



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: **[studentnumber.assessment4B]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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

Commented [DB1]: 46/50 – well done!

QUESTION 1 (multiple-choice questions) [10 marks in total] 9 marks in total

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

Question 1.1

Indicate the **correct answer** regarding Bankruptcy Legislation in Brazil:

- (a) The Bankruptcy Law regulates the liquidation – but not the reorganization – of any individual or legal entity with activities in Brazil.
- (b) Several different statutes have regulated bankruptcy proceedings in Brazil over the years and all of the statutes since the Republican Period, including the current Bankruptcy Law, have allowed for debtors to file for the *concordata* regimen as a means to reorganize.
- (c) The current Bankruptcy Law contains a section addressing cross-border bankruptcies.
- (d) The Bankruptcy Law provides for the judicial recovery of debtors (whether individuals or legal entities) who carry on business activities.

Commented [GMP2]: Correct = 1,0

Question 1.2

Which of the following statements is **incorrect** with regards to the Brazilian Judiciary?

- (a) Brazil has two apex courts: the Superior Court of Justice is in charge of non-constitutional matters, whereas the Supreme Federal Tribunal has jurisdiction over constitutional issues.
- (b) Labour disputes take place at a specialized segment of the Judiciary, composed of labour courts, 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.

Commented [GMP3]: Correct = 1,0

Question 1.3

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

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

(c) The *antichresis* is a widely used type of security, the purpose of which is to assign the income from a movable property to the guaranteed party.

Commented [GMP4]: Correct = 1,0

(d) Fiduciary titles are increasingly used as a security due to the fact that this guarantee allows for the guaranteed party to – as long as certain conditions are met – take possession of the collateral and sell it outside a bankruptcy proceeding.

Question 1.4

Which of these parties is **allowed** to file for a judicial recovery case under the terms of the Bankruptcy Law?

(a) An *Empresa pública* (a company belonging to the Federal, State or local government).

(b) A law firm.

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

Commented [GMP5]: Correct = 1,0

(d) A bank.

Question 1.5

Concerning corporate liquidation, indicate the **correct** statement below:

(a) The Bankruptcy Law does not provide a means for the debtor to file a voluntary liquidation proceeding.

(b) None of the gateways for the involuntary liquidation of a debtor require the creditor to actually prove the balance sheet insolvency of the debtor.

Commented [GMP6]: Correct = 1,0

(c) A debtor has a 30-day period, after service of process, to present his defence against a creditor seeking its liquidation.

(d) A decision from the bankruptcy court declaring the bankruptcy of a debtor is unappealable.

Question 1.6

Which of the following claims has the **lowest** priority under a bankruptcy proceeding?

(a) Unsecured claims. Among the unsecured claims, the tax-related fines are the lowest ranked. The correct answer should be letter (b).

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(b) Tax-related fines.

(c) General privilege claims.

(d) Labour claims short of 150 minimum wages.

Question 1.7

A debtor under judicial recovery has the following creditors:

- 20 creditors in Class I (workers and labour-related claims)
- 2 creditors in Class II (creditors secured by *in rem* guarantees)
- 150 creditors in Class III (unsecured creditors)

- 40 creditors in class IV (claims held by micro and small enterprises)

The total amount of debt owing in each class is the following:

- BRL 0.5 million in Class I
- BRL 5 million in Class II
- BRL 30 million in class III
- BRL 10 million in Class IV

Assuming all creditors are present at the debtor's General Meeting of Creditors, **indicate the only true statement** regarding the approval of the plan:

- (a) The approval of the plan in Class I is dependent on its approval by creditors whose claims amount to a quantity in excess of BRL 0.25 million.
- (b) The approval of the plan in Class II is dependent on a double majority: by head count and by total amount of claims.
- (c) The approval of the plan in Class III depends solely on a majority by head count.
- (d) The approval of the plan in Class IV is dependent on favourable votes by creditors whose claims exceed BRL 5 million.

