



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] (7)

Question 2.1 [2 marks] (2)

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

Under Article 7 of the China Enterprise Bankruptcy Law of 2006, a creditor can file for the liquidation of a debtor company if that company is unable to pay a debt that is due, i.e. a cash flow bankruptcy test.

Question 2.2 [maximum 4 marks] (2)

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 dominate Chinese regional bankruptcy administrator lists are law and accounting (in that order).

Generally, provincial supreme courts compile a list of regional qualified insolvency practitioners, which mostly comprise of local large law and accounting firms. This compilation would be done in consultation with the local legal and accounting associations.

There is no centralised qualification exam or training courses and so the assumption is that large firms would have the requisite financial strength and technical competence merely due to their size. The lack of central qualification also makes it difficult to regulate and keep these 'qualified' practitioners accountable. The only practical recourse in these circumstances is to complain to that practitioner's local lawyer or accounting association.

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 is the most used type of security under Chinese law.

Fixed charges must be registered under the China Civil Code of 2020 in order for it to be valid and enforceable, usually for a small fee. Upon registration (and the proper recording of the same), the government agency will issue a security certificate to the charge holder.

A fixed charge can be created over both movable and immovable property in favour of the secured creditor.

Most fixed charges are against immovable property (i.e. buildings and associated land use rights). In these circumstances, the security against immovable property must be registered with the local office of the China Housing Management Authority. As a matter of practice and precaution, charge holders also often simultaneously register the security with the China Land Management Authority, since the use of land is also part of the property.

Fixed charges can also be against movable property. The relevant government authority will depend on the type of movable property. For example:

- 1. a fixed charge over vehicles must be registered with the local police vehicle management office; and*
- 2. a fixed charge over machinery and other equipment must be registered with the local office of the China Industries and Commerce Regulation Bureau.*

QUESTION 3 (essay-type questions) [15 marks in total] (11)

Question 3.1 [maximum 8 marks] (4)

“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.

These legal mechanisms in the China Enterprise Bankruptcy Law of 2006 (the “2006 Law”) that support this statement are as follows.

There are three insolvency processes under the 2006 Law being:

- 1. Reorganisation: this is the 2006 Law equivalent to the United States' Chapter 11 voluntary bankruptcy procedure, which allows a company to trigger the reorganisation process. Importantly:***
 - a. the filing for reorganisation can be done in the absence of evidence that the company is actually bankrupt - this is to encourage companies to apply the reorganisation processes as soon as possible; and***

- b. there is provision for the company's management to apply for a form of debtor-in-possession order in order to allow management to remain in control of the company in order to keep valuable management and sector knowledge.*

The focus of a reorganisation is to allow the company to emerge from the process and avoid liquidation.

- 2. Composition / settlement: this is also a rescue process under the 2006 Law, allowing the company to present a composition / settlement plan to the Court for approval.*
- 3. Liquidation: the final process under the 2006 Law is liquidation. Even if a company enters involuntary liquidation under the 2006 Law, Article 70 allows the debtor or a shareholder (holding more than 10% of the equity of the company) to apply to the court to convert the liquidation into a reorganisation. This again emphasises that the rehabilitation and rescue of companies, even in liquidation, should be at the forefront of practitioners' minds.*

It is notable that the 2006 Law comprises of two chapters to rescue-oriented processes (reorganisation in Chapter VIII and composition/settlement in Chapter IX) and only one chapter on liquidation (Chapter X). This, together with the ordering of the chapters (i.e. rescue first, liquidation last), strongly indicates that the emphasis of the 2006 Law is to promote rescue over liquidation.

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.

The process for the proof of claims in a corporate liquidation procedure is set out in Chapter V of the 2006 Law, as follows:

- 1. The putative creditor must, within the requisite time period, liaise and declare with the administrator and will be provided with a proof of claim form, which would need to be filled out;*
- 2. The administrator would then register and examine the proof, usually by reference to the company's books, records and financials as well as with the company's finance staff;*
- 3. The administrator must submit the completed proof of claim forms at the first creditors' meeting of the company for checking;*

4. *If no objections, then the Court will make a ruling confirming the same;*
5. *If there are objections (whether as to value or legality), then that putative creditor may file an action with the same Court for judgment - this is quite a usual process and Courts may arrange for an expedited procedure to resolve these matters.*

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.

