



**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?**

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

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.**

*The law and accounting professions dominate Chinese regional bankruptcy administrator lists.*

*The court has the exclusive power to appoint a bankruptcy administrator. While Article 22 of the China Enterprise Bankruptcy Law of 2006 authorises creditors to request the replacement of the court-appointed administrator by way of a resolution at the creditors' meeting when the incumbent administrator behaves unlawfully or is biased, this is a rare occurrence in practice. This is because the court retains control over the creditors' meeting and motions for the replacement of 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.**

*The most used type of security is the fixed charge. A charge must be registered under the China Civil Code of 2020 to be valid. Once the charge has been properly recorded at the government agency, a security certificate will be issued to the charge holder. The charge holder may be charged a small fee for the registration of the charge. For immovable property, the registration authority is the local office of the China Housing Management Authority. To err on the side of caution, most secured creditors will simultaneously register the charge*

*at the local office of the China Land Management Authority, since the use right of the land upon which the building stands is part of the property.*

QUESTION 3 (essay-type questions) [15 marks in total] (13)

Question 3.1 [maximum 8 marks] (6)

***“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.**

*There are a number of legal mechanisms in the China Enterprise Bankruptcy Law of 2006 which support the view that it is a rescue-oriented piece of insolvency legislation. However, they appear to only support this view in theory, and the practical implementation of these mechanisms still show gaps.*

*One legal mechanism supporting the view that the China Enterprise Bankruptcy Law of 2006 is a rescue-oriented piece of insolvency legislation is the bankruptcy reorganisation procedure. The bankruptcy reorganisation procedure is aimed at rescuing the company and avoiding liquidation. A formal bankruptcy reorganisation procedure can be initiated by either the company or its creditors. Under Article 2 of the China Enterprise Bankruptcy Law of 2006, a petition can be made when the company is not yet bankrupt but is likely to be bankrupt in the near future. Therefore, a reorganisation filing does not require evidence that the company is already bankrupt. This encourages rescue efforts to be made at as early a stage as possible. However, in almost all existing cases in practice, the debtor must present evidence to prove the company is balance-sheet bankrupt before the court opens the procedure. Moreover, in the case of a creditor petition under Article 2, the bankruptcy tests (either cash flow or balance sheet) still need to be satisfied.*

*Another legal mechanism supporting the view that the China Enterprise Bankruptcy Law of 2006 is a rescue-oriented piece of insolvency legislation is the conversion mechanism in Article 70. Article 70 of the China Enterprise Bankruptcy Law of 2006 provides that in the event of an involuntary liquidation procedure, the debtor or its shareholders holding 10% or more of the company’s equity can apply to court for a conversion from liquidation to reorganisation.*

*While Article 70 is a mechanism to promote more corporate rescues, in practice, the conversion from liquidation to reorganisation only occurs in a very small number of cases because the practical implementation of Article 70 gives rise to several problems. First, it is not clear how the debtor’s board can exercise its right to raise a legitimate conversion request. This is because, following the*



*commencement of a liquidation procedure, the company's own management is dissolved and the company becomes fully controlled by the court-appointed administrator. Second, empowering shareholders to raise a conversion motion also appears untenable as entering liquidation means the company must have been able to meet the bankruptcy tests. Allowing shareholders to substantially alter the course of bankruptcy in this way seems unjustified and appears prejudicial to creditors. Third, it is ultimately the court who decides whether to grant the conversion request. This is controversial because in such circumstances, the creditors' interests are at risk and it should ideally be the creditors, rather than the court, who legitimately decides whether or not to convert the current liquidation into a reorganisation procedure.*

*Finally, the option of settlement in the China Enterprise Bankruptcy Law of 2006 also supports that it is a rescue-oriented piece of legislation. Under Article 95 of the China Enterprise Bankruptcy Law of 2006, when the company files for composition, the company is obliged to present a debt compromise plan to the creditors. If the court is satisfied with the composition plan, a meeting of the creditors will be convened to vote on the plan. If the compromise plan passes the vote of creditors, the company may avoid liquidation. The settlement option thus gives considerable flexibility for the company to seek survival.*

*However, the practical implementation of the settlement provisions in the China Enterprise Bankruptcy Law of 2006 also suffers defects. The provisions are vague and lack necessary detail. Article 97 merely states that the composition plan is passed if voted in favour of by half or more of attending creditors in number holding two-thirds or more of the total claims. The composition procedure under Chapter 9 of the China Enterprise Bankruptcy Law of 2006 does not indicate whether creditors should be lumped together to vote on the composition plan, or if separate classes of creditors should be formed. Moreover, Article 96 states that secured creditors are not bound by a composition procedure, which means that secured creditors are not subject to the stay suspending all legal enforcement against the company's assets. Without the support of secured creditors which are usually banks holding substantial claims, a composition effort is highly unlikely to succeed.*

*Therefore, while the China Enterprise Bankruptcy Law of 2006 does include a number of rescue-oriented legal mechanisms, the implementation of these mechanisms faces practical issues. Until these issues are resolved, the rescue-oriented ambitions of the China Enterprise Bankruptcy Law of 2006 may not be fully realised.*

**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 corporate liquidation procedure commences and the liquidation administrator is appointed by the court, the liquidation administrator will assume control of the company's assets and business affairs, and will advertise the bankruptcy procedure in both local and national newspapers in order to inform all creditors to submit their claims. Creditors must approach the liquidation administrator and will usually be required to fill in a claim form provided by the administrator. In many cases, the liquidation administrator will check the company's books and consult with staff from the company's financing unit for verification of the creditors' claims.*

