



47 = 94%

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] - 9

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1 - zero

Indicate the correct answer regarding bankruptcy legislation in Brazil:

- (a) The Bankruptcy Law regulates the liquidation - but not the reorganisation - of any individual or legal entity with activities in Brazil.**
- (b) The former Civil Procedure Code regulates the reorganisation of non-business individuals and legal entities.**
- (c) The 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 - 1

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 - 1

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.**
- (e) 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.

1. *Incurring expenses that are unjustifiable in the context of the type of business, ordinary transactions and other similar factors.*
2. *Decapitalising the company or impairing its regular functioning in an unjustifiable manner*

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.

1. *Sale by auction of certain assets individually*
2. *Sale by private treaty, provided that it is through a competitive procedure with the process conducted by an specialist agent*
3. *By other such means, as long as the process is approved by a general meeting of creditors or by the Court (with such Court process to including hearing from the judicial administrator and from the creditor's committee)*

Question 2.3 [maximum 2 marks] - 2

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.

1. *The debtor paying a debt prior to it falling due where the payment extinguishes the creditor's claim. (even if the payment is only of a part)*
2. *The debtor granting an *in rem* guarantee in respect of an unsecured liability of the debtor.*

Question 2.4 [maximum 3 marks] - 3

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

1. *Must not have obtained a judicial recovery concession within the last five years*
2. *Must not have obtained a judicial recovery concession for micro or small enterprises within the last five years*
3. *Neither the debtor itself nor its officers or controlling shareholders may have been convicted of insolvency procedure-related offences.*

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

Question 3.1 [maximum 5 marks] - 4.5

How is a judicial recovery different from an extrajudicial recovery?

Summarily, an extrajudicial recovery involves an agreement between a debtor and its creditors negotiated and made outside of court (and then subsequently ratified by the court), whereas a judicial recovery involves heavier oversight by the court throughout the process. Key differences are that an extrajudicial recovery is generally more flexible, simpler, faster and less expensive; on the other hand, a judicial recovery provides the debtor with greater scope to affect the rights of dissenting creditors and certain other creditors - for example, by:

- a) *automatically including labour-related claims, i.e. any effect on labour-related claims in an extrajudicial recovery would need to be separately negotiated with each claimant or claimant representatives, which presents potential significant difficulties given the nature of labour claims; (in an extrajudicial recovery, a negotiation with the labour union is necessary)*
- b) *potentially allowing assets to be disposed free of encumbrances, i.e. it is possible in a judicial recovery for a security interests to not remain attached to the asset after its sale to a purchaser, which is not possible in an extrajudicial recovery without the secured party releasing its security.*

In addition, other key considerations include that extra-judicial recoveries do not provide for post-commencement financing (e.g. financing the cost of the recovery, such as in a judicial recovery) and that an extrajudicial recovery does not provide a debtor with any 'safe-harbour' from ineffective-actions provisions (such as those in the 'suspect period' provisions) should the debtor be later declared bankrupt.

Further, whilst a judicial recovery prescribes in law the classes of creditors, and how those classes rank for distribution of the debtor's funds recovered in the judicial recovery, in an extrajudicial recovery it is up to the debtor negotiated and agree a plan with its creditors, and how each of them may rank (although the plan must still be ratified by filing with the Court).

Question 3.2 [maximum 5 marks] - 3.5

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

A claim for restitution is a claim by which certain parties are entitled to make which returns funds or assets to the party claiming restitution from the bankrupt estate. A claim for restitution may arise in a number of scenarios, including, for example:

- a) a return of property in possession of the debtor but owned by a party other than the debtor;*
- b) a return of property sold and delivered by a creditor to the debtor, on credit, within no more than fifteen days before the bankruptcy petition, provided that the asset has not been disposed of;*
- c) if an asset under item (b) has been sold or no longer exists, payment in cash for the sale price or the appraisal value of the asset.*

A claim for restitution is to be made by the affected party in the relevant court, but as a separate case to the bankruptcy itself. The application will be on-notice to the creditors' committee, the individual creditors, the judicial administrator and the debtor, and each of those parties may choose to oppose it.

*A claim for restitution ranks ahead of all other claims in the bankrupt estate - i.e. it has super-priority - given that its purpose is, in effect, for the specific *return* of funds or an asset within a relatively short window, rather than a collective distribution in respect of claims following realisation of the debtor's assets.*

(Restitution in cash refers to:-

- 1. Together with the appraised value of the asset and monetary compensation be delivered to a third party if the asset no longer exists at the time of the claim for restitution or, if the asset has been sold, the price it was sold for, as in both cases;***
- 2. the amount delivered to the debtor, in domestic currency, resulting from an advance on an export exchange contract, provided the full term of the transaction, including any extensions, does not exceed the term established in the specific rules of the competent authority;***
- 3. the amounts delivered to the debtor by the bona fide contracting party in the event the contract is revoked or declared ineffective; and the amount of withholding taxes, taxes due for subrogation and any amounts received by collecting agents and not transferred to the government.)***

amounts received by collecting agents and not transferred to the government.