As a starting position, China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Notwithstanding this, Article 5 of the 2006 Law relevantly states that:

"Where a legally effective judgment or ruling made on a bankruptcy case by a court of another country involves a debtor's property within the territory of the People's Republic of China and the said court applies with or requests the people's court to recognize and enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or on the basis of the principle of reciprocity, conduct examination thereof and, when believing that the said judgment or ruling does not violate the basic principles of the laws of the People's Republic of China, does not jeopardize the sovereignty and security of the State or public interests, does not undermine the legitimate rights and interests of the creditors within the territory of the People's Republic of China, decide to recognize and enforce the judgement or ruling."

This provides a gateway for the Singaporean bankruptcy judgments or rulings to be recognised in China on the proviso that Singapore is either (1) a signatory to a relevant international treaty with China; or (2) a jurisdiction that had first favourably recognised a Chinese judgment, such that the principle of reciprocity applies.

Singapore is a signatory to a relevant international treaty with China, such that the Singaporean liquidator would be able to rely on limb (1) above. There is also precedent for Chinese Courts recognising Singaporean judgments; in particular, in 2020, a Maritime Court in Xiamen, Fujian Province, previously recognised a Singaporean bankruptcy order.

Because the assets are located in Shanghai, the Singapore liquidator will need to seek enforcement of the Singaporean judgment / ruling in the Shanghai Intermediate People's Court.

One practical issue that may arise is that Chinese Courts typically will not withdraw a freezing order over assets (as is the case here), notwithstanding the Singaporean bankruptcy process. This may lead to real and serious practical issues of disposing the assets located in Shanghai notwithstanding recognition.

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.

Article 70 of 2006 Law provides for an ability for a company's liquidation to be converted into a reorganisation. Specifically, Article 70 provides:

"... Where a creditor applies for putting his debtor into bankruptcy liquidation, the debtor or his capital contributors whose capital contribution makes up one-tenth or more of the debtor's registered capital may, after the people's court accepts the application for bankruptcy and before it declares the debtor bankrupt, apply with the people's court for reorganization."

In terms of the statutory preconditions set out in Article 70:

- 1. The liquidation of HuangPu Food Limited (the "Company") was commenced by Bank of China (Shanghai Branch) ("BOC Shanghai"), i.e. by a creditor;***

2. *In these circumstances, either the Company itself or a shareholder of the Company holding more than 10% of the Company's registered capital have standing to make an application for conversion;*
3. *Given that Naking Limited ("Naking") is a controlling shareholder holding 32% of the equity of the Company, Naking has sufficient equity to make the application;*
4. *The Company is still in the liquidation process and it does not appear to have yet been declared bankrupt (pursuant to Article 107 of the 2006 Law).*

Notwithstanding the satisfaction of the statutory preconditions, the practical reality is that very few applications for conversion are successful. Particularly so in circumstances where there is political pressure for the liquidation of a company. The existence of such political pressure can be inferred from the fact that the petition brought by BOC Shanghai (i.e. a State-controlled bank) was accepted by the Shanghai Second Intermediate People's Court (the "Court") in just three days.

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 has the jurisdiction to confirm the proposed reorganisation plan (the "Plan") prior to it taking effect.

Notably, Article 85 of the 2006 Law stipulates that in circumstances where the Plan involves the adjustment of the rights and interests of capital contributors (i.e. shareholders), then those shareholders can also vote on the Plan. However, Article 85 is silent as to whether the voting is binding or of advisory effect only; though the likely effect is the former.

In any event, Article 87 of the 2006 Law allows the Court to cram-down dissenting voting groups (including the shareholder group). In order to do so, the Court must be satisfied that the Plan:

- 1. must have been voted in favour by the secured creditor class and, if not, then the secured creditors must be paid out of the secured assets in full, together with fair compensation for the delayed foreclosure;***
- 2. must be voted in favour of by the employee and tax authority classes and, if not, those two classes must be paid out in full;***
- 3. must be voted in favour of by the ordinary unsecured creditor class and, if not, then that class must be paid a sum not less than what they would have otherwise received under a liquidation;***
- 4. must be voted in favour of by shareholders where their equity is affected by the Plan (as is the case here) and, if not, the treatment of the shareholders is fair and equitable;***
- 5. must pay the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and***
- 6. must be feasible.***

The relevant limb applicable to Naking is limb (4). If the Court is satisfied that the cancellation of the Company's previous shares is fair and equitable, then the shareholder class (including Naking) can be crammed down and the Plan can be confirmed. What is just and equitable will depend on the circumstances. However, given that the Company is insolvent, the shareholders would arguably have already been 'out of the money' such that the cancellation of their shares would be neither unjust nor inequitable. Further information would be required to advise Naking definitively.

Final mark: 43/50

*** End of Assessment ***