



46.5 = 93%

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 - 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 - 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.**

*The debtor's administration can be removed from a judicial recovery case for among other reasons:*

- *Acting with malice in opposition to the interests of its creditors*
- *Being dismissed as per the judicial recovery plan*

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 three manners in which assets of a bankruptcy estate can be sold by a judicial administrator during a liquidation are:*

- *Via auction, in an in-person, electronic or hybrid format*
- *Via a competitive process promoted by a specialised agent*
- *Via any other process, provided it is approved under the terms of the Bankruptcy Law*

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.**

*Acts that may be rendered ineffective towards the estate when occurring during the "suspect period" include, but are not limited to:*

- *Acts that are performed free of charge performed in the two years preceding a bankruptcy decree (two years and suspect period are differente concepts)*
- *Payment of debts by the debtor that had become due, during the suspect period, in a method that was not provided for in the terms of the debt contract*

Question 2.4 [maximum 3 marks] - 3

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

*In order to be able to file for judicial recovery a Brazilian corporation must meet the below requirements:*

- *Not be in a bankruptcy process, or if the company has ever been declared bankrupt, the liabilities due as part of said bankruptcy have been extinguished*
- *Not have obtained any concessions in the past 5 years for judicial recovery*
- *Not have obtained any concessions in the past 5 years for a judicial recovery for micro or small enterprises*
- *The officers, shareholders and debtor must not have been convicted to any offences in relation to insolvency procedures*

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?**

*The judicial recovery and extrajudicial recovery processes within the Brazilian insolvency regime have a number of similarities and differences between them. Generally speaking though, the extrajudicial process is considered to be a faster and more simplistic process, allowing for faster, but not necessarily better outcomes for both the debtor and creditors.*

*One of the main differences between the two processes is the involvement of various parties within them. In a judicial recovery process, there is a requirement for numerous **(in theory it could be finished without anyone or even with just one, not numerous)** general meetings of creditors to be held, a creditor's committee must be convened, and a judicial administrator must be appointed for the process. The involvements of additional participating stakeholders in the process (and fee accruing stakeholders in the case of the judicial administrator) causes the judicial recovery process to typically be slower and more costly to the estate.*

*In a similar vein, there is a difference in significance of creditor voting for both processes. While in a judicial recovery all four designated creditor classes are required to approve the plan in order for it be adopted, in an extrajudicial recovery there is the possibility of a creditor cram down. This is possible when creditors holding in excess of 50% of credits in each class vote on the plan, provide certain other provisions are met.*

*Furthermore, even upon the adoption of a plan the two processes can differ. In the case of an extrajudicial recovery the court decision ratifying or dismissing the process ends the process entirely. However, in the case of a judicial recovery, the court judgement executing the plan commences a maximum two-year supervisory period during which the plan is executed. During this period the non-performance of the plan causes the recovery procedure to convert into a bankruptcy.*

*With regards to how a company is able to handle its assets and liabilities during, the extrajudicial recovery process is arguable more restrictive. For example, contrary to a judicial recovery, assets are not allowed to be disposed free of encumbrances, thereby increasing the difficulty of finding a viable purchaser for any assets. Furthermore, in an extrajudicial recovery there is not a provision for post-commencement financing, which can make it difficult to fund the work required to execute a plan, especially given the aforementioned difficulty that can be involved with selling assets with encumbrances.*

*Overall, both processes allow for effective ways for a debtor to navigate their financial situation and have their own strengths. Generally speaking, in comparison to its counterpart, the judicial recovery process provides more tools for the debtor to use in the disposal of assets and the acquisition of financing at the expense of a procedure that's requirement of additional players, will take longer at an additional cost.*

***(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)***

Question 3.2 [maximum 5 marks] - 5

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

*In the Brazilian Bankruptcy Law certain parties have a right to seek claims for restitution of funds or estates in possession of the bankruptcy estate. Generally speaking, these claims involve assets belonging to party that are in possession of the bankrupt estate and seek to return the property to the party. Additionally, restitution claims allow for the return of assets sold on credit by a seller and delivered to the debtor during the 15 days before a bankruptcy petition is presented, provided that the assets have not been disposed.*

*Restitution suits are run on separate case record in the judicial system and amounts due from successful claims have priority over all claims, including super-priority claims.*

*In addition to the return of property claims for restitution in bankruptcy procedures also allow for restitution to be made in the form of cash.*

*Such claims can be made in several situations these are: if the value (or the asset?) of the assets delivered by the party no longer exists, or alternatively if the assets has since*

*been sold on, the price received for the asset can be claimed. Also, if an advance has been provided to the debtor for an export exchange contract the amount provided to the debtor can be claimed back as restitution as long as the terms of the transaction meet specific rules. Furthermore, amounts given to a debtor as part of a contract that is revoked or deemed ineffective; or withholding tax amounts received by collecting agents and not provided to the government constitute amounts that can be pursued through restitution claims.*

*Overall restitution claims provide a useful tool for third parties to quickly seek to return of funds or property that was provided to a bankrupt estate in the period just prior to its petition, thus providing somewhat of an incentive to third parties to continue to do business with parties that may be on the verge of financial difficulty.*

Question 3.3 [maximum 5 marks] - 5

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

*Within a judicial recovery process, the primary goal for the judicial administrator that has been appointed is to create a viable recovery plan that achieves the mandatory approval of the creditor classes, is ratified by the court, and is executed thereafter. Thus, allowing the debtor to resolve their financial issues and continue as a functioning business.*

*During this process the most difficult step for the judicial administrator typically is receiving the approval of the creditor classes for its recovery plan. The process for this involved the presentation of the proposed recovery plan which started a 30-day period for objections, if no objections were reported during this period the plan would be automatically approved. If any objections were heard a general meeting would be called to put the plan to a vote by the creditors.*

