



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] (9)

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 (0)

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] (9)

Question 2.1 [2 marks] (2)

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

Article 7 of the China Enterprise Bankruptcy Law of 2006 (Law), allows for a creditor to file a bankruptcy liquidation petition before the people's court if the "debtor company cannot pay off his debts due". The test here is that the creditor must show the court that the debtor company is unable to pay its debts as and when they fall due. This form of bankruptcy test is termed as the "cash-flow test."

The requirement of a debtor on the other hand is spelt out under Article 2 of the Law. A debtor by a bankruptcy petition can show the court that the debtor company is unable to pay its debts when due or that per the balance sheet of the company the company is unable to pay its debts. The debtor thus has ways by which it can persuade the court, that by the cash-flow or balance sheet test.

Question 2.2 [maximum 4 marks] (3)

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 in China that control the Chinese regional bankruptcy administrator space are "qualified" lawyers and accountants. This includes law and accounting firms.

Article 13 and 22 of the China Enterprise Bankruptcy Law of 2006 provides for the appointment of a bankruptcy administrator or liquidator by the court at the same time the court grants the liquidation application. The court before whom a bankruptcy liquidation application is heard is determined by the location of the company and where the company operates from.

What happens in practice is that there is a list of locally "qualified" bankruptcy administrators/liquidators on the roll. Where there is the need for a bankruptcy administrator to be appointed, the court will choose from the list of persons or firms on the roll of bankruptcy administrators in the region. The authority to include a lawyer or law firm or accountant or accounting firm to the list of bankruptcy administrators is generally administered by the provincial Supreme People's Court. Some of the

considerations for adding a firm to the roll of qualified bankruptcy administrators include an assessment of the size of the firm.

In the case where the bankruptcy process proves to be complicated, there have been instances where the administrator was appointed after a bidding process was held.

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.

The China Property Law of 2007, provides several securities. It is however noted that though the law has made for several securities, very few are mostly used. It is again noted that the frequency of the listed securities below is mostly due to the available procedures in place to support its implementation and or registration.

Below are the details of the most used available charges as follows;

One of the most used securities under Chinese law is a fixed charge. This type of charge is created on specific assets (movable and immovable) of the borrower in favour of the secured creditor. In such an instance, the borrower cannot dispose of the charged assets unless with the consent of the secured creditor. It is observed that in some cases, the assets of a third party can be charged in favour of the secured creditor if the third-party consents to the asset being used to secure the debt of another. This consent is required before the asset can be used to secure the debt. For instance, a fixed charge can be created over land buildings, vehicles and machinery.

Under the China Civil Code of 2020, there is a requirement for a fixed charge to be registered. For immovable properties such as buildings and land, the registration is done at the place where the property is situated. It is done by filing the necessary documents at the local office where the property is located. The applicant is required to provide any documentation needed to be produced to have the charge registered. The applicant will, in addition, pay a minimal fee for the registration to be recorded. Once it is recorded, a certificate is issued to the applicant to support the registration of the charge.

Pledges are another form of security mostly used in China. This type of security is covered under Chapter 17 of the China Civil Code of 2020. The type of assets that fall under this type of security includes warehouse receipts and bill of lading, shares, IP rights in trademarks, and copyright and patent rights.

For a pledge to be created, the parties must evidence their intention to create the pledge in writing. This agreement must include among others, a clause on the amount secured and the term for the obligation to be performed. Where physical movable properties are pledged, there is no requirement for the pledge created to be

registered. Once, the movable property is in the actual possession of the creditor the property has been pledged to the creditor.

On the other hand, movable intangible assets which include IP rights, shares and bonds must however be registered to be effective.

It is realised that depending on the type of asset to be registered there are different procedures and agencies to register with. For instance, a pledge created on trademarks is to be registered with the China Industries and Commerce Regulation Bureau Central Office in Beijing whilst shares of listed companies if pledged, must be registered with the China Securities Depository and Clearing Corporation Limited. On the other hand, a pledge on patents must be registered with the China Intellectual Property Authority Central Office in Beijing.

