



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)

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] (8 points)

Question 2.1 [2 marks] (0 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, cash-flow test and balance sheet tests will be applied when the creditor filed a bankruptcy petition.

Question 2.2 [maximum 4 marks] (4 points)

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

The bankruptcy administrators are mainly from accounting and law firms. The appointment of bankruptcy administrator is governed by Article 13 of the China Enterprise Bankruptcy Law of 2006. When the bankruptcy petition is accepted, a bankruptcy administrator will be chosen from the roster list of candidate firm by the Court, usually local provincial Supreme People's Court or Intermediate People's Court. In case of complex liquidation case, a bid may also be used in appointing the bankruptcy administrator. Creditor has little say to the appointment unless evidences show that the bankruptcy administrator is incompetent and partial in handling the proceedings.

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 two most common form of security under the China Property Law is fixed charge and pledge. Fixed charges are mostly dealt with land use right, immoveable properties and sometimes vehicles and machinery. Pledges are often used in moveable tangible assets as well as intangible assets, such as, patent, trademark and shares.

To validate a fixed charge, the chargee must register the charge in accordance to the China Civil Code of 2020. For landed property, the chargee can approach China Housing Management Authority and China Land Management Authority for registration. While for vehicle and machinery, it is the local police vehicle management office and

Commerce Regulation Bureau respectively. A security certificate is issued to the chargee upon successful registration.

Similar to fixed charges, a pledge has to be registered in order to be effective. The registration authority varies depending on the nature of the assets. For shares of listed company, it is the China Securities Depository and Clearing Corporation Limited responsible for registration. For non-listed shares, it is the China Companies House accountable for registration.

QUESTION 3 (essay-type questions) [15 marks in total] (11 points)

Question 3.1 [maximum 8 marks] (4 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.

I would say the China Enterprise Bankruptcy Law of 2006 (“the Law”) were established under a rescue based. However, in practice, the decision to undergo a corporate rescue or liquidation depends on government supports.

Unlike western counterparts, most of the prominent corporates in China are stated-owned enterprises (“SOE”) where liquidation may be presumed as governance failure undermining the creditability of Chinese government. Meanwhile, a corporate rescue did not contain disgraceful effect but also open room for the SOE to overhaul its operation, hence, resume to a financially healthy company.

Another concern is the chain effect on liquidation over corporate rescue. Most of the financial institutions in China are SOEs. A large number of losses will be absorbed by the state-owned banks in liquidation circumstances, it may cause domino effect to the economy which are priority on Chinese development. On the other hand, reorganisation offers a less painful solution to all of the stakeholders, including local government and employees.

Under this background, it was understandable that the when drafting the Law, Professor Wang make reference to Chapter 11 of the US Bankruptcy Code 1978 which are more rescue-driven rather than liquation-driven. In fact, there are 2 chapters, Chapter 8 and 9, dedicated to corporate rescue in the Law. In fact, liquidation comes after in Chapter 10 implies that liquidation should be viewed as the last resort. To encourage wider use of corporate rescue, power was given to the debtor or its shareholder to convert liquidation into a reorganisation if they held 10% or more of the company’s equity. The low threshold for conversion implies corporate rescue is more preferable than liquidation.

In reality, it should be noted that government supports are critical for a corporate undergoing corporate rescue or liquidation. No matter liquidation or corporate rescue, both procedures are required to approval by court. The Court was given wide range of power where creditors and debtors are marginalised. For example, for voluntary liquidation filing, even meeting cash-flow or balance-sheet requirement but without government support, the court may not entertain the application. Not only liquidation required government support, for liquidation converting to corporate rescue plan, it has to be backed by government before it will be considered by Court.

Besides government support, reorganisation of SOE will become liquidation as these plans are too often political-driven. Buyers are difficult to find as the reorganisation plan not commercially viable. Therefore, liquidation may become the only possible solutions.

To conclude, although the Law encouraged corporate rescue rather than liquidation. In reality, liquidation and corporate rescue are used depending on government attitude which rendered unpredictability on insolvency proceedings.

