



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 [1 mark]

Indicate the **correct answer** regarding bankruptcy legislation in Brazil:

- (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.**
- (d) The Bankruptcy Law does not allow companies belonging to the same economic group to file for restructuring jointly.

Question 1.2 [1 mark]

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.**
- (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 [1 mark]

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.
- (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.

Below are two (2) defective actions that could lead to the removal of the debtor's management during a judicial recovery case.

As a first step, it is important to note that the debtor may continue to manage the company during judicial recovery. This is done with the supervision of (i) the creditors' committee (if any), (ii) the receiver, (iii) the creditors and (iv) the public prosecutor.

However, there are two cases in which the debtor in possession can be removed:

1. If this is foreseen in the recovery plan, or
2. Where the debtor (or its administrators) has acted defectively. Where the debtor or the administrators have acted defectively, they will be removed. For this purpose, the law considers that a the debtor or the administrators acted defectively, for example, in the following two situations:
 - a. When they have been finally and definitely convicted of an offense committed pursuant to a prior judicial recovery or bankruptcy or of an offense against property, public welfare or economic order provided for in the applicable law; or
 - b. When they have acted with malice, simulation or fraud against the interests of their creditors.

Article 64 establishes two (2) other defective actions that could lead to the debtor's administration being removed during a judicial recovery case..

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.

Below are three (3) ways in which the judicial administrator may sell the assets of the bankruptcy estate during a liquidation proceeding:

1. By means of an electronic, face-to-face or hybrid auction;
2. Through a competitive procedure promoted by a specialized agent; or
3. By any other modality, provided that it is approved under the terms of the Law.

Likewise, alternative forms of sale of the assets in a bankruptcy may be authorized, provided that they are approved by the general meeting of creditors or approved by the court after hearing the receiver and the creditors' meeting.

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.

The following are two (2) acts that may be rendered ineffective against the bankruptcy estate if performed during the "suspect period" of a bankruptcy proceeding:

1. *"The payment by the debtor, within the suspect period, of debts not yet due, by any means that allows extinguishing the credit, including advances on a given promissory note";*
2. *"The acts performed free of charge (for example, a donation or services rendered free of charge) during the two years prior to the bankruptcy decree".*

When these events occur, the claimant does not need to prove that the debtor and the third party acted with the intent to defraud other creditors.

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.

The following are three changes introduced in the Brazilian insolvency legal system with Federal Law 14.112/2020:

1. **Adoption of the UNCITRAL Model Law on Cross-Border Insolvency:** the Brazilian legal system had not adopted the UNCITRAL Model Law on Cross-Border Insolvency until the enactment of Federal Law 14.112/2020. Thus, with the 2020 reform, the UNCITRAL Model Law on Cross-Border Insolvency was adopted to: regulate the recognition and enforcement of foreign insolvency proceedings in Brazil and cooperation with foreign courts.
2. **Creation of a special procedure for the enumeration of tax claims in bankruptcy proceedings.** The Federal Law allows that once the public notice declaring the debtor's bankruptcy is published, the court will create an incidental procedure for the

classification of tax claims, ordering electronic notification to the tax authorities to submit the complete list of their definitive claims within 30 days. The debtor, the remaining creditors and the receiver have 15 days to challenge the list of tax credits. However, it is important to note that the grounds for challenge are limited to an error in the calculation or classification of the claim in the list of creditors.

3. **Introduction of the possibility for the debtor to initiate a mediation or conciliation procedure with creditors prior to the actual filing of the judicial recovery case.** The Federal Law allows a debtor prior to the filing of the judicial recovery case to initiate a conciliation or mediation procedure and may request the court, among other things, to order a remedy equivalent to a stay.

Finally, it should be noted that there are many other general provisions that were introduced with the Federal 2020 Act, among those for example:

- i. The time periods provided for in the Bankruptcy Law will be computed in calendar days (instead of business days), including weekends and holidays;
- ii. The stay period for enforceable claims against the debtor in judicial reorganization has a duration of 180 days and can only be extended once for the same period (i.e., for another 180 days);
- iii. If a creditor fails to file a proof of claim within three years from the publication of the decision declaring the debtor's bankruptcy, its claim will be extinguished.

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

Question 3.1 [maximum 5 marks] [4 marks]

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

As a first step it is important to note that Complementary Law 123/2006 establishes that micro enterprises are those whose gross revenues do not exceed BRL 360,000 per year and small enterprises are those whose gross revenues exceed BRL 360,000 but do not exceed BRL 4,800,000 per year.

