



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.
- (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.

[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.

(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.

Article 64 of the Bankruptcy Law lists faulty manners by which the debtor's administration will be removed. Two examples include:

- The debtor or manager has been sentenced for a crime committed under previous judicial recovery / bankruptcy cases or for a crime against property, public welfare or economic order.
- The debtor or manager has acted with malice, simulation or fraud against the interests of its creditors.

Of these circumstances cited under Article 64, the bankruptcy judge will call a general meeting of creditors to decide on who is to assume the administration of the debtor's business. The judicial administrator will be in control of the business until such meeting is held.

Question 2.2 [maximum 3 marks] [3 mark]

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 different manners or ways by which assets of the bankrupt estate may be sold by the judicial administrator during a liquidation procedure include:

- By in-person / electronic or a hybrid auction
- By a procedure which is competitive and is promoted by a specialised agent

- By a mode that is approved under the terms of the Bankruptcy law.

It is noted that there may be alternative methods of selling assets in a bankruptcy is approved by creditors at a general meeting or approved by the court after hearing from the judicial administrator and the creditor's committee.

Question 2.3 [maximum 2 marks] [2 mark]

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.

Per Article 129 of the Bankruptcy Act, two acts that may be rendered ineffective towards a bankruptcy estate if carried out whilst the suspect period of a bankruptcy proceeding was in effect include:

- A payment made by a debtor within the suspect period for debts that have not yet fallen due, by any means whereby the claim is extinguished, including advances on a given note payable.
- A payment of a debt within the suspect period that have become due and payable in a way that is not provided for under the terms stated in 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 that were introduced to the Brazilian insolvency legal system due to the enactment of Federal Law 14.112/2020 includes:

- The creation of a specific incidental procedure for the tax authorities to present their definitive claims against a debtor.
- Creditors being given the possibility of presenting an alternative judicial recovery plan in case the plan presented by the debtor is rejected at a general meeting of creditors.
- Incentivising the judicial administrator to use alternative dispute resolution methods such as mediation and to also have an active role on supervising the ongoing negotiations between the debtor and its creditors.

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?

Firstly, it is important to establish what is a micro and small enterprise as opposed to a normal debtor company in Brazil:

- Micro enterprises comprise of gross revenues that do not exceed BRL 360,000 per year; and
- small enterprises comprise of gross revenues in excess of BRL 360,000 but not exceeding BRL 4,800,000 per year (as per Complementary Law 123/2006).

The difference between the judicial recovery for micro and small enterprises as opposed to a regular judicial recovery includes:

- Special procedures attributed to micro and small enterprises under the Bankruptcy Law, however, the procedure is not mandatory. A debtor of a micro / small enterprise can choose between the regular regime of judicial recovery or the special procedure for micro / small enterprises. It is noted however that the requirements for filing the special judicial recovery is the same as a regular judicial recovery and that the recovery plan must be presented within 60 days of the filing for judicial recovery.
- For micro and small enterprises, the plan must include all existing claims at the time of the filing, even though they may not be due yet (similar to a regular judicial recovery) however the difference is that claims relating to the borrowing of official funds, tax claims and other legal exceptions is not included in the plan.
- The plan may only include a maximum of 36 months for instalment payments of equal amounts, which will be restated to incorporate interest equivalent amounts according to the *Taxa Selic* and also includes haircuts on claims.
 - The first instalment must be paid within 180 days from the filing of the judicial recovery petition before a court. In a normal judicial recovery, stay is granted for 180 days and no payments are required to be made before such time.
 - The plan must also provide for authorisation by the judge to increase expenses or hire employees. This is not required under a regular judicial recovery.
 - As a consequence, the recovery procedure for micro / small enterprises per the Bankruptcy Law is restrictive and is often ineffective for the purposes of restructuring a financial crisis.
- A main advantage for the debtor of a micro / small enterprise is the fact that there is no judicial administrator, making the proceeding less expensive when compared to a regular judicial restructuring.
- There is no requirement for a general meeting of creditors to be conducted. Creditors who hold over half the claims of each asset class can make the decision; if half do not agree to the plan, then the judicial recovery is dismissed and it will be converted into a bankruptcy. This differs to a regular recovery whereby there are differing criteria approval requirements for varying creditor classes.
- The total amount paid to the judicial administrator may not exceed 5% of the amount payable to the creditors in a regular judicial recovery. The judicial administrator's remuneration decreases to a 2% limit in the case of a micro or small enterprise judicial recovery (if applicable).

Question 3.2 [maximum 5 marks] [4.5 marks]

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

A claim for restitution under the Bankruptcy Law allows for a third party to seek restitution of assets that belong to him/her but are in the possession of the bankrupt estate. This type of claim will seek to reclaim the property out of the bankruptcy estate in order for it to be returned to the creditor. The Bankruptcy Law also allows for an asset to be returned to the seller (if sold on credit and delivered to the debtor during the 15 days prior to the petition for bankruptcy) provided that the asset has not then been sold.

For cash restitution, the Bankruptcy Law states:

- It is the appraised value of an asset that is required to be delivered to a third party if the asset no longer exists at the time of the claim for restitution or, should the asset have been previously sold, the price it was sold for, in both cases, with a monetary compensation.

- The domestic currency equivalent amount which was delivered to the debtor as a result of an advance on an export exchange contract (which is pursuant to Article 75, paragraphs 3 and 4, of Federal Law 4.728/1965) provided that the full term of the transaction (which includes any extensions), does not exceed the term established in the specific rules / regulations of the competent authority.
- The amounts provided to the debtor through a bona fide contracting party in the event the contract is cancelled or declared ineffective.
- The amount of outstanding taxation owing (i.e. withholding taxes, taxes due for subrogation and amounts received by collecting agents) and not transferred to the government.