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 creditor has to fill in a claim form and submits it to reorganisation administrator. Upon receipt, the administrator will correlate with the company's staff and book and records to check the legality of claims. In case of dispute, the creditor may apply to court for a judgement of the proof of claims where expedited process was used to solve the dispute.

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

Question 4.1 [maximum 8 marks] (8 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.

According to Article 5 of China Enterprise Bankruptcy Law of 2006, the Australia bankruptcy ruling can bind the company's assets located in Shanghai under 3 conditions, namely, Chinese court ruling is obtained, the existence of judicial assistance treaty between China and Australia or the concept of reciprocity.

Australia is not one of the countries that has signed judicial assistance with China, it has to apply Chinese court ruling or reciprocity before the bankruptcy order can be enforced in China.

The recognition of foreign judgement is governed by Chapter 27 of the China Civil Procedure Law of 1991. As the bankruptcy order issued by Australia is final and conclusive, the liquidator can apply to Shanghai intermediate people people's court where the disputed assets are located under article 281 of the China Civil Procedure Law of 2007. Although China legal systems is not a common law based, presenting successful precedent case may increase the chance of favourable ruling for this case. The judgements of some of the successfully cases may be relevant to look in, i.e. bankruptcy recognition ruling to a France liquidator in 2005 made by Guangzhou Intermediate People's Court.

As an injunction was obtained by a Chinese creditor, the Australian liquidator should consider there is judicial reciprocity which allow the Chinese creditor obtaining favourable recognition regarding the liquidation, i.e., whether the injunction order can be recognised in Australia first and, if it is feasible, the liquidator may initiate the recognition process of injunction in Australian court. This concept of reciprocity was highlighted in Wuhan Intermediate People's Court in 2012 regarding German bankruptcy case.

Given the recent political tension between Australia and China, the recognition application is very likely to be rejected by the Chinese court. As a last resort, the liquidator may also consider filing a bankruptcy petition to the Chinese court and recover the assets under the China Enterprise Bankruptcy Law.

Question 4.2 [maximum 7 marks] (7 points)

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.

According to Article 70 of the China Enterprise Bankruptcy Law of 2006, for involuntary liquidation procedure, the shareholder holding 10% or more of the company's equity can apply to court converting liquidation to reorganisation.

Given the involuntary nature of the liquidation and SanLong Limited held 32% of Yangtze Steel Limited, it is eligible for CEO of SanLong Limited to apply for a conversion. It should be noted that there are few successful conversion cases in which government support is essential. The CEO should highlight reorganisation has less impact than liquidation on local employment and tax revenue. Meanwhile, the liquidity crisis was short term which the underlying business was still strong. The Court will only consider the proposal if local government support is secured.

Meanwhile, a reorganisation proposal must be worked out. The proposal should comprise debt forgiveness or equity adjustment arrangement. An overhaul of business units, including restructure and close inefficiency division, is also to be included in the proposal. The options of sales rescue should also consider to lure potential buyer.

Before filing to the Court, the proposal should be circulated among stakeholders, i.e. employee, government, suppliers, customers and creditors, for their support. The more endorsement of proposal is obtained, the more likely the proposal is agreed by the Court. The endorsed proposal should be filed to the Court and subjected to the approval.

At last, once approval of the proposal is obtained, it will come into effect immediately.

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.

Although all of the creditors have voted for the plan, it involved curtailment of shareholders holding. The plan should be voted by the shareholders as well.

Article 85 of the China Enterprise Bankruptcy Law of 2006 states that if the company's equity, Yangtse Steel Limited, is affected, (i.e. Shareholding of SanLong has been down to 0%), it should be voted on by the shareholders.

Although the shareholders have voted down the reorganisation plan, the Court may still cram-down the plan if it meets the 6 conditions listed down in provisions of Article 87. It is cleared that the all creditors approve the plan. However, there is no information regarding whether other stakeholders, i.e. employees and tax authority, are in favour of the plan. Meanwhile, the court will also consider whether the stakeholders in the same class is treated fairly and whether the plan is feasible.

In case, the Court decide to cram down the plan, it will be legally binding on all consenting and dissenting parties.

44 out of 50 points awarded

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*** End of Assessment ***