INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4B

BRAZIL

49 = 98%

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] - 10

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

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.

(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.

Usually, the corporate activities of the debtor continue to be carried out by the debtor and its officers and directors in the ordinary course of business while the debtor is in judicial recovery, but subject to the supervision of the judicial administrator, the creditors' committee (if there is one), the creditors and the public prosecutor.

However, the debtor's administration (its officers and directors) may be removed during judicial recovery where those individuals are found to be guilty of committing a crime against property, public welfare or the economic order, or they are found guilty of reducing the value of the company without justification, or of creating or omitting claims when submitting the debtor's claims list. In this situation, the court will call a general creditors' meeting to determine who will assume the management of the company, with the judicial administrator taking control of the debtor's business until the meeting is called.

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.

The judicial administrator is to try to sell the business as a whole, or at least to sell each commercial establishment as a whole. Selling groups of assets as opposed to individual assets is preferred, unless the proceeds will be greater by selling assets individually.

The three methods by which assets are sold are:

1. *by auction, which is either held electronically, in person or a hybrid approach;*
2. *by a competitive procedure that is promoted by a specialised agent; or*
3. *in any other way that is approved under the terms of the Bankruptcy Law.*

Other ways of selling assets in a liquidation may be authorised, if they are approved by the general meeting of creditors, or approved by the court after it has heard from both the judicial administrator and the creditors' 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.

The bankruptcy order will contain the "suspect period", which cannot be more than 90 days prior to the filing of the petition requesting the bankruptcy, or from the first protest by a creditor due to default by the debtor.

A variety of acts carried out in the "suspect period" may be rendered ineffective, two of which include:

1. *a payment made by the debtor within the suspect period to pay off debts that have not yet fallen due, by any means extinguishing the claim, including advances on a note;*

2. *the payment of a debt within the suspect period that has become due and enforceable, but is paid in a way that is not provided for by the contract pursuant to which the debt fell due.*

Question 2.4 [maximum 3 marks] - 3

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

The Brazilian corporation must be a business legal entity in order to file for judicial recovery. It must not be a empresa públicas (public enterprise) or a sociedades de economia mista (mixed economy association). It must also not be engaged in an economic activity that is subject to a special protective provision, for example finance, credit, health care and public utility power generation.

The other requirements the Brazilian corporation needs to meet are:

a) *the entity must not be bankrupt or, if it has ever been declared bankrupt, the liabilities must be declared to have been extinguished;*

b) *the entity must not have obtained a concession for judicial recovery, or for judicial recovery for micro or small enterprises, within the previous 5 years; and*

c) *the debtor entity, its officers and controlling shareholder must not have been convicted of any offences relating to insolvency procedures.*

Finally, it is necessary for a Brazilian corporation to have the prior authorisation of its shareholders in a general meeting to enter into judicial recovery.

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 main difference between a judicial recovery and an extrajudicial recovery is that a judicial recovery is supervised by the court at all times, whereas an extrajudicial recovery only involves the court after the recovery plan has been agreed between the debtor and its creditors. In a judicial recovery, a judicial administrator is appointed to supervise the procedure and to ensure that it is implemented. There is no judicial administrator appointed in the case of an extrajudicial recovery. This means that an extrajudicial recovery is cheaper than a judicial recovery.

*Once the court initiates the judicial recovery process **(and the case is accepted by the court)**, the debtor is only able to withdraw from it if the creditors agree to it. It is also possible for judicial recovery to be converted to liquidation in certain circumstances, including where there is resolution of the creditors, or the debtor fails to submit a recovery plan within the set timescale. In extrajudicial recovery, however, there is no risk of the procedure being converted to liquidation.*

Judicial recovery takes a much longer time than extrajudicial recovery. Once a judicial recovery process is commenced by the court, the debtor has 60 days to submit its judicial recovery plan to the court. Creditors then have 30 days to object to the plan. If an objection is received, a general meting of creditors must be called, and creditors must vote to approve the plan. The meeting must be concluded within 90 days if it is adjourned. In contrast, with extrajudicial recovery, the petition is only filed once the debtor has prepared the plan and negotiated with creditors, and may even be filed as soon as the debtor has a third of votes approving the plan from creditors who are subject to the proceeding. The court then gives 30 days for creditors to file objections to the plan, with 5 days for the debtor to respond to an objection. The court will then decide whether to approve the plan; there is no general meeting of creditors in an extrajudicial recovery process as there would be in a judicial recovery.

