



46 = 92%

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: 202223-336.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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] - 8

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: - 1

- (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 Bankruptcy Law has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.
- (d) The Bankruptcy Law allows companies belonging to the same economic group to jointly file for restructuring.**

Question 1.2 - 1

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

- (a) Brazil has a single apex court: the Superior Court of Justice, which is in charge of constitutional issues.
- (b) Tax disputes take place at a specialised segment of the judiciary; composed of tax courts, tax courts of appeal and a superior court.
- (c) Insolvency proceedings take place at the state-level judiciary (as opposed to the federal-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 - zero

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

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

(c) The *antichresis* is a widely 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

Which one 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) A big law firm.

(c) An individual who carries on a business activity without the use of a legal entity.

(d) An investment bank.

Question 1.5 - 1

Concerning judicial recovery, indicate the **incorrect** statement below:

(a) Failure to present the judicial reorganisation plan within the stipulated period is a case for conversion into bankruptcy.

(b) The judicial recovery plan must be presented within 60 days from the decision granting the processing of the procedure.

(c) The special regime of judicial recovery for small or micro enterprises is optional, and the company may opt for the common regime.

(d) With no objections to the judicial reorganisation plan, the judge will appoint a general meeting of creditors so that the creditors can deliberate on the judicial reorganisation plan.

Question 1.6 - zero

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 claims, including principal, interest, and fines.

(c) Administrative expenses of the estate.

(d) Unsecured claims.

Question 1.7 - 1

Assume that a debtor under judicial recovery has the following creditors:

- 700 creditors in class I (workers and labour-related claims);
- three creditors in class II (creditors secured by *in rem* guarantees);
- 150 creditors in class III (unsecured creditors); and

- 47 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 20 million in class II;
- BRL 10 million in class III; and
- BRL 200 thousand in class IV.

Assuming all creditors are present at the debtor's general meeting of creditors, **indicate the only correct 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 an amount 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 100,000.

Question 1.8 - 1

Select the **correct statement** from the options below regarding the judicial recovery of small or micro enterprises:

- (a) As it is a simplified regime, there is no stay period.
- (b) There is no discount in the judicial reorganisation plan, but instalments are allowed.
- (c) The remuneration of the judicial administrator is limited to 2% of the amount payable to the creditors.
- (d) There is no limit in the Bankruptcy Law as to the number of instalments for the payment of the debts.

Question 1.9 - 1

Indicate the **correct statement** 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 as 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 held by the creditors that were present at the general meeting.
- (d) A cramdown cannot be imposed if the creditors have presented an alternative recovery plan after rejecting the recovery plan presented by the debtor.

Question 1.10 - 1

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 tax 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 in total]

Question 2.1 [maximum 2 marks] - 2

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

Article 64 of the Bankruptcy lists many reasons under which a debtor may be removed from administration. Out of these, two such actions that could lead to the debtor's administration being removed during a judicial recovery case include: (1) refusing to provide information requested by either the judicial administrator or other Committee members; or (2) acting with malice, simulation, or fraud against the interest of its creditors.

Question 2.2 [maximum 3 marks] - 3

State the three manners or ways by which the assets of the bankrupt estate may be sold by the judicial administrator during a liquidation procedure.

Once a judicial administrator has taken custody of the assets, there are three ways a judicial administrator could attempt to sell the assets. *First*, the judicial administrator must try to sell the business *as a whole*. If the business could not be sold as a whole, the judicial administrator must then try to sell each "commercial establishment" (that is, different segments or processes of the business as a whole. *Third*, a judicial administrator could sell individual assets separately. In terms of the actual modalities of the asset sale, a judicial administrator could opt to sell assets (1) electronically, in person, or in a hybrid sale; (2) through a competitive procedure promoted by a specialized agent with expertise; or (3) through any other means, so long as it is permitted under the Bankruptcy law. Alternative manners of selling assets require creditor approval or court approval.

