



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]: 47/50 – well done!

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

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.

(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]: Correct = 1,0

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. [\[The is a legal provision in the bankruptcy law.\]](#)
- (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]: Wrong

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

[As per the Brazilian law, an important role is assigned to the judicial administrator. He is in charge of winding-down the business towards its liquidation and taking on the management of the bankrupt estate. In addition to the above, he also oversees the procedure as a whole, granting validity to the acts performed under the bankruptcy procedure. Some of his duties include: -

- i) 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;
- ii) providing all such information as requested by creditors;
- iii) providing relevant extracts of the debtor's books;
- iv) requiring any information whatsoever from creditors or from the debtor;
- v) preparing a reviewed list of creditors based on the information presented by the creditors and information gathered from the debtor;]

Question 2.2 [maximum 3 marks] – 3,0 marks

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

Commented [GMP12]: Correct = 3,0

[The committee of creditors is an intrinsic part of the bankruptcy proceedings. Its main duties are basically those of supervising the validity of the procedure. It will be comprised of :

- a) one representative appointed by the labour creditors;
- b) one representative appointed by creditors with claims based on *in rem* guarantees and

special privilege claims;

c) one representative appointed by creditors with unsecured claims and general privilege claims; and

d) one representative appointed by creditors classed as micro enterprises and small companies.]

Question 2.3 [maximum 2 marks] – 2,0 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.

Commented [GMP13]: Correct = 2,0

[In the bankruptcy decree, a suspect period relating to the bankruptcy of the debtor, is set out, which may not be retrospective for a period exceeding 90 days from the filing of the petition requesting the bankruptcy, or from the time of the first protest by a creditor due to default. Certain acts which may be rendered ineffective when carried out in the suspect period are as follows: -

a) 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;

b) 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;

c) the granting of an **in rem** guarantee, including a lien, within the suspect period, in relation to a debt previously entered into but not secured.]

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 the following components:

(a) a detailed description of how the debtor will be rescued;

(b) a statement regarding the economic feasibility of the plan; and

(c) an economic-financial and appraisal report regarding the debtor’s assets.

The economic feasibility of the plan must be ascertained by the creditors;]

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

[As per the Bankruptcy Statutes, a debtor who qualifies for the filing of a judicial recovery procedure has the option to apply for an extrajudicial recovery instead. The extrajudicial

recovery procedure is a special regime that is only considered by the court in the final phase of the bankruptcy process, when the extrajudicial recovery plan is approved by the Court. The recovery plan is negotiated out of court between the debtor and its creditors and once the negotiation has been completed, the debtor files for extrajudicial recovery, seeking approval of the plan by the court.

When compared to the judicial recovery procedure, the extrajudicial recovery procedure has the following advantages:-

- (i) flexibility
- (ii) simplicity
- (iii) faster
- (iv) less expensive and
- (v) less risky.

The above is because there is no general meeting of creditors, creditor's committee or judicial administrator and it is easier to approve the plan. In addition to all these, there is no risk of conversion to bankruptcy nor the two-year period in which the proceeding remains running after approval of the plan.

At the same time there are certain disadvantages, mainly:-

- (i) exclusion of labour-related claims in the plan
- (ii) there is no stay or moratorium
- (iii) assets are not disposed of free of encumbrances, binding the buyer to the liabilities incurred by the debtor,
- (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 and
- (v) there is no provision relating to post-commencement (DIP) financing]

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*?

[As per the Brazilian Law, the personal guarantees are divided into

- a) *fiança* and
- b) *aval*.

Fiança, which can be implemented through a guarantee agreement, a letter of guarantee or the inclusion of specific clauses in a finance, lease or other agreements; and

Aval, which is a personal guarantee of debts represented by certain instruments of credit like for instance, promissory notes, checks, bills of exchange. A single signature of the person as grantor in the instrument of credit is enough to create the guarantee.

The comparison of both can be laid down as follows:-

- a) The *aval* is always a guarantee to a debt represented by an instrument of credit, in that the grantor in an *aval* guarantee is jointly liable alongwith the debtor for the payment/satisfaction of the debt. In the instances where there is more than one grantor to the same payment obligation, the possibility exists of whom to agree for the obligation to pay shall first fall upon.
- b) Whereas in a *fiança* guarantee, on the other hand, the rule is that, in the absence of a contrary agreement, the creditor will need to demand payment from the debtor first.

Commented [GMP16]: Correct = 5,0

c) Another difference between the two kinds of personal guarantees is in the fact that the obligation of the guarantor in an *aval* guarantee is considered to be autonomous from the obligation of the debtor, in so that whoever issues his signature in a title as guarantor is directly linked to the creditor. For example, in the scenario where the creditor assigns the claim to a third party in good faith and the original transaction between the debtor and the creditor is later on considered to be void, the guarantors continue to be liable for the payment to the assignee.

d) In a *fiança*, however, the guarantee is not autonomous from the debtor's obligations and, thus the guarantor may not pay the creditor if the original debt 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

[As per the Brazilian Bankruptcy Statutes, the liquidation procedure highlights three lists of creditors in any liquidation procedure. The lists contain the details of the creditor and the nature and amount of the debt. Each list is published in the official press and the same are also frequently made available by the judicial administrators in their websites.

The order that decrees the bankruptcy of the debtor will determine the publication of the first list of creditors. After the publication of the first list, the creditors have a period of 15 days during which they can request the judicial administrator to include any missing claim or the correction of any claim that has been incorrectly listed. The requests are in the usual course done via e-mail or by correspondence. The Article 9 of the Bankruptcy Law lays down the requirements that must be met/provided by creditors, for example the name of the creditor, address of the creditor, amount of the debt, documents proving the existence of the debt, etc. There is no legal fees which need to be paid by creditors in order to present their requests during this first stage, referred to as the administrative phase of the proof of claims.

