



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8B

CHINA (PRC)^[INS 11]

This is the summative (formal) assessment for Module 8B of this course and must be submitted by all candidates who selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 8B. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment8B]. An example would be something along the following lines: 202223-336.assessment8B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 9 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] (10)

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1 (1)

Select the correct answer:

Which of the following are eligible to use the China Enterprise Bankruptcy Law of 2006 to enter into a court-involved bankruptcy procedure in China?

- (a) Consumers, when in financial difficulty.
- (b) **Enterprises having an independent legal status.**
- (c) Partnerships and sole traders.
- (d) Individuals or sole traders.

Question 1.2 (1)

Select the correct answer:

Which three bankruptcy options are provided by the China Enterprise Bankruptcy Law of 2006?

- (a) Reorganisation, scheme of arrangement and liquidation.
- (b) Receivership, settlement and liquidation.
- (c) Liquidation, settlement and company voluntary arrangement.
- (d) **Reorganisation, settlement and liquidation.**

Question 1.3 (1)

Select the correct answer:

How is a bankruptcy administrator appointed under the China Enterprise Bankruptcy Law of 2006?

- (a) *The bankruptcy administrator can only be appointed by the debtor when the company files for bankruptcy in court.*
- (b) **Only the court can appoint a bankruptcy administrator. Creditors may request a replacement bankruptcy administrator to be appointed if the court-appointed administrator is proven to be incompetent or biased at a later stage of the proceedings.**
- (c) *Both the debtor and creditors can appoint provisional bankruptcy administrators when filing.*
- (d) *The court can only appoint a bankruptcy administrator after getting consent from both the debtor and the creditors.*

Question 1.4 (1)

Select the correct answer:

Which parties may file for bankruptcy in court under the China Enterprise Bankruptcy Law of 2006?

- (a) *Directors can file for company bankruptcy in a court.*
- (b) **Both the debtor and the creditors may file for bankruptcy.**
- (c) *Only the debtor is allowed to file.*
- (d) *Both creditors and shareholders of the company may file for bankruptcy.*

Question 1.5 (1)

Regarding the "control" model in corporate reorganisation under the China Enterprise Bankruptcy Law of 2006, which of the following statements is correct?

- (a) *The debtor-in-possession model is not available under the Chinese corporate reorganisation provisions.*
- (b) **Both debtor-in-possession and administrator-in-possession models are available under the Chinese corporate reorganisation provisions.**

(c) Once the administrator-in-possession model is chosen, it cannot be converted into the debtor-in-possession model.

(d) The debtor-in-possession model is automatically selected once a reorganisation procedure is commenced.

Question 1.6 (1)

Regarding preferential creditors in China, which of the following statements is correct?

(a) Both the tax authorities and employees are treated as preferential creditors in China.

(b) The preference of tax authorities has been abolished by the China Enterprise Bankruptcy Law of 2006.

(c) Tax authorities are ranked higher than employees in the priority hierarchy.

(d) Tax authorities are treated as unsecured creditors in China and are not given preferential treatment.

Question 1.7 (1)

A corporate reorganisation plan that has been voted on must be approved by the court before it takes effect. Indicate which one of the following statements is correct:

(a) If the reorganisation plan was voted down (rejected) by one or more class of creditors, the court may still approve the plan if certain statutory conditions are met; a cram-down is therefore available under Chinese law.

(b) A cram-down cannot be exercised by the Chinese courts.

(c) If shareholders do not support / approve the reorganisation plan, the plan cannot be crammed-down by the courts.

(d) Only a reorganisation plan that has been fully supported by all classes of stakeholders entitled to vote can be sent to the court for approval.