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

Question 3.1 [maximum 8 marks] (5)

“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 (Law) emphasises corporate rescue under two chapters; Chapter VIII and Chapter IX. From these Chapters, it is evident that the Law is perhaps more rescue-oriented than first perceived.

The first point to make is that the Law was passed to regulate the “procedures for enterprise bankruptcy, fairly settling claims and debts, safeguarding the lawful rights and interests of creditors and debtors, and maintaining the order of the socialist market economy.” (Article 1)

Per the combined reading of Articles 2 and 7 of the Law, the “rescue-oriented” nature of the Law can be reduced to two legal mechanisms or procedures. These procedures are “reorganization or compromise”. If the company is unable to utilise any of these rescue procedures, the final option is to liquidate the company. Liquidation is particularly dealt with under Chapter X of the Law.

Though a company in distress has the choice to reorganise, compromise or liquidate under the Law, I will emphasise the two rescue options available to a company in this essay.

The Law, in the first instance, provides that a company “may undergo reorganization” where the company “cannot pay off his debts and his assets are not enough to paying off all the debts, or lacks the ability to pay off his debts”. Where a debtor company falls within this category, the debtor company “may make the application to the people’s

court.” This part of the Law thus, permits a debtor company to, at its option, file for reorganization of the company without passing any bankruptcy tests. Thus, if the company envisages that it is likely to be bankrupt the company can voluntarily file for reorganization in court without showing that it is unable to pay its debt as and when the debts fall due. It is observed that the type of ‘legal enterprises’ envisages such enterprises to excludes partnerships or traders.

On the other hand, the option to apply to the people’s court to have a debtor company reorganised is not only exercised by the debtor company. Under Article 70, a creditor can also apply to the court to have the debtor company reorganized.

The difference between the application made by the debtor company and the creditor is that, an enquiry into whether or not the company can pay its debt will be done during the hearing of a creditor’s application for reorganization. Thus, the creditor must show that the debtor company is unable to pay its debts as and when they fall due. Such an enquiry will not on the other hand be made where the debtor company voluntarily applies for reorganization.

Thus, should it become obvious to the company or a creditor that a company will not be able to pay its debts immediately or in the future, the company or a creditor can take timeous steps to reorganise the affairs of the company to ensure the company survives.

In my view therefore ,the focus of this provision is to ensure that the debtor company makes a shot at reorganising its affairs to ensure survival rather than wait until the company falls in massive debts before a step is taken. Also, because the debtor company need not prove that it is unable to pay its debts as and when they fall due in order to petition to the people’s court to voluntarily reorganise, the Law makes the process simple and easily accessible.

In essence, where a company is under the belief that it will not be able to pay its debts as and when they fall due, the company can voluntarily apply to the court to reorganise itself. Where a creditor applies to the court for a company to be reorganised, the creditor must show that the company is unable to pay its debts as and when they fall due.

The Law also envisages a situation where a creditor has already put a debtor “into bankruptcy liquidation” as per Article 70. The debtor or “his capital contributors whose capital contribution makes up one-tenth or more of the debtor’s registered capital” may apply to the court for reorganization. This provision makes it possible for one to change liquidation proceedings to reorganization if accepted by the court.

Due to the importance of reorganization, Article 87 of the Law allows for a court ‘forcibly approve’ a reorganisation plan if the reorganisation plan is not voted by these classes of creditors; secured creditor, employees, tax authorities and ordinary unsecured creditors. Article 87 of the Law envisages a situation where 50% or more of the listed creditors who are in attendance do not vote for the plan. Should such a situation arise, then, the reorganisation plan has not attained the required approval.

As stated, the court can 'forcibly' approve the plan, however, the approval of the plan by the court must meet the conditions set by statute.

From this procedure, a corporate debtor has the option to restructure its debts and reorganise its operations all in an attempt to continue to be in existence. Though the Law has made such a provision, it is noted that the use of such a procedure for liquidating a company in China is rare. For instance, though the law makes it possible for one to convert a liquidation process to reorganization, in reality not many cases are actually converted. This is because it appears one needs the support of the local government for any 'conversion' application will be considered by the court. So, though the option is available not many debtors or creditors exercise this option and would rather apply for the reorganization of the company from the outset.