Commented [GMP7]: Wrong

Question 1.8

Which of the following documents **need not** be mandatorily presented by the debtor at the moment of filing for judicial recovery?

- (a) A full nominal list of creditors.
- (b) Accounting statements for the last three financial years and for the current year.
- (c) A judicial recovery plan.
- (d) A list of private assets of the debtor's controlling partners and officers.

Commented [GMP8]: Correct = 1,0

Question 1.9

Indicate the **only false statement** below relating to the cramdown of a judicial recovery plan:

- (a) "Cramdown" is a doctrine that allows for a judicial recovery plan that was not approved by the creditors under a General Meetings of Creditors to still be confirmed by the Court as long as certain conditions are met.
- (b) There are no statutory provisions on cramdown under the current Bankruptcy Law, 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 present at the general meeting.
- (d) A cramdown cannot be imposed if the judicial recovery plan entails distinct treatment to creditors within the class that rejected it under the General Meeting of Creditors.

Commented [GMP9]: Correct = 1,0

Question 1.10

Select the **correct statement** from the options below regarding extrajudicial recoveries:

- (a) Extrajudicial recoveries allow for a larger set of debtors to seek their reorganization in comparison to the set of debtors that are allowed to file for judicial recovery.
- (b) Extrajudicial recoveries allow for a larger set of claims to be adjusted by a recovery plan in comparison to the set of claims that may be adjusted by a recovery plan under a judicial recovery proceeding.
- (c) Extrajudicial recoveries tend to be slower and more expensive than judicial recoveries; however, extrajudicial recoveries tend to allow for the turnaround of more severe economic-financial crises.
- (d) Extrajudicial recoveries do not allow the debtor to dispose of its assets free of any encumbrances, unlike judicial recoveries.

Commented [GMP10]: Correct = 1,0

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] – 2 marks

Cite **three (3) duties** of a judicial administrator under a liquidation proceeding.

Commented [GMP11]: Correct = 2,0

Among judicial administrator's duties are:

1. Notifying the creditors listed in the first public notice containing the list of creditors, stating the date of the bankruptcy decree and the kind, amount and rating established for the claim.
2. Providing all information requested by creditors.
3. Providing extracts of the debtor's books.

Question 2.2 [maximum 3 marks] – 3 marks

State the **composition** of a committee of creditors.

A committee of creditors is composed of one representative and two alternates of each one of the classes of creditors: (i) labour creditors; (ii) creditors with guarantees or special privileges; (iii) unsecured creditors and creditors with general privileges; and (iv) creditors defined as small or micro enterprises.

Commented [GMP12]: Correct = 3,0

Question 2.3 [maximum 2 marks] – 2 marks

State **two (2) acts** that may be rendered ineffective towards the bankrupt estate if carried out whilst the "suspect period" of a bankruptcy proceeding was in effect.

Among acts that may be rendered ineffective towards the bankrupt estate are:

Commented [GMP13]: Correct = 2,0

1. Payment by the debtor, within the suspect period, of debts that have not yet fallen due, by any means whereby the claim is extinguished, including advances on a

given note payable.

2. Payment of debts, within the suspect period, that have become due and enforceable, in a way not provided for under the terms of the contract.

Question 2.4 [maximum 3 marks] – 3,0 marks

Identify the three (3) components of a judicial recovery plan.

Commented [GMP14]: Correct = 3,0

The judicial recovery plan must contain:

1. A detailed description of how the debtor will be rescued.
2. A statement regarding the economic feasibility of the plan.
3. An economic-financial and appraisal report regarding the debtor's assets.

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

Question 3.1 [maximum 5 marks] – 5,0 marks

What are some of the advantages and disadvantages of an extrajudicial recovery in comparison to a judicial recovery proceeding?

