



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: 202223-336.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 "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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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] (10)

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)

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) Partnerships and sole traders.
- (d) Individuals or sole traders.

Question 1.2 (1)

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)

Select the correct answer:

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

- (a) *The bankruptcy administrator can only be 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 can appoint provisional bankruptcy administrators when filing.*
- (d) *The court can only appoint a bankruptcy administrator after getting consent from both the debtor and the creditors.*

Question 1.4 (1)

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 debtor is allowed to file.*
- (d) *Both creditors and shareholders of the company may file for bankruptcy.*

Question 1.5 (1)

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 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 is automatically selected once a reorganisation procedure is commenced.*

Question 1.6 (1)

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 treated as unsecured creditors in China and are not given preferential treatment.*

Question 1.7 (1)

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 the Chinese courts.*

(c) *If shareholders do not support / approve the reorganisation plan, the plan cannot be crammed-down by the courts.*

(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)

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 from countries which have adopted socialism.

Question 1.9 (1)

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)

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 most?

(a) The United States of America.

(b) Russia.

(c) Poland.

(d) The United Kingdom.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [2 marks] (2)

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

According to Article 7 of the China Enterprise Bankruptcy Law of 2006, "where the debtor cannot pay off his debts due, the creditor may make an application to the people's court for the debtor's reorganization or bankruptcy liquidation". Accordingly, the cash-flow bankruptcy test should be met if the bankruptcy petition is filed by a creditor in China.

Question 2.2 [maximum 4 marks] (4)

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

The legal and accounting professions are dominating Chinese regional bankruptcy administrators lists. Both a firm or an individual can be included in the lists.

In general, local law and accounting firms are included in the lists by provincial supreme people's courts without going through qualification exams or trainings. Large firms are preferred as they are assumed to be more competent and trustworthy financially.

The court has exclusive power to appoint a bankruptcy administrator after a formal bankruptcy procedure is commenced. Under Article 22 of the China Enterprise Bankruptcy Law of 2006, creditors may request replacement of incumbent bankruptcy administrator who behaves unlawfully or act in biased manner. However, this is very rare as it requires a resolution at creditors' meeting which is under control of the court.

Question 2.3 [maximum 4 marks] (4)

Name the most used type of securities available under Chinese law and explain how and where they are registered.

There are three types of securities generally available under the Chinese law, fixed charge (most common), pledge (used but less frequent) and lien (very rare).

The most commonly used type of security under Chinese law is fixed charge which can be created over both movable and immovable property. For a charge to be valid, it must be validly registered under the China Civil Code of 2020. When the charge is properly recorded at the government agency, a security certificate would be issued to the charge holder.

The following are some examples of how and where the fixed charges are registered :

Immovable property : Charges are registered at the local office of the China Housing Management Authority and sometimes also at the local office of the China Land Management Authority for security.

Vehicles : Charges are registered at the local police vehicle management office.

Machinery and other equipment : Charges are registered at the local office of the China Industries and Commerce Regulation Bureau.

On the other hand, pledge becomes valid after possession of the pledged movable asset has been changed into secured creditor's hand. Simply physical change of possession is sufficient therefore registration for pledge on movable assets is not necessary.

For intangible assets, pledges are valid only after registration and examples of relevant registration authorities are as follows :

Trademarks : China Industries and Commerce Regulation Bureau Central Office

Patents : China Intellectual Property Authority Central Office

Shares of listed companies : China Securities Depository and Clearing Corporation Limited

Shares of non-listed companies : local office of the China Industries and Commerce Regulation Bureau where the company is incorporated

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

Question 3.1 [maximum 8 marks] (8)

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

Discuss what legal mechanisms in this statute can support this statement.

The China Enterprise Bankruptcy Law of 2006 ("CEBL") was drafted with the greatest influence from the USA and Germany, especially Chapter 11 of the US Bankruptcy Code 1978 which contains powerful corporate rescue procedure.

There are three substantial bankruptcy options/procedures in CEBL, "reorganisation" (Chapter 8) and "composition/settlement" (Chapter 9) are both related to corporate rescue. On the other hand, "liquidation" (Chapter 10) was included as a last Chapter

which somehow reflects that those rescue procedures are expected to be attempted first.

Even if a involuntary liquidation is filed, the company is given 7 days under Article 7 of CEBL to raise an objection and whether the liquidation procedure would be formally opened is solely jurisdiction of the court. In this process, support of local government is crucial otherwise such application will be ignored by the court.

