



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?

The creditor must show that the debtor is cash-flow insolvent (ie, unable to pay debts as they fall due): Article 7 of the China Enterprise Bankruptcy Law of 2006. However, absent support of the local government, the bankruptcy petition may well be ignored.

Question 2.2 [maximum 4 marks] (3)

Name the two professions in China that dominate Chinese regional bankruptcy administrator lists and briefly explain how they are appointed in practice.

Lawyers and accountants dominate Chinese regional bankruptcy administrator lists - in particular, large law and accounting firms. In practice, bankruptcy administrators are appointed by the courts. While creditors may, pursuant to Art 22 of the China Enterprise Bankruptcy Law of 2006, request the replacement of the court-appointed administrator by way of a resolution at the creditors' meeting, in a case where the court-appointed administrator behaves unlawfully or is biased, this does not happen in practice as the court controls the creditors' meeting. Any motion to replace the administrator are rarely heeded.

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.

Fixed charges are the most used type of security available under Chinese law. Such charges must be registered under the China Civil Code 2020. They are not valid till they are registered. Such charges are registered once they are properly recorded at the government agency, and a security certificate is issued to the charge holder.

*For fixed charges over immovable property, the registration authority is the local office of the China Housing Management Authority. Acting *ex abundanti**

caute/a (with caution), most secured creditors will also register the charge at the local office of the China Land Management Authority. This is because the right to use the land upon which the building stands is also part of the property.

Fixed charges may also be created over movable property such as vehicles or machinery. Fixed charges over vehicles are registered with local police vehicle management office. Registration of fixed charges over machinery and other equipment is managed by the local office of the China Industries and Commerce Regulation Bureau.

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

Question 3.1 [maximum 8 marks] (7)

“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.

Pursuant to Article 70 of the China Enterprise Bankruptcy Law of 2006 (“CEBL”), the debtor or its shareholders (who hold more than 10% of the company’s equity) can apply to court, in the event of an involuntary liquidation procedure, to convert from liquidation to reorganisation. Article 70 was aimed at promoting more corporate rescues.

Apart from Article 70, the CEBL emphasises rescue over liquidation through the ordering of the three bankruptcy procedures of reorganisation (Chapter 8), composition (Chapter 9) and liquidation (Chapter 10). That liquidation is placed last, after the two rescue procedures, demonstrates legislative intent that rescue be attempted first.

As for the rescue procedure, the first is that of reorganisation. Art 2 of the CEBL provides that a company, which is likely to become bankrupt in the future can voluntarily file for reorganisation in court. This means that it is not necessary to pass any bankruptcy tests in filing for reorganisation which encourages rescue efforts to be made as early as possible. The reorganisation procedure can be filed by either the debtor company or its creditors. Further, Art 19 of the CEBL provides that all executions against the debtor company must be stayed once the court accepts the reorganisation filing and the formal reorganisation procedure begins. Significantly, secured creditors are also bound by the Art 19 moratorium though such creditors may apply for the moratorium to be lifted under Art 75 of the CEBL if the encumbered assets are likely to be substantially damaged, or its value is likely to substantially decrease over a short period of time. There are some problems with the Art 19 moratorium - specifically that it is unclear whether the moratorium applies to legal action taken by government

agencies (such as tax officials). Notwithstanding this, the Art 19 moratorium does promote rescue over liquidation as it buys the beleaguered company time and space to restructure its debts, as opposed to having to fend off various actions.

Then there is the mechanism of the reorganisation plan (which consists of either debt forgiveness, equity adjustment or both) itself. Art 81 of the CEBL provides that the reorganisation plan must include a business restructuring sub-plan given that reorganisation aims to revive the company's business. This provides for concrete action to be taken to ensure that the company can get back on its feet. The manner in which the reorganisation plan is approved also promotes rescue. Creditors are separated into four classes for voting purposes - the reorganisation plan must be accepted by each class of creditor and voted in favour of by 50% or more of attending creditors in number (absent creditors are not counted) whose claims represent 2/3 or more of the entire claims in each class. Where the company's equity is affected, adjusted or cancelled by the reorganisation plan, this should also be voted on by the shareholders: Arts 82, 84 and 85 of the CEBL. Ultimately, the reorganisation plan must be confirmed by the court before it is effective - here, Art 87 provides that the court may cram-down a reorganisation plan which has been voted down by one or more classes of creditors or the stakeholders. This cram-down can only be done if the requirements in Art 87 are met, specifically that the reorganisation plan is:

