



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] **(9)**

Question 2.1 [2 marks] **(2)**

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

[According to Article 7 of the China Enterprise Bankruptcy Law 2006, if the company is unable to pay a due debt, the creditor may file an application to request liquidation of its debtor in court (involuntary liquidation). To request a liquidation order and to prove that the debtor is unable to pay a due debt the creditor must use the cash flow bankruptcy test for the court to accept the liquidation request.]

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.

[After the China Enterprise Bankruptcy Law of 2006 came into effect, China Supreme People's Court instructed provinces to establish their own regional qualified insolvency practitioner lists, where both a firm or individual can be qualified for the list. In practice, Provincial Supreme Courts simply select large law or accounting firms to the list, without any qualifying examination or preparation course. If the law or accounting firm is included in the list, it can receive appointments to function as liquidator in the bankruptcy procedure, which is currently a lucrative business in China.

Therefore, the power to include a law or accounting firm in the official insolvency practitioner list is exercised - in general - by Provincial Supreme People's Courts, which always seek collaboration with the local association of lawyers and accountants. At the moment, these two associations are coordinated by the local government justice and finance departments, respectively.

In addition, considering that it is a lucrative business, the competition to be included in the list is high, and the size of the law or accounting firm matters, because there is an assumption - which does not necessarily reflect reality - that a large firm will be able to provide a more trustworthy service in terms of financial strength and of competence. Currently, according to a report released by the China People's Congress, it is known that in 2021 there were 5,060 law and accounting firms across China appearing on local insolvency list as practitioner able to receive appointments by the courts to function as liquidator in insolvency proceedings.]

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.

[In China there are three types of securities established by the China Property Law of 2007, these being: fixed charges, pledges and liens. The most used of these is the fixed charge, which can be created over buildings or the right to use the debtor's land, or even over third-party assets, provided that the third-party consents.

To be valid, the fixed charge needs to be registered, according to China's Civil Code of 2020. A security certificate is issued to the holder of the charge once the charge has been duly registered with the government agency. In addition, there may be costs to make the registration. For real estate properties, the place of registration is the local office of the China Housing Management Authority, and as a precaution, secured lenders also simultaneously effect a registration of the charge at the local office of the China Land Management Authority, as the right to use the land on which the building stands is part of the property.

Therefore, most fixed charges in China are created on buildings and the right to use the land. Rarely will a fixed charge fall on a movable property, such as vehicles or machinery. For vehicles, registration must be done at the local police vehicle management office; for machinery, registration must be done at the local office of the China Industries and Commerce Regulation Bureau.

In addition to fixed charge, Chapter 17 of the Civil Code of China 2020 also enables pledges to be established as security in favor of creditors, although it is less frequently used. The pledge becomes valid when the movable property changes possession into the hands of the secured creditor. Thus, for movable goods, registration of a pledge is not necessary, as the change of physical possession itself (traditio) is sufficient. However, intangible movable assets such as trademarks, patents, stocks, checks and bonds can also be pledged, but for the validity of such security, registration is required.

For trademarks, registration must be done at the Central Office of the China Industries and Commerce Regulation Bureau, located in Beijing. For patents, the registration authority is the Central Office of the Intellectual Property Authority of China, also located in Beijing. For shares of listed companies, the registration authority is the China Securities Depository and Clearing Corporation Limited, a state-owned company with offices in Beijing, Shanghai, Shenzhen, and Hong Kong. Finally, for shares of non-listed companies, registration must be made with the China Industries and Commerce Regulation Bureau, where the company is incorporated.

Finally, there is the Lien - regulated by Chapter 19 of China's Civil Code, which is a virtually unused security in day-to-day Chinese commerce.]

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

Question 3.1 [maximum 8 marks] (3)

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

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

[The main legal tool supporting this statement is the fact that it is possible for the debtor, in the event that the creditor requests its liquidation before a court, to request that the liquidation be converted into reorganisation. This provision is contained in Article 70 of the China Enterprise Bankruptcy Law of 2006, whereby in the event of an involuntary liquidation petition, the debtor or its shareholders holding 10 % or more of the company's equity may request the court to convert the liquidation into reorganisation.

However, this provision has some negative consequences. Among them, the fact that in a liquidation the company becomes directly controlled by a court-appointed administrator, so that it is not clear how the management of the company - which would already be dissolved - could exercise this right to request the conversion from liquidation to reorganisation.

Moreover, secondly, the provision seems to be contradictory, as applying for involuntary liquidation presupposes that the company meets the bankruptcy tests of cash flow insolvency. Therefore, it seems that allowing such conversion would be burdensome to creditors, since it would be done at their expense.

Thirdly, there is again a problem with the creditors, since considering that it was the creditors who filed for the company's bankruptcy, it should be them - and not the court - who should have the standing to authorize the conversion of liquidation into reorganisation.

Finally, it is important to point out that in practice there are few cases in which conversion from liquidation to reorganisation occurs, based on article 70 of the China Enterprise Bankruptcy Law of 2006.]

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.