Question 2.3 [maximum 2 marks] - 1

State two acts that may be rendered ineffective towards the bankrupt estate if carried out whilst the "suspect period" of a bankruptcy proceeding was in effect.

Article 129 of the Bankruptcy Law lists a variety of acts that could be rendered ineffective towards the bankrupt estate, if they were carried out during the "suspect period" of the bankruptcy proceeding. Two such acts include: (1) payment by the debtor, within the suspect period, of debts that not yet become due and payable (and payment may be through any

means to extinguish the claim, including advances on a given note payable); and (2) a waiver of inheritance or legacy in the two-year period prior to the decree of bankruptcy. (two years and suspect period are different concepts)

Question 2.4 [maximum 3 marks] – 3

State the requirements that a Brazilian corporation needs to meet to file for judicial recovery.

A corporation filing for a voluntary judicial recovery proceeding must first have previous authorization (if urgent, managers may file, subject to further approval) from shareholders in a general meeting, which can be obtained by a simple majority of votes (unless an urgency exists). Moreover, additional requirements set forth in the Civil Procedure Code include: (1) a statement setting out the causes of the debtor's economic and financial crisis; (2) accounting statements for the current and past three financial years; (3) a nominal list of creditors and their physical and economic addresses, as well as information about their claims; (4) a list of employees with their functions and salaries; (5) updated articles of incorporation, minutes of appointments of current officers, and a certificate of regular standing filed with the Board of Trade; (6) a list of private assets of the debtor's controlling partners and officers; (7) updated bank statements and financial applications; (8) certificates of protest offices; (8) a list of legal and arbitral actions that the debtor is a party to, as well as the amounts involved; (9) detailed tax liabilities; and (1) a list of assets and rights that integrate the non-current assets in a balance sheet.

Other requirements applicable to both, judicial and extrajudicial recovery, require a debtor to not be bankrupt (or if they have been declared a bankrupt, to have extinguished the resulting liabilities), to have not obtained any concessions for judicial recovery within five years, and for their debtors, officers, and controlling shareholders to not have been convicted of any offenses relating to insolvency procedures.

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

Question 3.1 [maximum 5 marks] – 5

How is a judicial recovery different from an extrajudicial recovery?

The central difference between a judicial and extrajudicial recovery is that the former is an in-court restructuring, while the latter is for out-of-court restructurings. An extrajudicial process does involve the court when the plan is approved — only in the final stages of the structuring process, such that the plan is still ratified by courts but courts do not oversee the entire process.

An extrajudicial recovery process does not have many of the same procedural “step” that a judicial recovery would, in that there is no mandatory general meeting of creditors, and the steps to approve a plan are easier than in a judicial recovery process. Procedurally, the extrajudicial recovery lets creditors and debtors negotiate out of court, and after a plan is agreed upon, a court will authorize a public notice for all credits so willing to object within 30 days. If in an extrajudicial process, creditors do not approve, the plan could still be crammed down. A judicial recovery involves much more involvement with the court at every stage, since the proceeding is controlled and supervised by the judge and a judicial administrator, and may even involve a public prosecutor. A judicial recovery includes a requirement that the debtor state in all documents that it is undergoing this process, and any substantial step — like the disposal of all assets — requires court approval. A stay is imposed and a judicial administrator

is appointed. Some creditors may be excluded from the process as holders of fiduciary title securities and in general, there is a very precise timeline for creditor meetings and threshold voting requirements for judicial recovery.

An extrajudicial recovery also does not have a risk of conversion to bankruptcy and does not have a two-year period in which proceedings continue to run after a plan is approved. In a judicial process, conversion to liquidation is mandatory under a list of enumerated circumstances, such as a failure by the debtor to submit a recovery plan within the legal timeframe.

As far as other disadvantages to an extrajudicial recovery go, this process does not dispose of all assets without encumbrances, which means a buyer is still bound on the liabilities of the debtor, unlike a judicial recovery. Moreover, procedures such as DIP financing are not applicable, and labour related claims can be included only through a negotiation with the labour union. Lastly, a court may choose not to ratify a negotiated extrajudicial process. In contrast, labour claims in a judicial recovery must be paid within a year of the plan's implementation (subject to some exceptions) and DIP financing is permitted. (court cannot ratify without grounds).

