



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4B

BRAZIL

This is the **summative (formal) assessment** for **Module 4B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 4B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment4B]**. An example would be something along the following lines: 202122-336.assessment4B. **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 via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
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]

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

Indicate the **correct answer** regarding bankruptcy legislation in Brazil: [zero]

- (a) The Bankruptcy Law regulates the liquidation – but not the reorganisation – of any individual or legal entity with activities in Brazil.
- (b) The former Civil Procedure Code regulates the reorganisation of non-business individuals and legal entities.**
- (c) The current Bankruptcy Law contains a section addressing cross-border bankruptcies. [correct answer]
- (d) The Bankruptcy Law does not allow companies belonging to the same economic group to file for restructuring jointly.

Question 1.2 [zero]

Which of the following statements is **correct** with regards to the Brazilian judiciary?

- (a) Brazil has a single apex court: the Superior Court of Justice, which is in charge of constitutional issues.
- (b) Labour disputes take place at a specialised segment of the judiciary, composed of labour courts, courts of appeal and a superior court. [correct answer]
- (c) Insolvency proceedings take place at the federal-level judiciary (as opposed to the state-level judiciary).**
- (d) The nomination of an individual as a judge of a bankruptcy court is the result of an election by popular vote from residents within that particular judicial district.

Question 1.3 [1 mark]

Select the **false statement** concerning security rights within the Brazilian legal system:

- (a) A pledge is a lien that may be constituted over both movable and immovable assets.**
- (b) Despite being a lien over immovable property, mortgages may also be used to offer aircrafts and vessels as security.

- (c) The *antichresis* is a rarely used type of security, the purpose of which is to assign the income from an immovable property to the guaranteed party.
- (d) Fiduciary titles are increasingly used as a security due to the fact that this guarantee allows for the guaranteed party to take possession of the collateral and sell it outside a bankruptcy proceeding, as long as certain conditions are met.

Question 1.4 [1 mark]

Which of these parties **is allowed** to file for a judicial recovery case under the terms of the Bankruptcy Law?

- (a) A *sociedade de economia mista* (a company whose majority equity interest belongs to the Federal, State or local government).
- (b) An accounting firm.
- (c) An individual who carries on a business activity without the use of a legal entity.
- (d) An insurance company.

Question 1.5 [1 mark]

Concerning corporate liquidation, indicate the **incorrect** statement below:

- (a) The Bankruptcy Law provides the means for the debtor to file a voluntary liquidation proceeding.
- (b) None of the gateways for the involuntary liquidation of a debtor require the creditor to actually prove the balance sheet insolvency of the debtor.
- (c) A debtor has a 10-day period, after service of process, to present his defence against a creditor seeking its liquidation.
- (d) A decision from the bankruptcy court declaring the bankruptcy of a debtor is unappealable.

Question 1.6 [1 mark]

Which of the following claims has the **highest priority** under a bankruptcy proceeding?

- (a) Fees payable to the judicial administrator and its auxiliaries.
- (b) Tax-related fines.
- (c) Administrative expenses of the estate.
- (d) Unsecured claims.

Question 1.7 [zero]

A debtor under judicial recovery has the following creditors:

- 50 creditors in Class I (workers and labour-related claims)
- 3 creditors in Class II (creditors secured by *in rem* guarantees)
- 300 creditors in Class III (unsecured creditors)
- 200 creditors in class IV (claims held by micro and small enterprises)

The total amount of debt owing in each class is the following:

- BRL 1 million in Class I
- BRL 5 million in Class II
- BRL 50 million in class III
- BRL 30 million in Class IV

Assuming all creditors are present at the debtor's general meeting of creditors, **indicate the only true statement** regarding the approval of the plan:

- (a) The approval of the plan in Class I is solely dependent on its approval by creditors whose claims amount to a quantity in excess of BRL 0.5 million.
- (b) **The approval of the plan in Class II is solely dependent on a majority by head count.**
- (c) The approval of the plan in Class III depends on a double majority: by head count and by the total amount of claims. **[correct answer]**
- (d) The approval of the plan in Class IV is solely dependent on favourable votes by creditors whose claims exceed BRL 15 million.

Question 1.8 [1 mark]

Which of the following documents **needs to be** presented by the debtor at the moment of filing for judicial recovery?

- (a) **A full nominal list of creditors.**
- (b) Accounting statements for the last financial year for the current administrators of the company.
- (c) A judicial recovery plan.
- (d) A list with a brief description of the contracts entered into by the debtor in the last financial year.

Question 1.9 [1 mark]

Indicate the **only correct statement** below relating to the cramdown of a judicial recovery plan:

- (a) "Cramdown" is a doctrine that allows for creditors to present their own alternative reorganisation plan.
- (b) There are no statutory provisions on cramdown under the current Bankruptcy Law, it is a judicially-created doctrine.

(c) Among the criteria that must be met for a cramdown to be imposed, the plan needs to receive favourable votes from over half the total amount of claims in each of the classes of creditors that were present at the general meeting.

(d) A cramdown cannot be imposed if the judicial recovery plan entails the discriminatory treatment of creditors within the class that rejected it at the general meeting of creditors.