One of the benefits of initiating a formal reorganization of a company is the suspension of legal proceedings against the company during the period (See Article 19 of the Law)

It appears that the implementation of the Law and how it is utilised is very much influenced by the government of the day and its political undertones. Because of this, though the courts can grant reorganization applications the courts are careful when granting corporate reorganizations. It is noticed that it is rare to see a debtor or creditor opting to commence reorganization as a mechanism for liquidating a company. Another observation made is that, it appears it is difficult to find persons who are willing to pump funds into a company distress and the inability to find buyers in some instances makes the process difficult.

As noted above, there is no requirement for a debtor company to prove that the company is unable to pay its debts before the reorganization process can begin. Though the Law makes such a point, in reality, it appears a debtor must prove that the company is unable to pay its debts before the court will permit the application. It is observed that some courts in addition to proving that the company is unable to pay its debts, require the applicant to also show that the reorganization can in fact be accomplished.

Because the courts are localised, it appears opening a corporate reorganization procedure is sometimes based on the local court and its requirements. Thus, a case is made that a determination on whether a reorganization application is granted or not will depend on several factors beyond what is stated in the Law. This brings a lot of inconsistencies in the Law and uncertainties.

The second rescue procedure permitted under the Law is "compromise." Chapter IX of the Law deals with this procedure. The first point to make is that, this procedure applies only to voluntary filing.

Article 95 of the Law permits a debtor to apply directly to the people's court for compromise. However, this application can only be made once the court has accepted the application "for bankruptcy and before it declares the debtor bankrupt." To enable

the debtor to apply, he must submit to the court the draft of an agreement evidencing the compromise.

On an examination, and if the court is satisfied that the compromise agreement submitted conforms with the Law, the court "shall rule on the compromise, announce it and hold a creditors' meeting at which to discuss" the draft compromise agreement. As soon as the court accepts the draft compromise agreement, creditors who have secured their debts with particular assets can exercise their respective rights. (see Article 96) This implies that secured creditors are not constrained by the terms of the compromise procedure and may invariably institute a legal proceeding to enforce their rights against the secured assets.

Article 97, states that at the meeting of the creditors, the compromise agreement shall be adopted or consented to if more than "half of the creditors who are present at the meeting and who have the right to vote, represent two-thirds or more of the total amount of unsecured claims". On this point, the Law is not clear on how the creditors should be treated for purposes of voting. Unlike other jurisdictions, there is no indication in the Law on whether the creditors present should be grouped or viewed separately by classes. In addition, there is no mention of whether a creditor can be present at the meeting by proxy. This opens up the possibility of disenfranchising some creditors who for one reason or the other could not be present at the meeting.

After the draft compromise agreement has been consented to by the creditors' meeting, Article 98 requires that the agreement must again be submitted to the court for confirmation. Once confirmed, the court will "terminate the procedure for compromise" and announce same. An agreement confirmed by the court is binding on the debtor and the creditors included in the compromise.

Thereafter the administrator "shall hand over the property and business operations to the debtor and submit to the people's court a report on the performance of his duties." If the compromise agreement is not adopted by the meeting of the creditors' or if the adopted agreement is not confirmed by the court, the court shall opt to "terminate the procedure for compromise and declare the debtor bankrupt."

It can be inferred from the Law that in situations where companies are unable to pay their debt, the company should exercise the options available in the following order; reorganisation, compromise and then, liquidation. Hence, the primary focus of the Law is to first attempt to rescue the company. It is when options under all the rescue procedures have been exhausted that the company can commence the liquidation process.

Question 3.2 [maximum 7 marks] (5)

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.

Corporate liquidation is dealt with under the China Enterprise Bankruptcy Law of 2006. Per Article 2 of the said Law,

“where an enterprise legal person cannot pay off his debts due and his assets are not enough for paying off all the debts, or he apparently lacks the ability to pay off his debts, the debts shall be liquidated according to the provisions of this Law”

The type of enterprise contemplated here are businesses or enterprises with legal standing. It is therefore not contemplated that small businesses registered as partnerships and sole traders will fall within this category.

