



**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.**
5. Before you will be allowed to upload / submit your assessment, 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. The final submission date for this assessment is **27 September 2021**. This assessment must be submitted to [David.Burdette@insol.org](mailto: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: 6ju**

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.**

### 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.

The correct answer is B.

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

#### 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.

Two advantages of the format of the Model Law are (1) the format allows for flexibility as the Model Law's form is not jurisdiction specific and allows for differing approaches in national insolvency laws and the varying propensities of States to co-operate and co-ordinate in insolvency matters; and (2) the format allows for a more cost and time efficient process for dealing with cross-border insolvencies.

Two disadvantages of the format of the Model Law are (1) the format of the Model Law as a 'soft law' allows for domestic amendment in the adoption process which risks depriving the Model Law of its meaning and limits any uniformity and; (2) the format of the Model Law means that widespread harmonisation is unlikely to be achieved because adoption is left to individual States, rather than global, regional or bilateral agreements.

### **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 – Article 22 – balancing interests

Statement 2 – Article 19 – relief

The correct answer regarding statement 2 is art. 27.

### **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 captured in Article 32 and intends to avoid situations in which a creditor may obtain more favourable treatment than the other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.

### **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.

The ongoing duty of information is set out in Article 18. Article 18 states that the foreign representative is obliged to update the court in the enacting State promptly where there is any substantial change in the status of the foreign proceeding or the status of their appointment. The representative must also update the court promptly where any other foreign proceedings relating to the common debtor becomes known to them.

Article 30 – coordination of more than one foreign proceeding. Article 30 require that any relief granted to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding. This is an example of the co-operation duty of the court to provide the same relief in concurrent foreign proceedings.

**QUESTION 3 (essay-type questions) [15 marks in total] Total marks received on this question: 11,5**

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]**

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?

The access rights provided to the foreign representative in article 9 of the Model Law grant the foreign representative automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. The status in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts. Article 11 of the Model law would also entitle the foreign representative to apply for the opening of domestic insolvency proceedings in State A, provided that the requirements under Article 11 could be met.

These rights ensure that local tools are available to the foreign representative of State A without the need for separate proceeding in the enacting State to obtain standing – this is beneficial as it saves time and cost. As a result, value destruction can be avoided and value enhancement is being promoted.

**For full marks on this question, you should also address access rights in relation to cooperation**  
**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?

For the foreign representative:

1. Article 15 of the Model Law sets out in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement is required to accompany the recognition application that identifies all foreign proceedings in respect of the debtor that are known to the foreign representative (Article 15(3) of the Model Law). The foreign representative is also subject to ongoing disclosure obligations under Article 18 to update the court of any changes in the status of the foreign proceedings; their appointment and/or whether any other foreign proceedings have become known to the foreign representative.

2. In accordance with Article 5, the foreign representative must ensure that the law and courts in State A enable him/her to act abroad as a foreign representative in recognition proceedings. In addition, Article 24 of the Model Law enables the foreign representative to intervene in any



local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements for this. The foreign representative should therefore consider whether local requirements in State A allow for him/her to intervene in any ongoing proceedings, where applicable.

3. The foreign representative should ensure under Article 6 of the Model Law that the recognition application is not manifestly contrary to the public policy of State A.

For the court:

1. Based on Article 3 of the Model Law, the court should check that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the Model Law in State A.

2. In accordance with Article 17, the court must ensure that the application for recognition is decided upon at the earliest possible time.

3. The court in State A is able to rely on the rebuttable presumption set out in Article 16 of the Model Law, under the provisions of Article 17 of the Model Law the court will have to assess whether the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is located in State B then it follows that the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

For full marks on this question, you should also address art. 2 (a) and 2 (d) and the exclusions in art. 1(2).

### 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?

For the foreign representative:

1. In accordance with Article 3 of the Model Law, the foreign representative should ensure there are no existing international obligations of State A that may conflict with granting the requested relief.

2. The foreign representative should consider what type of relief is available to him in advance of the application being made. There are three types of relief available – urgent relief (Article 19); automatic relief (Article 20) and discretionary relief (Article 21). If urgent relief under Article 19 is sought, the foreign representative should consider if further relief is needed to urgently protect the assets of the debtor or the interests of the creditors.

3. Article 22 of the Model Law clarifies that the court must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. These interests must be considered and weighed up by the foreign representative before a decision is made to file for a recognition application.

For the court:

1. In accordance with Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law requires the court in State A to consider and 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. In accordance with Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A that may conflict with granting the requested relief in State A.

3. The court in State A should consider and verify that the relief application is not manifestly contrary to public policy of State A, in accordance with Article 6 of the Model Law.

For full marks on this question, you should write just a little more on art. 21 (3). Otherwise great answer.

**QUESTION 4 (fact-based application-type question) [15 marks in total] total marks received on this question: 12**

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?

Recent UK legislation (CIGA 2020) does allow for the termination of certain ipso facto clauses where the debtor has become subject to certain UK insolvency proceedings. CGS is only subject to insolvency proceedings in South Korea, and therefore the legislation under CIGA 2020 does not apply to the facts of this case.