Question 1.10 [1 mark]

Select the **correct statement** from the options below regarding extrajudicial recoveries:

(a) Extrajudicial recoveries allow for a larger set of debtors to seek their reorganisation in comparison to the set of debtors that are allowed to file for judicial recovery.

(b) Extrajudicial recoveries do not allow the debtor to restructure labour claims.

(c) Extrajudicial recoveries represent a consensual solution to a financial crisis, as extrajudicial plans may not be imposed on dissenting creditors.

(d) Extrajudicial recoveries do not allow the debtor to dispose of its assets free of any encumbrances, unlike judicial recoveries.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] [2 marks]

Cite **two (2) faulty actions** that could lead to the debtor's administration being removed during a judicial recovery case.

1. The debtor or its managers have acted with malice, simulation or fraud against the interest of its creditors; and
2. The debtor its managers have refused to provide information requested by the judicial administrator or the other Committee members.

Question 2.2 [maximum 3 marks] [3 marks]

State the **three (3) manners or ways** by which the assets of the bankrupt estate may be sold by the judicial administrator during a liquidation procedure.

The three manners by which the assets of a bankrupt estate may be sold by the judicial administrator include:

1. By electronic, in person or hybrid auction;
2. By a competitive procedure promoted by a specialist agent;
3. By any other modality, as long as they approved under the terms of the Bankruptcy Law.

Question 2.3 [maximum 2 marks] [2 marks]

State **two (2) acts** that may be rendered ineffective towards the bankrupt estate if carried out whilst the "suspect period" of a bankruptcy proceeding was in effect.

Two acts that may be rendered ineffective towards the bankrupt estate if carried out during the suspect period include:

1. Payment of by the debtor (within the suspect period) of debts that have not yet fallen due, by any means whereby the claim is extinguished, including advances on a given note payable; and
2. The waiver of an inheritance or legacy during the two years preceding the decree of bankruptcy.

Question 2.4 [maximum 3 marks] [3 marks]

Identify **three (3) changes** introduced to the Brazilian insolvency legal system due to the enactment of Federal Law 14.112/2020.

Three changes introduced by Federal Law 14. 111/2020 include:

1. The possibility of creditors presenting a judicial recovery plan for the debtor in certain cases;
2. The stimulus to the use of alternative dispute resolution procedures such as mediation; and
3. Substantial and procedural consolidation for groups for filing judicial recoveries.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks] [3 marks]

How is the judicial recovery for micro and small enterprises different from a regular judicial recovery?

1. There is no judicial administrator which makes the proceeding much less expensive when compared to regular restructuring,
2. A general meeting of creditors is not called.
3. The plan encompasses all existing claims at the time of filing, even if that are not yet due (except claims relating to borrowing official funds, tax claims and other exceptions. **[how about the regular judicial recovery?]**)
4. The plan may only provide for a maximum of 36 months instalment payments of equal and successive amounts **[any grace period?]**
5. The plan must also provide for authorisation by the judge for the debtor to increase expenses of hire employees

Question 3.2 [maximum 5 marks] [5 marks]

What is a “claim for restitution” under a bankruptcy procedure? How does it work?

Brazilian Bankruptcy Law grants certain parties the right seek restitution of assets or funds in the possession of the estate. In other words, a third party has the right to restitution of assets that belong to him but are currently in the possession of the bankrupt estate.

Where an asset was sold on credit within 15 days prior to the onset of bankruptcy, the Bankruptcy Law authorises the return of the asset (but only if the asset has not been disposed of)

The law also allows for restitution in cash which means:

1. the appraised value of the if the asset no longer exists or the price the asset was sold for, if the asset was sold.
2. The amount delivered to debtor resulting from an advance on export exchange contract;

3. The amount delivered to the debtor by the bona fide contracting party (where contract declared void or ineffective);
4. The amount of withholding taxes, taxes due for subrogation and amounts received by collecting agents and not transferred to government

It is also worth noting that the amounts due as a result of a restitution lawsuit must be paid in priority to all other claims, including super priority claims.

Question 3.3 [maximum 5 marks] [3 marks]

Describe the process of proof of claims for a creditor, under a judicial recovery case, who (i) was not listed in the first list of creditors (presented by the debtor) and (ii) for a creditor who was not listed in the second list of creditors (presented by the judicial administrator).

[The proof of claim process for judicial recovery is basically the same as the procedure in bankruptcy claim:

- (i) After the first list is published (which includes the creditors listed by the debtor himself, creditors that are subject to the judicial recovery process have 15 days to submit their proof of claim to the judicial administrator. During this 'administrative phase, the creditor does not incur any costs even if the claim is rejected by the judicial administrator. Although this sometimes happens, there is no legal provision mandating that the judicial administrator allow the debtor to present a defence.
- (ii) After the judicial administrator decides on the proof of claims, he proceeds to publish a second list. This is based on the debtor's list, debtor's accounting books, commercial and tax documents and the proof of claims submitted by the creditors. This publication is done in the public press. This is known as the judicial phase of the proof of claims. Any claim made at this stage may be challenged and the creditor may argue a claim is missing and must be listed. At this stage, a creditor who loses the challenge will be on the hook for costs and may be ordered to pay the associated legal fees and judicial costs. Where the creditor misses the 15-day period, this strips the creditor of his voting right and also makes the creditor vulnerable for costs. **[what is the term to oppose the second list? Who is notify to answer the opposition?]**