The Law provides for a special procedure for micro and small companies, but the procedure is not mandatory. Therefore, a debtor may choose between the ordinary judicial recovery regime or the special procedure for micro and small companies.

In view of the above, the following are some of the differences between a regular process and a process for micro and small enterprises:

1. In the process for micro and small companies, the plan can only provide for a maximum of 36 months of installment payments of equal and successive amounts, which will be monetarily updated to include interest equivalent to the Selic Tax, as well as credit haircuts. The first installment must be paid within 180 days from the filing of the petition for judicial recovery before a court.
2. In the process for micro and small companies there is no receiver, which makes the procedure much less costly compared to a normal restructuring. On the contrary, in an ordinary process, in the same order granting the judicial recovery, the judge also

orders, among other things, the beginning of the suspension period (moratorium) and appoints the judicial administrator.

3. In the process for micro and small companies a general meeting of creditors is not convened.

[the regular judicial recovery and the judicial recovery of micro and small companies encompasses the same creditors?]

Question 3.2 [maximum 5 marks] [5 marks]

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

The Bankruptcy Law allows a third party to request the restitution of assets that belong to it, but are in the possession of the bankruptcy estate. This is so that such assets may be returned to the creditor's possession.

If a restitution claim is filed, it will be processed in a separate file. The debtor, the creditors' committee, the creditors and the receiver will be notified of the existence of the claim so that they may oppose or not.

The Bankruptcy Law establishes that cash restitution will be given as follows:

1. The appraised value of the property that should be delivered to a third party if (i) the property no longer exists at the time of the restitution request or, (ii) if the property has been sold, the price for which it was sold. In either case it is given with monetary compensation;
2. The amount delivered to the debtor, in local currency, resulting from an advance payment of an export exchange contract, provided that the total term of the operation, including any extensions, does not exceed the term established in the specific rules of the competent authority;
3. The amounts delivered to the debtor by the contracting party in good faith in the event that the contract is revoked or declared ineffective; and
4. The amount of withholdings, taxes due by subrogation and amounts collected by collection agents and not transferred to the Administration.

In this regard, it should be noted that amounts due as a result of a restitution claim must be paid in priority to all other claims (including superpriority claims).

Likewise, the Law also authorizes the return to the seller of an asset sold on credit and delivered to the debtor during the 15 days prior to the insolvency petition, but only if the asset has not yet been sold.

Question 3.3 [maximum 5 marks] [5 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).

1. Proof of claims process for a creditor who was not on the first list of creditors (filed by the debtor):

Once the first list of creditors is published, creditors subject to the judicial recovery process have 15 days to submit their proof of claim to the receiver. In this way, any creditor not appearing on this list must request the receiver to include it in the list of creditors within the aforementioned period.

The creditor may make this request by e-mail or by correspondence, and shall not incur any cost. Likewise, the creditor must take into account the requirements set forth in the Insolvency Law in order to submit this request.

Once the application has been filed, the receiver will decide. There are no specific rules that the receiver has to give reasons for his decisions.

2. Proof of claims process for a creditor who was not on the second list of creditors.

After the publication of the second public announcement of the list of creditors, in the official press, (i) the creditors, (ii) the debtor (or its shareholders) and (iii) the public prosecutor have 10 days to challenge the list of creditors.

In this way, a creditor that has not been included in the second list may challenge the list to allege that its credit is missing and therefore request that it be included. Such challenge is made before the court.

This challenge will be carried out in a separate file and is assigned its own file number.

In case your challenge is unsuccessful you may be ordered by the court to pay legal fees and associated court costs. In any case, an appeal may be filed against the court's decision.

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] [5 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?

1. Grounds for filing bankruptcy proceedings:

According to article 94 of the Bankruptcy Law, Banco Braz as creditor of Empreendimentos, could request the initiation of an involuntary bankruptcy proceeding of Empreendimentos arguing that Empreendimentos:

- i. Without a relevant reason according to law, did not pay on the due date a debt certain in value.
- ii. That said debt is expressed in an extrajudicial title: Since the loan contract met all the criteria to convert it into an extrajudicial executory title according to the Code of Civil Procedure.
- iii. That the debt exceeds the equivalent of 40 minimum wages on the date of the bankruptcy petition, since the debt is in the amount of BRL 1,000,000.