A claim for restitution will run under a separate case record. The debtor, the committee of creditors, the creditors and the judicial administrator will then be notified about the existence of the claim for restitution request in order to oppose it or not.

Should the claim for restitution be successful, the amounts due must be paid in priority to all other claims, including super-priority claims. **[see article 84 of the Bankruptcy Law.]**

Question 3.3 [maximum 5 marks] [4.5 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).

The process of proof of claims for a creditor, under a judicial recovery case, who was not listed in the first list of creditors (i.e. within the administrative phase of the proof of claim process) which is presented by the debtor includes:

- Within 15 days from the publication of the first list of creditors, to make a request to the judicial administrator to include any missing claim that has been missed. This request it to be done via e-mail or by correspondence.
- The claim to the judicial administrator must include the correct creditor details (per Article 9 of the Bankruptcy Law) including but not limited to the creditor's name, address, amount of debt and documents to prove the claim. No legal fees are to be incurred at this stage for the creditor to present their requests in the first stage.

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

- The creditors, debtors (or its shareholders) and prosecutor can now make applications to the Court to oppose the new list of creditors within 10 days from the date the second list of creditors was published by the judicial administrator.
- If the creditor is unsuccessful with their opposing views, the creditor will have to bear the legal and judicial costs as the opposing application to Court is in the judicial phase of the proof of claims procedure and are processed as independent lawsuits under separate case records.
- As it is an independent lawsuit, creditors and debtors may appeal the decision (even to higher Courts in rarer circumstances). **[what happens if the creditor is not include in the first list and fail to oppose it before the judicial administrator?]**

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?

- Braz Bank is a financial institution and therefore cannot apply for extrajudicial or judicial recovery, however, is able to apply for extrajudicial liquidation (regulated by Federal Law 6.024/1974).
- Therefore, Braz Bank does have grounds for filing an involuntary bankruptcy (i.e. to initiate a foreclosure action) proceeding against Empreendimentos, pursuant to Article 94 of the Bankruptcy Law, as the defaulted loan agreement meets the criteria for the extrajudicial executive title under Article 784 (item XII) of the Federal Law 13.105/2015 (the Brazilian Civil Procedure Code).
- There is no need for prior judicial debate on the fact that Empreendimentos has defaulted on the loan valued at BRL 1,000,000.
- Empreendimentos has 10 days to present a defence against the claim by Braz Bank or to make payment of the defaulted loan (by depositing the amount with the interest owing) at which stage Braz Bank will take the deposit and Empreendimentos will not go into involuntary bankruptcy, however, provided Braz Bank has sought to protest the contract before a protest officer, whereby Empreendimentos did not cure its breach, it is unlikely that a judge will reject the request for bankruptcy. **[is the amount of the claim relevant; any other grounds to oppose the request?]**

Question 4.2 [maximum 5 marks] [3.5 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?

- Article 58, Paragraph 1 of the Bankruptcy Law allows for a judge to grant a judicial recovery based on a plan that has not been approved by all creditors at the general provided it has obtained the following (cumulatively) at the same general meeting:
 - the favorable vote of creditors representing over half the amount of all creditors represented at the general meeting, independently of classes;
 - the approval of three of the classes of creditors. If there are only two classes with voting creditors, the approval of at least two of them. If there are only two classes with voting creditors, the approval of at least one; and
 - in the class that rejected the recovery plan, the favorable vote of over one-third of the creditors.
- The judicial recovery will only be granted in accordance to Paragraph 1 if the recovery plan does not entail different treatment amongst the differing creditor classes that have rejected it.
- Provided details regarding the class composition and willingness to accept the recovery plan for Classes I, III and IV are not known from the facts of the question, it is not possible currently to give a definitive answer with respect of the overall recovery plan being accepted and for the cramdown under Article 58 to be applied.
- However for Class II, 51.8% of the value is attributed to Braz Bank (therefore the threshold is met for value) and it would also require Banco Enterprises SA to also approve the recovery plan in order to meet the majority head count criteria for Class II creditors. **[Braz Bank and Banco Enterprises alone will not meet the head count criteria.]**

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?

The holding of a fiduciary title by Braz Bank is a rem lien on an asset which secures the payment of a debt and therefore:

- The title of the property of the asset is in the name of Braz Bank.
- Braz Bank considered to own a claim outside of the judicial recovery that Empreendimentos has entered (and therefore cannot be adjusted by a restructuring plan).

- Braz Bank keeps the right to take possession of the land and can sell it outside of the judicial recovery proceeding.

Braz Bank may not retake possession of the land during the stay period granted upon the judicial recovery of Empreendimentos, which is 180 days from the date of judicial recovery (which can be further extended by the court for an equal term). Further, the Superior Court of Justice has decided that creditors cannot automatically resume the foreclosure measures as soon as the 180 day stay term is over.

It may be difficult for Braz Bank to take repossession of the land as Empreendimentos can present a defence to the court that the land is where their main factory is located and is required in order to fulfil the obligations of the restructuring plan presented under a judicial recovery proceeding; therefore the court may consider the land as a fundamental asset for the judicial recovery to take place. Courts will often favour the debtor in this instance.

*** End of Assessment ***

TOTAL MARKS 44.5 OUT OF 50

VERY GOOD!