



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] (2 points)

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

Per Article 7 of the China Enterprise Bankruptcy Law of 2006, a cash-flow bankruptcy test is used in order to present to the Court that the company is bankrupt.

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.

Law firms and accounting firms are the two professions that dominate the Chinese regional bankruptcy administrator lists. It is predominantly the larger firms that are appointed, as most provincial courts take comfort with the assumed financial strength and competence of the larger firms.

The provincial courts create qualified practitioner lists. It is from these lists that the bankruptcy administrators are appointed. The lists vary per province.

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.

There are two main types of security available under Chinese law, fixed charge and pledges.

With respect to fixed charges, a charge must be registered under the China Civil Code of 2020, and not valid until registered. For immovable property, register with the local office of the China Housing Management Authority, most secured creditors also register with the local office of the China Land Management Authority.

With respect to pledges, the pledge become valid after the pledged moveable asset changes possession to the secured creditor. For moveable assets – no registration is needed as the move of the physical possession of the asset is sufficient. For intangible assets,

they must be registered to be valid. For trademarks, the authority is China Industries and Commerce Regulation Bureau Central Office.

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.

There are three options to handle a bankruptcy under The China Enterprise Bankruptcy Law of 2006 (“the Law”).

The three options are as follows:

- Settlement
 - o This is where the company is required to provide the creditors with a debt compromise plan. If the plan is voted in favour of, then the Company can avoid liquidation.
 - o An advantage to this is that it provides flexibility for the Company to seek to continue operations which proves it as rescue-orientated.
 - o Within both Chapter 8 & 9 of the Law, the focus is corporate rescue which clearly demonstrates the intent of the Chinese judiciary to emphasise the rescue where possible.
- Liquidation
 - o This option is where the bankruptcy administrator sells the assets of the Company to satisfy the debts of the creditors in the order outlined within the bankruptcy statute.
- Bankruptcy reorganisation
 - o This can be filed by either the debtor or creditor. The reorganisation is aimed at rescuing the company and avoiding a winding up of the company. The bankruptcy reorganisation needs to be voted by creditors and it will then need to be confirmed by the Court.
 - o The majority of the elements of the reorganisation procedure are adapted from the US Chapter 11 reorganisations, whereby the focus and emphasis is on corporate rescue.
 - o The reorganisation can be initiated by either debtor or creditor in order to increase the chance of a successful rescue.

Further to the above three options with respect to the Law, I agree with the statement that the Law is rescue oriented legislation. Two of the three options are focused on the rescue of the Debtor, as provide significant flexibility in doing so, either with or without the blessing of the Court. Further, the Chinese Courts have proven that they do not sanction significant quantities of liquidations, particularly with State-owned-enterprises, and the Court has significant power throughout all proceedings.

Article 2 of the Law states that a voluntary reorganisation petition can be made in advance of the Company technically being bankrupt, either cash flow or balance sheet. This demonstrates that rescue efforts are encouraged as **early as** possible.

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.

A claim form is required to be filled out for creditors to prove a claim in a reorganisation procedure. The form will be verified by the reorganisation administrator by reviewing the company's books and records, and consulting with the staff of the company. The creditor shall have not less than 30 days, but not more than three months from the date of the announcement from the Court of the proceeding. It is the court that stipulates the exact amount of time for the claim to be made. This is outlined within Article 45 of the Bankruptcy Law 2006.

Should a dispute arise to the validity or legality of the creditor's claim, the creditor has the ability to litigate and appeal to the court for a judgement, noting this must be the same court that is supervising the reorganisation. It is common practice for the Court to arrange for a quicker process to conclude these proceedings.

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.

Under Article 5 of the China Enterprise Bankruptcy Law of 2006, a foreign bankruptcy ruling can be recognised in China if some assets are located there. In the scenario, there are assets in Shanghai, China, hence this requirement is met.

The Chinese civil procedural law governs the recognition of foreign judgement in China. China is not a common law jurisdiction, whereas Australia is a common law jurisdiction, as such Chinese judgments rely more heavily on legislative provisions rather than precedents. Chapter 27 within the China Civil Procedure Law (1991) addresses judicial co-operation.

Article 282 of the China Civil Procedure Law of 2007 states that the recognition of a foreign judgment is conditional upon the foreign jurisdiction having a judicial assistance treaty with China, or reciprocity being established between the countries. The Chinese view with regards to reciprocity is restrictive, with reciprocity not established until a Chinese judgment has been recognised in Australia. There is no reciprocity established with China and Australia, so foreign recognition cannot be provided to the Australian liquidator within this scenario. This was demonstrated in the case of *DNT France Power Engine Co., Ltd. v. Zhen Xiyong* [2006].

In reality, the vast majority of foreign recognition requests are rejected by the Chinese Courts on the grounds that there is either no judicial assistance treaty or that reciprocity has not been sufficiently established. It is rare for foreign judgments to be recognised.

As an alternative, the liquidator could explore options to use the local Shanghai court system in order to settle the dispute.

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.

Article 70 of the China Enterprise Bankruptcy Law of 2006 states that during an involuntary liquidation, a shareholder holding more than 10% of the company's shares may apply to the Court for the involuntary liquidation to be converted to a reorganisation. As such, I would provide this information to the CEO of SanLong Limited, that his company controls 32% of the equity, it surpasses the 10% threshold. SanLong could submit an application to the Court for the transfer to a reorganisation.

It is important to ensure that local government support is gained in advance of applying to the Court, in order to ensure that the reorganisation filing is considered seriously.

As explained with Article 71 of the China Enterprise Bankruptcy Law of 2006, if the Court is to approve the rectification, the Court would order Yangtze Steel Limited to publicly announce the change from involuntary liquidation to a reorganisation.

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.

Under Article 85 of the China Enterprise Bankruptcy Law of 2006, cases in which the reorganisation plan adjusts, effects or cancels the company's equity, should be voted on by the shareholders. This would appear to be in the scenario of Yangtze.

However, under Article 87 of the China Enterprise Bankruptcy Law of 2006, the Court has the ability to cram down a reorganisation plan that has been voted against by one or more class of shareholders or creditors. In this case, the Court would have the power to cram down and enforce the cancellation of shares. A reorganisation plan seeking to cram down approval by the Court must ensure to adhere to the statutory provisions of

Article 87. The reorganisation plan must adhere to the following in order to meet the statutory provisions of Article 87:

- Be voted in favour by the secured creditor class;
- Be voted in favour by the employee and tax authority class;
- Be voted in favour by the ordinary unsecured creditor class;
- Be voted in favour by the equity holders where their equity is impacted by the plan;
- Pays the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and
- Be feasible.

43 out of 50 points awarded

*** End of Assessment ***

Commented [ZZ1]: 43 out of 50 points awarded