Banco Braz will not have to prove the insolvency of Empreendimentos.

2. Defense of Empreendimentos

Once Empreendimentos is notified of the request to initiate the insolvency process, it has 10 days to present its defense against the request. In order to succeed in its defense, Empreendimentos must prove one of the following assumptions, which will allow it to prevent a bankruptcy decree:

- i. Falsity of the title presented by the bank;
- ii. Statute of limitations;
- iii. Nullity of the obligation or of its title;
- iv. The debt has already been paid;
- v. Any other fact that extinguishes or suspends the obligation, or does not legitimize the collection of the credit presented by the creditor;
- vi. Defect in the protest or in its instrument;
- vii. Filing of a petition for judicial recovery during the 10-day period that the debtor has to oppose the bankruptcy petition;
- viii. Cessation of business activities for more than two years prior to the bankruptcy petition, evidenced by an appropriate document from the Board of Commerce, which should not prevail against proof that the debtor has, in fact, developed its business activities at any time during the referred period.

Notwithstanding the foregoing, Empreendimentos could also deposit the debt and present any arguments to avoid liquidation. If the arguments presented by Empreendimentos to avoid bankruptcy do not prevail, the Bank will withdraw (take) the deposit, but the debtor will not enter bankruptcy.

On the other hand, if Empreendimentos cannot sustain one of the above defenses, nor can it deposit the amount due to the Bank, the judge will decree its bankruptcy.

Finally, it is important to note that both the bank and Empreendimentos may appeal the decision to accept or reject the bankruptcy petition.

Question 4.2 [maximum 5 marks] [5 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 required majority of the second class creditors for the approval of the judicial recovery plan is "*majority by number of persons and by value of the claims of the concurrent creditors*". Considering the above, if Brasil Autoparts SA and Oil Brasil SA reject the recovery plan, the required majority would not be reached in order to understand that the second class creditors approved the plan. This is because, although without the vote of these two creditors a majority of the value of the claims is obtained, the majority is not exceeded by number of persons.

All four classes must approve the plan. Therefore, the fact that the plan is not approved by the second class (because it is not voted positively by Brasil Autoparts SA and Oil Brasil SA) would prevent the adoption of the recovery plan.

In any case, it would be important to validate whether or not the rights of Brasil Autoparts SA and Oil Brasil SA would be affected by the recovery plan. The above, since the only creditors that can vote are those whose claims are adversely affected by the terms of the recovery plan. If the plan does not provide for any alteration of the original terms of payment of a given claim, the creditor does not have the right to vote.

Notwithstanding the above, despite not having the vote of Brasil Autoparts SA and Oil Brasil Sa, and therefore not having the vote of the second class of creditors, Article 58 of the Bankruptcy Law, which contains cramdown provisions, could be applied. This article would allow the adoption of lower thresholds with respect to the quorum for approval of the judicial recovery plan, as follows:

1. The favorable vote of creditors representing more than half of the amount of all claims represented at the general meeting, regardless of classes;
2. The approval of three (3) of the classes of creditors pursuant to Article 45 hereof, or if there are only two (3) classes with voting creditors, the approval of at least two (2) of them, or if there are only two (2) classes with voting creditors, the approval of at least one (1);
3. In the class that rejected it, the favorable vote of more than one third (1/3) of the creditors, computed in accordance with Article 45, paragraphs 1 and 2, of these Regulations: Regarding this requirement, and taking into account the facts of the case, it could be concluded that this requirement would be met, since the agreement would be voted by (i) 50% of the number of persons and (ii) the majority by value of the credits.

In this case these three requirements would have to be met for the recovery plan to be approved under the cramdown, and it is demonstrated that the plan does not imply a different treatment among the creditors of the class that rejected it.

Question 4.3 [maximum 5 marks] [5 marks]

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?

Considering that Banco Braz has as security for its debt, a fiduciary title to the land, such debt will not be subject to the recovery proceeding of Empreendimentos. Therefore, the Bank could take possession of the asset and sell it outside the proceeding. This is because the Bank would be totally excluded from the recovery proceeding.

Notwithstanding the foregoing, taking into account that the referred land corresponds to the site where Empreendimentos' main factory is located, the debtor could argue that this is an essential asset for its activities. This would imply that during the suspension period (which lasts 180 days and may be extended by the court for an equal period), such property could not be removed from Empreendimentos.

*** End of Assessment ***

TOTAL MARKS 49 OUT OF 50

WELL DONE!