



**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?**

*Article 7 of the China Enterprise Bankruptcy Law of 2006 provides that the creditor can file for liquidation in court if a company is unable to pay a debt that is due. Accordingly, where a creditor files a bankruptcy petition in China, the applicable bankruptcy test that should be met is that of a cash-flow bankruptcy test, i.e, the company must be unable to meet its financial obligations as they fall 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 two professions that dominate Chinese regional bankruptcy administrator lists are: (a) law; and (2) accounting. A report released by the China People's Congress stated that in 2021, there were 5060 law and accounting firms across China appearing on local insolvency practitioner lists, with 703 individuals who were either lawyers or accountants, qualified to practice insolvency in courts.*

*In practice, most provinces are instructed by the China Supreme People's Court to establish their own regional qualified insolvency practitioner lists. Firms and/or individuals which are included in these lists can receive appointments as liquidators in the bankruptcy of a company.*

*However, the term "qualified" may be somewhat of a misnomer as most, if not all provincial supreme courts simply select local large law and accounting firms to be included in the lists without undergoing any qualification exams or training courses. The power to include a law or accounting firm in the insolvency practitioner list is generally exercised by provincial supreme people's courts, which seek collaboration from local lawyer and accounting associations. Whether firms are included mostly depends on the size of the law or accounting firm concerned, as most provincial courts assume that a large law or accounting firm is more trustworthy in terms of financial strength and in respect of competence.*

*When a formal bankruptcy procedure is entered into, the court has the exclusive power to appoint a bankruptcy administrator. In this regard, Article 22 of the China Enterprise Bankruptcy Law of 2006 authorises creditors to request the replacement of the court-appointed administrator via a resolution at the creditors' meeting where the incumbent administrator has behaved unlawfully or is biased. However, this does not generally happen in practice as the court has control over the creditors' meeting.*

**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 securities available under Chinese law are fixed charges.*

*A charge must be registered under the China Civil Code of 2020 and will not be valid until it has been registered. Once the charge has been properly recorded at the government agency, a security certificate will be issued to the charge holder. A small fee may apply for the registration of charge.*

*According to Article 209 of the China Civil Code of 2020, the creation, alteration, alienation or extinguishment of a real right in immovable property shall become effective upon registration in accordance with law, and shall not take effect without registration, unless otherwise provided by law. Moreover, according to Article 210 of the China Civil Code of 2020, the registration of immovable property shall be handled by the registration authority at the place where the immovable property is located. Furthermore, according to Article 211 of the China Civil Code of 2020, when applying for registration of immovable property, an applicant shall provide necessary materials such as the proof of real rights, metes and bounds, and area of the immovable property. For immovable property (such as buildings, houses and the associated land use rights), the registration authority is the local office of the China Housing Management Authority. However, for safety, most secured creditors tend to simultaneously register the charge at the local office of the China Land Management Authority because the use right of the land on which the building stands is part of the property.*

*As for movable property, Article 224 of the China Civil Code of 2020 provides that the creation or alienation of a real right in movable property shall take effect upon delivery, unless otherwise provided by law. The relevant registration authority for vehicles is the local police vehicle management office. As for machinery and other equipment, the registration authority is the local office of the China Industries and Commerce Regulation Bureau.*



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

**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.**

*There are various provisions in the China Enterprise Bankruptcy Law of 2006 (the “CEBL”) that point to it being a rescue-oriented piece of insolvency legislation. These provisions provide mechanisms which make it easier for parties to have resort to rescue as opposed to liquidation, and which facilitate the rescue of companies by the Chinese courts.*

*First, Article 2 of the CEBL provides that when a company is likely to become bankrupt in the near future, the company can voluntarily file for reorganisation in court. This means that where a company voluntarily files a reorganisation petition, it can do so without showing any evidence of bankruptcy as the CEBL does not require the company to pass any bankruptcy tests. This makes it easier for the company to commence a voluntary reorganisation prior to formal liquidation proceedings being commenced against it. It is clear that this has been done to encourage rescue efforts to be made at as early a stage as possible. However, it should be noted that in the case of a creditor petition under Article 2 of the CEBL, the bankruptcy tests (either cash flow or balance sheet) must still be met at the time when the reorganisation petition is presented. Moreover, in practice, in almost all existing cases, the debtor has to prove that the company is balance-sheet bankrupt before the court opens the reorganisation procedure.*

*Second, the CEBL, like Chapter 11 of the United States Bankruptcy Code, provides for a debtor-in-possession procedure under Article 73 of the CEBL. Notably, such a privilege is not automatically granted. When a reorganisation petition is accepted by the court, a court-administrator will take control of the company’s assets and business affairs. Following the commencement of the reorganisation procedure, the debtor’s management may request the court for a debtor-in-possession type order which, if sanctioned by the court, allows the debtor’s management to regain control from the reorganisation administrator. The reorganisation administrator then takes on a supervisory role for the remainder of the procedure. The possibility of a debtor-in-possession procedure makes reorganisation a much more attractive option for companies which, though facing financial distress, are confident of restoring the company through the reorganisation of the company’s debts and assets.*