Question 3.3 [maximum 5 marks] - 5

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

*Creditors may file a recovery plan in the event that creditors, at a general meeting of creditors, reject the recovery plan filed by the debtor and, in this sense, a creditors' recovery plan is an *alternative* recovery plan, and where more than 50% of creditors present at the meeting vote in favour of an alternative recovery plan being presented.*

This vote is to be put to the creditors by the judicial administrator, and if creditors do vote favourable for an alternative recovery plan, that plan must be presented within 30 days.

In order for a debtor's recovery plan to be rejected, and for this circumstance to arise, at least one class of creditor (whose claims are impaired by the recovery plan's terms) must reject the recovery plan (in accordance with that specific class's criteria for rejection or approval).

However, notwithstanding that a creditor may only file a recovery plan once the debtor's plan has been rejected, it should be noted that creditors still have an opportunity to negotiate the terms of the debtor's recovery plan. This may be done where creditors decide to adjourn the general meeting of creditors in order to negotiate the terms of the recovery plan with the debtor (albeit there is a time limit in this respect, with the meeting having to be concluded within no more than 90 days from its commencement).

(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

Based only the facts presented and assuming nothing else prevents the company from filing for a second judicial recovery, company should allowed to file for a second judicial recovery because it meets the requirements of Article 48 of the Brazilian Bankruptcy Law. In particular, Article 48 provides that a company cannot file for judicial recovery more than once every five years (counting from the date that the court granted or rejected the previous request), so the termination of the previous judicial

recovery case 10 years ago falls outside of this window. There is nothing in the facts presented that indicate that the company is abusing the judicial recovery process, and it appears that it maintains an active, legitimate business and there are clear reasons for the business struggling.

The judicial recovery should likely be filed in the State Tribunal of Rio Grande do Sul, being the Court having jurisdiction over the bankruptcy of the Company given that the main business activity (i.e. given that the 'officers and most of the back office' work in Porto Alegre, the capital of Rio Grande do Sul) and the location of its main assets. Rio Grande do Sul is the state would appear to be the most important place for the business - its board could meet elsewhere, including electronically, but it couldn't simply move its manufacturing plant overnight. It is noted that insolvency proceedings are run at the judiciary of the relevant state, rather than federally.

(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) - 5

It is possible that the Bankruptcy Court may apply cramdown and grant the judicial recovery plan despite only two of the five class II (secured) creditors voting in favour of the plan; however, more information is required to advise fully. On the face of it, the judicial recovery plan will fail because a favourable vote by class II creditors requires a majority in both number and value (and two out of five is clearly not a majority, regardless of those two creditors' claim values), and ordinarily all four classes of creditors must vote in favour of a judicial recovery plan for it to be accepted. However, the Court *may* grant a judicial recovery plan in the following despite all four classes not voting in favour of it, if all of the following are true:

- a) At least 50% of all creditors represented at the meeting, by claim value, and regardless of class, voted in favour of the plan (i.e. in this case we would need to know the value of each represented-creditor's claim and how each of those creditors voted);
- b) No more than one class of creditors failed to approve the plan (i.e. in this case we would need to know which of the other classes of creditors were

represented at the meeting, and whether each of them voted to approve the judicial recovery plan, in accordance with the relevant criteria);

- c) In respect of the class that rejected the plan (i.e. class II / secured creditors, in this case), at least two-thirds approved it (calculated by reference to paragraphs 1 and 2 of Article 45 of the Bankruptcy Law (NB, link provided in course materials is broken) AND ONLY where the only judicial recovery plan does not affect the creditors within this class differently (i.e. we would need to know the terms of the judicial recovery plan).*

- (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**

*A fiduciary title will ordinarily allow a secured creditor to enforce their security and repossess its secured asset outside of the insolvency process and irrespective of the stay period provided to a company under Judicial Administration. However, a fiduciary title-holding secured creditor is not allowed to enforce its security to the extent of removing or selling its secured asset within the stay period **(180-day term + 180)**(if the asset is considered essential to the debtor's business. In this case, the asset is "deemed essential to the carrying on of the business", however the only reasoning given for this is that the equipment allows it to adapt to a new market. It is unclear whether a court would agree with this reasoning, as adapting to new markets is clearly not the same as continuing to carry on a business in that business's existing market. However, it is also of note that courts have extended the concept of "essential to carrying on the business" **(only capital goods)** beyond simply running the business to even being a fundamental component to the company's recovery and turnaround. In this case, the Company should assert that the asset is essential to carrying on its business and essential to its judicial recovery as its adaptation to new markets will ultimately drive the success of its successful judicial recovery; however, it should be prepared for the secured party to assert that the equipment is non-essential and prepare for a risk that the court may agree.*

*** End of Assessment ***