In both procedures, the court may cramdown (forcibly approve) the recovery plan, but there are different requirements for this. In a judicial recovery, the conditions for this are that:

1. *the debtor must obtain votes in favour from more than half the amount of all credits represented at the general meeting;*
2. *approval by at least three of four voting classes, or two of three voting classes, or one of two voting classes, as appropriate; and*

3. *at least one third of favourable votes in the class that did not approve the plan.*

In comparison, an extrajudicial recovery plan may be crammed down if creditors holding more than half of the credits in each class vote to approve the plan.

Once the plan is approved by the court, a debtor under judicial recovery remains under the supervision of the court in the procedure for up to two years. The extrajudicial recovery process is different: once the plan is court-approved, it becomes effective and the debtor is not subject to a two-year period of supervision.

Other differences include:

- *labour-related claims are not subject to an extrajudicial recovery process automatically because there must be a collective negotiation with the labour union, whereas in judicial recovery such claims are automatically included;*
- *in a judicial recovery process, the debtor's assets may be sold free of encumbrances, but this is not possible in an extrajudicial recovery process; and*
- *while post-commencement debtor-in-possession (DIP) financing is possible for a debtor in judicial recovery, it is not possible for a debtor in extrajudicial recovery.*

Question 3.2 [maximum 5 marks] – 4.5

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

The Bankruptcy Law contains provisions allowing particular parties the right to seek restitution of assets or funds that are in the possession of the bankruptcy estate, but which belong to that particular party. A claim for restitution seeks the recovery of that property from the estate by the owner of the property.

There are also provisions in the Bankruptcy Law that allow an asset that was sold on credit to the debtor and delivered within the 15-day period prior to the petition for bankruptcy being filed, to be returned to the seller. However, this can only occur where the asset has not been disposed of subsequently by the debtor.

Any claim for restitution will run under a separate case record to the bankruptcy proceeding. The debtor, the creditors, the committee of creditors, and the judicial administrator are all given notification of the claim, and may choose to oppose it or not.

The Bankruptcy Law provides that restitution in cash is for:

1. *the appraised value of the asset, if the asset no longer exists at the time the claim for restitution is made, or it was sold the price it was sold for;*
2. *the amount the debtor received in domestic currency from an advance on an export exchange contract;*

3. *the amount received by the debtor from a bona fide contracting party in the event a contract is revoked or declared ineffective; and*
4. *the amount of withheld tax, tax due for subrogration, and amounts received by collecting parties but not transferred to the government.*

If the court determines that funds should be paid following a claim in restitution, the amounts are paid in priority to all other claims, including those with super priority. The only claims that have a higher priority are the fees for the administration of the bankruptcy procedure, and funding delivered under a DIP financing loan. ***(Art. 150. Expenses whose advance payment is essential for the administration of bankruptcy, including in the event of provisional continuation of the activities provided for in item XI of the caput of art. 99 of this Law, will be paid by the trustee with the resources available in cash.***

Art. 151. Labor credits of a strictly salary nature overdue in the 3 (three) months prior to the declaration of bankruptcy, up to the limit of 5 (five) minimum wages per worker, will be paid as soon as cash is available.)

Question 3.3 [maximum 5 marks] - 5

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

Following the enactment of Federal Law 14.112/2020 on 24 December 2020, which amended Federal Law 11.101, it is now possible for creditors to file an alternative recovery plan in a judicial recovery proceeding, but only where the debtor's proposed plan is rejected at a general meeting of creditors.

