



**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**.

## **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 [1 mark]**

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.
- (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 [1 mark]**

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.
- (d) Unsecured claims.

**Question 1.7 [1 mark]**

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.
- (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] [2 marks]**

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

This could occur, as per Article 64, if the debtor's administration/officers have:

1. committed a crime against property, public welfare or the economic order (and been found guilty and sentenced); or
2. refused to provide information requested by the judicial administrator or other committee members.

**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.

Can be sold via –

- Electronic, in person or hybrid auction;
- A competitive procedure facilitated by a specialised agent; or
- Any other modality approved under the Bankruptcy Law terms.

**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.

- Payment by the debtor of debts which were not due (by any means, including advances on a given note payable). **[within the suspicious period]**

- Acts performed free of charge in the two years preceding the decree of bankruptcy e.g. donations or services provided free of charge.

**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.

- Groups of companies are now eligible to file for a restructuring procedure as a group. Previously the Bankruptcy Law was silent on this matter which led to confusion. **[they were not prevented from filing but now there is an specific provision]**
- Creditors can now present an alternative judicial recovery plan if the voluntary one presented by the debtor is rejected.
- Debtors can now file for extrajudicial recovery as soon as the debtor has one-third of votes in favour from the creditors subject to the proceeding.

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

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

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

The judicial recovery for micro and small enterprises is different from a regular judicial recovery in many ways. The company can elect between the special micro and small regime vs the regular regime.

Some examples of how a micro/small regime work differently are set out below:

- The judicial administration's remuneration for micro/ small is a 2% limit rather than 5% in regular.
- Micro and small recoveries are more focused on tax benefits compared to regular.
- Micro and small recoveries have no judicial administrator – i.e. less expensive procedure than compared to a regular judicial recovery.
- Any plan proposed in a micro and small regime may include a maximum of 36 monthly payment instalments of equal and successive amount. The first instalment must be paid within 180 days from the filing of the judicial recovery petition before the court.
- There is no general meeting of creditors called in a micro and small (unlike in a regular recovery).
- In a micro and small regime, if creditors holding over 50% of the claims of each class object to the plan, the judicial recovery will be dismissed and it will become a bankruptcy.

**Question 3.2 [maximum 5 marks] [4 marks]**

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

- A claim for restitution applies where property is in the possession of the estate but belongs to the third party. It seeks to reclaim property from the estate for the purpose of returning it to the creditor.

- A restitution claim runs as a separate case record. The debtor, committee of creditors, creditors and the judicial administrator are all notified and given the opportunity to oppose it.
- In addition, if a party sold an asset to the debtor on credit, in the 15 days prior to the petition for bankruptcy, it may be returned (if it has not been disposed of).
- All restitution amounts due under a lawsuit must be paid in priority to all other claims including super-priority claims.
- Restitution in cash is possible, based on an appraised value, if the asset no longer exists. Or if it has been sold, the value is the price sold for. The cash value cannot exceed the term established in the specific rules of the competent authority<sup>1</sup>. **[any other circumstances would allow the filing of a restitution?]**

**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 (ii) for a creditor who was not listed in the second list of creditors (presented by the judicial administrator).

- After the debtor's list is published, creditors have 15 days to request the judicial administrator to include any missing claims or correct an incorrect claim.
- If their claim wasn't listed and they miss the 15 day period for presentation, the claim will be a "late claim" and the creditor will not have the right to vote at the general meeting of creditors until such claim is recognised by the court. The claim will be recognised as an opposition claim and the court will need to decide if it should be admitted. In this situation, the creditor will have lost its voting right, and incurred legal/court fees.
- After the second list is published, the creditor can present their opposition to the court within a 10 day period of the publication of the list by the judicial administrator. The third list after this is final. If the claim is not included, unfortunately there are no objections allowed so there is no further recourse if the objection to list two is unsuccessful. **[what about costs? Who may object the request presented by the creditor?]**

**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

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<sup>1</sup> Pursuant to Article 75, paragraphs 3 and 4, of Federal Law 4.728/1965



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?

