



**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: **[studentID.assessment4B]**. An example would be something along the following lines: 202122-336.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 "studentID" 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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **9 pages**.

**Commented [DB1]:** It is very disappointing that you have not followed the instructions for any of the assessments you submitted.

## **ANSWER ALL THE QUESTIONS**

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

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

#### **Question 1.1 [1 mark]**

Indicate the **correct answer** regarding bankruptcy legislation in Brazil:

- (a) The Bankruptcy Law regulates the liquidation – but not the reorganisation – of any individual or legal entity with activities in Brazil.
- (b) The former Civil Procedure Code regulates the reorganisation of non-business individuals and legal entities.
- (c) The current Bankruptcy Law contains a section addressing cross-border bankruptcies.**
- (d) The Bankruptcy Law does not allow companies belonging to the same economic group to file for restructuring jointly.

#### **Question 1.2 [1 mark]**

Which of the following statements is **correct** with regards to the Brazilian judiciary?

- (a) Brazil has a single apex court: the Superior Court of Justice, which is in charge of constitutional issues.
- (b) Labour disputes take place at a specialised segment of the judiciary, composed of labour courts, courts of appeal and a superior court.**
- (c) Insolvency proceedings take place at the federal-level judiciary (as opposed to the state-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.

#### **Question 1.3 [1 mark]**

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

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

- (c) The *antichresis* is a rarely used type of security, the purpose of which is to assign the income from an immovable property to the guaranteed party.
- (d) Fiduciary titles are increasingly used as a security due to the fact that this guarantee allows for the guaranteed party to take possession of the collateral and sell it outside a bankruptcy proceeding, as long as certain conditions are met.

**Question 1.4 [zero]**

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

- (a) A *sociedade de economia mista* (a company whose majority equity interest belongs to the Federal, State or local government).
- (b) An accounting firm.
- (c) An individual who carries on a business activity without the use of a legal entity. [correct answer]
- (d) An insurance company.

**Question 1.5 [1 mark]**

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

- (a) The Bankruptcy Law provides the 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.
- (c) A debtor has a 10-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 [zero]**

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

- (a) Fees payable to the judicial administrator and its auxiliaries.
- (b) Tax-related fines.
- (c) Administrative expenses of the estate. [a and c were accepted as correct]
- (d) Unsecured claims.

**Question 1.7 [zero]**

A debtor under judicial recovery has the following creditors:

- 50 creditors in Class I (workers and labour-related claims)
- 3 creditors in Class II (creditors secured by *in rem* guarantees)
- 300 creditors in Class III (unsecured creditors)
- 200 creditors in class IV (claims held by micro and small enterprises)

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

- BRL 1 million in Class I
- BRL 5 million in Class II
- BRL 50 million in class III
- BRL 30 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 solely dependent on its approval by creditors whose claims amount to a quantity in excess of BRL 0.5 million.

**(b) The approval of the plan in Class II is solely dependent on a majority by head count.**

(c) The approval of the plan in Class III depends on a double majority: by head count and by the total amount of claims. **[correct answer]**

(d) The approval of the plan in Class IV is solely dependent on favourable votes by creditors whose claims exceed BRL 15 million.

**Question 1.8 [1 mark]**

Which of the following documents **needs to be** 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 financial year for the current administrators of the company.

(c) A judicial recovery plan.

(d) A list with a brief description of the contracts entered into by the debtor in the last financial year.

**Question 1.9 [1 mark]**

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

(a) "Cramdown" is a doctrine that allows for creditors to present their own alternative reorganisation plan.

(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 in each of the classes of creditors that were present at the general meeting.

(d) A cramdown cannot be imposed if the judicial recovery plan entails the discriminatory treatment of creditors within the class that rejected it at the general meeting of creditors.

**Question 1.10 [1 mark]**

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

(a) Extrajudicial recoveries allow for a larger set of debtors to seek their reorganisation in comparison to the set of debtors that are allowed to file for judicial recovery.

(b) Extrajudicial recoveries do not allow the debtor to restructure labour claims.

