



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8B**

**CHINA (PRC)**

This is the **summative (formal) assessment** for **Module 8B** 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 8B.** 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.assessment8B]**. An example would be something along the following lines: 202122-336.assessment8B. **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 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 **8 pages**.

## **ANSWER ALL THE QUESTIONS**

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

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 point)**

Select the **correct answer**:

Which of the following are eligible to use the China Enterprise Bankruptcy Law of 2006 to enter into a court-involved bankruptcy procedure in China?

- (a) Consumers, when in financial difficulty.
- (b) Enterprises having an independent legal status.**
- (c) Enterprises or partnerships.
- (d) State-owned enterprises only.

#### **Question 1.2 (1 point)**

Select the **correct answer**:

Which three bankruptcy options are provided by the China Enterprise Bankruptcy Law of 2006?

- (a) Reorganisation, scheme of arrangement and liquidation.
- (b) Receivership, settlement and liquidation.
- (c) Liquidation, settlement and company voluntary arrangement.
- (d) Reorganisation, settlement and liquidation.**

#### **Question 1.3 (1 point)**

Select the **correct answer**:

How is a bankruptcy administrator appointed under the China Enterprise Bankruptcy Law of 2006?

- (a) The bankruptcy administrator is appointed by the debtor when the company files for bankruptcy in court.
- (b) Only the court can appoint a bankruptcy administrator. Creditors may request a replacement bankruptcy administrator to be appointed if the court-appointed administrator is proven to be incompetent or biased at a later stage of the proceedings.**

- (c) Both the debtor and creditors may appoint provisional bankruptcy administrators.
- (d) The court can only appoint a bankruptcy administrator after consulting with both the shareholders and the creditors.

**Question 1.4 (1 point)**

Select the correct answer:

Which parties may file for bankruptcy in court under the China Enterprise Bankruptcy Law of 2006?

- (a) Directors can file for company bankruptcy in a court.
- (b) Both the debtor and the creditors may file for bankruptcy.**
- (c) Only the shareholders of the debtor company may file for bankruptcy.
- (d) Both creditors and shareholders of the company may file for bankruptcy.

**Question 1.5 (1 point)**

Regarding the “control” model in corporate reorganisation under the China Enterprise Bankruptcy Law of 2006, which of the following statements is correct?

- (a) The debtor-in-possession model is categorically not available under the Chinese corporate reorganisation provisions.
- (b) Both debtor-in-possession and administrator-in-possession models are available under the Chinese corporate reorganisation provisions.**
- (c) Once the administrator-in-possession model is chosen, it cannot be converted into the debtor-in-possession model.
- (d) The debtor-in-possession model automatically applies once a reorganisation procedure is commenced.

**Question 1.6 (1 point)**

Regarding preferential creditors in China, which of the following statements is correct?

- (a) Both the tax authorities and employees are treated as preferential creditors in China.**
- (b) The preference of tax authorities has been abolished by the China Enterprise Bankruptcy Law of 2006.
- (c) Tax authorities are ranked higher than employees in the priority hierarchy.
- (d) Tax authorities are paid before fixed charge holders.

**Question 1.7 (1 point)**

A corporate reorganisation plan that has been voted on must be approved by the court before it takes effect. Indicate which one of the following statements **is correct**:

- (a) If the reorganisation plan was voted down (rejected) by one or more class of creditors, the court may still approve the plan if certain statutory conditions are met; a cram-down is therefore available under Chinese law.
- (b) A cram-down cannot be exercised by Chinese courts.
- (c) If the shareholders do not support / approve the reorganisation plan, the plan cannot be crammed-down by the court.
- (d) Only a reorganisation plan that has been fully supported by all classes of stakeholders entitled to vote can be sent to the court for approval.

**Question 1.8 (1 point)**

**Select the correct answer:**

As regards the recognition of foreign bankruptcy proceedings in China, select the **correct answer**:

- (a) A foreign bankruptcy proceeding can be recognised in China, provided there is a judicial assistance treaty with China or reciprocity with China has been established.
- (b) China strictly applies the principle of territorialism and consequently no foreign bankruptcy proceeding or ruling can be recognised in China.
- (c) China has adopted the UNCITRAL Model Law on Cross-Border Insolvency and all foreign bankruptcy proceedings can be automatically recognised in China.
- (d) China only recognises foreign bankruptcy orders of its largest trading partners, such as the USA and the EU.

**Question 1.9 (1 point)**

**Select the correct answer:**

In terms of the stated universal effect of a Chinese bankruptcy proceeding, the practical approach is that:

- (a) The Chinese bankruptcy administrator can use the court bankruptcy ruling to bar foreign creditors from taking legal action against the company's assets in all foreign courts.
- (b) The Chinese bankruptcy administrator must seek recognition of the Chinese bankruptcy ruling abroad, otherwise the Chinese bankruptcy ruling will not be effective in other jurisdictions.
- (c) The Chinese bankruptcy ruling can only be recognised in countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvency.
- (d) The Chinese bankruptcy ruling will never be recognised in other jurisdictions since China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

**Question 1.10 (1 point)**

Select the **correct answer**:

When drafting the corporate reorganisation chapter of the China Enterprise Bankruptcy Law of 2006, which country's corporate rescue laws influenced Chinese lawmakers the most?

