



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 [zero]

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. [correct answer]

(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 [zero]

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. false
- (b) There are no statutory provisions on cramdown under the current Bankruptcy Law, it is a judicially-created doctrine. false

(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.

[correct answer]

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. **no**

(c) Extrajudicial recoveries represent a consensual solution to a financial crisis, as extrajudicial plans may not be imposed on dissenting creditors. **no**

(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 mark]

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

In accordance with Article 64 of the Bankruptcy Law details faulting manners which could lead to debtors administrators being removed:

- If the debtor's administration have been sentenced finally and conclusively for a crime committed under previous judicial recovery or bankruptcy or for a crime against property, public welfare or economic order provided by the law.
- Have acted malice, simulation or fraud against the interests of its creditors.

In such cases, the bankruptcy judge will call a general meeting of creditors to decided on who is to assume the management of the debtor's business. Until the meeting is called the judicial administrator controls the business.

Question 2.2 [maximum 3 marks] [2 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.

Three manners by which the assets of the bankrupt estate may be sod by the judicial administrator during a liquidation procedure include:

- Electronic, in-person or hybrid auction.
- A competitive procedure promoted by a specialised agent.

- By any other modality, as long as it is approved under the terms of the Bankruptcy Law.

Alternative manners of selling the assets in a bankruptcy may be authorised, as long as they are approved by the general meeting of creditors or approved by the court.

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.

In accordance with Article 129 of the Bankruptcy Act, two acts may be rendered ineffective towards the bankruptcy estate if carried out whilst the “suspect period” of a bankruptcy was in effect:

- Payment by the debtor within the suspect period, of debt that are not yet due, by any means whereby the claim is extinguished, including advances on a given note payable.
- Payment of debts within the suspect period, that have become due and enforceable, in a way not provided for under the terms of the contract.

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 to the Brazilian insolvency legal system due to the enactment of Federal Law 14.112/2020 include:

- The periods provided for by the Bankruptcy Law will be computed in calendar days (versus business days), including weekends and holidays.
- The stay period over executive suits against debtors in judicial reorganisation lasts for 180 days and be extended only once by another 180 days.
- The debtor, until approval of the judicial reorganisation plan, may not distribute profits or dividends to partners or shareholders, under penalty of criminal liability.

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

Question 3.1 [maximum 5 marks] [5 marks]

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

Complementary Law 123/2006 provides for micro enterprise with gross revenue not greater than BRL 360,000 per year and small enterprises are these with gross revenues in excess of BRL 360,000 but not exceeding BRL 4,800,000 per year.

The Bankruptcy Law provides for a special procedure for these micro and small enterprises, however, the procedure is not mandatory, and a debtor can choose between the regular regime or judicial recovery or the special procedure for micro and small enterprises. The filing

requirement for the judicial recoveries are the same i.e. the recovery plan must be presented within 60 days of the filing for judicial recovery.

The differences between the judicial recovery for micro and small enterprises include:

- For micro and small enterprises the plan must include all existing claims at the time of filing even if they are not yet due. Apart from claims relating to borrowing of official funds, tax claims and other legal exceptions as is the case in a regular judicial recovery.
- The plan only provides for a maximum of 36 months instalment payments of equal and successive amount, which will include interest equal to the Taxa Selic, as well as harcuts on claims.
- The first instalment must be paid within 180 days from the filing of the judicial recovery petition before a court.
- The Plan must provide for authorisation by the judge for the debtor to increase expense or hire employees.
- There is no judicial administrator which makes the proceeding less expensive.
- General meetings of creditors are not called. If creditors holding over half the claims of each class object to the Plan, judicial recovery will be dismissed and it will be converted into bankruptcy. If this is not the situation, judicial recovery will be granted.

Question 3.2 [maximum 5 marks] [5 marks]

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

Certain parties have the right to seek restitution of assets or funds that are in the possession of the bankrupt estate. These claims seek to reclaim the property from the estate so it is returned to the creditor. The Bankruptcy Law allows the return to the seller of assets sold on credit and delivered during the 15 days before the petition for bankruptcy, if the asset has not been disposed of.

- Restitution of cash is the appraised value of the asset that should be delivered to a third party if the asset no longer exists at the time of the restitution claim; if the asset is sold, the price it was sold for in both cases with monetary compensation.
- The amount delivered to the debtor, in domestic currently, resulting from an advance on an export exchange contract, in accordance with Article 75, para 3 and 4 of the Federal Law allow the full term of the transaction, including any extension, does not exceed the term established in the specific rules of the competent authority.
- The amount delivered to the debtor by a bona fide contracting party in the event that the contract is revoked or deemed ineffective.
- The amount of withholding taxes, taxes due and amount received by collecting agents and not transferred to the government.

