



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 [zero]

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. **[correct answer]**
- (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 [zero]

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. [correct answer]
- (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 [zero]

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. [correct answer]

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.

[Under Article 64(a) "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 for by applicable law

(b) "shown strong signs of having committed a crime provided for herein"

(c) "have acted with malice, simulation or fraud against the interests of its creditors"]

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.

[i) sale can be electronic auctioning

ii) Competitive proceedings organised by a specialised agent of immaculate reputation

iii) Institutional offers] [what is it?]

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.

[(a) Payment 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

(b) Payment of debt, withing the suspect period, that have become due and enforceable, in a way not provided for under the terms of the countract]¹

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 main reforms to the legal framework on bankruptcy, provided by the new law, are:

More balanced procedure rules for debtors and creditors, including provisions on Stay Period; More dynamic rules on bankruptcy, including Fresh Start obligations; More flexible extrajudicial recovery rules²;

Stay period

“It expressly provides for the possibility of extending the stay of 180 days, for an equal period and a single time, provided that the failure to vote on the plan is not attributed to the debtor in possession”³

Arbitration agreement

“The need to respect the arbitration agreement by the debtor in possession or bankrupt party, represented by the judicial trustee, will be established in positive law (article 6, paragraph 9)”⁴

Abusive vote

“Legal provision that the vote will be exercised by the creditor in the interest and in accordance with its judgment of advisability and declared null and void for abusiveness only when manifestly exercised to obtain an illicit advantage for itself or others (article 39, paragraph 6)”⁵.

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

Question 3.1 [maximum 5 marks] [2.5 marks]

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

[According to Article 47 of the Bankruptcy Law, “ *The object of judiciary recovery is to make it possible for the debtor to overcome his economic and financial crises in order to be able to*

¹ Foundation Certificate in International Insolvency Law, “*Insolvency System of Brazil*” (Suspect period), INSOL pp 39

² Retrieved (22/07/2022) “Char“https://portal.apexbrasil.com.br/regulatory_report/the-federal-government-enacted-the-new-brazilian-bankruptcy-law-law-n-14-112-2020-seeking-to-improve-the-business-environment-the-law-implemented-a-wide-range-of-revisions-to-the-legal-framework/”

³ Retrieved (22/07/2022) “Changes To Law No. 14,112/20 To The Bankruptcy And Reorganization Law “<https://www.machadomeyer.com.br/en/recent-publications/publications/restructuring-and-insolvency/changes-to-law-no-14-112-20-to-the-bankruptcy-and-reorganization-law>”

⁴ Ibid pg1

⁵ Ibid para 9

maintain the production source, employment of workers and interest of the creditors, thus contributing to preserve the company and its social aim and to foster economic activity”⁶

In a judiciary recovery, the debtor continues to manage the business subject to the supervision by creditor’s Committee, where such Committee has been set up, the judicial administrator, creditors and the public prosecutor. Unless otherwise the debtor is dismissed from managing the business on the grounds of Article 64 of the Bankruptcy Law.

In reference to Complementary Law 123/2006, provides those micro enterprises are those businesses whose gross revenues do not exceed BRL 360,000 per annum and small enterprises are those with gross revenue in excess of same amount but must not exceed BRL 4,800,000 in a year. Brazilian Constitution recognizes that impact, micro and small enterprises, which sometimes receives support in the form of incentives from the legislator.

There is a special procedure for micro and small enterprises but not mandatory. Here the debtor under the proceedings can choose regular regime of judicial recover or special procedure. One more difference is there is no judicial administrator for the micro and small enterprises [there can be] which otherwise can be very expensive under regular judicial recovery specifically corporate entities.

Under judicial recovery for micro and small enterprises, no creditor’s meeting is called different from a regular judicial recovery where creditor meetings are very necessary for the proceedings. Also, there is no creditor committee set up under judicial recovery under judicial recovery for micro and small enterprises. [which creditors are subject to it; time to pay; grace period...]