Yes, Braz Bank has grounds for filing an involuntary bankruptcy proceeding against Empreendimentos as per the following key points:

- Empreendimentos is a legal entity who perform business activities – as such, the Bankruptcy Law applies.
- Braz Bank is a business legal entity and must prove the regularity of the business by showing their Board of Trade certificate.
- Pursuant to Article 94 of the Bankruptcy Law Braz Bank can file an involuntary bankruptcy proceeding as a creditor.
- Braz Bank has met the following legal criteria:
  - Empreendimentos has not paid its debt as it was due (for no known legal reason per the facts given in the question).
  - Braz Bank has sent its indebtedness title to the protest officer for protest i.e. an official notice was sent to the debtor to pay or recognise the existence of the debt. Braz Bank would need to provide the certificates of the protest officers in the petition.
  - Braz Bank does not have to prove that Empreendimentos is insolvent and it is simply enough, with evidence, to suggest that Empreendimentos simply does not want to pay its debts on the due date. **[the minimum amount requirement was met?]**
- Empreendimentos may have defences, such as a defect in the protest or in its instrument. However, no evidence of such can be seen from the facts of the question.
- Alternatively, Empreendimentos could file a petition for judicial recovery during the 10 day timeframe that it has to oppose the bankruptcy request. **[under which grounds?]**
- Empreendimentos could also pay the amounts due (plus inflation/interest/fees) and present other arguments to avoid bankruptcy.

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

Approval for Class II must be Majority by head count and by value of the claims of the attending creditors. Assuming all secured creditors attend, there are 4 creditors, 2 of which may reject the plan. As such, it will not obtain majority approval. All four classes must approve the plan, therefore it will not pass.

Article 58 of the Bankruptcy Law provides for a cramdown by a judge provided:

- At least half the amounts of all creditors represented at the meeting are in favour (independent of the class).
- Three of the four classes of creditors approved it. (Noting that if there are only three classes, then two classes must approve, or if there are only two classes then one must approve).
- In the class that rejected the plan, at least one-third of the creditors were in favour.

Based on the facts I am unable to confirm if the above three apply, but there may be grounds for a cramdown if only two vote against. However, if the other three vote against, then there are no grounds as it will not have achieved at least 1/3 in favour.

It is possible, since the enactment of Federal Law 14.112/2020 for creditors to present their own version of a recovery plan for the debtor, if the debtor's plan isn't approved. However, creditors who support the plan would need to release personal guarantees from third party individuals.

#### **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?

As Braz Bank has a fiduciary title on a given assets, it will be granted with immunity to any restructuring the company undertakes. Whilst Braz Bank will not be subject to the insolvency proceedings, it cannot take possession of the land during the stay period of 180 days (noting the timeframe may be extended by the court as well) as it is assumed that the land is an essential good for Empreendimentos' business as it is the land the main factory is in (per Article 49, Paragraph 3 of the Bankruptcy Law).

Per the above mentioned facts, we are 2 days into the 180 day stay. However, the court may give a one time addition 180 day (or less) stay again.

Even after the 180 days has passed, it can be seen in prior cases<sup>2</sup> that repossession should not occur without the consent of the Bankruptcy Court.

This is a major issue and in particular, if the court determines this piece of land is fundamental for any restructuring, it may prevent Braz Bank from repossessing the land. It is likely this is what Empreendimentos would argue as a defence.

Empreendimentos may even request the stay is extended on the basis that a judicial recovery plan has not yet been approved – this would further delay any enforcement action.

**\* End of Assessment \***

**TOTAL MARKS 47 OUT OF 50**

**EXCELLENT!**

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<sup>2</sup> STJ, AgRg on CC 127.629, Second Joint Panel, Reporting Justice Joao Otavio de Noronha, decided on April 23<sup>rd</sup> 2014; STF, AgRg on CC 125.893, Second Joint Panel, Reporting Justice Nancy Andrichi, decided on March 13<sup>th</sup> 2013.