debtor's affairs (Article 21(1)(d)). The court may also entrust the administration or realization of the debtor's assets to the foreign representative (Article 21(2). However, in the case of a foreign main proceeding there will be automatic relief in terms of article 20 of the Model Law.]

A key consideration that the court in state A needs to take into account is firstly that it needs to check whether there are no existing international obligations of state A that may conflict with the granting of the relief under the Model Law of state A. This is based on article 3 of the Model Law which states that should the Model Law conflict with any treaty or other form of agreement to which it is a party with one or more other states, the treaty or agreement provisions will prevail.

Another consideration is that the court in state A must take cognizance of the public policy exception based on article 6 of the Model Law. Article 6 states that the Court may refuse to grant the relief sought if such relief would be contrary to the public policy of the state. Therefore, the court in state A would need to verify that the relief is not contrary to public policy.]

For full marks on this question, art. 22 on adequate protection, should also be mentioned.

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

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?

[Since the Korean insolvency proceedings will be recognized as foreign main proceedings the English court is provided with the discretionary power to grant relief in the form of urgent include interim relief In terms of article 19 of the Model Law, as well as other post recognition relief in terms of article 21 of the Model Law automatic relief in terms of article 20.

Article 21(1)(a) of the Model Law gives the English courts the necessary powers to protect the assets of the debtor or the interests of the creditors and grant relief including staying the commencement or continuation of proceedings concerning the debtor's assets, rights, obligations or liabilities.

Furthermore, in terms of Article 20(1)(c) of the Model Law the Court can suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor.

In terms of Article 21(1)(g) the court must ascertain whether the relief is appropriate ie: to make available the relief that would have been available under Korean insolvency law.

Should be Korean liquidator apply for relief in terms of article 21, the English court will have to decide whether it is in the best interests of the creditors and/or the debtor, to suspend CGS's attempts to cancel the agreement with SK, also ensuring that such relief will not interfere with the administration of the main insolvency proceeding.

In terms of the Pan ocean[1] case The English court ruled that it cannot restrain the party from serving a termination notice and in Belmond Park v BNY Corporate Trustee Services[2] the English Supreme Court clarified that ipso facto clauses are in principle valid and enforceable in a UK insolvency.]

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

[1] Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch).

[2] Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38.

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]

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?

[the Colombian liquidator may take actions in terms of article 23 of the Model Law to avoid acts detrimental to creditors.]

For full marks on this question, the answer should mention the following:

1. Outside of Columbia, CGS has assets in the US and in the UK. As both jurisdictions have implemented the Model Law, 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.)
2. 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.
3. However, in order for the US court and UK court, respectively, to provide the Columbian liquidator with this relief, the court must be satisfied that the interests of creditors in the US and the UK, respectively are adequately protected.
4. In particular the English court (see answer to Question 4.2(b) below) may be hesitant to conclude that the English law interests of the three Swiss PPN holders are adequately protected if this type of relief is granted to the Columbian liquidator.

Question 4.2.2 [maximum 4 marks]

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?

[Type your answer here]

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

1. The fact pattern here is similar to that in the *IBA* case. In the *IBA* case an application was made by the Azeri foreign representative for an indefinite continuation of the automatic moratorium based on Article 20 of the Model Law that followed an earlier recognition order based on Article 17(2)(a) of the Model Law in which the Azeri insolvency proceedings were recognised as foreign main proceedings.
2. In the present case, the Columbian liquidator would also have the benefit of the automatic moratorium of Article 20 of the Model Law following recognition of the Columbian insolvency proceedings of CGS by the English court as foreign main proceedings. However, once the restructuring agreement has become final and binding on all CGS creditors, an English court may hold that – as a matter of substance - the original purpose of the Columbian insolvency proceedings of CGS was achieved and the insolvency has run its course.
3. Assuming that the Columbian liquidator would – in effect – also request an indefinite moratorium so as to avoid that the Swiss holders of the PPNs can exercise their English law rights under the PPNs, the real issue will be whether the English court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the Swiss holders of the PPNs from enforcing their English law rights in accordance with the Gibbs Rule and / or (ii) prolong the stay after the Columbian insolvency proceedings have come to an end.

Question 4.2.3 [maximum 4 marks]

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?

[It is unlikely that a Colombian court would recognize the US and Brazilian foreign proceedings under the Model Law, as The USA and Brazil have not adopted the Model Law therefore they have not accepted the provisions and stipulations of the Model Law.

They have – which is also mentioned in the note under Q4.

Furthermore, the US and Brazilian foreign proceedings would not qualify as a foreign main proceedings as the COMI of CGS is neither in the USA or Brazil therefore it should not be recognized as a foreign main proceeding by the Colombian court (article 17(2)(a) of the Model Law).

for the US and Brazilian proceedings to be recognized it must be shown to the Colombian court that the CGS has at least an establishment in these countries (Article 17(2)(b) of the Model Law. An establishment is defined as “any place of operations where the debtor carries out a non transitory economic activity with human means and goods or services”. (Article 2(f) of the Model Law).

Based on the above facts CGS only has a bank account in the USA in Brazil which in practice no operations were run through. This therefore falls short of the definition of an establishment

and due to the fact that there is also no COM I as well as an establishment the Colombian court would most likely decline to recognize the foreign proceedings.]

There are 20 employers in the US and the office in the US would most likely qualify as an establishment.

*** End of Assessment ***

Total marks received: 29