Question 3.2 [maximum 5 marks] - 5

What is a “claim for restitution” under a bankruptcy procedure, and how does it work?

Under the Bankruptcy Law, a claim for restitution permits certain parties to seek the restitution of assets that belong to him but that may be in possession of the bankruptcy estate. The result of this claim is for the party to effectively reclaim the property and have it returned to them from the bankruptcy estate. This includes scenarios where, fifteen days prior to bankruptcy, a debtor makes a purchase on credit: in that context, the property would be delivered back to the third party as long as it hadn't already been disposed of.

Procedurally speaking, restitution in CASH will refer to the appraised value of the asset to be returned to the third party if the asset was disposed of, or where the asset was actually sold, then the price the asset was sold for. Where an amount was part of an advance on an export exchange contract, the full term of the contracts in domestic currency would constitute the amount of restitution. Finally, where the amount was delivered to the debtor by the bona fide contracting party (even if the contract was revoked or later deemed ineffective) and any tax withholdings all count as restitution. These sums are to be paid in priority to ALL claims – even those ranked in superpriority.

In general, an innocent third party will be able to use a claim for restitution as recourse for their assets or amounts paid to the debtor, so long as they were transacting in good faith.

Question 3.3 [maximum 5 marks] – 5

Describe the circumstances in which the creditors may file a recovery plan in a judicial recovery.

In the event that a debtor's recovery plan in a judicial recovery is rejected or fails to garner the requisite majorities of creditor votes, creditors themselves could present an alternative recovery plan, so long as the debtor's plan was rejected at a general meeting of creditors. Once a debtor's plan is rejected, a judicial administrator must immediately ask and hold a vote, if applicable, whether creditors have any interest in presenting an alternative plan. Procedurally, if creditors favourably vote to submit their own, alternative plan with a majority

(more than half the claims present at the meeting), then the creditors can file their own recovery plan, which must be presented within 30 days from the vote.

(when the term of the stay period has elapsed without deliberation of the judicial recovery plan presented by the debtor)

QUESTION 4 (fact-based application-type question) [15 marks in total]

The business company Braz Veículos Ltda (the company) is a subsidiary of a holding company with head offices in Germany. Braz Veículos Ltda produces electrical cars and was incorporated in the city of São Paulo where its board sits, but its operations are conducted from a single plant located in the city of Porto Alegre, where the officers and most of the back office also work. Despite its long history of success, the past few years have been particularly rough for the company, especially as a result of the Covid-19 pandemic. The company has already asked for judicial recovery in the past, and the case was terminated 10 years ago. The company's chief executive officer (CEO) has gathered the board of directors in order to deliberate on a potential filing of a judicial recovery. Several issues have come up during this meeting and your law firm has been hired to advise on the matter.

Using the facts above, answer the questions that follow.

- (a) Advise why the company should be allowed to file for a second judicial recovery and where the judicial recovery should be filed. **(5 marks) - 5**

Though the company filed for a judicial recovery 10 years ago and it was terminated, any determination of the company as a bankrupt would since have been extinguished and a court could find, based on the initial statement of financial and economic conditions, that the impact of the past few years and especially the Covid-19 pandemic would have resulted in a renewed need for corporate rescue. The company does not engage in economic activity that might be subject to protective provisions — it is an electric car business. Moreover, a judicial recovery would allow the company to retain jobs and preserve creditor interest, which meets the goals of a judicial recovery.

In terms of *where* a debtor must file, the company can only file for judicial recovery in the location where he has his main commercial establishment or branch. The Superior Court of Justice has interpreted this to mean where the company has its main turnover, while the Appellate Court has interpreted this to mean the headquarters. Since this is a fact-based inquiry, the state courts of both Sao Paulo and Porto Alegre would work. Porto Alegre is arguably where the company has its main turnover and operations, but the company is incorporated and the board sits in Sao Paulo. Since Sao Paulo is effectively the headquarters of the company, it makes sense to opt for Sao Paulo as a location, though there could be a persuasive case for Porto Alegre also, given that that's where all the company's operations are based.

