



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] - 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 - 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 - 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 provides that the administration of a debtor can be removed where (i) the administration has acted with "malice, simulation or fraud against the interests of its creditors" or (ii) where the administration has incurred personal expenses that are manifestly excessive when compared to his equity position.*

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 may sell the assets of a bankrupt estate by (i) in-person, electronic or hybrid auction; (ii) by a competitive (bid) procedure operated by a specialist agent, or (iii) by any other method approved in the Bankruptcy Law.*

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.**

*Two acts that may be rendered ineffective towards the bankrupt estate if committed during the suspect period include (i) payment of debts that are not yet due in a way that extinguishes the claim; or (ii) payment of debts that are due any payable in a manner not provided for in the contract.*

Question 2.4 [maximum 3 marks] - 3

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

*To file for judicial recovery, a Brazilian corporation must (i) either never have been declared bankrupt or, if it has been declared bankrupt, have extinguished the resulting liabilities; (ii) not have obtained a concession for recovery (whether 'ordinary' or for small and micro enterprises) in the last 5 years and (iii) not have been convicted (and its officers and controlling shareholder also must not have been convicted) of any offence relating to insolvency.*

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?***

*A judicial recovery is a court-supervised process, whereas an extrajudicial recovery begins as an out-of-Court negotiation between the debtor and its creditors, and then concludes as a court process to approve the agreed recovery arrangement. An extrajudicial recovery can therefore be said to be a hybrid procedure.*

*An extrajudicial recovery is also simpler than a judicial recovery, as it lacks the requirements for example to have a judicial administrator, creditors' committee or general meeting of creditors.*

*In a judicial recovery, the debtor runs the risk of having the procedure converted into a bankruptcy (for example if it does not file the recovery plan in the required time); however, for an extrajudicial recovery this is not an available option so the debtor does not run that risk.*

*Further, a judicial recovery proceeding remains running for a period of two years following approval of the plan by the Court. This is not a requirement of an extrajudicial recovery, which terminates once the plan is approved.*

*Finally, a major difference is that in a judicial recovery assets can be disposed of (in certain circumstances) free of any liens, but in an extrajudicial recovery it is not permissible to do this so assets will be sold subject to the liabilities incurred by the debtor. This is considered to be a major disadvantage of the extrajudicial recovery process.*

**(labor 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] - 4

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

*A claim for restitution is a claim made by a third party where that third party owns assets that are in the possession of the bankrupt estate. Essentially, that third party will claim the return of the assets belonging to it but which are, for whatever reason, held by the bankrupt estate.*

*A claim for restitution is also permissible in respect of assets sold to the debtor in the 15 days prior to the bankruptcy petition where (i) that assets was sold on credit and (ii) the asset has not yet been disposed of i.e. it remains in the possession of the debtor.*

*It is possible to have restitution in cash where the asset has already been disposed of, and that cash value will be either (i) the appraised value of the asset; or (ii) the price that the debtor received on disposing of the asset.*

*A claim for restitution is made by way of a separate proceeding or suit, and so does not form part of the bankruptcy proceeding. That said, the debtor, creditors' committee, creditors and the judicial administrator will all be notified of the restitution proceeding so that they can decide whether or not to oppose that proceeding.*

*If a claim for restitution is successful, the resulting amount due must be paid in priority too all other claims, even super-priority claims. This places the successful restitution claimant in a very advantageous position.*

**(Other cash restitutions:-**

- ***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;***
- ***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.)***

**Question 3.3 [maximum 5 marks] - 5**

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

*The usual position in a judicial recovery is that the debtor files a recovery plan. Previously, this was the only way in which a plan could be filed but Federal Law 14.112/2020 (which became effective in January 2021) provides that in certain circumstances the creditors may file the plan.*

*The debtor's judicial recovery plan is published, along with a notice affording creditors 30 days to object to it. If no objections are received, the plan is automatically passed. However, if any creditor objects to the plan, the Court will convene a general meeting of creditors to vote on the plan.*