As such, the relief requested by the Korean liquidator under Article 21(1)(g) (to make available the relief that would have been available under Korean insolvency law) is likely to be rejected by the English Court in accordance with the case of *Fibra Celulose S/A v Pan Ocean Co Ltd*. The English Court will not consider the relief sought as appropriate where it goes beyond the relief that would be granted in a domestic insolvency. In the case of *Belmond Park*, the English Supreme Court clarified that ipso facto clauses are (in principle) valid and enforceable in a UK insolvency. This is contrary to the position in Korean insolvency law. In the case of CGS, the Korean liquidator should not expect the English Courts to apply Korean insolvency law.

For full marks on this question, you should also consider art. 21 (a).

#### **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]**

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 Rule in Gibbs existing because English law regards the discharge or modification of contractual debts as a matter to be governed solely by the governing law.

law of the contract. In this regard, it has been argued that the Rule in Gibbs provides certainty to parties that choose to contract under English law because it gives effect to those parties' expectations as to how their contractual liabilities will be discharged.

In the BTA case, the foreign representative applied to the English court for an order that the automatic stay of Article 20 of the Model Law was made permanent. The relief application was unopposed and no opposing creditors emerged at the time of the application. The liquidator may be able to apply for a stay on the PPN holders claim to the assets of CSG where the application is unopposed and includes no opposing creditors (this is unlikely). In addition, any application for a stay may not allow the court to balance the interests of creditors pursuant to Article 22, as the rights of the PPN holders under English law may be negated by the stay on their claim to the assets of CSG.

If no relief application is able to be made, is likely that the Colombian liquidation is unable to avoid a situation where the assets of CSG outside of Colombia are available to the Swiss PPN holders.

In accordance with the Court of Appeal's decision in the IBA Case, the insolvency proceedings in Colombia cannot be used by the liquidator to circumvent the Rule in Gibbs. The PPN holders have not submitted to the Colombian proceedings. As such, the Rule in Gibbs applies in favour of the PPN Holders and their claim to enforce their rights against CGS under English Law cannot be compromised by the Colombian proceedings.

Above is correct, but you first need to address if the proceedings in Colombia *can* be recognised according to Art. 17(2) and 16.

#### **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?

The court will need to consider their discretion to balance interests under Article 22 of the Model Law. The court must strike an appropriate balance between the relief that may be granted to the foreign representative and the interest of the persons that may be affected by the relief. In the case of Pan Ocean, the court had to consider whether the rights of a creditor under English law could ever be 'adequately protected' by intervention which if effect and intention negates or varies the rights of the creditor. On this basis, the English court will need to consider whether the rights of the Swiss PPN holders would be negated or varied by any relief application granted to the Colombian liquidator.

The English court should also consider whether or not the Colombian liquidator could have sought to promote a parallel scheme of arrangement in the UK. Following the adoption of CIGA 2020, the UK now also has a new so-called 'super' scheme of arrangement which also provided for a cross class cram down. In applying for a stay under article 21 of the Model Law, the Colombian liquidator is intending to override the substantive rights of the PPN holders under the proper law governing their debts. As such, according to the Court of Appeal in the IBA case, any court dealing with a request for appropriate relief will want to see discussion of a scheme of arrangement or super scheme of arrangement under CIGA at the preparatory stage in advance of the relief application.

For full marks on this question, you should discuss the indefinite stay more and discuss the IBA case in more detail.

#### **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 the Colombian court would recognise the Brazilian domestic proceedings as foreign proceedings as GCS has no establishment in Brazil in accordance with Article 2(f) and Article 17(2)(b) MLCBI. GCS has a bank account with a local bank in Brazil, however, the key to determining whether there is an establishment is where the operations of a company are. The Judicial Perspective at para 140 clarifies that “the presence alone of goods in isolation or bank accounts does not, in principle satisfy the requirements for classification as an establishment”. A bank account does not constitute an establishment. There is little connection of GSC to Brazil by way of operations as the finance provided to GSC is by way of US\$ loans and the PPNs are governed by English Law. Therefore, as Brazil is not determined to be GSC’s COMI and GSC does not have an establishment in Brazil, it is unlikely that the Brazilian domestic proceedings would be recognised as a foreign proceedings for the purposes of the Model Law.

It is likely that the Colombian court would recognise the US domestic proceedings as foreign proceedings as GSC has a ‘proper office’ in Texas, USA. In order to be recognised as foreign non-main proceedings, GSC are required to have an establishment in the US. Establishment is defined in the Model Law in the same way that the term is defined in the EIR: “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”. 20 employees work at GSC’s office in Texas. In addition, GSC has assets located in the US, US bank accounts and the global operations are financed by bilateral loans in \$US dollars. Therefore, as GSC has an establishment in the US, it is likely that the US domestic proceedings would be recognised as foreign proceedings for the purposes of the Model Law.

**\* End of Assessment \***

**Total marks received: 37,5**