Commented [GMP15]: Correct = 5,0

The main advantages of Extrajudicial Recovery instead of Judicial Recovery are:

- It is possible to negotiate partially with creditors (more flexible and simpler).
- It is not dependent on the Judicial system, because there is no general meeting of creditors or creditor's committee (faster).
- It does need a Judicial Administrator avoiding any external interference (less expensive)
- There is no risk of conversion to bankruptcy nor the two-year period in which the proceeding remains running after approval of the plan (less risky).

There are some disadvantages to the extrajudicial recovery procedure such as (i) labour-related claims are excluded; (ii) there is no stay; (iii) does not allow the sale of assets free and clear of liabilities; (iv) there is a risk of acts performed in terms of the plan being considered ineffective or being revoked should the debtor be declared bankrupt.

Question 3.2 [maximum 5 marks] – 5,0 marks

The Brazilian legal system provides two distinct types of personal guarantees – how does an *aval* differ from a *fiança*?

Commented [GMP16]: Correct = 5,0

Fiança is a guarantee agreement, a letter of guarantee or the inclusion of specific clauses in a finance, lease or other agreements, while *aval* is a personal guarantee of debts represented by certain instruments of credit.

So, *aval* is a guarantee to a debt represented by an instrument of credit, the guarantor in an *aval* guarantee is jointly liable with the debtor for the payment of the debt. In a *fiança*, absent agreement to the contrary, the creditor needs to demand payment from the debtor first.

Another difference between these is that the obligation of the guarantor in an aval guarantee is considered to be autonomous from the obligation of the debtor, so that whoever issues his signature in a title as guarantor is directly linked to the creditor, however, a fiança is not autonomous from the debtor's obligations and, in this sense, the guarantor may not pay the creditor if the original obligation is void.

Question 3.3 [maximum 5 marks] – 5.0 marks

Describe the process of proof of claims for a creditor, under a judicial recovery case, who (i) was not listed in the first list of creditors (presented by the debtor), and for a creditor (ii) who was not listed in the second list of creditors (presented by the judicial administrator).

Commented [GMP17]: Correct = 5,0

1. From the moment of the publication of the first public notice (which is drafted by the debtor himself) in the official press, creditors that are subject to the judicial recovery process have 15 days to submit their proof of claim to the judicial administrator.
2. After the judicial administrator has decided on the proof of claims, he must proceed to publish the second public notice containing the list of creditors.
3. After publication of the second public notice in the official press, creditors, the debtor (or its shareholders) and the prosecutor have a 10-day period to object the list of creditors – this is the so-called judicial phase of the proof of claims. Any claim may be challenged and the creditor may also argue a claim is missing and must be listed.
4. A creditor whose claim was not listed misses the 15-day period for the presentation of the proof claim during the administrative phase, the consequence is that the claim will be regarded as a "late claim" and, as a result, the creditor will not have the right to vote at the general meeting of creditors until his claim is recognised by the judge.

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

Braz Bank is a Brazilian bank. One of the areas the financial institution has had considerable success in, is lending to distressed debtors. Nonetheless, a series of risks are associated with this activity. Just recently, one of its borrowers, Brazil Empreendimentos Ltda (Empreendimentos), has defaulted on a loan.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks] 4 marks

The loan Empreendimentos has defaulted on was valued at BRL 1,000,000 (one million reais). Due to Empreendimentos' default, an acceleration clause came into effect and caused the entire value of the contract to mature. Given that the loan agreement met all the criteria for making it an extrajudicial executive title under the Civil Procedure Code, Braz Bank's initial step was to protest the contract before a protest officer, making it public that Empreendimentos had defaulted on it. Despite this measure, Empreendimentos did not cure its breach and the loan remains unpaid.

Does Braz Bank have grounds for filing an involuntary bankruptcy proceeding against Empreendimentos? Is there anything Empreendimentos can do to ensure that the Court will not declare its bankruptcy under any circumstances?

Commented [GMP18]: Correct = 4,0

In this case, Empreendimentos, without a relevant reason under the law, did not pay on the due date a debt that is certain on its value and it was duly protested, the sum of which exceeds the equivalent of [40 minimum wages (BRL 1'000,000),] so Braz bank might file an involuntary bankruptcy proceeding against the debtor. [A minimum wage, by the time when the guidance was prepared, was equal to BRL 954. Currently the value is BRL 1,100.]