(a) The United States of America.

(b) Russia.

(c) Australia.

(d) The United Kingdom.

**QUESTION 2 (direct questions) [10 marks] (7 points)**

**Question 2.1 [2 marks] (1 point)**

What bankruptcy test(s) should be met if a bankruptcy petition is filed **by a creditor** in China?

Under article 2 of the China Enterprise Bankruptcy Law of 2006, the bankruptcy tests are related to the presentation, by the debtor of balance-sheet or cash-flow. In cases of petition filed by a creditor, the debtor needs to use these tests to convince the court that the company is in balance-sheet or in fact with financial problems that will result in their bankruptcy.

The presentation, by the debtor, of an audited balance sheet is in daily practice, enough for the company to prove or to contest a bankruptcy petition filed by a creditor.

**Question 2.2 [maximum 4 marks] (2 points)**

Name the two professions in China that dominate Chinese regional bankruptcy administrator lists **and** briefly explain how they are appointed in practice.

The two professions that dominate Chinese regional bankruptcy administrator can be lawyers and accountants working on a qualified law or accounting firm.

The provincial supreme people's courts select some of these firms to be included in the list, even without doing qualification exams or training courses. If these firms are included in the local list, it can receive an appointment to be the practitioner of the bankruptcy proceeding

Lawyers and accounting associations are controlled by local government justice and finance departments. Also "liquidating firms" can be appointed as a practitioner, but there are no government agencies regulating insolvency practitioners in China.

In general, despite the responsibility of the administrator to control the bankruptcy proceeding, is the judge who takes control of the key decisions regarding the process. Even administrative functions provided under the China Enterprise Bankruptcy Law of 2006, are performed by the court, not the administrator.

**Question 2.3 [maximum 4 marks] (4 points)**

Name the two main types of security available under Chinese law **and** explain how and where they are registered.

The types of securities are fixed charges and pledges, both need to be registered. A fixed charge can be created upon buildings or the use right of land and must be registered under the China Civil Code of 2020. A security certificate is issued to the charge holder once the charge has been registered at the government agency and it has the application of a small fee.

A pledge can be made upon assets such as shares, trademarks, and patents. A pledge is valid after the pledged movable asset changes possession into the hands of the secured creditor. In this case no registration of a pledge is required because the change of physical possession is enough. However, for intangible assets like trademarks, patents, shares, cheques and even bonds, to be valid, the pledges must be registered, otherwise they are invalid.

**QUESTION 3 (essay-type questions) [15 marks in total] (10 points)**

**Question 3.1 [maximum 8 marks] (3 points)**

“The China Enterprise Bankruptcy Law of 2006 is a rescue-oriented piece of insolvency legislation, emphasising rescue over liquidation.”

Discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

The China Enterprise Bankruptcy Law of 2006 is a rescue-oriented legislation that prefers rescue over liquidation. I agree with the statement considering that the Law has the influence of the United States bankruptcy law, and predicts three options for companies: reorganisation, composition, and liquidation – which the last option is liquidation.

However, the three options contain a lot of rules and regulations that sometimes make the proceedings more complicated and complex.

Complexities can be found when, even appointing an administrator, the court is the main “actor” on the proceeding. It also can be found when the Law predicts the bankruptcy tests presented by the debtor to prove it’s real situation, when the petition is filled by the creditor.

Another difficulty is that the Law doesn’t allow personal and consumers to file bankruptcy petition, which stimulates the litigation in execution proceedings resulting in more problems to the company that is already with financial problems.

Despite the rescue-oriented Law, it’s implementation is still a challenge because there is a small number of court-involved bankruptcy cases considering China’s economic size, the majority of bankrupt companies in China exists in the market in an unlawful manner.

**Question 3.2 [maximum 7 marks] (7 points)**

Briefly explain the process for the proof of claims in a reorganisation procedure and the procedure that is followed should the value or legality of a creditor's claim be disputed.

The proof of claims in a reorganisation procedure filed by creditor, the administrator will (i) require the creditor to fill in a claim form; (ii) check the company's books and consult with staff from the company's financing unit for verification. Sometimes, because of the steps over the proofs, the creditor litigates before the same court for a judgment and the courts need to resolve these lawsuits.

On the other hand, if the reorganization is requested by the company, a voluntary reorganization filing can be made without showing any evidence of bankruptcy without the need to pass any bankruptcy tests.

The debtor can also request the court for a debtor-in-possession type order. If sanctioned, the debtor's management regains control from the reorganization administrator with the role of a supervisor for the remainder of the procedure.