*Should the value or existence of a creditor's claim be disputed, the creditor can litigate before the same court for a judgment - this is in fact something that occurs regularly in practice. Many courts also arrange for an expedited process to resolve these lawsuits in the interest of efficiency. The final result of the litigation is the finalised amount of the disputed claim. This represents a significant part of the administrator's work in practice.*

**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.***

*While China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (with little political will to do so in the foreseeable future), the Singaporean bankruptcy proceeding can still be recognised in China since Singapore has a judicial assistance treaty with China.*

*Article 5 of the China Enterprise Bankruptcy Law of 2006 states that a foreign bankruptcy ruling - in this case, the Singaporean bankruptcy proceeding - binds the company's assets located in China, provided that the Singaporean bankruptcy proceeding be recognised by a court before taking effect in China. The recognition should be based either on a judicial assistance treaty signed and ratified between China and Singapore, or on the principle of reciprocity if there is no treaty.*

*Recognition of foreign bankruptcy judgments is governed by Chinese civil procedure law. Under Article 281 of the China Civil Procedure Law of 2007, the Singaporean bankruptcy order must be final and conclusive before it can be recognised in China. Article 282 of the China Civil Procedure Law of 2007 makes clear that recognising a foreign judgment is conditional upon the foreign country having a judicial assistance treaty with China and, if not, reciprocity must already have been established between the two jurisdictions.*

*It should also be noted that Article 5 of the China Enterprise Bankruptcy Law of 2006 includes some public interest reservations and provides that the recognition of a foreign court bankruptcy ruling should not infringe upon the fundamental principles of Chinese law, China's sovereignty, security and public interests and does not disadvantage China's domestic creditors. More information is required from the bankruptcy liquidator as to whether any of these exceptions are engaged.*

*The liquidator is further advised that currently, only a handful of foreign bankruptcy procedures have been recognised in China. Many Chinese courts are still reluctant to accept a foreign court bankruptcy ruling in the belief that doing so could weaken Chinese judicial sovereignty. Chinese courts are also nervous when dealing with cases with foreign elements.*

*The liquidator must make the recognition application to the Chinese local intermediate people's court in Shanghai (ie, where the disputed assets are located). Since Singapore has a judicial assistance treaty with China, the Singaporean bankruptcy proceeding will likely be recognised and Article 5 of the China Enterprise Bankruptcy Law of 2006 will be effective. This is provided that none of the public interest reservations are engaged in the present case.*

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 current liquidation procedure can be converted to a reorganisation procedure under Article 70 of the China Enterprise Bankruptcy Law. Since HuangPu Food Limited ("HuangPu") is now being controlled by Fenda Partners as the liquidation administrator, it is unlikely that HuangPu will be able to make the conversion application itself. Nevertheless, since Naking Limited ("Naking") holds more than 10% of HuangPu's equity, Naking can apply to court to convert the liquidation procedure to a reorganisation procedure under Article 70.*

*Naking should be advised that in practice, conversion from liquidation to reorganisation only takes place in a very small number of cases. It is important to note that it is the court who has the ultimate say as to whether to grant the conversion request. Further, local government support is critical before any bankruptcy reorganisation filings will be seriously considered by courts. Naking should therefore mobilise efforts to gain such government support before commencing the conversion motion.*

*Another thing Naking should consider is whether any creditors will be prejudiced by the conversion. This is one concern that the court may have in mind when deciding whether to grant the conversion request.*

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.**

*Under Article 87 of the China Enterprise Bankruptcy Law of 2006, the Court may cram-down and approve the reorganisation plan provided that the reorganisation plan meet the following statutory conditions:*

- (a) The reorganisation plan must be voted in favour of by the secured creditor class and, if not, secured creditors must be fully paid out of the secured assets (in addition to fair compensation for the delayed foreclosure).*
- (b) The reorganisation plan must be voted in favour of by the employee and tax authority classes and, if not, these two classes must be paid in full.*
- (c) The reorganisation plan must be voted in favour of by the ordinary unsecured creditor and, if not, this class of creditors must not be paid less than they would have received under a liquidation procedure.*
- (d) The reorganisation plan must 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) The reorganisation plan must pay the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and*
- (f) The reorganisation plan must be feasible.*

*Requirements (a) and (c) are satisfied in the present case, since the reorganisation plan has been approved by all classes of creditors. Assuming all the other requirements are similarly met, the only issue will likely be (d). In this case, the shareholders' equity is clearly affected by the plan to cancel all shares of previous shareholders. Notwithstanding the disagreement of the shareholders, the Court can nevertheless approve the plan if it is shown that the treatment of equity holders is fair and equitable.*

*On the facts, it is possible for Naking Limited to argue that the treatment of equity holders is not fair and equitable. Much will depend on the precise terms of the reorganisation plan, for instance whether the shareholders will obtain any compensation upon the cancellation of their shares.*

*However, insofar as Huangpu Food Limited is a private company, Naking Limited should also be advised that due to the strict application of the absolute priority principle (especially in private company reorganisations), it is likely that the shareholders would gain nothing. The absolute priority principle is usually only relaxed in the interest of shareholders when the reorganisation of a listed company takes place.*

*Therefore, it is possible for Naking Limited to resist the reorganisation plan on the basis that its equity is affected by the plan and the treatment of equity holders is not fair and equitable. As stated above, much will depend on the terms of the reorganisation plan.*

Final mark: 47/50

\* End of Assessment \*