*At the general meeting of creditors, the debtor's recovery plan will be voted on. If this recovery plan does not obtain the required votes (headcount majority for labour and small and micro enterprise claims, and double majority (headcount and value) for secured and unsecured creditor claims), the judicial administrator will present to vote a 30-day opportunity for the creditors to present an alternative plan. If a simple majority of the credits present at the meeting vote in favour, the creditors will have 30 days to prepare and file their own recovery plan for the debtor.*

***(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***

*The company is eligible to file for a second judicial recovery. Under the Bankruptcy Law, the relevant requirement to file for judicial bankruptcy is that the debtor must not have been subject to a concession for judicial recovery within the last five years. Since the company's prior judicial recovery concluded 10 years ago, it is in compliance with that requirement and can therefore file the second judicial recovery.*

*The question of where the judicial recovery should be filed is a complex one. The Bankruptcy law requires that the recovery should be filed in the Court with*

*jurisdiction over the "main establishment" of the debtor, but this term has given rise to some conflicting decisions.*

*It is settled that the registered office is not enough to found jurisdiction, so Sao Paulo will not necessarily be the appropriate Court even though the company was incorporated there. The Superior Court of Justice has held previously that the "main establishment" is the area in which the company has the most turnover, i.e. the area which is most significant to the company commercially. However, the Sao Paulo Court of Appeal has held that the "main establishment" is the headquarters of the company or the place where the administrative decisions are undertaken.*

*In this instance, the registered office and the Board sit in Sao Paulo. However, the plant, back office and officers of the company all sit in Porto Alegre. Applying the criteria of the Superior Court of Justice, the company should file the recovery in Porto Alegre since that is where the main commercial business of the company takes place (i.e. the plant and all of the back-office decisions and the officers' decisions).*

- (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**

*Cramdown may be used to apply a reorganisation plan where 1 class of creditors has not voted in favour of the plan but where all of the following have been complied with:*

- *All other classes voting have approved the plan;*
- *Creditors representing at least half of all the credits present at the meeting (not having regard to classes) have voted in favour of the plan; and*
- *Within the non-approving class, at least 1/3 of the creditors in that class have voted in favour of it.*

*We do have sufficient information to state that, if the first two requirements are met (i.e. half of all total credits and all other classes approve the plan), the two secured creditors will be sufficient within Class II to meet the threshold of 1/3 of the creditors in that class (the third requirement).*

*However, in order to accurately advise the company, we will need to understand (i) what other creditors the company has, (ii) what classes those creditors fall into, and (iii) how those creditors intend to vote on the plan.*

***(Article 58 also requires that the plan does not provide for different treatment of creditors of the class that rejected the plan; which is the amount of the claims held by each one of the creditors of 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)***

*The stay period applies for 180 following the granting of an order allowing judicial recovery, and may be extended for an additional 180 days (but only one extension is permissible). The stay period operates as a moratorium on claims, and creditors subject to it are unable to seize any assets, even cash, from the debtor for the duration of the stay.*

*That said, as holder of a fiduciary security is entitled to enforce its security outside of the judicial recovery process, meaning that in theory (without more) the bank could enforce against the machinery since the security presumably perfected upon default. However, the position of fiduciary security holders in this situation is subject to numerous restrictions, both as a result of the Bankruptcy Law and as a result of debtor-friendly Court decisions.*

*Under article 49 paragraph 3 of the Bankruptcy Law, a fiduciary security holder may not seize any "essential capital goods" during the stay period, whether or not they have a perfected fiduciary security. Given that the machinery is essential to the company's business, and is a capital asset, the company will be able to rely on this provision to prevent the bank from taking possession of the machinery during the stay period.*

*Even after the stay period is concluded, the Superior Court of Justice has decided (in a 2010 decision) that the holder of a fiduciary security may not proceed to immediately continue enforcement measures against the secured asset, and an*

*order of the Bankruptcy Court granting consent is required before any expropriation of the asset. This will also protect the machinery and help to keep it in the company's possession even after the stay period is over.*

**\* End of Assessment \***