(c) Extrajudicial recoveries represent a consensual solution to a financial crisis, as extrajudicial plans may not be imposed on dissenting creditors.

(d) Extrajudicial recoveries do not allow the debtor to dispose of its assets free of any encumbrances, unlike judicial recoveries.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks] [1 mark]**

Cite **two (2) faulty actions** that could lead to the debtor's administration being removed during a judicial recovery case.

Crime against property and crime against public welfare

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

State the **three (3) manners or ways** by which the assets of the bankrupt estate may be sold by the judicial administrator during a liquidation procedure.

1. by an in-person/electronic/hybrid auction
2. by a competitive procedure promoted by a specialised agent
3. by other means if they are approved under the provisions of Bankruptcy Law

**Question 2.3 [maximum 2 marks] [1 mark]**

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 debt that is not yet due by the debtor **[within the suspicious term]**
2. acts performed on a free-of-charge basis during the period of 2 years preceding the bankruptcy decree

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

Identify **three (3) changes** introduced to the Brazilian insolvency legal system due to the enactment of Federal Law 14.112/2020.

1. Expedited termination of insignificant/assetless estates
2. Debtor can initiate mediation/conciliation with creditors before filing for judicial recovery
3. Creditors can present an alternative judicial recovery plan (if the debtor's voluntarily presented plan is rejected by the general meeting of creditors)

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

**Question 3.1 [maximum 5 marks] [4 marks]**

How is the judicial recovery for micro and small enterprises different from a regular judicial recovery?

1. Among others, the main advantage is that it is less expensive than the regular procedure (for example, there is a limit on judicial administrator's remuneration - 2%).
2. General meeting of creditors is not called.
3. The plan may only provide for a max. of 36 months instalment payments of equal & successive amounts. **[any grace period?]**
4. The special regime is more focused on tax benefits
5. The procedure is restricted and often very ineffective

**Question 3.2 [maximum 5 marks] [3 marks]**

What is a "claim for restitution" under a bankruptcy procedure? How does it work?

Claim for restitution is a claim by the third party to a restitution of its assets in possession of the bankrupt estate. The return of the asset itself is possible, if it was sold on credit and delivered to debtor within 15 days prior to the bankruptcy petition. If the asset is sold – there will be restitution in cash.

The amounts due as a result of restitution lawsuit (which is a separate case record) are the priority and override all other claims, including super-priority claims.

**[wich are the other circumstances that allow the filing of a claim for restitution?]**

**Question 3.3 [maximum 5 marks] [5 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 (ii) for a creditor who was not listed in the second list of creditors (presented by the judicial administrator).

The proof of claims procedure is parallel to the judicial recovery proceeding (p. 52).

1. Creditors have 15 days from the publication of the first public notice in the official press to submit the proof of their claim to the judicial administrator.
2. After the administrator rendered the decision regarding the proof of claims, he/she is obliged to publish the second notice with the list of creditors. After this second publication creditors, debtor and prosecutor have 10 days to object the list of creditors. Creditors may argue that their claim is missing.
3. Creditor, whose claim was not listed in the first official notice, and who misses the 15-day period will still be regarded. However, such a claim is regarded as a "late claim".

Creditor with such a claim will not be able to vote at the general meeting of creditors until the claim is recognized by the court.

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

Braz Bank is a Brazilian bank. The financial institution has had considerable success 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 any defence that may be presented by Empreendimentos in order to ensure that the court will not declare its bankruptcy under any circumstances?

- I. Braz Bank (the "Bank") has grounds for filing for an involuntary bankruptcy against Empreendimentos.

To start the involuntary bankruptcy proceeding, the Bank (as a creditor-applicant) has to meet some certain criteria:

1. The debtor (Empreendimentos) does not cover the debt on the due date without a relevant reason.
2. The debt is certain on its value and is expressed in extra-judicially/judicially enforceable titles
3. The debt is duly protested
4. The debt exceeds 40 minimum wages on the date of the bankruptcy petition

Empreendimentos defaulted a one million reais debt (I assume it exceeds 40 minimum wages). From the fact pattern, we are not aware of Empreendimentos's reason for that, so can assume that there was no relevant reason for a default.

