



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.** In fact, a reform of the Brazilian bankruptcy law passed after the guidance was prepared introduced the a section addressing cross-border bankruptcies. Based on the guidance Text, however, letter (d) is correct.
- (d) The Bankruptcy Law provides for the judicial recovery of debtors (whether individuals or legal entities) who carry on business activities.

Commented [GMP2]: Wrong.

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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, tax-related fines have the lowest priority.

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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] – 2 marks

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

Commented [GMP11]: Correct = 2,0

The judicial manager must notify the creditors listed in the first public notice, which notification should set out the date of the bankruptcy decree as well as the kind, amount and rating of the claim.

The judicial manager must provide all information requested by the creditors.

The judicial manager must prepare a list of creditors based on the information given by the creditors and information collected from the debtor.

Question 2.2 [maximum 3 marks] – 3 marks

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

Commented [GMP12]: Correct = 3,0

The committee of creditors consists of one representative appointed by the labour creditors; one representative appointed by creditors with *in rem* guarantees and special privilege claims; one representative appointed by creditors with unsecured and general privilege claims; and one representative appointed by creditors that are micro enterprises and small companies.

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.

Commented [GMP13]: Correct = 2,0

Payment by a debtor of a debt that has not yet fallen due and whereby the claim is extinguished.

Actions performed free of charge during the two years preceding the decree of bankruptcy.

Question 2.4 [maximum 3 marks] – 3 marks

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

Commented [GMP14]: Correct = 3,0

The plan must include a detailed description of how the debtor will be rescued.

It must also include a statement regarding the economic feasibility of the plan.

Thirdly, the plan must include 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 [GMP15]: Correct = 5,0

When compared to judicial recovery proceedings, extrajudicial recovery has the advantage that it is more flexible, simpler, faster, less expensive and less risky. The advantages are rooted in the fact that extrajudicial recovery does not involve a general meeting of creditors, creditors' committee or judicial administrator, while it is also easier to approve the plan. Furthermore, it is not possible to convert it to bankruptcy and there is no two-year period during which the proceeding continues after the plan is approved.

However, when compared to judicial recovery, extrajudicial recovery also entails certain disadvantages. These include that labour-related claims are excluded; there is no moratorium; assets cannot be disposed of free of encumbrances; there is a risk that, should the debtor be declared bankrupt, certain actions performed during recovery might be ineffective or revoked; and there is no provision for post-commencement 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 [GMP16]: Correct = 5,0

A *fiança* is implemented through a guarantee agreement, a letter of guarantee or through specific clauses in a finance, lease or other agreement. In such a case, unless otherwise agreed, the creditor should demand payment first from the debtor before seeking payment from the guarantor. The obligation of a guarantor in the case of a *fiança* is not autonomous from the debtor's obligation and therefore, if the original obligation is void, the guarantee is void as well.

An *aval*, on the other hand, is a personal guarantee represented by certain credit instruments, like promissory notes, bills of exchange or cheques. With *avals*, all that is needed is a single signature by the guarantor on the instrument in question. The guarantor in an *aval* is jointly

liable with the debtor for the payment of the secured debt. The obligation under an *aval* is autonomous from the original debt, meaning that if, for instance, the original debt is invalid, the guarantee will remain valid.

Question 3.3 [maximum 5 marks] – 5 marks

Commented [GMP17]: Correct = 5,0

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).

- (i) When the first list of creditors is published and a creditor's name was omitted from that list, such creditor will have 15 days after the publication of the list to submit a proof of his/her claim to the judicial administrator, which can also be done via email. The creditor will not incur any cost during these 15 days. If the omitted creditor missed the 15 day period, the claim will be regarded as a "late claim" and thus the creditor will not have the right to vote at the general meeting of creditors until his/her claim is recognised by the judge, who will decide on the admissibility of the claim.
- (ii) After the second list of creditors has been published, a creditor whose name has been omitted will have 10 days to object to the list. Such challenges take place in court and if the challenge is unsuccessful, the creditor runs of the risk of being ordered to pay the legal fees and costs. If the judge denies the claim, it can be taken on appeal.

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] – 3 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 terms of Article 94 of the Bankruptcy Law, one of the scenarios in which a creditor (like Braz Bank) can file an involuntary bankruptcy procedure is when the debtor (Empreendimentos in this case) does not pay, on the due date and without a relevant reason, a debt that is certain and is expressed in an extra-judicially (as in this case) or judicially enforceable title. Furthermore, the creditor had to duly protest the debt, which happened under these facts. Therefore, as long as the sum is more than 40 minimum wages (which is clearly the case here), the creditor may file an involuntary bankruptcy procedure.

If the debtor wants to try and prevent the court from granting the order, it has 10 days within which to present its defence. Article 96 sets out a list of facts that can prevent the granting of the bankruptcy decree. However, none of the appear to be applicable to this set of facts, and therefore the creditor will probably not be able to convince the court not to grant the order. [\[This is an assumption.\]](#)

Commented [GMP18]: ???

[\[Debtor could deposit the amounts due according to article 98, single paragraph of the Bankruptcy Law.\]](#)

Question 4.2 [maximum 5 marks] – 5 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 [GMP19]: Correct = 5,0

Braz Bank is not correctly listed. It has a total claim of BRL 1,000,000, but only BRL 600,000 will qualify as a claim secured by an *in rem* guarantee and thus fall into Class II, because the value of the mortgaged property is only BRL 600,000. The rest (BRL 400,000) will be an unsecured claim.

In order to correct this mistake, Braz Bank has 15 days after publication of the first public notice to submit proof of the true value of its secured claim. Hopefully the judicial administrator will then fix this error so that the second public notice reflects the true state of affairs. However, if the mistake is not corrected, Braz Bank will have a further 10 days from publication in which to object. Since this is the judicial phase, the challenge must be brought before the court, which means that the bank will carry the risk that it may have to pay the fees and costs should it be unsuccessful. If Braz Bank is not happy with the court's decision, an appeal can be filed.

When it comes to voting on the plan, all four classes of creditors must approve the plan. In this case, if Braz Bank votes against the plan, the majority of Class II would have rejected the plan and thus the plan will not be approved.

However, in the case of a cramdown, the court may grant the judicial recovery if over half of the creditors in the general meeting approved it independently of classes, if two classes of creditors approved it, and if at least a third of the class that rejected the plan was in favour of it. In other words, depending on how the other creditors vote, in the case of a cramdown, Braz Bank alone might not be able to prevent the plan from being approved by the court.

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?

Usually, the holder of a fiduciary title can enforce its security outside of the insolvency process by repossessing and selling the property. However, in terms of Article 49 Paragraph 3 of the Bankruptcy Law, in the case of judicial recovering, there is a 180 days moratorium (stay) in which the creditor will not be allowed to sell or remove any capital goods that are essential to the debtor's business. Since the land probably will be regarded as essential, the soonest point when Braz Bank will be able to repossess and sell the land will be after the moratorium is ended. However, the court can extend this period if the property is essential for the turnaround. Also, the bank will probably need the court's permission to foreclose. In other words, Empreendimentos can try to prevent repossession by convincing the court that, even after the 180 days, the property is essential for successfully turning the business around.

Commented [GMP20]: Correct = 5,0

*** End of Assessment ***