



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] (9 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?

Corporate Reorganisation petition by creditors requires either cash flow or balance sheet bankruptcy tests.

Composition/Settlement petition can only be filed by the company.

Liquidation petition by creditors requires cash flow bankruptcy tests.

Question 2.2 [maximum 4 marks] (3 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 2 professions in China that dominate the Chinese regional bankruptcy administrators list.

China Supreme People's Court has instructed most provinces to establish their own regional Qualified insolvency practitioner/ bankruptcy administrators list. Provincial Supreme People's court exercises the power to include law /accounting firms/liquidation firms in the official insolvency practitioner list. Generally provisional courts prefer large firms only to be listed.

Once the appropriate court accepts an insolvency petition, it has the power to appoint any administrator from the said list.

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 main types of security available under Chinese law is Fixed charge and Pledges

Fixed Charges -

Fixed Charge on Immovable property is required to be registered with Local office of the China Housing Management Authority. However, as a practice, simultaneous registration is also done with local office of China Land Management Authority.

Fixed charges on Movable property such as vehicles and Machinery are registered with Local Police vehicle management office and Local office of China Industries and Commerce Regulation Bureau respectively.

Pledges –

Movable tangible assets – no registration of pledges is required

Movable intangible assets need to be registered with appropriate authorities such as

1. Trademarks – China Industries and Commerce Regulation Bureau Central Office in Beijing
2. Patents – China Intellectual Property Authority Central Office
3. Shares of Listed companies – China Securities Depository and Clearing Corporation Limited
4. Shares of non-Listed Companies – Local offices of China Companies House where company is incorporated.

QUESTION 3 (essay-type questions) [15 marks in total] (12 points)

Question 3.1 [maximum 8 marks] (5 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.

Following are the few aspects of the China Enterprise Bankruptcy Law of 2006 which makes it a more rescue-oriented piece of Insolvency legislation, emphasising rescue over liquidation.

1. **Debtor in Possession** – The insolvency law allows debtor to be in control of the company as well as Reorganisation/Settlement process. However, Debtor in possession is not automatic and requires court's approval.
2. Settlement Procedure Option – This option is available for debtor to avoid liquidation. This procedure can be filed by debtor only (voluntarily) i.e. Article 2 and does not carry any **Bankruptcy test to be met**. The company can file a composition plan which can be put to credit vote.
3. Liquidation to Reorganisation **conversion** -- In case of Involuntary liquidation, Article 70 of the China Enterprise Bankruptcy Law of 2006 allows debtor or shareholder more than 10% to apply to court for a conversion from liquidation to reorganisation.

While in theory the China Enterprise Bankruptcy Law of 2006 seems like a rescue-oriented piece of insolvency legislation, the courts have the actual control over the entire process from initiation of the insolvency to choosing of administrator to cramp down of composition/restructuring plan to final orders of liquidation. The courts are in turn in controlled by The

Government/Chinese Communist Party. Social stability is of utmost important for the Government and Chinese Communist Party. Failure of any enterprise is viewed as danger to social stability and is to be avoided at all cost. Hence it is very difficult to obtain any liquidation orders from the court. The Court can and do simply keep the order pending or reject such orders without giving any specific reasons.

Question 3.2 [maximum 7 marks] (7 points)

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

Once the court accepts the insolvency application against a debtor, an administrator is appointed by the court. One of the duties of this administrator is to ascertain the liabilities of the company. The administrator will publish in newspaper asking creditors of the company to file their claim. The creditors will need to file their respective claim in the format specified by the administrator along with all proofs before a particular deadline.

The administrator will then verify these claims with the company's books and consult the company's management for clarification before either admitting the claim or rejecting the claim.

In event of claim rejection, the creditor can litigate before the same court for a judgment. Many courts do expedite the process to resolve these lawsuits.

Practically, claim filing process for foreign creditor is more complex as they need to get notarization and translation of the documents done with the stipulated time.

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.

While China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, the Article 5 of the China Enterprise Bankruptcy Law of 2006 provides that a foreign court bankruptcy ruling binds company's assets located in China. However, there is added restriction the foreign bankruptcy court ruling must be recognised by a Chinese court before taking effect in china. Additionally, this recognition should be based either on Judicial assistance Treaty signed and ratified between China and the requesting country OR on the principle of reciprocity if there is no treaty.

China does not have Judicial assistance Treaty with Australia. Thus, the liquidator needs to prove principle of reciprocity. There have been few judgements of China courts in recent past which have been recognized in Australia.

1. Victorian Supreme Court: Liu v Ma & anor [2017] VSC 810,
2. Suzhou Haishun Investment Management Co Ltd v Zhao & Ors [2019] VSC 110.
3. Bao v Qu; Tian (No 2) [2020] NSWSC 588

The administrator can use these judgements to argue in the Shanghai courts for recognition of the Australian bankruptcy proceeding on assets in China.

Additionally, the administrator needs to prove to Shanghai Intermediate court that Australian bankruptcy proceeding do NOT infringe upon the fundamental principles of Chinese law,

China's sovereignty, security and public interests and does not disadvantage China's domestic creditors.

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 allows for conversion of an involuntary liquidation procedure to reorganisation procedure. This conversion can be allowed basis application by the debtor or a shareholder holding more than 10% of company's equity to the court. Hence in this case as the CEO holds 32% of equity, he can make such a conversion application.

Additionally, the CEO may also seek debtor in possession for the reorganisation procedure to control the company as well as the process.

However, there are very few past instances of such applications being successfully.

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.

Any reorganisation plan needs to be ultimately approved by the court. Article 87 allows courts to cram-down a reorganisation plan that has been voted down by one or more class

of creditors or shareholders. Court may approve the plan if the reorganisation plan meets the following 3 test

1. The plan is fair and equitable on all stakeholders
2. The absolute priority order between groups of stakeholders respected
3. The plan is feasible

Normally, shareholders are in weak position due to their priority. However, CEO may argue in the court of the plan to being unfeasible and/or the loss suffered by retail investor of the company is listed.

46 out of 50 points awarded

Commented [ZZ1]: 46 out of 50 points awarded

*** End of Assessment ***