



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] (10)

Question 2.1 [2 marks] (2)

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

A creditor can file for liquidation under Article 7 of the China Enterprise Bankruptcy Law of 2006 if the corporate Debtor is unable to pay a debt that is due. This envisages an application of the cash-flow test, i.e, the company must be unable to meet its financial obligations as they fall due.

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 two relevant professions are lawyers and accountants.

In terms of appointment, the starting point is the regional insolvency practitioner lists established by provinces under the directions of the China Supreme People's Court. Both a firm or an individual can be qualified, although the practice is that most, if not all, provincial supreme people's courts simply select some local large law and accounting firms to be included in the lists without going through any qualification exams or training courses. Further, whether or not these firms are included mostly depends on the size of the law or accounting firm concerned, since a large law or accounting firm is perceived to be more trustworthy both in terms of financial strength and in respect of competence.

Generally speaking, law firms dominate insolvency practitioner lists across China. One report released by the China People's Congress states that in 2021 there are 5,060 law and accounting firms across China appearing on local insolvency practitioner lists, with 703 individuals, who are either lawyers or accountants, qualified to practice insolvency law in courts.

When a formal bankruptcy procedure is entered into, the court has the exclusive power to appoint a bankruptcy administrator. Article 22 of the China Enterprise Bankruptcy Law of 2006 authorises creditors to request the replacement of the court-appointed administrator via a resolution at the creditors' meeting where the incumbent

administrator has behaved unlawfully or is biased. However, this does not generally happen in practice as the court has control over the creditors' meeting.

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 most used type of securities is fixed charges. A fixed charge can be created upon buildings or the use right of land and must be registered. The assets that a fixed charge may be created over include not just the debtor's assets, but also the assets of a third party provided that the third party has given consent in advance.

Fixed charges must be registered. This is done under the China Civil Code of 2020. A fixed charge is not valid until it has been registered. A security certificate is issued to the charge holder once the charge has been properly recorded at the government agency. A small fee may apply for the registration of a charge.

Fixed charges are mostly used in relation to immovable property (buildings, houses and the associated land use rights). Since land is generally owned by the State in China and no private party can own the land, although they can purchase a right to use the land. A charge can then be created over that right, subject to registration. For immovable property, the registration authority is the local office of the China Housing Management Authority. As a matter of precaution, most secured creditors tend to simultaneously register the charge at the local office of the China Land Management Authority, since the use right of the land upon which the building stands is part of the property.

There are also times when a fixed charge will be registered over vehicles. Where this is so, the registration authority is the local police vehicle management offices. And as for machinery and other equipment, registration of charges is with the local office of the China Industries and Commerce Regulation Bureau.

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

Question 3.1 [maximum 8 marks] (6)

"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.

A couple of mechanisms support the view that the China Enterprise Bankruptcy Law of 2006 ("CEBL") is a rescue-oriented piece of insolvency legislation.

The starting point is Article 2 of the CEBL, which provides that a voluntary reorganisation petition can be made either by the company or its creditors when the company is not yet bankrupt but is likely to be bankrupt in the near future. The implication is that a voluntary reorganisation filing does not require evidence that the company is already bankrupt, and thus encourages corporate rescue efforts to be made as early as possible. Where an application is made by the company, the company must present evidence to prove that it is balance-sheet bankrupt before the court opens the procedure. Where an application is made by the creditor, the applicable test remains to be either the cash flow or balance sheet test. However, Art 2 of the CEBL only permits enterprises with an independent legal status to enter into a formal corporate reorganisation procedure. This, however, excludes sole traders and partnerships from making use of this procedure. In practice, in almost all existing cases, the debtor has to prove that the company is balance-sheet bankrupt before the court opens the reorganisation procedure.

Second, there is the availability of a moratorium, which suspends all executions against the company and its assets. In particular, Article 19 of the CEBL states that all executions against the company must be stayed once the court accepts the reorganisation filing and begins the formal reorganisation procedure. Notably, the moratorium also binds secured creditors. However, for secured creditors, the moratorium may be lifted under Article 75 of the CEBL if the encumbered assets are likely to become substantially damaged, or the value of those assets are likely to experience a sharp decline over a short period of time. In those circumstances, the secured creditor may, after obtaining leave of the court, sell the charged asset and receive payment immediately. It has been observed, however, that this provision has not yet been tested in practice since determining the extent of the damage of the charged asset, or the extent of its declining value, may be very difficult. This provision is thus criticised to be subjective and too vague to be used effectively in practice. Other than secured creditors, it has also been noted that some courts may refuse to withdraw the pre-existing asset-freezing orders against the company's particular assets.