Moreover, Empreendimentos has a 10-day period to present his defense against an involuntary bankruptcy petition claiming: (i) falsity of the title presented by the creditor, (ii) nullity of the obligation or its title; (iii) the debt has already been paid; (iv) any other fact that extinguishes or suspends the obligation, or does not legitimize the collection of the claim presented by the creditor; (v) defect in the protest or in its instrument; among others.

In addition, Empreendimentos can deposit the amounts due and present other arguments to avoid his bankruptcy. If the arguments presented by the debtor to avoid bankruptcy do not prevail, Braz Bank will take the deposit, but the debtor will not go into bankruptcy. If the arguments for no payment are accepted by the court, the judge will reject the request for bankruptcy.

Question 4.2 [maximum 5 marks] 3 marks

Suppose, additionally, that the loan agreement between Braz Bank and Empreendimentos was secured by a mortgage over land valued at BRL 600,000 (six hundred thousand reais). Before Braz Bank took any additional measure against Empreendimentos, another creditor of Empreendimentos filed for its bankruptcy proceeding. As a defence, Empreendimentos immediately filed for a judicial recovery proceeding, the processing of which was accepted by the Court. The list of creditors presented by the debtor upon filing for judicial recovery showed the following four (4) creditors in Class II (creditors secured by *in rem* guarantees):

- Braz Bank S.A.: BRL 400,000;
- Banco Enterprises S.A.: BRL 150,000;
- Brasil Autoparts S.A.: BRL 100,000;
- Oil Brasil S.A.: BRL 100,000.

The complete list of creditors (also portraying Classes I, III and IV) has just been published in the official press. Is Braz Bank correctly listed in Empreendimentos' list of creditors? If not, what measure should be taken by the bank to correct this? Is Braz Bank's sole contrary vote sufficient to bar the approval of a judicial recovery plan? Is it sufficient to bar a cramdown?

No, it is not correct because the real claim from the Bank is BRL 600,000, not 400,000. In this case, this creditor has a 10-day period [15 days] to object to the list of creditors and present the proof of the mortgage and the court will give the Bank the correct claim.

Commented [GMP19]: And the rest?

Commented [GMP20]: 10?

Additionally, according to the exercise, Braz Bank has BRL 400,000 out of BRL 750,000 secured claims, being enough to not obtain the majority by head count and by the value of the claims of the attending creditors (I assume that Braz Bank will attend to the general meeting of creditors).

On the other hand, BRL 400,000 or BRL 600,000 in favour of Braz Bank will not be enough to stop the cramdown due to the fact that the other secured claims represent more than one-third of the creditors of the rejected class (article 58 of the Brazilian bankruptcy law).

Question 4.3 [maximum 5 marks] - 5 marks

Suppose Braz Bank's loan agreement with Empreendimentos was not secured by a mortgage but rather by a fiduciary title over the same land valued at BRL 600,000 (six hundred thousand

reais). Empreendimentos' judicial recovery proceeding has just begun: the Court issued the decision allowing for the processing of the judicial recovery two (2) days ago. How soon can Braz Bank take possession of the land and sell it outside the recovery proceeding? Could Empreendimentos argue anything in defence of maintaining its possession over the land?

The holders of fiduciary titles can enforce their security outside the insolvency process. However, paragraph 3 of article 49 of the Brazilian Bankruptcy Law states that those essential capital goods may not be removed from the debtor's establishment during that 180-day stay period, in this case, Braz Bank might take possession of the land and sell it outside the recovery proceeding but it must demonstrate under the court that this asset is not an essential capital good for the debtor.

In contrast with this, Empreendimentos could argue under a judge that the land is an essential capital good to maintain its possession.

*** End of Assessment ***

Commented [GMP21]: Correct = 5,0