For voluntary application, a reorganisation petition can be made by the company when it is not yet bankrupt but is likely so in near future according to Article 2 of CEBL. However, it is necessary to prove either cash-flow or balance-sheet bankruptcy before the liquidation application would be considered.

For the purpose of promoting corporate rescue, if an involuntary liquidation procedure is commenced, the debtor or its shareholders holding 10% or more in the company's equity can apply to court under Article 70 of the CEBL for a conversion from liquidation to reorganisation.

In addition, while replacing an existing bankruptcy administrator in liquidation is almost impossible (despite there is a provision in Article 22 of CEBL), the debtor company may apply for the debtor-in-possession model to be applied for reorganisation. If sanctioned by the court, the debtor would steer the remaining reorganisation operation under Article 73 of the CEBL, including preparing and drafting of the reorganisation plan to be voted. This gives the debtor more control in rescue than in liquidation.

Under Article 42 of the CEBL, newly generated debts such as employee wages and other post-bankruptcy debts are treated as bankruptcy expenses (to be paid before pre-bankruptcy creditors) if the companies is in bankruptcy procedure. This helps the bankruptcy administrator to have post-commencement finance to assist the reorganisation effort by giving certain priority to those lenders.

Lastly, the court may cram-down a reorganisation plan that was voted down by one or more of classes of creditors (and shareholders) under Article 87 if certain statutory conditions are met. Therefore, non-adoption by some of the voting groups does not means it is the end of the draft plan for reorganization. The bankruptcy administrator may still solve the matter by going to the court (if consultation with those relevant groups is in vain).

Question 3.2 [maximum 7 marks] (7)

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

In general, proving of claims in corporate liquidation procedure is governed by Chapter 6 of The China Enterprise Bankruptcy Law of 2006 ("CEBL").

After being appointed, the liquidation administrator would advertise the bankruptcy procedure in both local and national newspaper for the purpose of informing all creditors that claims should be submitted. Accordingly, creditors should submit their claims within a specified period (usually 30 days to 3 months from the date of the notice according to Article 45 of CEBL). Under Article 49 of CEBL, the claims submitted should include a written statement on the amount of claims and on whether there is any guarantee (with evidence).

Under Article 56 of CEBL, a creditors who has not declared his claims with the time limit, he may still declare such claims afterwards before distribution of assets. However, no supplementary distribution would be made to him if there is prior distribution. He shall also borne the expenses for examining the confirmingthe claims which are declared late.

The liquidation administrator shall register and verify the claims submitted by creditors to determine their validity (Article 57 of the CEBL) and if necessary, creditors may be required to provide extra supporting evidence to prove their claims. The form of claims would be filled by the bankruptcy administrator and submitted for checking at first creditors's meeting (Article 58 of CEBL).

If there is disagreement on the value or validity of claims, litigation (at the court commencing the liquidation pceedings) would be used to resolve the matter according to Article 58 of the CEBL. The court's determination would be the finalized amount of the disputed claim (or whether it is valid).

Upon disposal of the company's assets, distribution of assets would be made according to the ranking of claims if the assets are not sufficient to cover all claims. Under Article 113 of CEBL, bankruptcy costs would be paid first and followed by employee claims then tax authorities and lastly the common bankruptcy claims, i.e. unsecured creditors. Creditors at the same rank would be paid on a pari-passu manner.

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

Question 4.1 [maximum 8 marks] (8)

The bankruptcy liquidator of a Singaporean 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 Singaporean company in China. The liquidator has approached you for advice on how the Singaporean bankruptcy proceeding can be recognised in China. Advise the liquidator.

China does not adopt the UNICITRAL Model Law on Cross-Border Insolvency but the principles of universality in dealing with cross-border insolvencies can be found in the China Enterprise Bankruptcy Law of 2006 (“CEBL”).

Under Article 5 of the CEBL, a foreign bankruptcy ruling may bind a company’s assets in China if certain conditions are met. Firstly, that foreign country must have either judicial assistance treaty signed and ratified with China or if there is no such treaty, recognition may be made on the basis of reciprocity (subject to prior favorable recognition in the interest of Chinese party).

In this case, the subject bankruptcy proceeding came from Singapore, which has concluded judicial assistance treaty with China therefore such condition is satisfied.

