



**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. [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.

1. Notify the creditors on the bankruptcy filing, including the date and the kind, amount and rating of their claim
2. Provide information requested by creditors
3. Examine the debtor's accounting books

Commented [GMP11]: Correct = 2,0.

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

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

- 1 representative appointed by the labour creditors
- 1 representative appointed by *in rem* guarantee and privilege guarantee claims
- 1 representative appointed by unsecured and general guarantee claims
- 1 representative appointed by micro enterprise and small company creditors

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.

1. Payment of amounts that have not yet fallen due, such as advances on notes payable, that extinguishes the claim
2. Granting of an *in rem* guarantee or a lien in relation to existing unsecured debt

Commented [GMP13]: Correct = 2,0

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

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

1. A description of how the debtor would be rescued

Commented [GMP14]: Correct = 3,0

2. A statement about economic feasibility of the plan
3. An appraisal report of 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

Extrajudicial recovery can be a helpful tool for certain debtors, as the process has a number of advantages over the judicial process, discussed below.

First, the process of extrajudicial recovery is more flexible in terms of negotiation with creditors, due to not being limited by the court process and timelines. It requires filing a simpler petition when filing for a court ratification.

Second, extrajudicial recovery can be a faster and cheaper process, as the debtor can negotiate the plan with its creditors in advance of filing the petition with the court. As a result, this process does not require the appointment of the judicial administrator, creditor committee (although rarely appointed in both cases) or holding the creditor meeting.

Third, negotiating the plan before the court filing eliminates the risk of the conversion of the case into bankruptcy, causing liquidation of the company, if the creditors do not support the plan. Instead, the debtor would gather the required support ahead of the filing. Upon approval of the plan, there is no two-year period when the proceeding remains active.

On the other hand, extrajudicial recovery has disadvantages and may be inadequate for a debtor looking to take advantage of specific provisions offered under judicial recovery discussed below.

First, extrajudicial recovery does not provide the benefit of release from labour-related claims or the opportunity to sell assets free and clear of liens. The latter can be an important disadvantage to debtors seeking to maximize value from the sale of productive business units.

Second, extrajudicial recovery requires a different threshold for approval, which is 60%. It is not directly comparable with the approval required by judicial recovery, but may be higher in certain cases.

Third, extrajudicial recovery does not provide the benefit of stay, so creditors may foreclose on the debtor's assets before plan negotiation process is completed. Creditors can also file an involuntary petition for judicial recovery if they are not happy with the way negotiations progress.

Finally, there is no provision for post-commencement DIP financing (which may be not as attractive in Brazil as it is in the U.S., though, since the lender does not get the protection).

**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

*Aval* is a guarantee of debts presented by certain credit instruments, such as promissory notes, checks or bills of exchange, implemented by a single signature of a person as grantor.

*Fiança* is a type of a personal guarantee implemented through a guarantee agreement, a letter of guarantee, or specific clauses in other agreements, such as finance or lease agreements

There are several differences between these personal guarantees. First, unlike *fiança*, *aval* is always a guarantee of debt presented by a credit instrument, not requiring a separate guarantee agreement. Second, while the guarantor of *aval* is jointly liable with the debtor at the same time (unless there are several guarantors and a certain order has been agreed upon), while in *fiança* the debtor is liable first, before the payment is requested from the guarantor. Third, the guarantee under *aval* is autonomous from the obligation of the debtor, meaning that if the creditor assigns the guarantee to the third party, the guarantor is still liable. On the contrary, in case of *fiança*, the assignment of the claim by the debtor makes the claim against the guarantor 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).

The process for a judicial recovery typically starts with the debtor filing a list of creditors, after which the creditors are invited to file the proof of claims. While creditors whose claims are listed correctly in the first list do not have to further prove their claim, creditors not listed on the first and/or second list require to take additional steps, described below.

In case of a creditor not listed on the first list of creditors presented by the debtor, the creditor has 15 days to request the judicial administrator to include or amend their claim. Such request is usually submitted by e-mail and would include the following information: the creditor's name and address; amount, origin and rating of the claim; documents evidencing the existence of the claim; indication of guarantee from the debtor; and the object of the guarantee, if applicable. During this administrative phase of the proof of claim process, the creditor does not incur any fees to be able to prove their claim. In case the creditor submits the proof of claim outside of the 15-day period, such claim the creditor loses their right to vote at the committee of creditor and the admission of such late claim is subject to the judge's decision, in which such creditor can also incur additional legal fees. The claim might have been listed incorrectly, for instance, in which case the creditor will have vote.