1. Voted in favour by the secured creditor class (if not, these creditors must be fully paid out of the secured assets and also compensated fairly for delayed foreclosure);
2. Voted in favour of the tax authority and employee classes as well - if not, these classes must also be paid in full;
3. Voted in favour of by the ordinary unsecured creditor class - if not, these creditors cannot be paid less than what they would have received in liquidation;
4. Voted in favour by the shareholders; if not, the treatment of shareholder must be fair and equitably;
5. Stakeholders in each class must be paid fairly and priority between shareholders and creditors must be upheld.

This cram-down feature is often invoked, featuring in 25% of all reorganisation plans.

The second rescue procedure is known as composition or settlement. Only the debtor company may voluntarily file for a composition procedure. Art 95 of the CEBL provides that when a company files for the composition procedure, it must present a composition plan to the court. If the court is satisfied, a meeting of creditors is convened to vote on the plan. Art 97 provides that if the plan is passed if it is voted in favour by half or more of attending creditors in number holding two-thirds or more of the claims. It bears noting, however, that the support of secured creditors is needed for a composition plan to succeed - this is because under Art 96 of the CEBL, secured creditors are not bound by a

composition procedure; in other words, they are not subject to the stay which suspends all legal enforcement against the company's assets. That said, the settlement procedure gives the debtor added flexibility to survive.

Question 3.2 [maximum 7 marks] (7)

Briefly explain the process for the proof of claims in a corporate liquidation procedure and the procedure that is followed should the value or existence of a creditor's claim be disputed.

After the liquidation administrator is appointed, the process begins with the liquidation administrator advertising the bankruptcy procedure in both the local and national newspapers to inform creditors to submit their claims. A creditor proves his claim by first approaching the liquidation administrator and filling out a claim form. The administrator will check the creditor's claim against the company's books and verify it with the staff from the company's financial department. When there is a dispute between the liquidation administrator and the creditor, litigation will commence in the same court to resolve the dispute. An expedited process can be arranged for this. The final result of the litigation serves as the finalised amount of the disputed claim.

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.

I would advise the liquidator that China has not adopted the UNCITRAL Model Law on Cross-Border insolvency. I would advise the liquidator that, according to Chinese civil procedure, the application has to be made by him/her, to a Chinese local intermediate people's court where the disputed assets are located, or where the defendant is domiciled.

Article 5 of the China Enterprise Bankruptcy Law of 2006 (CEBL) provides that a foreign court's bankruptcy ruling binds the company's assets located in China - this is, however, subject to the restriction that the foreign bankruptcy ruling must be recognised in China and that the recognition should either be based on: a) a judicial assistance treaty signed and ratified between China and the requesting country, or b) if there is no such treaty, on the principle of

reciprocity. Where the principle of reciprocity is concerned, this means that the Chinese courts will not, absent prior favourable recognition in the interest of a Chinese party by the Singapore courts, recognise the Singapore bankruptcy judgment in this case. I would also inform the liquidator that Art 5 of the CEBL contains a public interest exception which provides that recognition of foreign bankruptcy proceedings should not infringe the fundamental principles of Chinese law, China's sovereignty or its security and public interests, and does not disadvantage China's domestic creditors.

I would advise the liquidator that in this case, there is a judicial assistance treaty between China and Singapore, and that the liquidator must comply with the requirements set out under the treaty. I would emphasise to the liquidator that all the relevant requirements (ie, the manner in which the relevant documents must be served, as well as the form and language of the request) under the judicial assistance treaty should be complied with so that the Chinese court cannot throw out the application on grounds that it is procedurally defective.

Alternatively, the liquidator may rely on Art 281 and 282 of the China Civil Procedure Law of 2007 to recognise the Singapore judgment. Notably, the Wuhan Intermediate People's Court had recognised a bankruptcy procedure from Germany, basing its decision on Art 282 of the China Civil Procedure Law of 2007 rather than Art 5 of the CEBL. Art 281 provides that foreign judgments sought to be recognised in China must be final and conclusive. This should not pose a problem - if there is already a bankruptcy liquidator, there is likely to be a final and conclusive Singapore judgment ordering the company to be wound up.