Third, the debtor may apply for a debtor-in-possession procedure under Article 73 of the CEBL. This trades the default bankruptcy administrator appointment for management by the company's management. If a debtor-in-possession application is sanctioned by the court, it is the debtor itself that steers the rest of the reorganisation operation, including the drafting of the reorganisation plan for creditors to vote on. The creditors do not have a say in making such a decision as this falls under the exclusive remit of the court. The reorganisation administrator then takes on a supervisory role for the remainder of the procedure. A debtor-in-possession procedure makes reorganisation a much more attractive option for companies which, though facing financial distress, are confident of restoring the company through the reorganisation of the company's debts and assets.

The fourth is Article 70 of the CEBL. That provision promotes corporate rescue by providing that the debtor or its shareholders holding 10% or more of the company's equity can apply to the court for conversion from liquidation to reorganisation, in the event of an involuntary liquidation procedure and, if sanctioned, the reorganisation procedure will commence immediately thereafter. This, however, is noted to give rise to several problems:

- (a) It is not clear how, in the event of a liquidation procedure where the company is fully controlled by the court-appointed administrator, the debtor's board can exercise this right of conversion. This is especially so where the company's own management is dissolved upon the onset of an insolvency liquidation.*
- (b) To allow shareholders to interfere with the course of bankruptcy would be at the expense of the creditors' interest. This is especially since a company that enters into liquidation would have met the bankruptcy test, ie, the cash-flow insolvency test.*
- (c) In an insolvency situation, the creditors' interests are at risk and hence paramount. Therefore, the creditors should be given the right to decide whether to convert the liquidation into a reorganisation procedure.*

The fifth is Article 87 of the CEBL, which provides that the court may cram-down on dissenting creditors in order to facilitate a reorganisation plan. In this connection, Art 82 of the CEBL separates the creditors into the following 4 classes for voting purposes: (a) secured creditors; (b) employees; (c) tax authorities; and (d) ordinary unsecured creditors. Article 84 of the CEBL then provides that the reorganisation plan must be accepted by each class of creditors and should be voted in favour of by 50% or more of attending creditors in number whose claims represent two-thirds or more of the entire claims in each class. Art 87, however, comes in to provide that where a reorganisation plan that has been voted down by one or more class of creditors (or by the shareholders), the court may cram down on these dissenting creditors provided that the requirements under that provision are met. These include that the reorganisation plan must:

- (a) be voted in favour of by the secured creditor class and, if not, secured creditors must be fully paid out of the secured assets (in addition to fair compensation for the delayed foreclosure);*
- (b) be voted in favour of by the employee and tax authority classes and, if not, these two classes must be paid in full;*
- (c) be voted in favour of by the ordinary unsecured creditor class and, if not, this class of creditors must not be paid less than they would have received under a liquidation procedure;*

(d) be voted in favour of by the shareholders where their equity is affected by the plan and, if not, the treatment of equity holders is fair and equitable;

(e) pays the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and

(f) be feasible.

The presence of a “cram down” mechanism shows that the CEBL is rescue-oriented as it allows the court to override creditors who dissent to a reorganisation plan, thus facilitating reorganisation and preventing liquidation.

The sixth is a rescue procedure known as composition or settlement. Only the debtor company may voluntarily file for a composition procedure. Article 95 of the CEBL provides that when a company files for the composition procedure, it must present a composition plan to the court. If the court is satisfied, a meeting of creditors is convened to vote on the plan. Article 97 provides that if the plan is passed if it is voted in favour by half or more of attending creditors in number holding two-thirds or more of the claims. It bears noting, however, that the support of secured creditors is needed for a composition plan to succeed - this is because under Article 96, secured creditors are not bound by a composition procedure; in other words, they are not subject to the stay which suspends all legal enforcement against the company’s assets. That said, the settlement procedure gives the debtor added flexibility to survive.

Finally, Article 42 of the CEBL is relevant for corporate rescue procedures, as it enables a company in reorganisation to borrow new money and include the new debt as a category of post-bankruptcy debts, for instance providing that if a company in a bankruptcy procedure (including reorganisation) continues to trade, the newly-generated employee wages, pension contributions and other post-bankruptcy debts are treated as bankruptcy expenses to be paid before all pre-bankruptcy creditors. This super-priority financing method allows bankruptcy administrators to tackle illiquidity. This is confirmed in the third judicial notice on the enterprise bankruptcy law) issued by the China Supreme People’s Court in 2020, where the Court states that post-commencement borrowing could be treated as part of the reorganisation expenses and is paid before unsecured claims if such borrowing has either been agreed in advance by the creditor meeting or sanctioned by the court.