Once a judicial recovery process is commenced by the court, the debtor has 60 days to submit its judicial recovery plan to the court. Creditors then have 30 days to object to the plan. A general meeting of creditors will only be called if an objection to the debtor's plan is filed within 30 days of the plan being presented by the debtor. At the meeting, all four classes of creditors must approve the plan in order for it to be adopted (Article 45 of the Bankruptcy Law). The four classes and the criteria for approval are:

1. *Labour claims – a majority by head count of attending creditors must approve the plan.*
2. *Secured claims – a majority by both head count and value of claims of attending creditors must approve the plan.*
3. *Unsecured claims – a majority by both head count and value of claims of attending creditors must approve the plan.*
4. *Claims by micro and small enterprises – a majority by head count of attending creditors must approve the plan.*

In accordance with Article 56, paragraph 4, of the Bankruptcy Law, if the plan presented by the debtor is rejected at the meeting of creditors, the judicial administrator has to immediately ask for a vote on whether the creditors want 30 days to present an alternative plan. In order to pass the vote, a simple majority of the total amount of credits present at the meeting must vote in favour. The alternative plan must then be presented by the creditors within 30 days, for approval at another general meeting of creditors.

There are certain restrictions in place, for example that creditors who support the alternative plan must forego any personal guarantees provided for their credits which are subject to the judicial recovery proceeding.

If the alternative plan is also rejected, and there is no cram down of a plan under Article 58, the company will be placed into liquidation.

(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 has 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

A debtor must satisfy certain conditions in order to file for judicial recovery. These include a concession that the debtor has not obtained a concession for judicial recovery in the last 5 years. As Braz Veículos Ltda's previous judicial recovery case was terminated 10 years ago, more than the requisite amount of time has passed since that first judicial recovery case, and the company can file for a second judicial recovery.

All proceedings under the Bankruptcy Law, including judicial recovery, take place at the state-level courts of Brazil. According to Article 3 of the Bankruptcy Law, the court

with jurisdiction will be the court in the location of the debtor's main establishment. This is not necessarily the debtor's registered office. The definition of "main establishment" was considered in a number of cases:

1. ***In relation to the previous insolvency legislation, the Second Joint Panel of the Superior Court of Justice, ruling on Conflict of Jurisdiction Number 32,988 (STJ, CC 32.988, Reporting Justice Sálvio de Figueiredo Teixeira, dated 14 November 2001), determined that the appropriate court was not necessarily the one where the registered office was located, but rather that of the place where the business activity is centralised, forming the vital centre of the debtor's main activities.***

2. ***In cases decided by the Chamber Reserved for Bankruptcy and Judicial Recovery, Reporting Appellate Judge Elliot Akel on 30 June 2009 (in TJSP, AI 990.09.372608-4) and 1 June 2010 (in TJSP, AI 642.782-4/0-00) that the main establishment is most likely where the debtor's main assets are.***

3. ***In the decision of Reporting Justice Luis Felipe Salomão on 22 February 2017 (STJ, AgInt on CC 147.714) by the Second Joint Panel of the Superior Court of Justice, the guidance above was reaffirmed, with the addition that the main establishment should be the place where the debtor has its higher turnover, being the most important place from a business perspective.***

4. ***On 11 April 2017 (in TSP, AI 2230327-51.2016.8.26.0000), the Court of Appeals of the State of S***ão Paulo, by its Second Chamber Reserved for Business Matters, decided that the main establishment in the situation before it was the location where the administrative, financial, commercial and operational decisions were taken and not the place where the industrial plant was situated.

5. ***The Second Joint Panel have also used the criteria of "centre of activities" and "decision-making centre" as the basis for determining jurisdiction, but in circumstances where both led to the same conclusion.***

The two choices in this case are São Paulo, where the company was incorporated and its board sits, or Porto Alegre, where its officers and most of the back office also work, and where its operations are conducted from a single plant.

Clearly, most of the company's assets will be located in Porto Alegre, given that is where the plant and its operations are. The business will be considered centralised there because that is where most of the back office is and is where production takes place, and will also be the location of the higher turnover.