[Creditors wishing to prove the existence of a claim in Chinese insolvency proceedings should contact the court-appointed administrator and fill in a claim form provided by the administrator. Afterwards, the bankruptcy administrator will check the company's books and consult with the company's finance department for verification and confirmation of the data. In case of dispute over the amount or existence of the claim, the creditor can litigate before the same court where the insolvency proceeding takes place, which often happens in China. For this reason, to ensure the efficiency of the system, some courts stipulate an expedited process to deal with disputes over claims in insolvency proceedings.]

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.

[Article 5 of the China Enterprise Bankruptcy Law of 2006 provides that a court bankruptcy ruling also binds the company's assets located in China. However, there are some relevant restrictions set out in Article 5 regarding the recognition of foreign bankruptcy proceedings before Chinese courts. For recognition to occur, there must be a judicial assistance treaty signed and ratified between China and the requesting country. Currently, around 30 countries have signed such treaty with China, among them Argentina, Belgium, Bulgaria, France, Hungary, Italy, Morocco, Singapore, South Korea, Spain, Thailand, Tunis, the United Arab Emirates, Belarus, Cyprus, Cuba, Egypt, Greece, Kazakhstan, Kyrgyzstan, Laos, Lithuania, Mongolia, North Korea, Poland, Rumania, Russia, Tajikistan, Turkey, Ukraine, Uzbekistan and Vietnam.

In case the foreign proceeding does not come from one of the signatory countries of the treaty with China, it will be necessary to request recognition based on the principle of reciprocity, by which the Chinese judicial system understands that there would be reciprocity with the requesting foreign country only if it already has some recognition precedent in favour of a Chinese party, so that the Chinese court may not recognise a foreign bankruptcy proceeding in the absence of a precedent of the requesting country favourable to the interests of a Chinese Party. Moreover, Article 5 further contains reservations with regard to the Chinese public interest, providing that the recognition of a foreign proceeding must not infringe upon fundamental principles of the Chinese legal system, China's sovereignty, China's security and public interests and, finally, that it does not place China's domestic creditors at a disadvantage. That is, a wide range of restrictions, based on many subjective concepts that have not yet

been defined by the Chinese legal system, which considerably decreases the legal security for the request for recognition of foreign bankruptcy proceeding in China.

However, for the specific case, there are two factors that play in favour of the request for recognition of the Singapore bankruptcy proceeding before the Chinese courts. The first is the fact that Singapore has signed the judicial assistance treaty with China and the second is a 2020 precedent in which a Maritime court in Xiamen, Fujian Province, recognised a corporate bankruptcy order from Singapore, allowing the Singaporean liquidator to collect the company's assets located in China. Although the Chinese system is based on civil law, this precedent can assist in the interpretation of Article 5 of the China Enterprise Bankruptcy Law of 2006 when applying for recognition of the Singaporean bankruptcy proceeding in China.

Thus, it is possible to make an application for recognition of the Singaporean bankruptcy based on Article 5 of the China Enterprise Bankruptcy Law of 2006 and the judicial assistance treaty signed between Singapore and China, which, under civil procedure law, should be filed before the local intermediate people's court, where the company's assets are located.

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.

[According to Article 70 of the 2006 China Enterprise Bankruptcy Law, in case there is an application for involuntary liquidation, the debtor or its shareholders holding 10%

or more of the company's equity may apply to the court for conversion from liquidation to reorganisation in the case where it is believed that the company can overcome the debt crisis. Once the conversion from liquidation to reorganisation is requested, the court will rule on whether the request can be granted.

For the case of the liquidation petition filed by Bank of China against HuangPu Food Limited, it is possible for Naking Limited - as a shareholder holding more than 10% of the debtor's equity - to file an application with the Shanghai Second Intermediate Court for the conversion of liquidation proceedings to reorganisation, under Article 70 of the 2006 China Enterprise Bankruptcy Law].

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 the court may cram-down a reorganisation plan that has been voted down by one or more class of creditors or by its shareholders if the reorganisation plan seeking cram-down approval by the court meet some statutory provisions set forth in article 87.

Specifically, the provisions mentioned in article 87 are that the reorganisation plan must (a) be voted in favour of by the secured creditor class and, if not, at least secured creditor 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 of the company; (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; (f) be feasible.

Therefore, assuming that HuangPu Food Limited is a company that is not a listed company - which its name Limited implies - and assuming that the reorganisation plan

surpasses the fair and equitable test (which requires the application of the pari passu principle between creditors in the same class); surpasses the absolute priority test, which requires that all creditors be paid in full, so that shareholders receive the surplus (unless creditors have agreed otherwise); and that surpasses the feasibility test, whereby the reorganisation plan should be achievable, the only remaining alternative for shareholders would be to rely on the violation of statutory provision set forth in article 87 of the China Enterprise Bankruptcy Law of 2006.

In particular the one that provides that the court cannot cram-down a reorganisation plan affecting shareholders if the shareholders have voted against it. Alternatively, if the court does not accept this argument, it would be necessary to prove that the provisions of the plan would put the shareholders in an unfair and not equitable position, to prevent the court to cram-down the reorganisation plan.

Final mark: 43/50

* End of Assessment *