The amount due as a result of restitution lawsuit is paid in priority to all other claims. The restitution is run under a separate case record. The debtor, creditors and judicial administration is notified of the existence of the request in order to oppose it or not.

Question 3.3 [maximum 5 marks] [4 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 list of creditors identifies the creditor and the nature and amount of the debt. The list is published in the official press and on the judicial website.

The process of proof of claims for a creditor, under a judicial recovery case, who was not listed in the first list of creditors *presented by the debtor) includes:

- After the list is published, creditors have 15 days which they are able to request the judicial administrator to include any missing claim or the correction of a claim. Request are made via email or by correspondence.
- Requirements of the claim are under Article 9 of the Bankruptcy Law such as: name of creditor, address, amount of debt, documents that prove the existence of the debt. There are no legal fees to be paid to prove the debt.

The process of proof of claims for a creditor, under judicial recovery case, who was not listed in the second list of creditors (presented by the judicial administrator) includes:

- The creditor is able to present opposition to the court regarding the new list of creditors within a period of 10 days from the publication of the list
- Since this is the judicial phase of the proof of claims, if the creditor is unsuccessful they have to bear the legal fees and judicial costs relating to the process.
- These oppositions / objections are dealt with as independent lawsuits, under a separate case record. The creditor may appeal the courts decision. [who may oppose the request presented by the creditor?]

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] [3 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?

As Braz Bank, is a financial institution, they cannot apply for an extrajudicial or judicial recovery but are subject to extrajudicial intervention and extrajudicial liquidation. It is noted that the crisis of those legal entities, may cause serious socio-economic repercussions. Per Federal Law 6.024/1974 regulated the intervention and extrajudicial liquidation of financial institutions. **Braz Bank is the creditor, not the debtor.]**

Braz Bank can file an involuntary bankruptcy against Empreendimentos. Pursuant to Article 94 of the Bankruptcy Law, there are three situations that allow the commencement of an involuntary bankruptcy procedure in Brazil, which may be requested by a creditor, including, the debtors does not pay on the due date a debt, which has taken place as Empreendimentos defaulted on the loan repayment.

Once Empreendimentos is served with the involuntary liquidation, Empreendimentos has a 10 day period to present his defence against an involuntary bankruptcy petition. Article 96 of the Bankruptcy Law contains a list of facts that can prevent a bankruptcy decree.

Question 4.2 [maximum 5 marks] [3 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**?

Even if the judicial recovery plan is not approved by the general meeting of creditors, Article 28 of the Bankruptcy Law contains provisions on the cramdown of the judicial recovery plan. A cramdown can be used, it is the adoption of lower thresholds with regard to the approval quorum on the judicial recovery plan.

Per Article 58, the judge shall grant the judicial recovery of the debtor whose plan has not been objected to by any creditor. The judge may grant judicial recovery provided it has obtained, cumulatively, at the general meeting:

- I – favourable vote of creditors representing over half the amount of all credits represented at the general meeting, independently of class;
- II – the approval of 3 of the classes of creditors
- III – in the class that rejected it, the favourable vote of over one-third of the creditors

A successful cram down would be possible as even if Brasil Autoparts SA and Oil Brasil SA rejected the plan there would still be a favourable vote of over one-third of the creditors Banco Enterprises SA. [is the plan going to be approved under the given facts?]

Question 4.3 [maximum 5 marks] [4 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?

The fiduciary title over the land valued at BRL 600,000 is a rem guarantee, it is a rem lien on real assets which secured the debt.

The title of the land valued at BRL 600,000 should be in Braz Bank's name, considering the loan to Empreendimentos was valued at BRL 1,000,000, Braz may have an additional claim after the security is enforced for the additional amounts.

How soon can Braz Bank take possession of the land and sell it outside the recovery proceeding?

Secured assets such as the land fall in the insolvent estate upon bankruptcy and are subject to judicial and extrajudicial recovery. During the 180 day stay period provided for in the case of judicial recoveries, Braz Bank is not allowed to sell or remove from Empreendimentos establishment and capital considered essential to Empreendimentos' business. [can this term be extended?]

Could Empreendimentos argue anything in defence of maintaining its possession over the land?

Empreendimentos could potentially argue to the court that the piece of land corresponds to the site where Empreendimentos' main factory is located and is required for the restructuring plan, thus it is a fundamental asset for the turn around.

*** End of Assessment ***

TOTAL MARKS 41 OUT OF 50

WELL DONE!