Question 3.2 [maximum 7 marks] (6)

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.

The liquidation administrator advertises the bankruptcy procedure in both local and national newspapers in order to inform all creditors that they should submit claims. Creditors who wish to prove their claims must approach the reorganisation

administrator and will usually be required to fill in a claim form provided by the administrator. The administrator will check the company's books and consult with staff from the company's financing unit for verification. He or she must examine the company's books in order to trace the company's debtors and the amount of receivables, in addition to the existing assets already listed in the company's balance sheet. The procedure for the proof of claims is set out in Chapter V of the CEBL. The relevant rules include:

- (a) Article 45 of the CEBL states that after accepting an application for bankruptcy, the people's court shall specify the time limit for a creditor to declare claims. Such time limit, calculated from the date when the people's court announces its acceptance of the application for bankruptcy, shall be not less than 30 days at least but not more than three months at the most.*
- (b) Article 46 of the CEBL, which states that the company's debt that is not yet due at the point of entering into the liquidation procedure is deemed to be due, so that the bankruptcy administrator can instruct the debtor to pay immediately.*
- (c) Article 48 of the CEBL states that a creditor shall, within the time limit specified by the people's court for declaration of his claims, declare his claims to the administrator.*
- (d) Article 49 of the CEBL state that when a creditor declares his claims, he shall make a written statement on the amount of his claims and on whether there is any property guaranty, and present the relevant evidence. If the claims declared are joint-and-several claims, he shall give an explanation thereof.*
- (e) Article 56 of the CEBL states that where a creditor fails to declare his claims within the time specified by the people's court for the declaration of claims, he may declare his claims afterwards before distribution of the bankruptcy property in the final instalment. However, if the property has been distributed earlier, no more distribution shall be made to him. Further, the expenses for examining and confirming the claims declared afterwards shall be borne by the party making the declaration.*
- (f) Article 57 of the CEBL states that after receiving the materials for declaration of claims, the administrator will have them registered, examine the claims declared and fill out a form of claims.*

In the event of a dispute over the legality or the accuracy of the claim, such as where the administrator cannot agree on the amount of the claim with an individual creditor, the creditor can litigate before the same court for a judgment, something that occurs regularly in practice. Pursuant to Article 58 of the CEBL, where the debtor or creditor has objections to what is recorded in the form of claims, he may file an action with the people's court that has accepted the application for bankruptcy. For the sake of efficiency, many courts arrange for an expedited process to resolve these lawsuits.

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

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.

The liquidator may seek to have the Singapore bankruptcy proceedings ("SG Proceedings") recognised in Shanghai, China. Recognition may be sought under Article 5 of the China Enterprise Bankruptcy Law of 2006 ("CEBL"). Under Chinese civil procedure law, the party seeking recognition of the SG Proceeding must do so in a Chinese local intermediate people's court where the assets of the debtor-company are located. This would thus be Shanghai.

Article 5 further provides that a foreign court bankruptcy ruling also binds the company's assets located in China, but this is subject to restrictions. These include that the foreign bankruptcy court ruling must be recognised by a Chinese court before taking effect in China and that the recognition should be based either on a judicial assistance treaty signed and ratified between China and the requesting country, or on the principle of reciprocity if there is no treaty.

Article 5 also requires that the recognition of a foreign court bankruptcy ruling should not infringe upon the fundamental principles of Chinese law, China's sovereignty, security and public interests and does not disadvantage China's domestic creditors. This is a live issue in the present case, as the Chinese court has issued an injunction freezing the assets of the Singaporean company in China. The issue is thus whether the recognition of the SG Proceeding would satisfy these further requirements. In our view, much depends on the nature of the SG Proceedings. If that proceeding involves the distribution of the assets of the debtor to preferential creditors outside of China, it is unlikely that the Shanghai Court will recognise the SG Proceeding since it may potentially undermine the rights of domestic Chinese creditors. Conversely, if the SG Proceeding merely involves a restructuring of the debtor's operations and debts or a scheme of arrangement designed to help the debtor repay its debts, there is a possibility that the Chinese court may recognise the SG Proceeding given that it does not infringe upon China's fundamental principles of law, sovereignty, and/or public interests, nor is it necessarily inconsistent with the injunction issued by the local Chinese court.