*Third, the imposition of a moratorium upon the entering into a formal reorganisation procedure, which suspends all executions against the company and its assets,*

*shows that the CEBL is a rescue-oriented legislation. Pursuant to Article 19 of the CEBL, after the court accepts the reorganisation filing and begins the formal reorganisation procedure, all executions against the company must be stayed. Notably, the moratorium also binds secured creditors. Article 75 of the CEBL suspends the exercise of security rights over specific property of a debtor. However, for secured creditors, the moratorium may be lifted under Article 75 of the CEBL if the encumbered assets are likely to become substantially damaged, or the value of those assets are likely to experience a sharp decline over a short period of time. In those circumstances, the secured creditor may, after obtaining leave of the court, sell the charged asset and receive payment immediately.*

*Fourth, the CEBL provides for a mechanism by which the court can “cram down” on dissenting creditors in order to facilitate a reorganisation plan. A reorganisation plan must be voted on by creditors in four different classes: (1) secured creditors; (2) employees; (3) tax / revenue authorities; and (4) ordinary unsecured creditors. Ordinarily, a reorganisation plan would only be passed if it is voted in favour of by 50% or more of attending creditors in number, representing two-thirds or more of attending creditors in value of each class (Article 84 of the CEBL). Nevertheless, Article 87 of the CEBL provides that where a draft plan for reorganisation is not adopted by some of the voting groups, the debtor or administrator may apply to the court for approval of the draft plan. The court may then effectively forcibly approve the reorganisation plan which failed to win the votes of all four creditor classes, but meets the statutory requirements set out in Article 87 of the CEBL. The presence of a “cram down” mechanism shows that the CEBL is rescue-oriented as it allows the court to override creditors who dissent to a reorganisation plan, thus facilitating reorganisation and preventing liquidation.*

*Fifth, the legal mechanism under the CEBL whereby a liquidation procedure may be converted into a reorganisation procedure shows that the CEBL is rescue-oriented. Under Article 70 of the CEBL, in the event of an involuntary bankruptcy liquidation procedure (i.e., a procedure filed by a creditor), the debtor or its shareholders holding more than 10% of the company’s equity can apply to the court to convert liquidation to reorganisation. If that application is allowed, the reorganisation procedure will begin immediately. In practice, however, only a small number of cases are actually converted as the vast majority of reorganisation filings are made either by the debtor or its creditors at the first instance, in a more straightforward way.*

*Sixth, most of the above mentioned provisions are contained in Chapter 8 of the CEBL, pertaining to reorganisation. In addition, Chapter 9 of the CEBL also contains provisions that provide for a rescue procedure known as composition or settlement, which further suggests that the CEBL is a rescue-oriented piece of insolvency legislation that emphasises rescue over liquidation. Unlike the reorganisation procedure which can be filed by both the company and its*

*creditor(s), the composition procedure is reserved for a voluntary filing only. In particular, pursuant to Article 95 of the CEBL, a company which files for composition must also present a composition or settlement plan to the court. If the court is satisfied with the composition plan, a meeting of the creditors will be convened to vote on the plan. In this regard, Article 97 of the CEBL states that the composition plan will be passed half or more of the attending creditors in number holding two-third or more of the total claims vote in favour of the composition plan. However, the CEBL does not specify whether creditors should be lumped together to vote on the composition plan or divided into separate classes to vote on the plan. The composition plan that has been voted in favour of by the requisite majority of creditors should then be sent to the court for approval before taking effect. However, Article 96 of the CEBL states that secured creditors are not bound by a composition procedure, which means that secured creditors would not be subject to any stay that suspends all legal enforcement against the company's assets. In other words, composition efforts are unlikely to succeed without the support of secured creditors that are typically banks in possession of substantial claims against the company. Be that as it may, the fact that the CEBL contains two chapters - Chapters 9 and 10 of the CEBL - containing provisions that facilitate corporate rescue makes it evident that the drafters of the CEBL intended the CEBL to be a rescue-oriented piece of legislation that emphasises rescue over liquidation.*