Furthermore, under Article 5 of the CEBL, the following conditions must be satisfied for successful recognition application :

- 1. does not violate basic principles of the laws of the People’s Republic of China**
- 2. does not jeopardize the sovereignty and security of the State or public interests**
- 3. does not undermine the legitimate rights and interests of the creditors within the territory of the People’s Republic of China**

In the real world, Chinese courts are quite reluctant to accept a foreign bankruptcy ruling as they believe that it may weaken judicial sovereignty of China. Judges are also quite conservative and reluctant to deal with cases with foreign elements due to political sensitivity.

Barring the potential difficulties, should the liquidator of the Singaporean company still wish to go for application of recognition, it can be done at the location where the company’s assets locate at. In this case, application can be made to the Shanghai Intermediate People’s Court under the Chinese civil procedure law.

In addition, some problems may arise even if the recognition application is successful. For example, if a foreign liquidation procedure is recognized, the court issued the injunction freezing the company’s assets may refuse to withdraw such order as the recognition was made by another court, such that the moratorium under Article 19 of the CEBL is not respected among Chinese courts themselves.

Question 4.2 [maximum 7 marks] (7)

HuangPu Food Limited is a large beverage 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 Fenda Partners, a local law firm included in the local bankruptcy administrator list, as the liquidation administrator.

Shortly after the commencement of the bankruptcy of HuangPu Food Limited, the CEO of Naking Limited, a controlling shareholder holding 32% of the equity of HuangPu Food Limited, approaches you for advice.

Using the facts above, answer the questions that follow.

Question 4.2.1 [maximum 4 marks] (4)

The CEO of Naking Limited tells you that the various businesses of HuangPu Food Limited are still viable and that a piecemeal liquidation of the company will not be in the interests of any of the stakeholders. Since HuangPu Food 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.

Under Article 70 of the China Enterprise Bankruptcy Law of 2006 (“CEBL”), the debtor or its shareholders holding 10% or more in equity can apply to court for conversion from liquidation to reorganisation in cases of involuntary liquidation. Accordingly, Naking Limited who holds 32% equity of the HuangPu Food Limited may make such application as the petition was made by the Bank as a creditor. However, such application must be made to the Shanghai Second Intermediate People’s Court (same court accepting the petition) before HuangPu Food Limited is declared bankrupt by the Court.

If conversion application is sanctioned by the Court, the reorganisation procedure shall commence immediately. In reality, only a small number of cases are actually converted in such manner.

Question 4.2.2 [maximum 3 marks] (3)

Assuming that the bankruptcy liquidation of HuangPu Food Limited is successfully converted to a reorganisation procedure, a reorganisation plan for HuangPu Food Limited is eventually voted on by the various stakeholders. Due to the fact that HuangPu Food Limited is insolvent, the reorganisation plan *inter alia* proposes that the shares of all previous shareholders be cancelled. Unhappy that its equity in HuangPu Food Limited will be wiped out by the reorganisation plan, Naking 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 Naking Limited as to whether the Court can approve such a plan under the current law in China.

According to Article 85 of the China Enterprise Bankruptcy Law of 2006 (“CEBL”), representatives of shareholders may attend the creditors’ meeting to discuss the draft

plan as non-voting participants. They also form to a group to vote on the matter if the draft plan involves the adjustment of their rights and interests. It becomes a challenge of the bankruptcy administrator as the shareholders may simply to vote down the draft plan as they have nothing to lose in view of potential cancellation of shares.

However, according to Article 87 of the CEBL, in case where the draft plan is not adopted by a voting group (as in this case, probably the shareholders), the debtor or bankruptcy administrator may consult with the group and a second vote may follow.

Even the draft plan is still not adopted, approval of the draft plan may still be applied to the People's Court if certain conditions are met. Firstly, the pari passu principle between creditors in the same class is satisfied. Secondly, shareholders shall not be paid unless all other creditors are paid in full. Thirdly, the draft plan should be feasible.

As a result, unless it can be proved that the shareholders' rights and interests are affected by the draft plan, the bankruptcy administrator may still submit the same to Court for approval. As given in the case, HuangPu Food Limited is insolvent and any return to the shareholders is unlikely. The Court after taking into conditions in Article 87 of the CEBL, may still cram-down the plan despite opposition from the shareholders.

Final mark: 50/50 (excellent)

* End of Assessment *