Alternatively, recognition of the SG Proceeding may be sought under Chapter 27, Articles 281 to 282, of the China Civil Procedure Law of 1991 ("CCPL"), which is

devoted to international judicial cooperation. The recognition application can be made directly by the interested party to a Chinese local intermediate people's court where the disputed assets are located, or where the defendant is domiciled, or by a foreign court on behalf of the parties in dispute (if applicable). The requirements to be satisfied is similar to that under the CEBL, save that under Article 281 of the CCPL, a foreign judgment sought to be recognised in China must be final and conclusive. Assuming that the SG Proceedings were commenced further to a final and conclusive winding up order, this requirement would be satisfied.

Finally, for a foreign court bankruptcy ruling to be recognised in China, a judicial assistance treaty with China is necessary, and it happens to be that Singapore has such a treaty. In the alternative, Chinese cross-border insolvency law also requires judicial reciprocity. As such, it is necessary for Singapore to have a recognition precedent in favour of a Chinese party in the first place. In the event that there is no such recognition precedent in the interest of a Chinese party, the Chinese courts may not recognise the SG Proceedings. However, we can simply rely on the pre-existing judicial treaty.

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.

A conversion of the current liquidation procedure into a reorganisation procedure can take place under Article 70 of the China Enterprise Bankruptcy Law of 2006 ("CEBL"). Article 70 states that in the event of an involuntary liquidation procedure, the debtor or its shareholders holding 10% of more of the company's equity can apply to the court

for a conversion of the liquidation proceedings into a reorganisation. Once approval from the court has been granted, the liquidation will be formally converted into a reorganisation proceeding and the reorganisation procedure will commence immediately thereafter.

On the facts, it appears that Naking Limited ("Naking") may apply for conversion under Article 70 of the CEBL given that: (1) HuangPu's liquidation procedure was an involuntary liquidation commenced following the filing of a petition by the Bank of China (Shanghai Branch) ("BOC"); and (2) Naking is a controlling shareholder of HuangPu and holds 32% of HuangPu's equity, which is above the 10% requirement.

Ultimately, such conversion processes are rare and takes place only in a small number of cases. In the vast majority of cases, reorganisation filings are made either by the debtor or its creditors directly without there first being a liquidation petition by a creditor.

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.

Whether the plan can be approved under the present situation turns on the nature of the debt and debtors related to HuangPu, and whether the relevant requirements under the China Enterprise Bankruptcy Law of 2006 ("CEBL") have been complied with.

Article 82 of the CEBL requires that creditors be split into the following classes for voting: (i) secured creditors, (ii) employees, (iii) tax authorities and (iv) ordinary unsecured creditors. Article 84 of the CEBL then states that the reorganisation plan must be accepted by each class of creditors and should be voted in favour of by 50% or more of attending creditors in number whose claims represent two-thirds or more of the entire claims in each class. Moreover, where the company's equity is cancelled, the plan should also be voted on by the shareholders.

Thus, Naking must be involved in the voting process. In the present case, Naking and the rest of HuangPu's shareholders have voted down on the plan. The question, therefore, is whether the rest of the creditors of HuangPu can apply to have the shareholders' votes crammed down. The cram-down procedure is provided for under Article 87 of the CEBL, which states that the court may cram-down a reorganisation plan that has been voted down by one or more class(es) of creditors (or by the shareholders). However, such cram-down is subject to the reorganisation plan meeting the statutory requirements set out in Article 87 of the CEBL. Specifically these requirements are that:

- (1) the secured creditor class must vote in favour of the reorganisation plan and, if not, the secured creditors must be paid out of the secured assets (on top of fair compensation for the delayed foreclosure);*
- (2) the employee and tax authority classes must vote in favour of the reorganisation plan and, if not, those two classes must be paid in full;*
- (3) the ordinary unsecured creditor class must vote in favour of the reorganisation plan and, if not, this class must not be paid less than they would have received under a liquidation procedure;*
- (4) the shareholders whose equity is affected by the plan must vote in favour of the reorganisation plan and, if not, the treatment of equity holders must be fair and equitable;*
- (5) the reorganisation plan must pay the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and*
- (6) the reorganisation plan must be feasible.*

Since there is nothing to suggest that requirements (1), (2), (3) and (6) are not complied with (especially since the secured creditor class, the employee class, and the tax authority classes must have voted in favour of the plan), the only question is whether the treatment of HuangPu's shareholders is fair and equitable, and whether the priority between shareholders and creditors are upheld. We therefore require more information about the plan before it can be concluded whether the shareholders will be treated fairly and equitably, such that the court is empowered to cram-down the shareholders' dissent and approve the plan. We also require more information about the plan to determine whether the plan will pay stakeholders in the same class fairly and uphold the priority between shareholders and creditors, as well as is feasible.

Final mark: 47/50

*** End of Assessment ***