*The general meeting could be adjourned for up to 90 days for the creditor classes to approve and adopt the plan collectively. During this time the creditors could negotiate changes to the recovery plan with the debtor in order to reach a recovery plan that they could agree on and approve. The key distinction here being that while the creditors could negotiate a recovery plan with the debtor, they could not create a plan themselves.*

*This changed with an update to the law in 2020 under 14.112/2020 that allowed creditors to present a recovery plan within a judicial recovery. Under this change in law, creditors may now present a recovery plan to the wider creditor group for approval in the event that the plan presented by the debtor is rejected.*

*This change in the law has provided creditors with additional power within the judicial recovery process and increased flexibility to present solutions for the company's*

ongoing survival. Albeit this practice still remains irregular due to a series of restrictions put in place alongside this law, for example by supporting the creditor filed recovery plan, creditors forego any personal guarantees provided for by individuals that their credits are in relation to.

**(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**

*In order for a company to be eligible for the filing of a judicial recovery the company must meet four conditions, these conditions are:*

- *The company must not be in a bankruptcy process, or if the company has ever been declared bankrupt, the liabilities due as part of said bankruptcy have since been extinguished*
- *The company must not have obtained any concessions in the past 5 years for judicial recovery*
- *The company must not have obtained any concessions in the past 5 years for a judicial recovery for micro or small enterprises*
- *The officers, shareholders and debtor must not have been convicted to any offences in relation to insolvency procedures*

*Given the information provided about the company, it appears to meet all the criteria mentioned in order to be allowed to file for judicial recovery. The prior use of judicial recovery by the company should not disallow it from filing for a second judicial recovery given that the prior case was terminated 10 years ago, in excess of the 5-year time period condition.*

*With regards to where the judicial recovery should be filed, the jurisdiction of all Bankruptcy Law governed procedures is dependent on the location of the main establishment of the debtor. This however is not a clear-cut definition as it requires an examination of the facts on a company's business due to varying rulings between both Appeals courts and the Superior Court of Justice in Brazil. In making a decree on a conflict of jurisdiction the Super Court affirmed that the main establishment of a debtor was not necessarily the registered office but the place where the business activity was centralized and the main centre of debtor activities.*

*This differed to the Court of Appeals of Sao Paulo decision which ruled that the main establishment and hence jurisdiction for such cases was the place where the administrative, financial, commercial and operational decisions took place, not just where any industrial activity took place.*

*This being considered, Braz Veículos Ltda centres its operations in the city of Porto Alegre where its sole plant and most of its staff and officers work. Therefore according to precedent, the main establishment for the company would be in Porto Alegre and the judicial recovery should be filed in 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) - 5***

*Under the Bankruptcy Law strict criteria is set out for the creditor approvals required to adopt a judicial recovery plan. Furthermore, the Bankruptcy sets out four classes that creditors are to be grouped into, with each having its own voting criteria to approve a recovery plan; for class II, secured claims, the criterion for approval is a majority vote by head count and value for claims of attending creditors. Additionally for the recovery plan to be adopted and be confirmed by a Bankruptcy court all classes are required to approve the plan.*

*Taking this account of this, the class II creditors of Braz Veículos Ltda would not approve a recovery plan were it to be put to a vote given that only 40% of the creditors*

*(by headcount) would vote for the plan, less than the 50% required. However, it is worthwhile to note that creditors must be in attendance in order to vote on the plan, therefore while the provisional votes may be known by the management of the company, it is possible that voting could change if not all creditors attend.*

*Although we know that a potential recovery plan would not be approved by creditors due to the fact that at least one class of creditors would reject the plan, the Brazilian Bankruptcy Law Number 1.101/205 provides for an avenue to cramdown classes despite the dissent of a creditor class. In order for this to happen a favourable vote must be gained by more than 50% of the credits voting at the meeting; the standard approval of all but one classes is required (provided there are at least 2 classes) pursuant to article 45; and finally, the class that rejected the plan must have had at least one third of the voting creditors vote for the plan. Should all these criteria be met, under Article 58 of the Bankruptcy law a judge can grant a judicial recovery in spite of the plan being rejected by at least one class.*

*For Braz Veículos Ltda, there are several gaps in information that need to be filled prior to confirming a more precise legal opinion. Firstly, the amount of credits that each class II creditor has needs to be ascertained, as currently we are only aware of the total number of creditors and that two out of five would vote favourably for the plan, albeit given a majority is need in headcount and credits the creditor class would still reject the plan. Secondly, we would need to ascertain how many other creditor classes the company may have, as this would affect the possibility of a cramdown given that at least two different classes of creditors are required for this. Finally, the potential voting of the other classes of creditors needs to be ascertained in order to know if any other classes would reject a judicial recovery plan.*

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

*In Brazilian law a fiduciary security is a type of in rem guarantee that grants priority to creditors over assets in the event that a debtor goes into bankruptcy. In the case of a fiduciary security, the title of the security is transferred to the creditor who is able to sell the property in the event of a default by the debtor without the requirement of going to court. For judicial or extrajudicial recovery proceedings, the creditor is considered to own a claim this is not subject to the insolvency proceedings, therefore*

*the claim will not be affected by a restructuring plan. Albeit in the case of judicial recoveries, creditors are restricted from selling or removing from the debtor any capital goods that are deemed to be essential to the business of the debtor. Furthermore, in order to perfect a fiduciary security the agreement must be annotated with the Real Estate Registry in the cases of real property being used as security.*

*Taking this into account the company will be able to keep the machinery in its possession for 180 days during the stay period granted by the judicial recovery as the machinery is likely to be deemed essential to the functioning of the business. Additionally, should the 180-period end there is the possibility for a one time extension of the stay for a further 180 days.*

**\* End of Assessment \***