*Finally, although the CEBL does not contain any provision expressly allowing the bankruptcy administrator to deal with the illiquidity of the company in reorganisation by allowing it to borrow new money, there are provisions contained in the CEBL which allow it to circumvent this problem, which suggests that the CEBL is a rescue-oriented legislation. In particular, Article 42 of the CEBL provides that if a company in a bankruptcy procedure (including a reorganisation) continues to trade, the newly-generated employee wages, pension contributions and other post-bankruptcy debts are regarded as bankruptcy expenses to be paid before all pre-bankruptcy creditors. In theory, the bankruptcy administrator may therefore borrow new money and include this new debt as a category of post-bankruptcy debts in order to facilitate the reorganisation effort by offering to the post-bankruptcy lender *de facto* priority. In the third judicial notice on the CEBL issued by the China Supreme People's Court in 2020, the court stated that post-commencement borrowing could be treated as part of the reorganisation expenses and is paid before unsecured claims if such borrowing has been agreed to in advance by the creditor meeting or sanctioned by the court. This therefore confirms the viability of post-bankruptcy lending under Article 42 of the CEBL to facilitate reorganisation efforts.*

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.**

*The liquidation administrator will first advertise the bankruptcy procedure in both local and national newspapers in order to inform all creditors that they should submit claims. For a creditor to prove a claim in a corporate liquidation procedure, the creditor must approach the administrator. The administrator will, in many cases, check the company's books and consult with staff from the company's financing unit to verify the claim. The procedure for the proof of claims is set out in Chapter 5 of the CEBL.*

*Pursuant to Article 45 of the CEBL, after accepting an application for bankruptcy, the people's court shall specify the time limit for a creditor to declare claims. Such time limit, calculated from the date when the people's court announces its acceptance of the application for bankruptcy, shall be not less than 30 days at least but not more than three months at the most.*

*Pursuant to Article 46 of the CEBL, all claims undue shall be deemed to be due at the time when the application for bankruptcy is accepted. Further, beginning from the time when the application for bankruptcy is accepted, calculation of the interest on claims shall be stopped.*

*Pursuant to Article 48 of the CEBL, a creditor shall, within the time limit specified by the people's court for declaration of his claims, declare his claims to the administrator.*

*Pursuant to Article 49 of the CEBL, when a creditor declares his claims, he shall make a written statement on the amount of his claims and on whether there is any property guaranty, and present the relevant evidence. If the claims declared are joint-and-several claims, he shall give an explanation thereof.*

*Pursuant to Article 56 of the CEBL, where a creditor fails to declare his claims within the time specified by the people's court for the declaration of claims, he may declare his claims afterwards before distribution of the bankruptcy property in the final instalment. However, if the property has been distributed earlier, no more distribution shall be made to him. Further, the expenses for examining and confirming the claims declared afterwards shall be borne by the party making the declaration.*

*Pursuant to Article 57 of the CEBL, after receiving the materials for declaration of claims, the administrator will have them registered, examine the claims declared and fill out a form of claims.*

*Should the value or existence of a creditor's claim be disputed, the creditor can litigate before the same court for a judgment. Pursuant to Article 58 of the CEBL, where the debtor or creditor has objections to what is recorded in the form of claims, he may file an action with the people's court that has accepted the application for bankruptcy. For the sake of efficiency, many courts arrange for an expedited process to resolve these lawsuits. 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.***

*The recognition of the Singaporean bankruptcy proceeding (the "SG Proceeding") may be sought under Article 5 of the China Enterprise Bankruptcy Law of 2006 ("CEBL"). Under Chinese civil procedure law, the party seeking recognition of the SG Proceeding must do so in a Chinese local intermediate people's court where the assets of the debtor-company are located, i.e, China in the present case.*

*Article 5 of the CEBL provides that a foreign court's bankruptcy ruling binds the debtor-company's assets in China. However, Article 5 of the CEBL further imposes certain conditions before a foreign court's bankruptcy ruling is given recognition. Alternatively, recognition of the SG Proceeding may be sought under Chapter 27, Articles 281 to 282, of the China Civil Procedure Law of 1991 ("CCPL"), which is devoted to international judicial cooperation. The recognition application can be made directly by the interested party to a Chinese local intermediate people's court where the disputed assets are located, or where the defendant is domiciled, or by a foreign court on behalf of the parties in dispute (if applicable). The requirements to be satisfied under both the CEBL and CCPL are similar, save for the regime under the CCPL having an additional condition. Under Article 281 of the CCPL, a foreign judgment sought to be recognised in China must be final and conclusive. Assuming that the SG Proceedings were commenced further to a final and conclusive winding up order, this requirement would be satisfied.*

*First, the foreign court's bankruptcy ruling should be based either on a judicial assistance treaty signed and ratified between China and the requesting country, or if there is no treaty, on the principle of reciprocity. This requirement is satisfied given that Singapore has a judicial assistance treaty with China.*

*Furthermore, Article 5 of the CEBL also requires that the recognition of a foreign court's bankruptcy ruling does not: (a) infringe upon the fundamental principles of Chinese law; jeopardise China's sovereignty, security and public interests; and (c) undermine the rights and interests of domestic creditors of the debtor-company within China. Article 282 of the CCPL similarly requires that the foreign judgment does not contravene the basic principles of the laws of the China, China's sovereignty, or China's national and social interests.*