The fact pattern provides that the Bank met all the criteria for making its claim the extra-judicial executive title. Moreover, the Bank contacted the protest officer. In case such an indebtedness can/must be communicated to the protest officer for protest (we are not aware of particular requirements of the Brazilian law on this, but assume that the debt of Empreendimentos falls in this category), then the debt can also be considered as duly protested. **[not certain what you mean since in item 3 above is said that a protest is necessary.]**

Thus, it is likely that the Bank will meet the listed above criteria and will be eligible to file for involuntary bankruptcy against Empreendimentos.



- II. Empreendimentos will have 10 days after the Bank files for its involuntary bankruptcy to present its defence. The possible defences are listed under Art. 96 of the Bankruptcy Law. From the given fact pattern we are not aware whether there are any circumstances, which can prevent the bankruptcy decree regarding Empreendimentos, however, can elaborate based on the given facts.
- Under art. 96(e) [there is no such article] of the Bankruptcy Law, the fact that Empreendimentos was already an entity under financial distress can probably be regarded as a fact that does not legitimise the collection of the claim (this is hypothetical as we are not aware of the Brazilian Law on this question). [I do not understand what you mean.]
  - Under art. 96(f) [there is no such article] of the Bankruptcy Law, there might be a defect in the protest instrument used by the Bank. As specified in the section I of the answer, the procedure (communication with the protest officer) might not be a suitable procedure in the given case. However, we are not aware from the course materials in which type of situations it is possible to use the protest officer.

**Question 4.2 [maximum 5 marks] [4 marks]**

Suppose, additionally, that the referred loan agreement between Braz Bank and Empreendimentos was also secured by a mortgage over land valued at BRL 350,000 (three hundred-and-fifty thousand reais). Before Braz Bank took any additional measure against Empreendimentos, the debtor voluntarily 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 SA: BRL 350,000;
- Banco Enterprises SA: BRL 125,000;
- Brasil Autoparts SA: BRL 100,000;
- Oil Brasil SA: BRL 100,000.

The complete list of creditors (also portraying Classes I, III and IV) has just been published in the official press. A few rumors have come to Braz Bank's attention concerning the fact that Brasil Autoparts SA and Oil Brasil SA are likely to reject the recovery plan that Empreendimentos has been working on. Should the rumors show themselves to be accurate, is Empreendimentos still capable of having its recovery plan approved at a general meeting of creditors? Would there be grounds for a cramdown?

Secured creditors from Class II will vote by the majority (head count) and by value of the claims of the attending creditors. Provided all the creditors of Class II attend the meeting, the Bank would need that at least Banco Enterprises and either Oil Brasil or Brasil Autoparts vote for the plan (so that the majority by the head count is achieved).

Based on art. 58 of the Bankruptcy Law, the court will still grant the judicial recovery (the cramdown situation) if 50%+ of the creditors represented at the general meeting vote for the plan; three other classes approve it and 1/3 of the Class II creditors vote for it. [any other requirements?]

**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 land valued at BRL 600,000 (six hundred thousand reais). The referred piece of land corresponds to the site where Empreendimentos' main factory is located. 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?

Bank's claim will be immune from the restructuring as it is secured by the fiduciary title. The Bank will not be a subject to the insolvency proceedings, but it won't be able to take the possession of the land within 180 days (might be prolonged for the equal term by the court). The expropriation will only be possible with the court's sanction.

Empreendimentos may argue in its defence that there is an immovable property on the land (factory). One of the main goals of the Bankruptcy Law is to preserve the productive use of the company's goods and for that it is essential to preserve the asset as a business unit. Sale as individual branches would not generate enough proceeds and will diminish the value of the asset as a whole.

**\* End of Assessment \***

**TOTAL MARKS 40 OUT OF 50**

**GOOD EFFORT!**