



**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?**

*Article 7 of the China Enterprise Bankruptcy Law of 2006 requires that a creditor filing for a bankruptcy petition should convince the court that the debtor is cash-flow insolvent which means that the debtor is unable to pay its debts. In practice, support of local government is also usually required to avoid the petition from being ignored or rebuffed.*

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 China Supreme People's Court instructed most provinces to establish their own list of approved insolvency practitioners to act as bankruptcy administrators. Once a bankruptcy procedure is entered into the court has exclusive power to appoint a bankruptcy administrator from its approved list.*

*Accounting and law are the two professions that dominate the regional bankruptcy administrator list. Both firms and individuals are included on these lists.*

*Article 22 of the China Enterprise Bankruptcy Law of 2006 allows for creditors to request the replacement of an administrator, by passing a resolution at a creditors meeting, when an administrator has behaved unlawfully or is biased. However, this generally does not happen in practice.*

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 security under Chinese law is the fixed charge which can be created over both immovable and movable property. There is a legal requirement to register a charge (under Chapter 17 of the China Civil Code of 2020) and it is not considered valid until it has been registered. A security certificate is then issued to the charge holder.*

*A charge over immovable property should be registered with the local office of the China Housing Management Authority and most secured creditors will often*

*simultaneously register the charge with the local office of the China Land Management Authority for safety. A charge can be created over movable property, such as vehicles, which should be registered with the local police vehicle management office, and machinery, which should be registered with the local office of the China Industries and Commerce Regulation Bureau.*

*Pledges, a type of security that is used less often than fixed charges, become valid after the movable pledged asset changes possession to the hands of the secure creditor. No registration is required for pledges over movable assets.*

*Pledges can also be made over intangible assets, such as trademarks, which should be registered with the China Industries and Commerce Regulation Bureau Central Office in Beijing, patents, which should be registered at the China Intellectual Property Authority Central Office, and shares, which should be registered at the China Securities Depository and Clearing Corporation Limited or the local office of the China Industries and Commerce Regulation Bureau (where the company is incorporated) for listed and non listed companies respectively.*

**QUESTION 3 (essay-type questions) [15 marks in total] (14)**

**Question 3.1 [maximum 8 marks] (8)**

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

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

*When the Chinese Enterprise Bankruptcy Law of 2006 was drafted, the direction of it was largely reshaped by Chapter 11 of the US Bankruptcy Code 1978. The mere fact that reorganisation is an approved bankruptcy procedure means Chinese bankruptcy law is more modern than bankruptcy legislation from some other countries whose focus lies more with liquidations. There are two chapters of the Chinese Enterprise Bankruptcy Law of 2006 that deal with corporate rescue (Chapters 8 and 9) which shows the intent of the lawmakers to promote corporate rescue.*

*Some of the mechanisms included in the Chinese Enterprise Bankruptcy Law of 2006 which promote corporate rescue include the following:*

- *Article 2 states that when a company files for a voluntary reorganisation, it is not required to show evidence that the company is bankrupt. This means that a company can file a proceeding at a point where it is likely to become bankrupt in the near future. This encourages rescue efforts at the earliest stage possible.*
- *Article 70 states that an involuntary liquidation can be converted into a reorganisation by application to court by a debtor or shareholder holding over*



*10% of the company's equity. This gives a further opportunity to focus on rescuing the company rather than liquidating it.*

- *Article 87 allows for a court to forcibly approve a reorganisation plan which failed to win the necessary votes from creditors or shareholders. This prevents dissenting creditors or shareholders from putting their own interests first and blocking a reorganisation attempt at the expense of the company and its other creditors.*
- *Article 73 allows for a debtor in possession model to be applied meaning the current management can continue to run the business whilst it tries to overcome its insolvency issues.*

*Although the statute is considered to be rescue-oriented, in reality it is a very different story. It should be noted that in practice there is great difficulty in implementing a number of the above rules, partly due to the unlimited powers given to courts and partly due to the small number of court involved bankruptcy cases.*

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.***

*Once a liquidation administrator is appointed, they will advertise the bankruptcy of the company in the local and national newspapers informing creditors to submit their claims. The liquidation administrator will then verify all claims received to determine the company's total liabilities.*

*Article 40 of the Chinese Enterprise Bankruptcy Law of 2006 states that a creditor can claim set-off if they are also a debtor of the company. Any balance remaining owed to the creditor will be treated as a claim. However, there are certain restrictions, such as preventing the set-off debt from being purchased by a third party, meaning strict mutuality of claims should be applied and proved.*

