



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] (6)

Question 2.1 [2 marks] (0)

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

If a creditor files for a corporate reorganisation procedure, the creditor must prove that the debtor is either cash-flow or balance sheet insolvent before the court will consider the petition. A creditor filing for corporate liquidation must show that the debtor is cash flow insolvent, meaning the debtor is unable to pay a debt that is due.

A creditor cannot file for composition/settlement as that is a procedure reserved for voluntary filing only.

Question 2.2 [maximum 4 marks] (2)

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

Law and accounting. Bankruptcy administrators are selected from a local list of insolvency practitioners. In 2007, the China Supreme People's Court instructed most provinces to gradually establish their regional qualified insolvency practitioner lists, in order to facilitate the implementation of the China Enterprise Bankruptcy Law of 2006. The appointment process does not involve any qualification exams or training courses as most provincial supreme courts simply select local large law and accounting firms to be included in the lists. Provincial supreme people's courts will usually collaborate with local lawyer and accounting associations, which are usually controlled by local government justice and finance departments respectively. Whether law and accounting firms are included in the lists will usually depend on the size of the firm concerned, as provincial courts tend to assume that a large firm is more trustworthy in terms of financial strength and competence.

In practice, only a handful of law and accounting firms are given the chance to be included in the lists, and law firms tend to dominate bankruptcy practitioner lists across China.

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. Fixed charges can be created over movable and immovable property in favour of secured creditor, and can be created over the debtor's assets or a third party's assets (provided consent of the third party is obtained). In China, banks frequently demand fixed charges over buildings and the right of use of land as security.

A fixed charge must be registered under the China Civil Code of 2020 and will be not be valid until it has been registered. A small registration fee may apply and the charge holder will be issued a security certificate once the charge has been properly recorded by the government agency. For immovable property the registration authority is the local office of the China Housing Management Authority, though most creditors will simultaneously register their charge at the local office of the China Land Management Authority since the use of the land (which the building stands on) is part of the use of the property.

For vehicles, the registration authority is the local police vehicle management office. 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] (12)

Question 3.1 [maximum 8 marks] (5)

"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 two legal mechanisms available under Chapters 8 and 9 of the China Enterprise Bankruptcy Law of 2006 that support this statement, namely (a) reorganisation and (b) settlement. These chapters are found before the chapter that contains the provisions on liquidation (i.e, Chapter 10), which suggests that lawmakers expect rescue to be attempted first before liquidation.

Reorganisation borrows most of its elements from the United States Chapter 11 procedure. A debtor company can voluntarily file for reorganisation if the company is likely to be bankrupt in the near future, which means that no evidence is actually required that the company is already bankrupt. This presumably promotes rescue efforts to be done as at early a stage as possible. That said, it may be observed that this does not occur in practice, as in practice

most debtors must present evidence that the company is balance-sheet insolvent before the court will open the procedure.

If a formal reorganisation procedure is entered into, a moratorium will be imposed on all executions against the company and its assets, and a bankruptcy administrator will be appointed by the court. The bankruptcy administrator's role is to verify creditor's claims and investigate the company's assets. In addition, the company may enter into a reorganisaition plan, which entails either debt forgiveness or an equity adjustment arrangement. These arrangements would also help to promote rescue of the company, by easing the burden of the company's debts. A reorganisation plan must be approved by creditors pursuant to Article 84 of the China Enterprise Bankruptcy Law of 2006, as well as shareholders if their equity will be affected by the reorgansation plan (see Article 85 China Enterprise Bankruptcy Law of 2006), though a court may cram down on dissenting classes under Article 87 of the China Enterprise Bankruptcy Law of 2006. The reorganisation plan must also be confirmed by the court.

Given that most corporate reorganisations in China seek a sale, the bankruptcy administrator's key role is also to coordinate between creditors and potential buyers to achieve a going concern sale of either the company as a legal entity or the company's business. If this is achieved, this would aid in a rescue of the company and likely prevent liquidation.

