



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 [zero]

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

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

Question 1.3 [1 mark]

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

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

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

Question 1.4 [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 [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.

Article 64 of the Bankruptcy Law states how debtors or managers can be removed from a case. This includes:

- Being sentenced to a crime under a previous judicial recovery
- Showing strong signs of committing a crime
- Acting with malice or fraud against creditors
- Refusing to provide information to a judicial administrator
- Have the dismissal provide for within the recovery plan

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.

There are only three possible ways in which assets can be sold. These are:

- Auction (either electronic, in person or hybrid)
- Competitive procedure using a specialist agent
- Any other method which is approved under the Bankruptcy Law, including on the open market to an interested party

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.

It is possible to render the following acts as ineffective during the suspect period:

- Payment by a debtor which is not yet due (e.g. advancement) which distinguishes a claim
- Payment by a debtor which is not due or enforceable under the contractual terms
- Granting of a rem guarantee or a lien for a debt which was not previously secured

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.

This changes to the legal system in Brazil as a result of the enactment include:

- Allowing creditors to present a recovery plan for the debtor in certain cases
- The use of alternative dispute resolution,
- Consolidation for groups filing for judicial recoveries
- Alternative methods for payment of tax debts under judicial recover procedure
- Days were calculated using calendar days, rather than business days
- The stay period for executive suits could be extended once, for a further 180 days

Specifically in relation to insolvency, there were the following changes:

- Special privilege and general privilege claims became unsecured claims
- The priority was rearranged for non-subject credits
- The sale of assets being carried out by electronic auction
- If there are insufficient assets to discharge the costs of the bankruptcy, the judicial administrator must immediately notify the court. If the creditor require a continuation, they must pay the associated costs.
- Where assets sales are frustrated and no creditor wants to take them on, they will be returned to the bankrupt party

QUESTION 3 (essay-type questions) [15 marks in total]**Question 3.1 [maximum 5 marks] [4.5 marks]**

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

Brazilian Constitution has incentives from the Legislator for micro and small enterprises. A micro enterprise has revenue under BRL360k per year. A small company has revenue in excess of BRL360k per year, but not exceeding BRL4.8m.

The filing requirements remain the same, and both must be presented within 60 days. The plans must include all claims, regardless of whether they're due and payable. The plans must have 36 months of equal and successive instalments, with the first payment being made within 180 days. The plan must include provisions for expenses and employees, which must be

authorised by a judge. Consequently, the procedure for micro and small companies is restrictive. As a result, small and micro companies in financial crisis may find the options not effective for them.

However, there is no judicial administrator for small and micro companies, which reduces the costs of the process. [there might be]

There is no requirement to call a general meeting of creditors for small and micro companies.

If over 50% of creditors in each class reject a plan from a micro or small company, the judicial recovery will be dismissed and not granted, becoming a bankruptcy.

Complementary law which was introduced improved the position for creditors of micro and small companies, by limiting the remuneration which can be charged by the Trustee.

In regular recoveries, the fees to the judicial administrator must not exceed 5% of the amount payable to creditors. However, this is decreased to 2% for small and micro companies.

There are also different filing requirements for small and micro companies. This is mainly done to preserve and enhance asset values.

Question 3.2 [maximum 5 marks] [5 marks]

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

A claim for restitution under the Bankruptcy Law gives certain parties the ability to seek the restitution of funds or assets held by the estate. This gives third parties access to assets belonging to them, but within the estate. The claims seek to return the asset directly to the creditor.

Furthermore, the Bankruptcy Law states that assets sold on credit but not received by the debtor (within 15 days before a bankruptcy petition) are to be returned. This is provided the asset has not already been disposed.

In terms of cash, the restitution provides the following:

1. Where an asset has not been delivered to a party, the appraised value of the asset can be returned in monetary terms. Particularly if the asset has been sold.
2. Where there is an advance on an export contract, the amount delivered in domestic currency including the transaction and terms must not exceed the rules of the authority
3. Amounts received by a debtor in a genuine contract are revoked and become ineffective
4. Withholding tax, subrogated tax and collection agent fees are not payable to the Government.

Any amounts payable under the restitution by way of legal action are payable as a priority. This includes and super priority claims.

Any restitution must be held on a separate record to the main proceedings.

The following parties must be notified of restitution proceedings, including the existence of request to understand whether they chose to oppose it:

- Debtor
- Creditors Committee
- Creditors
- Judicial administrator

Question 3.3 [maximum 5 marks] [3.5 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).

Following the presentation of the second list of creditors, the creditors, debtor, shareholders or prosecutor are given 10 days (from the publication of the second creditors list) to present any oppositions to the court regarding the list of creditors.

As these form part of the judicial phase, when a creditor is not successful, they are responsible for the associated judicial and legal costs.

When a claim is challenged, must present why they have a valid claim and be listed in the proceedings. The debtor is given the opportunity to defend whether the claim is valid and the judicial administrator will reach a conclusion. Any challenges are heard by the Judge for the recovery procedure.

Any opposition must be held under a sperate case record to the main proceedings. Given these are independent lawsuits, they have the ability to be challenged and occasionally taken to higher courts.