**QUESTION 4 (fact-based application-type question) [15 marks in total] (11 points)**

**Question 4.1 [maximum 8 marks] (4 points)**

The bankruptcy liquidator of an Australian company finds that some of the company's assets are located in Shanghai, China. A Chinese creditor has taken legal action in a local (Chinese) court, which has issued an injunction freezing the assets of the Australian company in Shanghai. The liquidator has approached you for advice on how the Australian bankruptcy proceeding can be recognised in China. Advise the liquidator.

It's important to understand that The China Enterprise Bankruptcy Law of 2006 is not so friendly for cross border insolvency cases.

Under Article 5 of the Law, a foreign bankruptcy ruling can be recognised in China if some assets are located there. However, to seek recognition, the foreign bankruptcy liquidator must, first, check whether there is a judicial treaty between China and that foreign country, in this case, Australia, over civil and commercial matters.

The existence of a treaty is essential for a foreign bankruptcy ruling to be recognised in China and it's not only that: It's important to know if China judicial cases have already been recognized in Australia, because China won't give the "first step" to an opening negotiation or reciprocity on these matters.

In addition, article 82 predicts that the court may reject the recognition application if the foreign judgement violates the fundamental principles of Chinese law, sovereignty, security or the public interest. However, these concepts are not clearly defined.

Furthermore, until 2021, China has treaties with 30 countries, but Australia, US and Japan are not included.

**Question 4.2 [maximum 7 marks]**

Yangtze Steel Limited is a large steel manufacturing company based in Shanghai. In 2010, the company was unable to repay a RMB 23 million loan to the Bank of China (Shanghai Branch) and was petitioned for bankruptcy liquidation by the Bank at the Shanghai Second Intermediate People's Court. Three days after submitting the petition, the Court accepted the



liquidation filing and appointed Jingchen Partners, a local law firm included in the local bankruptcy administrator list, as the liquidation administrator.

Shortly after the commencement of the bankruptcy of Yangtze Steel Limited, the CEO of SanLong Limited, a controlling shareholder holding 32% of the equity of Yangtze Steel Limited, approaches you for advice.

**Using the facts above, answer the questions that follow.**

**Question 4.2.1 [maximum 4 marks] (4 points)**

The CEO of SanLong Limited tells you that the various businesses of Yangtze Steel Limited are still viable and that a piecemeal liquidation of the company will not be in the interests of any of the stakeholders. Since Yangtze Steel Limited appears to have a bright future if the current debt crisis can be resolved, you are asked to explain whether (and if so, how) the current liquidation procedure can be converted to a reorganisation procedure.

The debtor or its shareholders holding 10% or more of the company's equity can petition the court for the conversion into reorganisation. Upon approval by the court, liquidation will be changed to reorganisation.

Despite the existence of this possibility, it can result in several problems: (i) it is not clear how the debtor's board can exercise its right to raise a legitimate conversion request; (ii) empowering shareholders to raise a conversion motion seems to be complex, as entering into liquidation means the company must have been able to meet the bankruptcy test; and (iii) the conversion request must be submitted to the court that then also makes a decision in detrimental of the opinion of creditors.

**Question 4.2.2 [maximum 3 marks] (3 points)**

Assuming that the bankruptcy liquidation of Yangtze Steel Limited is successfully converted to a reorganisation procedure, a reorganisation plan for Yangtze Steel Limited is eventually voted on by the various stakeholders. Due to the fact that Yangtze Steel Limited is insolvent, the reorganisation plan *inter alia* proposes that the shares of all previous shareholders be cancelled. Unhappy that its equity in Yangtze Steel Limited will be wiped out by the reorganisation plan, SanLong Limited understandably votes against the plan. However, since the plan has only been voted down by the shareholders and approved by all the classes of creditors, the reorganisation administrator submits the reorganisation plan to the Shanghai Second Intermediate Court for approval.

Advise the CEO of SanLong Limited as to whether the Court can approve such a plan under the current law in China.

The approval of the reorganisation plan will only be confirmed by the court before taking effect. Article 87 provides that the court may cram-down a reorganisation plan that has been voted down by one or more class of creditors (or by the shareholders). For the cram-down approval by the court the reorganization plan needs contain some conditions and fulfil three tests.

The first one is the fair and equitable test, which requires the application of the *pari passu* principle between creditors in the same class.

The second is the absolute priority test, requiring shareholders to be paid nothing unless and until creditors are paid in full.

The third is the feasibility test, stating that the reorganisation plan should be achievable. If the court understands that these conditions remain feasible, even if the reorganisation plan failed in the vote of any class of stakeholders, the court may still confirm it and forcibly approve the plan, making it legally binding on all consenting and dissenting stakeholders.

38 out of 50 points awarded

**\* End of Assessment \***

Commented [ZZ1]: 38 out of 50 points awarded