A debtor or creditor can initiate a liquidation proceeding by applying to the people’s court. For a creditor to initiate the process, the creditor must show that the debtor is unable to pay its debts when they fall due. (See Article 7) . In case of a voluntary liquidation filing by the debtor, the debtor is required to show among others that there is ‘cash flow or balance-sheet bankruptcy’. This can be shown by providing statements on the financial position of the company, a list of debts and claims and a plan for payment of the company’s employees (Article 8). Per section 7, where on an application to voluntarily liquidate a company, it is detected that the company will not be able to its debts or that the company is bankrupt, “the person responsible for liquidation...shall make an application to the people’s court for bankruptcy liquidation.”

When the court grants the liquidation application, a general moratorium kicks in. It is noted that, a liquidation procedure commences when the court grants the application to liquidate and not when the application is filed by the applicant. When the application is accepted, a liquidator or ‘bankruptcy administrator’ is automatically appointed at the ‘same time’ the application is granted. (Article 13). On the liquidator’s appointment, he takes assumes responsibility for all of the assets of the company and the business in general.

The liquidator is saddled with various tasks as part of the liquidation procedure. Among the tasks assigned to the liquidator is to authenticate claims from creditors of the company under liquidation. Once the liquidator publishes the liquidation procedure in national and local newspapers, it is deemed that creditors have been notified to submit claims against the company. Once the claim is submitted, the creditor must take steps to prove the claims submitted.

As already noted, once a publication is made the creditor will submit his claim by filing a claim form. Once the claim has been submitted, the liquidator must verify all claims submitted. The verification can be done by consulting the company’s books and employees of the company.

After the verification, if the creditor proves the claim then the company will be indebted to the creditor for the amount proved and same will be due for payment. There are instances where the liquidator is unable to reconcile the claim filed and what

was revealed during the verification process. Where such a situation is occasioned and there appears to be a dispute on the claims made by a creditor against the company, the creditor can contest the position held by the liquidator and initiate an action in the same court where the liquidation order was granted for the court to determine the matter/dispute.

The determination of the claim by the court will be the claim that will be due to the creditor.

In sum, every creditor is required to prove all claims submitted during the liquidation of a company whilst a liquidator is required to verify all claims submitted for payment. Where there is a dispute or a disagreement between a creditor and liquidator on the value or existence of any claim, the creditor can sue in court for a determination of the value or existence of the claim. Once the court has determined the matter the liquidator will be required to comply.

QUESTION 4 (fact-based application-type question) [15 marks in total] (9)

Question 4.1 [maximum 8 marks] (5)

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.

Article 5 of the China Enterprise Bankruptcy Law of 2006 (Law), provides that a judgement or ruling resulting from a bankruptcy procedure in China in accordance with the Law shall apply to all the assets of the debtor outside China without any further action. It appears from the Law therefore that these judgements and rulings shall be automatically recognised in other jurisdictions without any recognition order from the courts.

On the other hand, and under the referenced Article, for a judgement or ruling relating to a bankruptcy procedure to be recognised and become binding in China, the said judgement or ruling must first comply with certain requirements in the Law.

The first requirement is that where the judgement obtained comprises of assets of the debtor in China, the court in the other jurisdiction must apply or request the court (Chinese local intermediate people's court) in China to recognise and enforce the said judgement before it can take effect in China.

In considering the application made by the court in the other jurisdiction, the court in China shall consider the following;

- a. Is there an international treaty (judicial assistance treaty) assented to by China that deals with recognition and enforcement of the judgement or ruling?*

- b. Is there an international treaty signed by China that requires reciprocity in such an instance? It is noted that Singapore is one of about 30 countries that have a reciprocity treaty with China.*
- c. Does the judgement go against the "basic principles of the laws of the People's Republic of China?"*
- d. Does the judgement "jeopardize the sovereignty and security of the State or public interest"?*
- e. Does the judgement "undermine the legitimate rights and interests of the creditors within the territory of the People's Republic of China?"*

In considering the application, the court in China shall conduct examine by considering the above issue before deciding on whether or not to "recognise and enforce the judgement or ruling."

