



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

Indicate the **correct answer** regarding bankruptcy legislation in Brazil: **[zero]**

- (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

Which of the following statements is **correct** with regards to the Brazilian judiciary? **[1 mark]**

- (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

Concerning corporate liquidation, indicate the **incorrect** statement below: [1 mark]

- (a) The Bankruptcy Law provides the means for the debtor to file a voluntary liquidation proceeding.
- (b) None of the gateways for the involuntary liquidation of a debtor require the creditor to actually prove the balance sheet insolvency of the debtor.
- (c) A debtor has a 10-day period, after service of process, to present his defence against a creditor seeking its liquidation.
- (d) A decision from the bankruptcy court declaring the bankruptcy of a debtor is unappealable.

Question 1.6 [1 mark]

Which of the following claims has the **highest priority** under a bankruptcy proceeding?

- (a) Fees payable to the judicial administrator and its auxiliaries.
- (b) Tax-related fines.
- (c) Administrative expenses of the estate.
- (d) Unsecured claims.

Question 1.7 [1 mark]

A debtor under judicial recovery has the following creditors:

- 50 creditors in Class I (workers and labour-related claims)
- 3 creditors in Class II (creditors secured by *in rem* guarantees)
- 300 creditors in Class III (unsecured creditors)
- 200 creditors in class IV (claims held by micro and small enterprises)

The total amount of debt owing in each class is the following:

- BRL 1 million in Class I
- BRL 5 million in Class II
- BRL 50 million in class III
- BRL 30 million in Class IV

Assuming all creditors are present at the debtor's general meeting of creditors, **indicate the only true statement** regarding the approval of the plan:

- (a) The approval of the plan in Class I is solely dependent on its approval by creditors whose claims amount to a quantity in excess of BRL 0.5 million.
- (b) The approval of the plan in Class II is solely dependent on a majority by head count.
- (c) The approval of the plan in Class III depends on a double majority: by head count and by the total amount of claims.
- (d) The approval of the plan in Class IV is solely dependent on favourable votes by creditors whose claims exceed BRL 15 million.

Question 1.8 [1 mark]

Which of the following documents **needs to be** presented by the debtor at the moment of filing for judicial recovery?

- (a) A full nominal list of creditors.
- (b) Accounting statements for the last financial year for the current administrators of the company.
- (c) A judicial recovery plan.
- (d) A list with a brief description of the contracts entered into by the debtor in the last financial year.

Question 1.9 [1 mark]

Indicate the **only correct statement** below relating to the cramdown of a judicial recovery plan:

- (a) "Cramdown" is a doctrine that allows for creditors to present their own alternative reorganisation plan.
- (b) There are no statutory provisions on cramdown under the current Bankruptcy Law, it is a judicially-created doctrine.

(c) Among the criteria that must be met for a cramdown to be imposed, the plan needs to receive favourable votes from over half the total amount of claims in each of the classes of creditors that were present at the general meeting.

(d) A cramdown cannot be imposed if the judicial recovery plan entails the discriminatory treatment of creditors within the class that rejected it at the general meeting of creditors.

Question 1.10 [1 mark]

Select the **correct statement** from the options below regarding extrajudicial recoveries:

(a) Extrajudicial recoveries allow for a larger set of debtors to seek their reorganisation in comparison to the set of debtors that are allowed to file for judicial recovery.

(b) Extrajudicial recoveries do not allow the debtor to restructure labour claims.

(c) Extrajudicial recoveries represent a consensual solution to a financial crisis, as extrajudicial plans may not be imposed on dissenting creditors.

(d) Extrajudicial recoveries do not allow the debtor to dispose of its assets free of any encumbrances, unlike judicial recoveries.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] [2 marks]

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

Two examples of actions that could lead to debtors administration being removed during a judicial recovery case include:

1. If the debtor or manager has been sentenced for crimes under previous judicial recovery processes; and
2. If the debtor or manager acts in a way that result in defrauding creditors against their inherent interests.

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.

The assets of the bankrupt estate may be sold altogether, as separate business unit individual branches and they can be sold:

1. By auction, either via online, in person or hybrid means;
2. By an agent that specialises in that asset through a complete procedure.
3. By another other way that is approved under the Bankruptcy Law which would usually require court or creditor approval of the same.

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.

Two acts that would be rendered ineffective if made during the suspect period would include:

1. A payment by the debtor, for an amount was not payable at the time and includes any form of payment that amounts to the claim being extinguished.
2. Providing a guarantee against an asset or lien for a debt during the suspect period for a debt that already existed but was previously not secured. Rendering ineffective will restore the position of the original encumbrances when the asset is sold.