Finally, an existing liquidation procedure may also be converted into reorganisation. Under Article 70 of the China Enterprise Bankruptcy Law of 2006, in the event of an involuntary liquidation, the debtor or its shareholders holding more than 10% of the company's equity can apply to the court to convert a liquidation into a reorganisation. This also helps to promote rescue over liquidation, though it may be noted that in practice only a very small number of cases are actually converted in this manner.

Settlement, or composition, is another procedure under the China Enterprise Bankruptcy Law of 2006 that helps to promote rescue over liquidation. Only the debtor company itself may file for composition. Under Article 95 of the China Enterprise Bankruptcy Law of 2006, a company filing for composition must also present a composition / settlement plan to the court. If the court is satisfied with the composition plan, a creditors' meeting will be convened to vote on the plan. Per Article 97, a composition plan is passed if voted in faovur of by half or more of the attending creditors in number holding at least two-thirds of the claims, but Chapter 9 of the China Enterprise Bankruptcy Law of 2006 unfortunately does not contain more detailed guidance on how creditors should be divided into classes for the purpose of this voting procedure.

A composition plans also needs final approval of the court. As secured creditors are not bound by copositoin under Article 96 of the China Enterprise

Bankruptcy Law of 2006, secured creditors are not subject to the stay that suspends legal enforcement against the company's assets. The support of secured creditors is therefore crucial for a composition plan to succeed.

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.

Under Article 45 of the China Enterprise Bankruptcy Law of 2006, the court will specify the time limit for a creditor to declare claims upon accepting an application for bankruptcy. Such time limit must be at least 30 days from the date that the people's court announces its acceptance of the application for bankruptcy, but not more than 3 months. The liquidation administrator will then advertise the bankruptcy procedure in local and national newspapers to inform creditors that they should submit claims.

Under Article 47 and 48 of the China Enterprise Bankruptcy Law of 2006, creditors should then approach the administrator to declare their claims, including claims that are attached with certain conditions or time limit, and claims that are subject to a pending action or arbitration. Pursuant to Article 49, a creditor declaring a claim is required to make a written statement of the amount of his claim and whether there is any property guarantee, and present the relevant evidence. After receiving the materials for declaration of claims, the administrator must then have the claims registered, examine the claims and fill out a form of claims (Article 57). The administrator may then check the company's books and consult staff from the company's financing unit to verify claims.

Under Article 58 of the China Enterprise Bankruptcy Law of 2006, if the debtor and creditor have no objections to the form of claims, then the people's court will rule on a confirmation of the claim. However, where the value or existence of the creditor's claim is disputed, the creditor may file an action with the people's court that accepted the bankruptcy application. The outcome of the litigation will determine whether the claim exists and/or the finalised amount of the claim. For the sake of efficiency, courts may arrange for an expedited process to resolve these lawsuits.

QUESTION 4 (fact-based application-type question) [15 marks in total] (14)

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.

As China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, recognition of foreign bankruptcy proceedings in China must take place pursuant to Article 5 of the China Enterprise Bankruptcy Law of 2006. Article 5 provides that a foreign bankruptcy court ruling must be recognised by a Chinese court before taking effect in China, and that recognition must be based on either a judicial assistance treaty signed and ratified between China and the foreign country, or on the principle of reciprocity if there is no treaty. The foreign bankruptcy court ruling must also not infringe on the fundamental principles of Chinese law, China's sovereignty, security and public interests and does not disadvantage China's domestic creditors.

