



**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]: 44/50 – 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.** 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]: 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.
- (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] – 1 mark**

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

- Supervise the insolvency proceeding.
- Analyse the proof of claims presented by creditors in order to review the list of creditors presented by the debtor and to consolidate it.
- Keep the court informed about the implementation of the recovery plan by the debtor, the debtor's financial situation etc. [There is no recovery plan in a liquidation proceeding.]

Commented [GMP11]: Partially correct = 1,0

Commented [GMP12]: Liquidation proceeding?

**Question 2.2 [maximum 3 marks] – 3 marks**

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

The committee of creditors must be formed by one representative and two alternates of each of the classes of creditors: (i) labour creditors, (ii) creditors in rem guarantees or special privileges, (iii) unsecured creditors and creditors with general privileged, and (iv) creditors defined as small or micro enterprises.

Commented [GMP13]: 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.

- (i) The payment by the debtor of debts that have not yet fallen due, by any means whereby the claim is extinguished, including advances on a given note payable.
- (ii) Payment of debts that have become due and enforceable in a way not provided for under the terms of the contract.

Commented [GMP14]: Correct = 2,0

**Question 2.4 [maximum 3 marks] – 3 marks**

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

Commented [GMP15]: Correct = 3,0

- (i) A detailed description of how the debtor will be rescued.
- (ii) A statement regarding the economic feasibility of the plan.
- (iii) 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 marks

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

Commented [GMP16]: Correct = 5,0

Advantages:

- (i) More flexible.
- (ii) Simpler.
- (iii) Faster.
- (iv) Less expensive.
- (v) Less risky.

Disadvantages:

- (i) labour-related claims are excluded.
- (ii) there no stay.
- (iii) assets are not disposed of free encumbrances, this binding the buyer to the liabilities incurred by the debtor
- (v) there is risk of acta performed in terms of the plan being considered ineffective or being revoked if the debtor is declared bankrupt.
- (v) There is no provision relating to post-commencement Dip financing.

#### Question 3.2 [maximum 5 marks] – 5 marks

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

Commented [GMP17]: Correct = 5,0

An *aval* defers from a *fiança* because an *aval* is always a guarantee to a debt represented by an instrument of credit, such as promissory notes, checks, bills of exchange. An *aval* is jointly liable with the debtor for the payment of the debt. On the other hand the *fiança* guarantee can be demanded of the payment of the debt if the debtor was demanded first.

Furthermore, the obligation of the *aval* is considered to be autonomous from the obligation of the debtor but in the case of a *fiança*, the guarantee is not autonomous from the debtor's obligations, thus the guarantor may not pay the creditor if the original obligation is void.

#### Question 3.3 [maximum 5 marks] – 4 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 [GMP18]: Partially correct = 3,0

The first list of creditors will be published with the order that decrees the bankruptcy of the debtor. [Although the term bankruptcy or insolvency might be used to refer to reorganization and liquidation proceedings, in Brazil the term bankruptcy is reserved for liquidation.]

After the publication of the first list the creditors will have a period of 15 days to request the judicial administrator to include any missing claim or the correction of a claim that was incorrectly listed. These requests can be done by email or correspondence.

The creditors must meet some requirements such as the name of the creditor, their address, amount of the debt, documents that prove the existence of the debt, etc

The judicial administrator will provide a second list with the requests and evidence of the creditors and the debtor. The creditors, the debtor, the debtor's shareholders and the prosecutor can present oppositions to the new list within a period of 10 days after the publication of the list.

Commented [GMP19]: How?

The third list will be the general list of creditors and will reflect the decisions of the judge regarding the oppositions and objections made to the list of the judicial administrator.

#### **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?

The bank can file for Empreendimentos' bankruptcy on the grounds that Empreendimentos, without a relevant reason under the law, has not paid the due debt that is certain on its value and is expressed in an enforceable title, duly protest and the sum of the debt exceeds the equivalent of 40 minimum wages.

Empreendimentos can answer the involuntary bankruptcy petition arguing any the following to prevent the bankruptcy decree:

- (i) falsity of the title presented by the bank.
- (ii) a statute of limitation that applies to the case.
- (iii) nullity of the obligation or the title.



- (iv) that the debt has already been paid.
- (v) a fact has extinguished or suspended the obligation or does not legitimise the collection of the claim presented by the creditor.
- (vi) defect in the protest or in its instrument.
- (vii) Empreendimentos can file for judicial recovery.
- (viii) cessation of corporate activities for more than two years prior to the petition for bankruptcy.

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[Debtor can deposit the due debt with applicable interest and other fees incurred by the creditor]

**Question 4.2 [maximum 5 marks] – 4 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 because of the debt the Empreendimentos owes Braz Bank is BRL 1,000,000 (one million reais) and its security is valued in BRL 600,000 (six hundred thousand reais).

Commented [GMP21]: And the BRL 400K?

Consequently Braz Bank will have a period of 15 days to request the judicial administrator to correct its claim, which can be done by email or correspondence by meeting the requirements contained in the law such as the name of the creditor, their address, amount of the debt, documents that prove the existence of the debt, etc

Braz Bank's sole contrary vote is enough to bar the approval of a judicial recovery plan. As it is a secured claim the majority by head count and value of the secured claims must approve the plan, thus if Braz Bank rejects the plan the secured claims would not have the majority in value to approve the plan.

Braz Bank's sole contrary vote would not be sufficient to bar a cramdown as the judge can grant the judicial recovery if the plan has obtained, cumulative, at the general meeting:

- (i) the favourable vote of creditors representing over half the amount of all creditors represented at the general meeting, independently of the classes.
- (ii) the approval of two of the classes of creditors pursuant to article 45 hereof, or if there are only two classes with voting creditors, the approval of at least one of them.
- (iii) in the class that rejected the plan, the favourable vote of over one third of creditors, computed pursuant to article 45, paragraphs 1 and 2.

**Question 4.3 [maximum 5 marks] – 4 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?

Braz Bank could take possession of the land after the stay period (180 days or if the court extends the term it could be more days) and sell it outside the recovery proceeding.

Empreendimentos could argue that the land is an asset fundamental for the turnaround in order to maintain its possession, thus the bank could not remove and sell the land, as it could be considered a "capital good".

**\* End of Assessment \***

Commented [GMP22]: Correct = 4,0