



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?

Under Article 7 of the China Enterprise Bankruptcy Law of 2006, the filing creditor must convince the court that the debtor is cash-flow insolvent (ie, that the debtor is unable to pay a debt that falls due).

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.

Provincial supreme courts simply select some large law and accounting firms to be included in the lists. The reason behind that is that the supreme courts always seek collaboration from local lawyer and accounting associations, which are, in fact controlled by local government justice and finance departments. For lawyers and accountants, to be included in such lists, the size of the law or accounting firm related really matters, since most courts assume that a large firm is more trustworthy; both, in terms of financial strength and expertise.

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 the commercial world, fixed charges (as one of three types of securities) are most used. A charge must be registered under the China Civil Code of 2020 and is not valid until it has been registered. After the registration at the government agency, a security certificate is issued to the charge holder. For immovable property (buildings, houses and the associated land use rights), the registration authority is the local office of the China Housing Management Authority. In practice, for safety's sake, and, most secured creditors also register the charge at the local office of the China Land Management Authority, as the house is attached to the land.

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.

The China Enterprise Bankruptcy Law of 2006 (**CEBL**), firstly, provides for two procedures which are rescue-oriented, ie (i) **reorganisation proceedings** (which are very similar to US Chapter 11 proceedings) and (ii) **composition or settlement**.

As regards features/mechanics, for voluntary reorganisation proceedings to be opened, the debtor does not need to pass any bankruptcy tests but only needs to demonstrate that it is likely to become bankrupt in the near future. With the aim of value protection and ensuring the debtor's going concern, this allows for a "early" restructuring. Furthermore, reorganisation proceedings can be commenced as **debtor-in-possession** proceedings, if the management of the debtor makes such request, which the court needs to sanction. The core feature of the reorganisation proceedings is the reorganisation plan, which needs to be voted on by the creditors and in the following sanctioned by the court. Importantly, the CEBL – a like the US Chapter 11 proceedings – includes the **option to cram-down** certain classes of creditors (provided that the statutory conditions are met), which can be considered as a truly rescue-oriented feature of the CEBL.

While the reorganisaiton procedure can be filed by both the company and the creditors. The composition procedure is reserved for a voluntary filing only. When the company files for such procedure, it must present a composition plan, which must – a like the reogranisation plan – be voted on and sanctioned by the court. It is, however, noteworthy that the opening of composition proceedings does not bind secured creditors. This also means that a stay (or moratorium) under such procedure does not apply to them. Therefore, the success of a composition procedure is usually dependent on the support of secured creditors, which are usually banks holding substantial claims. Nevertheless, also the composition procedure highlights the intent of the Chinese lawmaker to promote corporate rescue.

Also, the following mechanics/features can be considered rescue-oriented:

- Imposition of a moratorium, which suspends all execution against the company (but special rules may apply to secured creditors)
- Due to the latest judicial notice issued by the China Supreme People's court in 2020, a company undergoing reorganisation may be in a better position to refinance its going concern (new money) as the said notice clarified that post-commencement financings are – if the conditions therefore are met – treated as reorganisation expenses, having priority
- The reorganisation plan (including hair-cuts which may be sanctioned thereunder)
- Onerous contracts can be rejected by the administrator
- Set-off is possible
- Undervalued or transactions which are to be considered as undue preference can be voided

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.

Upon its appointment, the liquidation administrator assumes control of the debtor's assets and business affairs. As regards the assessment of creditors' claims, the liquidation administrator advertises the liquidation procedure in local and national newspapers in order to inform all creditors of the bankruptcy and the circumstance that they should submit their

claim(s) vis-à-vis the debtor. One of the core tasks of the liquidation administrator thereafter is to assess and verify the claims from creditors in order to ascertain the debtor's total liabilities. In order a claim is disputed (ie the administrator cannot agree on the amount of the claim), litigation will ensue in the same court to adjudicate the dispute. The decision of the court sets forth the finalised amount of the disputed claim.

Also, the bankruptcy administrator examines the company's books and records (including its balance sheet) in order to trace all existing assets and liabilities.

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.

Article 5 of the CEBL provides that a foreign court bankruptcy ruling also binds the company's assets located in China. However, such ruling must at first be recognised by a Chinese court before taking effect in China. Such recognition can either be based on a judicial assistance treaty or reciprocity (should there be no treaty).

Singapore has concluded a judicial assistance treaty with China. Under Chinese civil procedure law, the liquidator needs to seek recognition in the Chinese local intermediate people's court, where the debtor's assets are located (ie in Shanghai's intermediate people's court).

Notably, article 5 of the CEBL includes certain public interest reservations, providing that a foreign court bankruptcy ruling may not infringe with the fundamental principles of Chinese law, China's sovereignty, security and public interests. Furthermore, it must not for the disadvantage of China's domestic creditors.

As regards Singapore, in 2020 a mainland court in Fujian Province recognised a corporate bankruptcy order from Singapore, paving the way for the debtor's Singaporean liquidator to collect the company's assets in China. However, besides this only very few foreign office-holders have been successful to have been recognised in China; so there is still legal uncertainty – especially with regard to the discussed restrictions under article 5 of the CEBL. Generally, Chinese courts seem to be reluctant in recognising foreign bankruptcy orders.

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 CEBL, in the event of an involuntary bankruptcy liquidation procedure, the debtor or its shareholders holding more than 10% of the company's equity can apply to the court to convert liquidation to reorganisation and, if sanctioned. The reorganisatin procedure will commence immediately thereafter. As the filing was made by the Bank of China, it is considered as involuntary. As the CEO of Naking is a controlling shareholder with a equity holding of more than 32% also this criteria is met. The CEO can therefore apply for the conversion of the liquidation procedure to a reorganisation procedure.

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 may cram-down the reorganisation plan. Therefore, the plan must, *inter alia*, 1) be voted in favour of the secured creditor class; 2) be coted in favour of the employee and tax authority classes; 3) be voted in favour of by the ordinary unsecured creditor class, 4) 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. When assessing the cram-down pursuant to article 87 of the CEBL, the court needs to apply the absolute priority rule and consider whether the wipe out of the shareolding of Naking Limited is fair and equitable. If yes, the reorgainsaton plan may be sanctioned although Naking Limited has voted against it.

Final mark: 47/50

*** End of Assessment ***