In the present case, given that Singapore and China have concluded a judicial assistance treaty, the Singapore liquidator may apply to the Chinese local intermediate people's court where the company's assets are located, for recognition of the Singapore proceeding on the basis of the judicial assistance treaty. Alternatively, the Singapore liquidator may seek recognition on the basis of the principle of reciprocity. While the Chinese judicial system generally takes the view that the foreign country must already have a recognition precedent in favour of a Chinese party first (*ie*, Chinese courts will not unilaterally extend recognition of a foreign proceeding if the foreign court does not do so first), Chinese courts have previously recognised Singapore bankruptcy proceedings: see the decision of the Xiamen Maritime Court in *In re Xihe Holdings Pte Ltd et al.* (2020) Min 72 Min Chu No. 334. The Singapore liquidator may thus be able to obtain recognition of the Singapore proceeding on the basis of the principle of reciprocity, notwithstanding that Singapore has entered into a judicial assistance treaty with China.

That said, as mentioned above, one hurdle may be that the Singapore liquidator will have to show that the foreign bankruptcy court ruling will not disadvantage China's domestic creditors, in order to obtain recognition. In the present case, given that the Singaporean company has a domestic creditor who has obtained an injunction over the company's assets in China, the Singapore liquidator may have to demonstrate that the Chinese creditor will have an opportunity to file claims in the Singapore liquidation, such that he/she is not disadvantaged by the recognition of the bankruptcy proceeding in Singapore.

Question 4.2 [maximum 7 marks] 6)

HuangPu Food Limited is a large beverage company based in Shanghai. In 2010, the company was unable to repay a RMB 23 million loan to the Bank of China (Shanghai Branch) and was petitioned for bankruptcy liquidation by the Bank at the Shanghai Second Intermediate People's Court. Three days after submitting the petition, the

Court accepted the liquidation filing and appointed Fenda Partners, a local law firm included in the local bankruptcy administrator list, as the liquidation administrator.

Shortly after the commencement of the bankruptcy of HuangPu Food Limited, the CEO of Naking Limited, a controlling shareholder holding 32% of the equity of HuangPu Food Limited, approaches you for advice.

Using the facts above, answer the questions that follow.

Question 4.2.1 [maximum 4 marks] (4)

The CEO of Naking Limited tells you that the various businesses of HuangPu Food Limited are still viable and that a piecemeal liquidation of the company will not be in the interests of any of the stakeholders. Since HuangPu Food Limited appears to have a bright future if the current debt crisis can be resolved, you are asked to explain whether (and if so, how) the current liquidation procedure can be converted to a reorganisation procedure.

Under Article 70 of the China Enterprise Bankruptcy Law of 2006, in the event of an involuntary liquidation, the debtor or its shareholders holding 10% or more of the company's equity may apply to the court to convert the liquidation to a reorganisation. Upon approval by the court, the liquidation will be converted into a reorganisation.

However, it should be noted that it is not presently clear how the debtor's board can exercise its right to raise a conversion request, given that the company is fully controlled by the court-appointed administrator following the commencement of liquidation. It should also be highlighted that successful conversions only take place in a very small number of cases in practice.

Question 4.2.2 [maximum 3 marks] (2)

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 plan is unlikely to be approved by the court. Article 87 of the China Enterprise Bankruptcy Law of 2006 provides that the court may cram-down on a voting group if the reorganisation plan:

- (a) Was voted in favour of by the secured creditor class and if not, the secured creditors will be fully paid out of the secured assets (in addition to fair compensation for the delayed foreclosure);**
- (b) Was voted in favour of by the employee and tax authority classes, and if not, these two classes will be paid out in full;**
- (c) Was voted in favour of by the ordinary unsecured creditor class and if not, this class will not be paid less than they would have received under a liquidation procedure;**
- (d) Was voted in favour of by the shareholders where their equity is affected by the plan, and if not, the treatment of equity holders is fair and equitable;**
- (e) Pays the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and**
- (f) Is feasible.**

In the present case, while all creditor classes have voted in favour of the plan, the plan is unlikely to be regarded as fair and equitable to equity holders since it cancels the shareholding of all previous shareholders, with no apparent compensation to these shareholders. It therefore is unlikely to meet condition (e) above, and a court will therefore likely be unable to approve the plan.

Final mark: 42/50

* End of Assessment *