Although Art 282 of the China Civil Procedure law makes it clear that recognising a foreign judgment is conditional upon the foreign country having a judicial assistance treaty with China, or reciprocity having been established between the two jurisdictions, that is not a problem in the present case. As mentioned above, Singapore does have a judicial assistance treaty with China.

I would also point out, to the liquidator, Art 82 of the China Civil Procedure Law of 2007. It states that the court may reject the application for recognition if the foreign judgment violates the fundamental principles of Chinese law, sovereignty or the public interest - though, as to what these fundamental legal principles of Chinese law really are, is not fleshed out in the China Civil Procedure Law.

I would also emphasise to the liquidator that it is important to ensure that there are no procedural defects with the application to recognise the Singapore judgment. This is to avoid a situation where the Chinese court throws out the application for recognition on the ground that there is a procedural defect. Care must be taken to comply with Chinese domestic judicial practice - for example,

ensuring that judicial notices in foreign countries are delivered in person and returned with a signature from the receiving party.

I would also advise the liquidator that it is useful to present the Chinese court, to whom the application is made, of previous cases where a Chinese court had recognised a Singapore bankruptcy judgment. Although China is not a common law jurisdiction, and case precedent is not binding, previously successful cases may persuade the judge hearing the case to allow recognition of the foreign judgment. Fortunately for the liquidator, there is precedent of Chinese courts recognising Singapore bankruptcy judgments - a maritime court in Fujian province had, in 2020, recognised a corporate bankruptcy order from Singapore. This should be cited to persuade the Chinese court.

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.

The applicable provision here is Art 70 of the China Enterprise Bankruptcy Law of 2006. Art 70 provides that in the event of an involuntary liquidation procedure, either the debtor or its shareholders (who hold 10% or more of the company's equity) can apply to court to convert the liquidation proceedings to reorganisation. Once court approval to convert liquidation proceedings to reorganisation proceedings has been obtained, reorganisation procedure commences immediately thereafter.

Because Naking Limited is a controlling shareholder holding 32% of the equity of HuangPu Food Limited, they will be able to invoke the conversion

procedure under Art 70. I would add that one crucial factor is whether the CEO of Naking Limited is able to secure the support of the local government - without such support, it is unlikely that the conversion request will be seriously entertained by the courts.

Question 4.2.2 [maximum 3 marks] (3)

Assuming that the bankruptcy liquidation of HuangPu Food Limited is successfully converted to a reorganisation procedure, a reorganisation plan for HuangPu Food Limited is eventually voted on by the various stakeholders. Due to the fact that HuangPu Food Limited is insolvent, the reorganisation plan *inter alia* proposes that the shares of all previous shareholders be cancelled. Unhappy that its equity in HuangPu Food Limited will be wiped out by the reorganisation plan, Naking Limited understandably votes against the plan. However, since the plan has only been voted down by the shareholders and approved by all the classes of creditors, the reorganisation administrator submits the reorganisation plan to the Shanghai Second Intermediate Court for approval.

Advise the CEO of Naking Limited as to whether the Court can approve such a plan under the current law in China.

The court can approve such a plan provided that the following requirements set out in Art 87 of the China Enterprise Bankruptcy Law of 2006 are met. The reorganisation plan must:

- 1. Be voted in favour of by the secured creditor class. If the secured creditor class votes against the plan, they must be fully paid out of the secured assets, and also fairly compensated for the delayed foreclosure*
- 2. The employee and tax authority classes must also vote in favour of the plan. If not, both these classes must be paid in full.*
- 3. The ordinary unsecured creditor class must also vote in favour of the plan, failing which, they must not be paid less than what they would have received under a liquidation procedure.*
- 4. The shareholders whose equity is affected by the plan must vote in favour of the plan. If they do not vote in favour, the treatment of equity holders must be fair and equitable.*
- 5. Stakeholders in the same class must be paid fairly, and priority between shareholders and creditors must be upheld.*
- 6. The plan must also be feasible.*

I would advise the CEO of Naking Limited that there is a possibility that the court may not approve such a plan, and that the above requirements under Art 87 are not likely to be met. While all classes of creditor have approved of the plan, treatment of the shareholders must be fair and equitable given that their equity is being affected. Here, the court may consider that the decision to cancel their equity does not constitute fair and equitable treatment, and thus decide not to cram down.

Final mark: 48/50

*** End of Assessment ***