Based on the above detailed request and evidence provided by the creditors and the debtor, the judicial administrator must present the second list of creditors. After the second list, creditors, the debtor and the prosecutor are able to present oppositions to the court regarding the new list of creditors within a period of 10 days from the publication of the creditor's list elaborated by the judicial administrator.

In this phase, also termed as the judicial phase, since oppositions / objections comprise the proof of claims, in the event the creditor is unsuccessful, he has to bear the legal fees and judicial costs relating to this process. Oppositions / objections are processed as independent lawsuits, under a separate case record. As an independent lawsuit, creditors and debtors may take the matter on appeal and, in rare cases, even to the higher courts.

The third and final list is the general list of creditors, which reflects the decisions on the oppositions / objections by the judge.

The proof of claims proceeding runs in parallel to the bankruptcy proceeding and is basically the same as that of the judicial recovery proceeding]

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?

[In the above case scenario, Braz Bank has already protested the contract before a protest officer, making it public that Empreendimentos has defaulted on it.

As per Article 784 contracts and promissory notes are covered under extrajudicial titles.

As per the provisions of Article 94 of the Bankruptcy Law, there are three situations that allow the commencement of an involuntary bankruptcy procedure in Brazil, which may be requested by

- a) any creditor,
- b) the surviving spouse, any heir of the debtor, or the estate's administrator, or
- c) a shareholder of the debtor under the law or the articles of incorporation of the company.

One of the scenarios that allow for the commencement of the involuntary bankruptcy proceeding are that the debtor, without a relevant reason under the law, does not pay on the due date a debt that is certain on its value and it is expressed in one or more extra-judicially or judicially enforceable titles duly protested, the sum of which exceeds the equivalent of 40 minimum wages on the date of the petition for bankruptcy;

Braz Bank clearly falls under the above condition and hence Braz Bank has grounds for filing an involuntary bankruptcy proceeding against Empreendimentos.

Now Article 96 of the Bankruptcy Law contains a list of facts that can prevent a bankruptcy decree:

- (a) falsity of the title presented by the creditor;
- (b) statute of limitations applies in the case;
- (c) nullity of the obligation or its title;
- (d) the debt has already been paid;
- (e) any other fact that extinguishes or suspends the obligation, or does not legitimise the

Commented [GMP18]: Correct = 4,0

collection of the claim presented by the creditor;

(f) defect in the protest or in its instrument;

(g) filing of a petition for judicial recovery during the 10-day term that the debtor has to oppose the request for bankruptcy;

(h) cessation of corporate activities for more than two years prior to the petition in bankruptcy, evidenced by a proper document of the Board of Trade, which must not prevail against evidence that the debtor has, in fact, developed his business activities anytime during the referred period.

Empreendimentos does not have any defence under any of the above grounds. Although this is not said in the question.

Commented [GMP19]: ?

Other than either paying off the debt or arriving at a scheme of arrangement with Braz Bank, Empreendimentos does not have any recourse to apply to the court to ensure that its bankruptcy is not declared.]

Debtor can deposit the amount due with applicable interest and other fees incurred by the creditor.

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Question 4.2 [maximum 5 marks] – 4,0 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?

Commented [GMP20]: Partially correct = 4,0

[Braz Bank is not correctly listed in the list of creditors

Braz Bank must be listed in Class II with claims of BRL 600,000

The balance should be listed in Class III with Braz Bank amount of BRL 400,000

After the publication of the first list, Braz Bank has a period of 15 days during which they can request the judicial administrator to include the correction of the above claim that has been incorrectly listed. The requests are in the usual course done via e-mail or by correspondence.

In case of Class II, Braz Bank has more than 60 % of the claim amount and though it does not have the majority of the headcount, the value of the claim amount is in itself sufficient to bar the approval of the judicial recovery plan

The amount of claim once approved is also sufficient in class II to bar a cramdown]

Commented [GMP21]: ?

Question 4.3 [maximum 5 marks] – 5,0 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?

[As this question goes, regards to How soon can Braz Bank take possession of the land and sell it outside the recovery proceeding

In the order granting judicial recovery, the judge also *inter alia* orders the commencement of the stay period (moratorium) and appoints the judicial administrator. Secured assets in cases of pledge, mortgage and antichresis fall in the insolvent estate upon bankruptcy and are subject to judicial and extrajudicial recovery, but the holders of fiduciary titles can enforce their security outside the insolvency process. However, during the 180-day stay period provided for in the case of judicial recoveries, the creditor is not allowed to sell or remove from the debtor's establishment any capital goods which are considered to be essential to the debtor's business. Here it is not clarified whether the land plot is essential to the business of the debtor. However taking a stand that the same is essential to the running of the business and its turnaround, Braz Bank may not be allowed to take possession of the same.

With regard to the second question, from the statute it is relevant that the judicial proceeding is initiated by a cognisance phase. The cognisance phase allows for an ample discussion on facts and allows the debtor to present an extensive defence. However, in this case as the creditor is a Financial institution, and there is extensive documentation as well as proof Empreendimentos cannot argue anything in defence of maintaining its possession of the land other than stating and proving its essentiality of being a capital asset in running and for the turnaround of the debtor. In such a case, Braz Bank may be precluded from taking possession of the land during the stay period/moratorium.]

*** End of Assessment ***

Commented [GMP22]: Correct = 5,0