Any claim not made within 15 days of the presentation for the proof of claim will become a late claim. The creditor will not have the ability to vote in the creditors meeting until it has been recognised by a judge. [15 days after the proof of claims? The answers seems to make a confusion between the administrative and the judicial phases]

Therefore, any creditor not included in the first list must present their claim to the court within the relevant time periods, for the courts to duly consider. They must remain mindful of the implications noted above.

The third list represents the finalised list of creditors following any oppositions and concluded by the judge. The proceedings run simultaneous to the bankruptcy proceedings.

A creditor not included in that list has 3 years to present a claim from the Bankruptcy decree. After 3 years they will be time barred from making a claim.

Pursuant to Article 19 of the Bankruptcy Law, any of the following parties may make a request for a claim to be include or excluded from the final list (the requirements are subject to any fraud, malice or misrepresentation etc.):

- Judicial Administrator
- Creditors Committee
- Public Attorney's Office

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?

Obtaining an extrajudicial executive title will make the recovery of Braz's claim more certain and a quicker process. The proceedings would enter a cognisant phase which transitions into an enforcement stage. The phase allows the debtor to present a defence and a discussion of the facts before a judgment is made.

Under the Bankruptcy Law, certain claims must be issued via a protest officer. In this process, an official notice is served on the company, which recognises the debt and requests payment. It will also advise of the creditors intention to file for Bankruptcy. Braz has ensured that this has been complied with.

Given that Empreendimentos has defaulted on the loan and it has become due and payable, Braz has the ability to apply to the court to seek for an involuntary bankruptcy.

Under Federal Law 14.112/2020 was enacted, Braz would be able to present an alternate judicial recovery plan too.

In order to apply for involuntary bankruptcy under Article 94 of the Bankruptcy Law, there are three situations where involuntary bankruptcy proceedings can be commenced. They can be brought by a creditor, which would include Braz in this case. The situations are:

1. Not paying a debt as it falls due, exceeding the equivalent of 40 minimum wages
2. The debtor will be executed and does not provide assets for attachment
3. Or if the debtor has performed one of a number of acts.

Based on the information, it would appear that Empreendimentos is in breach of 1. The equivalent minimum wage is under US\$10k, therefore the value will be sufficient.

Braz must serve the necessary documents, which will commence a 10 day period of Empreendimentos to defend the proceedings on any of the following grounds:

- Falsifying the title

- Statute of limitations has expired
- Nullity of the obligations
- Debt has been paid
- Any fact that removes liability
- Defect in a protest
- Filing for the petition of judicial recovery
- Ceasing corporate activities for 2 years before the petition

Therefore, based on the facts there doesn't appear to be a clear and obvious defence. However, Empreendimentos could file for judicial recovery still or may deposit the amounts due to the court and arguments against the bankruptcy.

If Empreendimentos does not successfully argue one of the defences above, then the judge will decree its bankruptcy. This will be subject to a 15 day period to appeal for both parties.

Question 4.2 [maximum 5 marks] [4.5 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?

On the basis that Brasil Autoparts and Oil Brasil reject the recovery plan and Banco and Braz accept the recovery plan, then there would be a majority in terms of value. However there needs to be a majority in terms of headcount, which 50% would not achieve.

Class II, which includes secured creditors requires a majority by headcount and by value of the creditors attending. Therefore, if one of the parties did not attend the creditors meeting, then this could change the position.

However, it may still be possible for a cramdown based on the information available.

If a judicial plan is not approved at the creditors meeting, cramdown could apply under Article 58 of the Bankruptcy Law. This provides lower thresholds in order to achieve the quantum required for a plan.

The requirements that would need to be met for a cramdown to be successful are:

- Over half of all creditors represented across all classes vote favourably
- The approval of at least 3 classes (or 2 if there are only 3 classes, and 1 if there are only 2 classes)
- In the rejected class, one third of the creditors made a favourable vote
- The plan cannot change the treatment of the creditor that rejected it [in fact, treat the rejecting minority differently.]

Based on the information available, if Brasil Autoparts and Oil Brasil rejected the plan, but Banco and Braz accepted, and all the other classes of creditors approved the recovery plan, then there would be good grounds for a cramdown.

Question 4.3 [maximum 5 marks] [4.5 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?

A fiduciary title is a rem lien securing payment of a debt against an asset. A claim made by fiduciary title cannot be changed by a restructuring plan.

A creditor which has security by a fiduciary title retains the ability to take possession of the asset and to sell it outside the insolvency proceedings, under the right circumstances. This provides an additional layer of security to the creditor.

However, once a recovery proceeding has commenced, the debtor has an extended period where no further action can be taken against assets. This period lasts for 180 days. [can be extended?] Furthermore, no action can be taken without the express authority of the bankruptcy court. Therefore, Braz would need to make a separate application to the court to take possession of the land, if it has not been covered by the recovery proceedings.

As the factory is a capital good, it cannot be removed during the 180 day period, pursuant to Article 29, Paragraph 3 of the Bankruptcy Law.

Empreendimentos would have the opportunity to defend those proceedings. If the land and property is continuing to generate an income and the position to creditors overall is improved, then this may be a good defence to those proceedings to take possession.

Therefore, in these circumstances, Braz may struggle to take possession of the land.

*** End of Assessment ***

TOTAL MARKS 43 OUT OF 50

WELL DONE!