*Claims are then ranked by order of priority. Any bankruptcy costs will be paid as a priority from the funds available for distribution. Next in line are claims made by employees. Claims made by tax authorities then rank third in priority. The last class is the general unsecured creditors' claims. It is not clear whether tax fines constitute as a preferential debt ranking ahead of ordinary unsecured creditors.*

*A secured creditor is entitled to claim on the assets that it has a charge over. However, secured creditors may be required to surrender part of their security to ensure that employee claims are paid first to alleviate possible social instability concerns.*

*If a liquidation administrator does not agree with a creditor's claim then litigation will take place in the same court to adjudicate the dispute. The final result of the litigation will be the final amount of the creditor's claim.*

**QUESTION 4 (fact-based application-type question) [15 marks in total] (14)**

**Question 4.1 [maximum 8 marks] (7)**

***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.***

*Whilst China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency itself, some of the draftsment were influenced by the UNCITRAL Model Law when drafting the Chinese Enterprise Bankruptcy Law of 2006. Therefore, Chinese bankruptcy law does embrace some of the universality principles when dealing with cross-border insolvencies.*

*Article 5 of the Chinese Enterprise Bankruptcy Law of 2006 provides that a foreign court bankruptcy ruling binds the company's assets located in China, although there are a number of restrictions. The foreign bankruptcy ruling has to be recognised by a Chinese court before it can take effect in China. Such recognition will be based on either a judicial assistance treaty signed and ratified by the requesting country and China, or in the absence of a treaty it should be on the principal of reciprocity. The foreign ruling should also not infringe upon the fundamental principles of China's laws, sovereignty, security and public interest and will not disadvantage China's domestic creditors.*

*Only around 30 countries have concluded the required treaty with China and Singapore is not one of them. In regards to judicial reciprocity, the Chinese judicial system will only consider an application from a foreign country that has had a recognition precedent in favour of a Chinese party. Most courts in China are cautious in entertaining or accepting a foreign bankruptcy proceeding recognition application and recognition has only been successful for a very small number of foreign bankruptcy rulings to date.*

*In 2020 a court in the Fujian Province recognised a bankruptcy order from Singapore, which meant the Singaporean liquidator was able to smoothly dispose of said company's assets. However, there is no guarantee that this would be replicated in a different Singaporean recognition request. Notwithstanding the previous success of Singapore recognition, in practice, most foreign judgment recognition applications are rejected due to political social and judicial constraints, even when there is a treaty*

*in place or reciprocity has been established, with the court seeking procedural defects to reject the recognition request.*

*Under Chinese civil procedure law, the liquidator of the Singaporean company would need to apply to the local Chinese Intermediate people's court where the company's assets are held. Even if the recognition application was successful, it is not clear from current guidance whether a moratorium period will be granted, like it would if the bankruptcy proceeding were to be brought in China originally. Even still, if a Chinese court does order that a moratorium period is applicable, it is uncertain if other courts will honour such an order due to a lack of detailed precedents and rules. This could mean that the asset freezing injunction already awarded may continue to be upheld and the Singaporean liquidator would not be able to realise those assets.*

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.***

*In the event of an involuntary bankruptcy liquidation procedure, Article 70 of the China Enterprise Bankruptcy Law of 2006 allows for the debtor or its shareholders holding more than 10% of the company's equity to apply to convert the liquidation to a reorganisation.*

*In this instance, HuangPu Food Limited ("HPF") entered into a bankruptcy liquidation proceeding involuntarily following a petition from a creditor, being the Bank of China. Additionally, Naking Limited ("Naking") hold 32% of the equity of HPF which is above the 10% threshold. Therefore, Naking is permitted to apply to convert the*

*liquidation to a reorganisation procedure under Article 70 of the China Enterprise Bankruptcy Law of 2006.*

*The conversion procedure will require Naking to apply to the Shanghai Second Intermediate People's Court ("Shanghai Court") requesting the conversion. If sanctioned by the Shanghai Court, the reorganisation procedure will commence immediately.*

*Whilst the law does allow for the conversion, it is at the Shanghai Court's discretion as to whether they will allow it, which can be controversial. Therefore, in practice, this conversion is not frequently used in China.*

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.***

*Article 87 of the China Enterprise Bankruptcy Law of 2006 provides that a cram-down approval can be given by the court provided it meets six conditions. In essence, these conditions can be summarised as the following three tests:*

- 1) Fair and equitable - The reorganisation plan must be fair and equitable requiring application of the *pari passu* principle between creditors of the same class;*
- 2) Absolute priority - This means that shareholders should be paid nothing unless all creditors are paid in full; and*
- 3) Feasibility - The reorganisation plan must be achievable.*

***Providing the HPF reorganisation plan passes the above three tests the Shanghai Court may approve the plan under current Chinese law.***

Final mark: 48/50

\* End of Assessment \*