Commented [GMP17]: Correct = 4,0 (don't necessarily lose)

Following the review of the proof of claims in the administrative phase and the publication of the second list by the judicial administrator, in case of a creditor not listed of the second list, the creditor has 10 days to challenge the new list. The creditor takes the risk of the legal fees incurred during the challenge, in case they are unsuccessful, and the objection cases are filed under a separate case number. The debtor and the judicial administrator are heard in court on the subject of the presented claim and the judge makes a final decision (that can be appealed if a party deems it necessary).

Finally, following the objection process, the third and final list is published, reflecting the accepted proofs of claims and the judge's decisions from the objection process.

### 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] – 5 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 = 5,0

Braz Bank can file involuntary petition against Empreendimentos in if it can demonstrate that the debtor has not paid a debt that was due and duly protested, in the amount of at least 40 minimum wages, or BRL41,800. Empreendimentos has defaulted on a loan valued at BRL1,000,000 which meets this threshold and Braz Bank protested the contract and made it public that the debtor defaulted on the loan, and the default was not cured. Therefore, Braz Bank has grounds for filing an involuntary bankruptcy proceeding against Empreendimentos.

Following such petition from Braz Bank, Empreendimentos will have 10 days to present defence against involuntary petition. Assuming Braz Bank's claim is fully valid and Empreendimentos operations have been active in the last 2 years, if the debtor has enough funds, they can pay off all Braz Bank debts that are in default. That action would extinguish their claims and invalidate the petition.

Alternatively, if a paydown is not possible, Empreendimentos can file a petition for judicial recovery in order to avoid bankruptcy. Given the number of documents required, this may be difficult to achieve in practice if the petition for liquidation was not expected by Empreendimentos, but given limited information in the question, it could be the case that Empreendimentos was in process of preparing such petition and that was why they did not cure the default in the first place. Saying that, it is important to note that the judiciary recovery does not guarantee no bankruptcy in the future, but instead gives the company time to negotiate a plan of reorganization. If the plan is not approved by the creditors, Empreendimentos may still be forced to liquidate.

Finally, if judicial recovery is not an option, Empreendimentos may consider challenging the validity of Braz Bank claim or the instrument or consider another defence that proves Braz Bank illegitimate.

**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 [GMP19]:** Correct = 4,0. And the rest of BRL one million reais?

Braz Bank claim is not listed correctly in the creditor list, since the amount of Class II (Secured claims) should be the BRL 600,000 secured by the land. [\[BRL 400,000 should be listed as unsecured.\]](#)

In order to correct the claim value, Braz Bank should contact the judicial administrator appointed on the case and provide a proof of claim to support the correction. The proof of claim should include Braz Bank name and address, documentation for the BRL 1,000,000 loan, documentation for the lien on the land and an appraisal supporting the BRL 600,000 valuation. At this time Braz Bank will not incur any legal costs.

Yes, Braz Bank's contrary vote can bar the plan. Assuming all other claims are listed correctly, Braz Bank represents ~63% of the value and 25% of head count of the class. Approval by a class requires majority by both value and headcount, so Braz Bank sole contrary vote can bar the approval of the plan by Class II on the basis of value, and therefore, bar the overall approval that requires the support of every class.

No, Braz Bank's contrary vote cannot bar the cramdown. Assuming other requirements for a cramdown are met (ie the plan is supported by the majority of overall claim amount across classes and approval by at least 2 other classes), the court can implement a cramdown if dissenting Class II receives a favourable vote from 1/3 of creditors. Assuming all the other claims are correct and indeed Braz Bank represents ~63%, it cannot bar the cramdown, if all other creditors, representing ~37% (or >33.3%) support the plan.

#### **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?

**Commented [GMP20]:** Correct = 5,0

While a fiduciary title claim is immune to the reorganization procedure, Braz Bank cannot take possession of the land for the stay period. The standard stay period is 180 days, so Braz Bank has to wait 178 more days. In addition, the court may extend the stay period, which would extend the duration of the wait.

In order to maintain possession of the land, Empreendimentos may argue that that land is a fundamental asset for the turnaround of the business and cannot be separated without undermining the whole plan for a recovery for all other creditors. If the judge agrees with this argument, it may be very difficult for Braz Bank to foreclose. In addition, upon the expiry of the stay period, Braz Bank would not be able to proceed to foreclosure without the consent of the Bankruptcy Court, to which Empreendimentos can appeal, so extend the stay or to argue again that the land is fundamental to the recovery and plan approval.

**\* End of Assessment \***