



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] (8)

Question 2.1 [2 marks] (2)

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

The cash-flow bankruptcy test. This means that the debtor is unable to pay a debt that is due (Article 7 of the Chinese Enterprise Bankruptcy Law of 2006).

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.

Lawyers and accountants. To be appointed, the law/accounting firm must be on a list of qualified insolvency practitioners for the province. In practice, the law/accounting firms that are on such lists are just a few large local firms. They are selected by the provincial supreme people's courts. When bankruptcy proceedings are commenced, the court will appoint one of these practitioners to act as the bankruptcy administrator.

Question 2.3 [maximum 4 marks] (3)

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

The fixed charge. A fixed charge is only valid once it has been registered under the China Civil Code of 2020 (Article 209). For this to be done, a small fee must be paid to the relevant authority. For immovable property, the relevant authority is the local office of the China Housing Management Authority. For safety, most creditors will also register the charge at the local office of the China Land Management Authority

QUESTION 3 (essay-type questions) [15 marks in total] (13)

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.

*First, there is the reorganisation procedure contained in Article 2 of the 2006 Law. A company that is not bankrupt yet but is likely to be bankrupt in the near future can apply for voluntary reorganisation under this Article. This allows rescue efforts to commence as early as possible (they need not only begin once the company is actually bankrupt). That said, it should be noted that, in practice, the debtor will generally be required to provide evidence to prove that it is balance-sheet bankrupt before the court opens the procedure. Nevertheless, the concept behind this mechanism shows that the 2006 Law is oriented towards rescue - if it were oriented towards liquidation, there would be no need to provide a reorganisation procedure which is available *before* bankruptcy.*

There is also the moratorium that comes with the commencement of formal reorganisation. Article 19 provides that, upon entering a formal reorganisation procedure, all executions against the company and its assets are stayed. This further supports the statement, because the 2006 Law ensures that the company’s assets can be organised and it can hopefully avoid the bankruptcy that would otherwise be imminent. The protections offered by the 2006 Law in this regard even extend to secured creditors (Article 75), albeit with the possibility of the secured creditor applying to court to have the stay lifted in certain circumstances.

The 2006 Law also contains a mechanism by which the court can “cram-down” on classes of creditors that do not approve of a reorganisation plan. The circumstances in which the court may do so are contained in Article 87 of the 2006 Law. This allows reorganisation plans to go ahead even where there are one or more classes of creditors that vote it down. This shows that rescue is emphasised over liquidation.

Finally, while the default position is that the bankruptcy administrator is given control over the company’s assets once reorganisation commences, it is possible for a company to apply under Article 73 of the 2006 Law to retain control of its affairs in reorganisation.

Other than reorganisation, the 2006 Law also provides for composition/settlement. Article 95 allows the debtor to file a composition plan with the court. This composition plan, if approved by the court, will then be voted on by creditors. While this mechanism is not as strong as reorganisation (there is no moratorium put in place in respect of secured creditors - Article 96), it still provides another avenue for a debtor to seek rehabilitation. This further demonstrates that the 2006 law is rescue oriented.

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.

After a bankruptcy application is accepted by the courts, the courts will specify a time limit within which creditors must declare claims. This time limit will not be less than 30 days, but will not be more than three months (Article 45). A creditor must declare his claims to the administrator within the prescribed time limit (Article 47). When a creditor does so, he must make a written statement which sets out the amount of the claim, whether there is any security, and any relevant evidence (Article 49). Where a creditor fails to declare his claims, he loses his right to pursue his claim in the bankruptcy procedure (Article 56).

Where the value or existence of a creditor's claim is disputed, either the debtor or creditor may file an action with the people's court that has accepted the application for bankruptcy (Article 58). Any such dispute will come after the administrator has received all the declarations of claims, examined them, and filled out a form of claims which he then presents to the first creditor's meeting for checking (Article 57).

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.

It is technically possible for foreign bankruptcy proceedings to be recognised in China. Article 5 of the 2006 Law states that a foreign bankruptcy court's ruling binds the debtor's assets in China, and provides that the Chinese courts will accede to requests to recognise and enforce foreign bankruptcy proceedings where there are international judicial assistance treaties in place. Singapore does have a judicial assistance treaty with China. While that may be, in this case, recognition is unlikely for two reasons.

First, Article 5 requires that the recognition of the foreign bankruptcy proceedings does not violate the fundamental principles of Chinese law, does not jeopardize the sovereignty and security of China or public interests, and does not undermine the legitimate rights and interests of creditors in China. The difficulty in this case is the fact that a local Chinese court has already issued an injunction freezing the company's assets in China at the application of a

Chinese creditor. Depending on further facts, this may render recognition of the Singapore bankruptcy proceedings impossible because it undermines the legitimate rights and interests of creditors in China. Having already obtained an injunction against the assets in China, it would undermine the rights of the Chinese creditor if the assets were placed in the company's pool of assets to be distributed to other foreign creditors as well, some even in priority to the Chinese creditor. Potentially, the situation may be different if the Chinese creditor in question is in fact party to the Singapore bankruptcy proceedings.

Second, even assuming that the legal requirements for recognition are satisfied, recognition of foreign bankruptcy proceedings rarely happens in practice. Only a handful of foreign bankruptcy procedures have been recognised in China despite the fact that, as of 2015, around 30 countries have concluded the required judicial assistance treaty with China. Chinese judges tend to be considerably nervous when dealing with cases with foreign elements. There is also a belief that accepting a foreign court's bankruptcy ruling will diminish Chinese judicial sovereignty.

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 2006 Law, after a creditor applies for liquidation and such application has been accepted by the courts, the debtor or one of its capital contributors making up at least 10% of the debtor's registered capital may

apply for reorganisation instead. If the requirements for a reorganisation application are met, the court will rule that the debtor should undergo reorganisation (Article 71).

Here, Naking is a 32% shareholder of HuangPu, so it has standing to make an application under Article 70 as one of its capital contributors making up at least 10% of the debtor's registered capital.

However, it should be made known to the CEO that conversion from liquidation to reorganisation only takes place in a very small number of cases in practice.

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.

The court can approve such a plan, even though the shareholders (as one of the voting groups) have voted it down, if certain statutory requirements are met (Article 87). In this case, the most relevant statutory requirement is that rights of shareholders must be adjusted in a fair and impartial manner (in the case where they have not approved the plan) (Article 87(4)). Here, it does appear that all the shareholders are being treated equally, given that all shares will be cancelled. Thus, it does appear that this requirement will be satisfied.

Of course, it may well be that the court does not approve of the plan for other reasons, such as the lack of feasibility of the plan. More information would be necessary to determine whether this would be the case.

Final mark: 46/50

* End of Assessment *