*The issue that arises is whether the recognition of the SG Proceeding would satisfy these further requirements given that the Chinese court has issued an injunction freezing the assets of the Singaporean company in China. It may be argued that whether the SG Proceeding is recognised depends on the nature of the proceeding. For instance, if the SG Proceeding involves the distribution of the assets of the debtor-company to preferential creditors outside of China, it is unlikely that the Shanghai Court will recognise the SG Proceeding since it undermines the rights of domestic Chinese creditors. Conversely, if the SG Proceeding merely involves a restructuring of the debtor-company's operations and debts, or a scheme of arrangement designed to help the debtor-company repay its debts, there is a possibility of the Chinese court recognising the SG Proceeding given that it does not infringe upon China's fundamental principles of law, sovereignty, and/or public interests, nor is it necessarily inconsistent with the injunction issued by the local Chinese court.*

*Ultimately, however, judicial collaboration between China and foreign countries has been rare in practice and only a handful of foreign bankruptcy procedures have been recognised in China, as many Chinese courts remain reluctant to accept a foreign court's bankruptcy ruling out of fear that doing so would weaken Chinese judicial sovereignty. Moreover, Chinese Judges are considerably nervous when dealing with cases involving foreign elements. As a result, even where a judicial assistance treaty exists, many Chinese courts simply reject applications for recognition on the basis of some procedural defect. For instance, some Chinese courts cite the fact that judicial notices on foreign countries are not delivered in person and are not returned with a signature from the receiving party, which contradicts Chinese domestic judicial practice.*

Question 4.2 [maximum 7 marks]

***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 of HuangPu Food Limited (“HuangPu”) may be converted into a reorganisation procedure via Article 70 of the China Enterprise Bankruptcy Law of 2006 (“CEBL”). Article 70 of the CEBL provides that in the event of an involuntary liquidation procedure, the debtor or its shareholders holding 10% of more of the company’s equity can apply to the court for a conversion of the liquidation proceedings into a reorganisation. Upon the approval of the court, the liquidation will be formally converted into a reorganisation proceeding and the reorganisation procedure will commence immediately thereafter.*

*In the present case, it appears that Naking Limited (“Naking”) may apply for conversion under Article 70 of the CEBL given that: (1) HuangPu’s liquidation procedure was an involuntary liquidation commenced at the petition of Bank of China (Shanghai Branch) (“BOC”); and (2) Naking is a controlling shareholder of HuangPu holding 32% of HuangPu’s equity.*

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.**

*In theory, the Court can approve such a plan under the current law in China, notwithstanding the fact that the plan has been voted down by the shareholders. However, much information is required about the debt(s) owed by HuangPu to provide a definitive answer.*

*To elaborate, pursuant to Article 87 of the China Enterprise Bankruptcy Law of 2006 ("CEBL") provides that the court may cram-down a reorganisation plan that has been voted down by one or more class(es) of creditors (or by the shareholders). However, such cram-down is subject to the reorganisation plan meeting the statutory requirements set out in Article 87 of the CEBL. Specifically these requirements are that:*

- (1) the secured creditor class must vote in favour of the reorganisation plan and, if not, the secured creditors must be paid out of the secured assets (on top of fair compensation for the delayed foreclosure);*
- (2) the employee and tax authority classes must vote in favour of the reorganisation plan and, if not, those two classes must be paid in full;*
- (3) the ordinary unsecured creditor class must vote in favour of the reorganisation plan and, if not, this class must not be paid less than they would have received under a liquidation procedure;*
- (4) the shareholders whose equity is affected by the plan must vote in favour of the reorganisation plan and, if not, the treatment of equity holders must be fair and equitable;*
- (5) the reorganisation plan must pay the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and*
- (6) the reorganisation plan must be feasible.*

*In other words, for the court to approve such a plan to, *inter alia*, cancel the shares of all previous shareholders pursuant to Article 87 of the CEBL, the secured creditor class, the employee class, and the tax authority classes must have voted in favour of the reorganisation class. Given that all other classes of creditors have approved the plan, these conditions are satisfied.*

*More pertinent to this question is the fourth requirement, since the shareholders (including Naking) have voted against the plan. For the court to cram-down on the shareholders' dissent under Article 87, it must be shown that the treatment of equity holders will be fair and equitable under the plan. More information is needed about the plan before it can be concluded whether the equity holders will be treated fairly and equitably, such that the court is empowered to cram-down the shareholders' dissent and approve the plan.*



*More information about the plan is also required to determine whether the plan will pay stakeholders in the same class fairly and uphold the priority between shareholders and creditors, as well as is feasible.*

Final mark: 47/50

**\* End of Assessment \***