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 under the enactment of Federal Law 14.112/2020 include:

1. An expedited process to terminate bankruptcies where there are insignificant or assetless estates. This process allows for the objection by interested parties and sets out the ground on which the request can be challenged.
2. The clarification and eligibility for groups of companies to file for restructuring procedure together which contains provisions on the consolidation of the group and distinction of legal entities involved.
3. The ability for creditors to present an alternative judicial recovery plan where the one presented by the debtor was rejected at a meeting of 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?

When entering judicial recovery proceedings, there is the choice between the regular process and the special procedure for micro and small enterprises (Special Procedure). The micro and small enterprises both have annual revenue caps for eligibility under the Special Procedure which are less than BRL 360,000 and greater than BRL 360,000 but less than BRL 4,800,000 respectively. The other differences between the Special Procedure and regular judiciary recovery include:

1. There is no judicial administrator in a Special Procedure compared to the regular judicial recovery, which is a cost saving element for micro and small enterprises who would otherwise struggle to cover the cost compared to a larger entity.
2. In a Special Procedure a general meeting is not called like in a normal judiciary recovery. This means that creditors who hold more than 50% of the claims of each class reject the restructuring plan, the proceedings will be dismissed and converted into bankruptcy. If accepted by creditors, the plan will be put into place.

3. The Special procedure includes all creditors even contingent or claims not payable yet aside from borrowed funds, taxes and other legal exceptions. Whereas in a normal judicial recovery fiduciary title holders, those with leases and contracts to purchase and any advance on foreign exchange contracts are excluded from the process as well.
4. In a Special Procedure, the debt must be paid in a maximum of 36 equal and ongoing monthly instalments and will be adjusted to include interest amounts at the interest rate used for federal securities. Any judicial plan can be put forward in a normal recovery as long it meets certain criteria like paying labour claims within one year and one month (unless extended).
5. Payment to occur within a Special Procedure within 180 days compared to a normal judicial recovery where the amounts can be stayed for 180 days plus a further 180 days under

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 in a bankruptcy procedure seeks to return property to the creditor or third party that is in the possession of the bankrupt or their estate. A claim for restitution has to meet certain criteria and timeframes in order for the benefit to be returned to the third party.

A claim for restitution works in the following way and includes:

1. In the Bankruptcy procedure and return of funds to creditors claims for restitution are paid ahead of all other claims, including super-priority.
2. During 15 days prior to the petition for bankruptcy being filed, if assets were sold to the debtor on credit, delivered and not disposed of they can be returned to the seller.
3. If the property no longer exists or is disposed of by the debtor, the value in cash of that asset and monetary compensation for the asset should be given to the third party.
4. Restitution of cash can also refer to an advance on an export exchange contract as long as the debtor provided for the full term of the transaction per the relevant governing rules can be considered under the claim for restitution provisions.
5. That if the debtor entered into a contract that is revoked or declared ineffective, amounts delivered to the debtor in cash would be the restitution to the third party.
6. Taxes not transferred to the government that would usually be held for the governments benefit and its value in cash would constitute a claim restitution.

Question 3.3 [maximum 5 marks] [5 marks]

Describe the process of proof of claims for a creditor, under a judicial recovery case, who (i) was not listed in the first list of creditors (presented by the debtor) and (ii) for a creditor who was not listed in the second list of creditors (presented by the judicial administrator).

If a creditor was not listed in the first list of creditors published in the official press and on the judicial administrator’s website, creditors have 15 days to request that the judicial administrators update or include their claim. The first list of creditors that is presented by the debtor is called the administrative phase of the proof of claims, and updates to the creditors list can be done via email and written correspondence to the judicial administrator. The creditor will need to include details of the claim which are set out in Article 9 of the Bankruptcy Law and includes providing name, address, amount owed, supporting documents for the debt. To request an amendment to the creditor list in the first phase does not require payment for any legal fees to be considered. If the creditor

misses the 15 day window they will have what is known as a late claim and will need to be updated by the judge seeing the case rather than the judicial administrator. This will result in increased costs such as legal fees and also does not allow creditors to vote in the process until they have been admitted by the judge.

If a creditor was not listed in the second list published by the judicial administrator then they have 10 days from publication to object or request amendments. Unlike the administrative phase, this is considered the judicial phase and as such requires unsuccessful creditors to bear the legal and judicial costs relating to the inclusion of the claim. Costs will not be required for successful creditors. If the claims are unsuccessful as they are run as separate lawsuits, they can be appealed and taken to the high court if still challenged.

If there were grounds that the claim was not considered, submitted or ranked appropriately due to fraud or malice, the Bankruptcy Law provides the opportunity to include the creditors claim in the final list of creditors.