The Court of Appeals case suggests that the main establishment is the location where the administrative, financial, commercial and operational decisions are taken, not necessarily where the industrial plant is situated. However, in this case it is only the board of directors who are based in São Paulo, whereas the back office who will take the day-to-day decisions are located in Porto Alegre. For this reason, and given that most of the assets will be

in Porto Alegre, and that location will have the higher turnover, the most appropriate place for the judicial recovery to be filed will be Porto Alegre.

(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) – 4.5

In accordance with Article 45 of the Bankruptcy Law, creditors are divided into four classes and all four classes must approve the recovery plan pursuant to the criteria set out in Article 45 in order for it to be adopted at a general meeting of creditors:

1. ***Labour claims – a majority by head count of attending creditors must approve the plan.***
2. ***Secured claims – a majority by both head count and value of claims of attending creditors must approve the plan.***
3. ***Unsecured claims – a majority by both head count and value of claims of attending creditors must approve the plan.***
4. ***Claims by micro and small enterprises – a majority by head count of attending creditors must approve the plan.***

For the class II creditors to approve the plan, the majority by head count and by value of claims must approve the plan. We are told that only 40% of creditors in class II would approve the plan and so it would not be approved by the class II creditors.

Article 58 of the Bankruptcy Law provides that a recovery plan that is not approved by the general meeting of creditors may be crammed down by the court. The conditions for cram down are that at the same general meeting of creditors the debtor obtained, cumulatively:

1. ***the favourable vote of creditors representing over half the amount of all credits represented at the general meeting, irrespective of classes;***

2. *depending on how many creditor classes there are, approval by either 3 out of 4 classes, 2 out of 3 classes, or at least 1 out of 2 classes; and*

3. *in the class that rejected the plan, the favourable vote of over one-third of the creditors in accordance with Article 45.*

Article 58 also requires that the plan does not provide for different treatment of creditors of the class that rejected the plan.

The company has the favourable vote of 40% of creditors in class II, which is more than the one-third of creditors who rejected the plan that is required by Article 58. ***(40% in number of creditors, not necessarily in value)*** *This would suggest that cram down by the court would be available. However, in order to advise fully, the following further information is required:*

a) *Does the company have any creditors in any of the other classes prescribed by Article 45, and how would they vote?*

b) *Would the result of votes mean that only the class II creditors reject the plan? If another class would reject the plan then cram down would not be possible.*

c) *Would the result of votes mean that more that half the amount of credits represented overall would be in favour of the plan? If not, there is no opportunity to cram down.*

d) *Does the plan provide that creditors within class II will be treated equally? If not, then the plan cannot be crammed down.*

(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

Once the bankruptcy court orders judicial recovery (not at the point when the application is filed), the court will also order the commencement of the stay period or moratorium. Pursuant to Article 6 of the Bankruptcy Law, the stay lasts for 180 days, and may be extended once for an additional 180 days.

Certain creditors are excluded from the judicial recovery process. In particular, the holders of fiduciary title securities are excluded and their claims cannot be altered by the judicial recovery plan. This means that Banco XPTO, as the holder of a fiduciary title over the machinery, will not be subject to the judicial recovery procedure and its claim to the machinery does not form part of the proceeding. However, if Banco XPTO actually seeks to enforce its rights to take the machinery, it may be difficult, as none of the company's assets may be repossessed or affected without the approval or authorisation of the bankruptcy court. There are examples of first instance judges preventing the repossession of such property, in order to preserve the debtor's business (on 25 March 2015 by Reporting Judge Moura Ribeiro in STJ, Second Joint Panel, AgRg on CC 133.509/DF, and on 24 February 2016 by Reporting Judge Marco Buzzi in ST, Second Joint Panel, AgRg on CC 140.146/SP).

Furthermore, during the stay period of 180 days (or longer if extended), the property over which claims that are excluded from the judicial recovery procedure is secured may not be repossessed from the debtor if it is essential to the debtor's business activities. In this case we are advised that the machines are essential for the debtor company to carry on its business, and so Banco XPTO is unlikely to be able to repossess the machines during the stay period.

Once the stay period expires, as set out above the bankruptcy court must approve the repossession of the machinery, and it is possible that the court would refuse to do so in circumstances where the machines are necessary for the company to continue its business.

* End of Assessment *