Question 3.2 [maximum 5 marks] [4.5 marks]

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

[“Claim for restitution” basically means the demand to pursue the right of a party for recovery of assets, shares value or funds and any monetary value. Under the Bankruptcy Law of Brazil, claim restitution is granted to a party who has legitimate claim over an asset or funds to seek restitution of such, which are in the custody of the debtors estate.

According to Section III, Article 85, ⁷*“the owner of an asset collected in the bankruptcy process or found to be held by the debtor on the date of bankruptcy abridgment may request the restitution of such asset. Sole paragraph. Restitution can also be requested for credit-based sale of asset delivered to debtor in the 15 days prior to bankruptcy request, if not yet disposed”.*

First the supplier of the assets which was sold on credit and delivered to the debtor within 15days under the Bankruptcy Law, before the petition for bankruptcy and the asset has not been disposed off is authorized under the law to go back to the supplier of those asset.

In terms of cash items or fund, the Bankruptcy Law states that “*restitution in cash to i) the appraised value of the asset that should be delivered to the third party if the asset no longer exists at the time of the claim for restitution or, if the assets has been sold, the prices it was sold for, in both cases with monetary compensation, ii) the amount delivered to the debtor, in domestic currency, resulting from an advance on an export exchange contract, pursuant to Article 75, paragraphs 3 and 4, of the Federal Law*

⁶ Brazilian Bankruptcy Law, Article 47

⁷ Ibid Article 85,

4.728/1965, provided the full term of the transaction, including any extensions ,, does not exceed the established in the specific rules of the competent authority; iii) the amounts delivered to the debtor by the bona fide contracting party in the event the contract is revoked or declared ineffective; and iv) the amount of withholding taxes, taxes due for subrogation and amounts received by collecting agents and not transferred to the government.”⁸

When a law suit as a result of restitution is granted, the amount must be paid above all other claims including super-priority claims.] [see article 84 of the Bankruptc Law]

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).

[Proof of claim is basically the evidence to a charge over an asset of a company which a creditor has right over. For instance, the claim can be a pledge, mortgage, antichresis, fiduciary title among others. The judicial administrated is mandated under the Bankruptcy Law to publish the list of creditors after which within 15days, creditors have the opportunity to verify their claims or name whether their claim may be missen or altered among others.

“Under Article 9 of the Bankruptcy Law, gives the requirement for which the creditors must satisfy. Here no legal fees is needed for creditors to file for their proof of claim or otherwise correct or verify. Such are spilt out in accordance to the forms showing the name, amount among others. This list are published from first, second, third and last of final to ensure a true reflection of all creditors of the business who have claim over the business to allow the judiciary administrator classify them or put them in appropriate classes”⁹.

In the case where a creditors details ;

- (i) was not listed in the first list of creditors (presented by the debtor). Here after the first publication or the official press, creditors who are subject to a judicial recovery have 15days, known as the “administrative phase” to file their proof of claim to the judicial administrator and this can be done electronically. Then the second list will be published regarding the creditors.
- (ii) After the second publication notice in the official press, creditors have 10days period to ensure their names are captured and also to object. For a creditor who was not listed in the second list of creditors (presented by the judicial administrator) misses the 15day period, this is treated as a late claim and as result the creditor will not have the right to vote at the general meeting of creditors until the claim is recognised by the judge and the proof of claim will be admitted or opposed subject to the judges on the case. This strips off their voting rights and can be subject to cost should the claim be rejected by the courts, then they bear legal fees or judicial cost..] [who can oppose the request presented by the creditor?]

⁸ Foundation Certificate in International Insolvency Law, “Insolvency System of Brazil” (claim for restitution), INSOL pp 40

⁹ Ibid Article 47

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] [4.5 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?