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

Braz Bank is a Brazilian bank. The financial institution has had considerable success lending to distressed debtors. Nonetheless, a series of risks are associated with this activity. Just recently one of its borrowers, Brazil Empreendimentos Ltda (Empreendimentos), has defaulted on a loan.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks] [4 marks]

The loan Empreendimentos has defaulted on was valued at BRL 1,000,000 (one million reais). Due to Empreendimentos' default, an acceleration clause came into effect and caused the entire value of the contract to mature. Given that the loan agreement met all the criteria for making it an extrajudicial executive title under the Civil Procedure Code, Braz Bank's initial step was to protest the contract before a protest officer, making it public that Empreendimentos had defaulted on it. Despite this measure, Empreendimentos did not cure its breach and the loan remains unpaid.

Does Braz Bank have grounds for filing an involuntary bankruptcy proceeding against Empreendimentos? Is there any defence that may be presented by Empreendimentos in order to ensure that the court will not declare its bankruptcy under any circumstances?

Given that Empreendimentos has (without a relevant reason under law) not paid its debt to Braz Bank which is certain on its value and Braz Bank has protested before a protest officer (given that the loan agreement met the criteria for a extrajudicial title) and the value of the loan exceeds 40 minimum wages, Braz Bank can present has grounds to file an involuntary proceedings against Empreendimentos.

In circumstance Empreendimentos may pay the loan and then argue that the grounds no longer exist for it to be declared a bankrupt. **[the answer should have mentioned the defense referred to in article 96 of the Bankruptcy Law.]**

Question 4.2 [maximum 5 marks] [4 marks]

Suppose, additionally, that the referred loan agreement between Braz Bank and Empreendimentos was also secured by a mortgage over land valued at BRL 350,000 (three hundred-and-fifty thousand reais). Before Braz Bank took any additional measure against Empreendimentos, the debtor voluntarily filed for a judicial recovery proceeding, the processing of which was accepted by the court. The list of creditors presented by the debtor upon filing for judicial recovery showed the following four (4) creditors in Class II (creditors secured by *in rem* guarantees):

- Braz Bank SA: BRL 350,000;
- Banco Enterprises SA: BRL 125,000;
- Brasil Autoparts SA: BRL 100,000;
- Oil Brasil SA: BRL 100,000.

The complete list of creditors (also portraying Classes I, III and IV) has just been published in the official press. A few rumors have come to Braz Bank's attention concerning the fact that Brasil Autoparts SA and Oil Brasil SA are likely to reject the recovery plan that Empreendimentos has been working on. Should the rumors show themselves to be accurate, is Empreendimentos still capable of having its recovery plan approved at a general meeting of creditors? Would there be grounds for a cramdown?

The starting point is that the mortgage value of BRL 350,000 means that Braz Bank's claim would only be secured up to the value of the mortgage. The amount owing that is not covered by the value of the mortgaged land which is the remaining 650 BRL would be considered unsecured.

The fact that Empreendimentos has filed for judicial recovery which has been accepted by the court means that the court would have ordered the commencement of the stay period and appointed a judicial administrator. The stay takes effect as soon as the restructuring process is accepted by the judge. It therefore means that Braz would not be able to independently bring proceedings to wind up Empreendimentos.

Class II creditors

Creditors to reject recovery plan that make up 200k –

Can plan still succeed? What about cram down?

Pursuant to article 58, the judge may grant judicial recovery based on a plan that has not been approved, provided it has obtained:

1. The favourable vote of over half of the all creditors represented (independently of class)
2. The approval of three of the classes of cr4ditors or if there are only 3 classes then the approval of two classes and if only 2 classes then the approval of 1
3. In the class that rejected it, the favourable vote of over one-third of the creditors

Applying the above to the facts, it is clear that the value held by Brasil Autoparts SA and Oil Brasil SA is not enough in value to defeat the recovery plan. It there means that notwithstanding there objection the plan can succeed by relying on the cram down provisions as their 200,000 BRL in value is less than half the value of all the creditors. [less than 1/3] It therefore means that if Branz Bank and Banco support the plan then Brasil Autoparts SA and Oil Brasil SA can be crammed down.

Type your answer here]

Question 4.3 [maximum 5 marks] [zero]

Suppose Braz Bank's loan agreement with Empreendimentos was not secured by a mortgage but rather by a fiduciary title over land valued at BRL 600,000 (six hundred thousand reais). The referred piece of land corresponds to the site where Empreendimentos' main factory is located. Empreendimentos' judicial recovery proceeding has just begun: the Court issued the decision allowing for the processing of the judicial recovery two (2) days ago. How soon can Braz Bank take possession of the land and sell it outside the recovery proceeding? Could Empreendimentos argue anything in defence of maintaining its possession over the land?

[Type your answer here]

*** End of Assessment ***

TOTAL MARKS 36 OUT OF 50