From the facts, a Singaporean company under liquidation has some assets in China. The assets belonging to the Singaporean company form part of the assets affected by an injunction order. It is inferred from the facts that the relevant judgements and rulings have been obtained in Singapore which has given rise to the liquidation of the company.

Per Article 5 of the Law, for the judgement obtained in the court to have any legal effect in China and thus enable the liquidator to deal with the assets it must first be determined whether or not the restrictions under Article 5 can be complied with.

As already noted, Singapore is one of the countries that has a reciprocity agreement with China. Thus, on an application by the court in Singapore, the applicant will be able to satisfy the test of reciprocity. Though the applicant has satisfied this, the court in China has to consider other factors before deciding whether or not to recognise and enforce the judgement obtained in Singapore. Because other factors up for consideration by the Chinese court borders on basic principles of the laws of China and the sovereignty and security of China and the public, it is difficult at this stage to advise whether or not the judgement flouts any of these requirements. This is because, whether or not the judgement threatens the security and sovereignty of China allows the court a wide discretion.

On the issue of whether or not the Chinese creditor's action has any bearing on a recognition and enforcement application, under the Law, the Chinese creditors and foreign creditors are treated the same.

Though the restrictions are in place, there have been instances where the court in China has granted applications for recognition and enforcement. Again, though the hurdle appears to be tall to meet, there are some instances where the court in China has granted applications for recognition and enforcement of foreign bankruptcy judgement and rulings.

In this instant case, because Singapore has a reciprocity agreement with China, there is a higher probability that the court will grant an application for recognition and enforcement of the judgement obtained in Singapore.

Question 4.2 [maximum 7 marks] (4)

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.

Article 70 of the China Bankruptcy Law of 2006, allows for the current liquidation of HuangPu Food Limited (Company) can be converted to a reorganization procedure.

The conversion process can be initiated by the debtor (who in this case the Company) or a shareholder or shareholders of the debtor company holding 10% or more of the registered capital of the debtor company. To exercise this, the debtor or eligible shareholder or shareholders shall after the petition for liquidation has been granted by the court, apply to the same court for the liquidation procedure to be changed or converted to a reorganization procedure.

Where the court is satisfied that the Company meets the provisions of the China Bankruptcy Law of 2006 has been complied with the court will grant the application and order that the Company goes under reorganization.

In this instance, Naking Limited, a shareholder of the Company holds more than 10% of the registered capital of the Company. Also, the debtor, which is the Company appears to have 'various businesses' that still make the Company viable. Because of

the viability of the Company, the step taken by the Bank will not be beneficial to the survival of the Company.

Given that the Company or Naking Limited can each apply to the people's court for the liquidation procedure granted to be converted to a reorganization procedure.

Question 4.2.2 [maximum 3 marks] (0)

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.

Although shareholders are non-voting participants, Article 85 of the China Enterprise Bankruptcy Law of 2006, permits shareholders of the debtor company to attend a meeting where a reorganisation plan will be voted. However, where the draft reorganization plan prepared by the liquidator "involves the adjustment of the rights and interests" of the shareholders of the debtor company, the cited article requires that the shareholders must, in addition to the categories of creditors listed under Article 82, approve the reorganisation plan.

It is apparent from the facts that the categories of creditors have approved the plan however, the shareholders have not approved same. Though this is the case the liquidator has submitted the reorganisation plan to the court for approval. It is observed that there are two steps to having the reorganization plan approved. The first step involves the creditors and shareholders approval or otherwise then the approval of the court. The approval of the court is very important as the reorganization plan can only take effect after such approval has been obtained from the court.

On whether the court can approve such a reorganization plan, Article 87 states that a court may decide not to take into account the fact that the reorganization plan has not been approved by the shareholders (cram-down approval). For the court to ignore the objections raised by the shareholders, the reorganization plan must comply with the provisions of Article 87 (1) to (6).

Final mark: 37/50

*** End of Assessment ***