According to Article 94 of the Bankruptcy Law, there are three main gateway to allow form involuntary bankruptcy either by a creditor, surviving spouse, any heir of the debtors or the estate's administrator or shareholders. The grounds to initiate an involuntary bankruptcy must be the debtor unable to fulfil its obligation as they fall due or the debtor does not want to pay for its debts as they fall due. In view of this Braz Bank has firm grounds to file for involuntary bankruptcy as Empreendimentos has defaulted on was valued at BRL 1,000,000. **[any minimum amount requeriment?]**

Besides, Empreendimentos has 10day period to file defence in order to ensure that the court will not declare its bankruptcy. The following are subject to Article 96 where they can prevent the declaration:

- (a) Falsity of the title presented by the creditor
- (b) Statute of limitation applies to the case
- (c) Nullity of the obligation or its title
- (d) The debt has already been paid
- (g) filling of a petition for judicial recovery during the 10days term that the debtor has to oppose the request for bankruptcy^{10]}

Question 4.2 [maximum 5 marks] [2 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

¹⁰ Ibid Article 96

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?

[A judicial recovery plan forms the bases for collection or recovery of debt, where creditors can have enough information on the modality for payment to make decisions whether to vote for or against the plan. The judicial recovery plan according to the Bankruptcy Law must be submitted to the courts within 60days.

In the event the judicial plan is not approved, provision is made under Article 58 which contains provision for cramdown of the judicial recovery plan.

Cramdown under Article 58 shows that lower thresholds for quorum to vote on judicial recovery plan at a general meeting of creditors. Under Article 45, a judge may approve in accordance with Article 45, where the judicial recovery plan must obtain cumulative votes from the follow

"I – the favourable vote of creditors representing over half the amount of all credits, represented by at the general meeting, independently of classes

II – the approval of three (3) of the classes of creditors pursuant to article 45 hereof, of if there are only two (2) 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).

III – In the class that it, the favourable vote of one-third (1/3) of the creditors....

If the plan does not entail different treatment among the creditors of the class that rejected it"

Nonetheless, criteria for approval for Class I will be majority by head count of attending by creditors, Class II, majority head count and by value of the claim of the attending creditor and Class IV, majority head count of attending creditors.

From the above, the voting per value of claim of Braz Bank SA: BRL 350,000 and Banco Enterprises SA: BRL 125,000 (total value BRL475,000) which is more than Autoparts SA: BRL 100,000; and Oil Brasil SA: BRL 100,000 (total of BRL200,000).

Assuming Braz Bank and Banco do not take the rumor as is and Brasil SA and Autoparts SA, dissents the plan through the rumour, the plan will still be approved by the majority at the general meeting which the favourable votes will be more than one-third (1/3) of the votes of creditors and there will be no grounds for cramdown, Empreendimentos still capable of having its recovery plan. **[how can the plan be approved if the majority head count is needed?]** On the other hand, should the rumor affect Banco to sway its votes, that gives the class to reject the plan, which has (1/3) more to initiate a cramdown, Empreendimentos will not be capable of having its recovery plan approved.]

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?

[Some creditors may hold fiduciary title on a given assets, secured which grants the claimant immunity to any sort of restructuration. These are often not subject to the insolvency proceedings however the creditor may not retake possession of the collateral during the stay period which last for 180days subject to further extension by the court.

A creditor can file for enforcement of right over these assets under Article 784, items 1-XII, of the Federal Law 13.105/2015, which list documents that are characterized by extrajudicial enforcement where such documents can be used to initiate such actions and fiduciary title is one of such which allows for immediate repossession without the need to even involve the judiciary in such proceedings.

Braz Bank can file for enforcement at the court to possess the land, before the stay period. Ones there is no stay period initiated by Empreendimentos for judiciary recovery which is 180day period, Braz can take possession when granted by the courts.

Empreendimentos has 10day period to resent his defence against any involuntary bankruptcy petition. Article 96 gives some facts to prevent backrupcy.

A defence for Empreendimentos is to proof to the courts that land is fundamental for the turnaround. Article 49 , paragraph 3 states that essential capital goods may not be removed from a debtor's establishment during the stay period. Also, from above, Empreendimentos must be also proof that the fiduciary title has not been duly registered. Also, Emprreedimentos can also file for extrajudiciary recovery to allow the business carry on with business to allow for restructuring rather than liquidating the it.]

*** End of Assessment ***

TOTAL MARKS 38.5 OUT OF 50