- (b) The company has entered into some preliminary negotiations with key creditors in order to assess whether said creditors would support the recovery of the company. The company currently has five creditors that fall into class II of a judicial recovery: creditors secured by *in rem* guarantees. Through the preliminary negotiations, two secured creditors have signalled that they would vote in favour of a judicial recovery plan, whereas three secured creditors have shown that they are likely to seek the liquidation of the company in the event that it initiates a judicial recovery proceeding. The board of directors is aware that the current standing of the class II creditors would not allow for a reorganisation plan to be approved in such class, but doubts have arisen regarding the possibility of a Bankruptcy Court applying a cramdown in order to confirm the plan. Advise the company on whether the current standing of the class II creditors (favourable votes by 40% of the creditors) would, in the future, allow for a judicial recovery plan to be

confirmed by a Bankruptcy Court applying the cramdown provisions of the Brazilian Bankruptcy Law (Law Number 11.101/2005). Is further information required in order to offer a more precise legal opinion? **(5 marks) - 4**

Further information would be required in order to provide a more precise opinion. To cramdown a plan that otherwise does not meet the voting thresholds is permitted under Article 58 of the Bankruptcy Law, so long as a set of requirements are met. These requirements include: (1) favourable votes of creditor representing over half the amount of all creditors represented at the general meeting (regardless of which class they are in); (2) the approval of three classes of creditors (where applicable) or if only two classes have voting creditors, approval of at least one of them; AND (3) in the class that rejected such a plan, the favourable vote of over one third of the creditors. In this case, we know the third requirement is met: out of five secured creditors, two creditors plan to vote for the plan — marking 40% in favourable votes — which is above the 1/3 threshold of the dissenting creditor class. However, we need more information as to the first and second requirements to determine whether a cramdown is permissible. Specifically, we need to know how many classes of creditors the company has, and as a result, how many of them voted in favour of the plan. We need at least two more classes to vote for the plan, if there are only three classes, or if there are four classes total, we need the other three classes to vote in favour of the plan. Moreover, a total of half the amount of all creditors, regardless of class, would need to vote for the plan in order for the court to successfully cramdown on the dissenting secured creditors in class II. **(also important to know the amount of the claims held by each one of the creditors in class II)**

- (c) The company has recently acquired new auto-components manufacturing machines which are deemed essential to the carrying on of the business, given the need of the company to adapt to a new market. The financing for the acquisition of the machinery was granted by Banco XPTO, a Brazilian financial institution. The financing is secured by a fiduciary title over the machines. Due to the rough financial situation of the company, the company has recently defaulted on the financing and were not able to pay some of the instalments that had fallen due. The board of directors is worried that the bank might take possession of the machinery, given its fiduciary security. Advise the company whether the stay period might keep it (the company) in possession of the machinery. **(5 marks) – 5**

Creditors with a perfected fiduciary title interest securing a given asset can immediately repossess their collateral without the involvement of courts. Effectively, holders like Banco could enforce their security interest outside of the insolvency process. However, in a judicial recovery context, a 180-day-long stay period is imposed, which prohibits a creditor from selling or removing from the debtor's establishment any capital goods that would be deemed "essential" to the debtor's business. In this case, new auto-component manufacturing machines ARE deemed essential to carrying on the business and a court will likely find the asset fundamental for turnaround. This could preclude Banco from foreclosing on the machines in the event that the company were to enter into a judicial recovery process. Notably, this stay only applies for a judicial recovery, where any expropriation of property requires court approval (and courts fortunately tend to favour debtors like the company) — not otherwise or in other types of restructuring proceedings, like an extrajudicial proceeding.

(180-day term can be extended for another equal term)

*** End of Assessment ***