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 does have grounds that it can commence involuntary proceedings against Empreendimentos for. The facts of the case state that Braz Bank is a Brazilian bank, and so assumed that it has regularity of business being able to obtain a certificate from the Board of Trade. Under Article 94 of the Bankruptcy Law, Braz Bank would be considered a creditor capable of commencing proceedings against Empreendimentos. The options available to Braz Bank for commencement of proceedings, do not require proof of insolvency of Empreendimentos either.

Braz Bank has already protested the contract before a protest officer in which the breach was not cured which means that it has one option to commence proceedings which are that Empreendimentos has a debt higher than the statutory minimum of approximately 40,000 BRL, has not paid the amount that is due and taken it a protest officer. Accordingly, Braz Bank has grounds to file proceedings against Empreendimentos.

In order for Empreendimentos to defend against the filing, it has 10 days to bring the defence against the petition of winding up. To prevent the filing being successful Empreendimentos can deposit the 1,000,000 BRL due adjusted for inflation, interest and legal fees and the creditor, Braz Bank, can withdraw those funds and Empreendimentos will not go into bankruptcy. [incomplete, could ask for judicial recovery or argue questions about the debt] If the debt is paid, under Article 96, this will prevent a bankruptcy order being issued. The other arguments that Empreendimentos may use will not guarantee it will not go into bankruptcy proceedings as the rest are arguments on the circumstances such as the debt itself or its legitimacy, which could be argued unsuccessfully.

Question 4.2 [maximum 5 marks] [5 marks]

Suppose, additionally, that the referred loan agreement between Braz Bank and Empreendimentos was also secured by a mortgage over land valued at BRL 350,000 (three hundred-and-fifty thousand reais). Before Braz Bank took any additional measure against Empreendimentos, the debtor voluntarily filed for a judicial recovery proceeding, the processing of which was accepted by the court. The list of creditors presented by the debtor upon filing for judicial recovery showed the following four (4) creditors in Class II (creditors secured by *in rem* guarantees):

- Braz Bank SA: BRL 350,000;
- Banco Enterprises SA: BRL 125,000;
- Brasil Autoparts SA: BRL 100,000;
- Oil Brasil SA: BRL 100,000.

The complete list of creditors (also portraying Classes I, III and IV) has just been published in the official press. A few rumors have come to Braz Bank's attention concerning the fact that Brasil Autoparts SA and Oil Brasil SA are likely to reject the recovery plan that Empreendimentos has been working on. Should the rumors show themselves to be accurate, is Empreendimentos still capable of having its recovery plan approved at a general meeting of creditors? Would there be grounds for a cramdown?

For Empreendimentos to have its recovery plan presented provides a 30 day period for objections after publication in the official press. If Brasil Autoparts SA and Oil Brasil SA object to the recovery plan, a vote will be heard at a general meeting of creditors. The vote and passing of resolutions will be determined by each class of creditor involved and those whose claims are impaired.

The facts state that Braz Bank SA are secured by in rem guarantee of 350,000 BRL for its 1,000,000 BRL loan and it is assumed that there will be a shortfall for creditors. For the secured creditors, majority needs to have both head count and value of the attending creditors which means it would need Banco Enterprises SA to vote in favour of the recovery plan put forward by Empreendimentos as it already has majority in value. On the basis that all three other creditors vote against the recovery plan, they will not have all class acceptance to approve the plan.

The grounds for cramdown to reach the lower threshold of adoption of Empreendimentos would need Braz Bank SA to have over half of all creditor claims, approval from three of the four classes of creditors or one third of the vote in the secured creditor class if it was rejected by Class II creditors. Based on these scenarios:

1. Braz Bank SA may have over half of the creditors depending on Classes I, III and IV creditor values. More detail of the claims is needed to follow this route.
2. Braz Bank SA may have approval from other classes, especially with its unsecured portion of the 1,000,000 BRL loan although further details are needed to confirm.

3. Braz Bank SA could approve the cramdown as Braz Bank SA holds over one third of the claims in Class II.

It is possible for the cramdown although further details would be required to be certain.

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?

While a fiduciary title will grant immunity from the recovery proceedings, the land in question may not be taken possession of during the stay period which under the law can be 180 days if not extended further by the court. While the title will sit with Braz Bank over the land and as it is where Empreendimentos' main factory is located it will have to wait for the stay to expire before being able to deal with the land. The Superior Court of Justice has also confirmed it is not an automatic right to enforce over the land in this case once the stay expires and needs the consent of the Bankruptcy court especially where it is a fundamental asset to the business. Empreendimentos' main factory is located on the land that Braz Bank has its fiduciary title for and to maintain its possession over the land it would argue in the Bankruptcy court that it is integral to the business and outcome of the recovery proceedings. It is common that the court will side with the debtor so Empreendimentos would likely maintain its possession of the asset throughout the procedure.

*** End of Assessment ***

TOTAL MARKS 47 OUT OF 50

EXCELLENT WORK!