Question 1.8 (1)

As regards the recognition of foreign bankruptcy proceedings in China, select the correct answer:

- (a) **A foreign bankruptcy proceeding can be recognised in China, provided there is a judicial assistance treaty with China or reciprocity with China has been established.**
- (b) **China strictly applies the principle of territorialism and consequently no foreign bankruptcy proceeding or ruling can be recognised in China.**
- (c) **China has adopted the UNCITRAL Model Law on Cross-Border Insolvency and all foreign bankruptcy proceedings can be automatically recognised in China.**
- (d) **China only recognises foreign bankruptcy orders from countries which have adopted socialism.**

Question 1.9 (1)

Select the correct answer:

In terms of the stated universal effect of a Chinese bankruptcy proceeding, the practical approach is that:

- (a) **The Chinese bankruptcy administrator can use the court bankruptcy ruling to bar foreign creditors from taking legal action against the company's assets in all foreign courts.**
- (b) **The Chinese bankruptcy administrator must seek recognition of the Chinese bankruptcy ruling abroad, otherwise the Chinese bankruptcy ruling will not be effective in other jurisdictions.**
- (c) **The Chinese bankruptcy ruling can only be recognised in countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvency.**
- (d) **The Chinese bankruptcy ruling will never be recognised in other jurisdictions since China has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.**

Question 1.10 (1)

Select the correct answer:

When drafting the corporate reorganisation chapter of the China Enterprise Bankruptcy Law of 2006, which country's corporate rescue laws influenced Chinese lawmakers most?

- (a) **The United States of America.**
- (b) **Russia.**

(c) Poland.

(d) The United Kingdom.

QUESTION 2 (direct questions) [10 marks] (8)

Question 2.1 [2 marks] (1)

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

If a creditor files a bankruptcy petition for corporate reorganisation, the creditor should prove that the debtor is cash-flow, ie, that the debtor is unable to pay a debt that is due, or balance sheet insolvent.

If a creditor files a bankruptcy petition for corporate liquidation, the cash-flow test applies (per Art 7 of the China Enterprise Bankruptcy Law of 2006 ("CEBL")).

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.

In general, large law or accounting firms tend to dominate the Chinese regional bankruptcy administrator lists. These firms are drawn from a list of qualified insolvency practitioners. The provincial Supreme People's Courts exercise the power to include and appoint a law or accounting firm into this list. For some other provinces (such as in Zhejiang), the local Intermediate People's Court exercises the power of appointment.

The bankruptcy administrators are appointed exclusively by the courts in the context of a formal insolvency procedure. Although the creditor may ask the court to replace the incumbent administrator pursuant to Art 22 of the CEBL, such an application can only succeed upon proof that the administrator is incompetent or biased, and further that there appear to be little to no examples of this happening in practice.

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 fixed charge is the most widely used form of security. A fixed charge must be registered under the China Civil Code of 2020 and are not valid until so registered. FA 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

charges over immovable property, the registration authority is the local office of the China Housing Management Authority, though for safety, most secured creditors tend to simultaneously register the charge at the local office of the China Land Management Authority.

With specific categories of movable properties, there are specific registration sites. 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.

The thesis that CEBL emphasises rescue over liquidation is supported by the following legal mechanisms: (a) reorganisation and (b) settlement in Chapters 8 and 9 of CEBL.

Reorganisation

The statutory architecture of reorganisation in the CEBL mirrors the United States Chapter 11 procedure.

Pursuant to Art 2, 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 and allows the debtor to assume greater autonomy.

By Art 19 of the CEBL, a moratorium will be imposed on all executions against the company and its assets once the court accepts the reorganisation filing. This includes secured creditors, subject to the caveat that secured creditors may apply under Art 75 of the CEBL for the moratorium to be lifted if the encumbered assets are likely to be substantially damaged or if the value of the assets is likely to decline sharply over a short period of time. This is likely a neutral factor, as the moratorium is available even in liquidation proceedings.

An existing liquidation procedure may also be converted into reorganisation under Art 70 of CEBL. Where there is 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.

Composition / settlement

The debtor company may file for composition. Pursuant to Art 95 of the CEBL, when the company files for composition it must also present a composition/settlement plan to the court, which will then be approved/rejected by a meeting of creditors. Art 97 provides 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 plan also needs the court's final approval. As secured creditors are not bound under Art 96, they 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.

Pursuant to Art 45 of the CEBL, the court specifies a time limit for a creditor to declare claims upon accepting an application for bankruptcy. The 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 advertises the bankruptcy procedure in newspapers to urge creditors to submit their claims.

For the proof of claims process, the similar practice of advertising the bankruptcy procedure to ensure that the creditors are reached is followed. Creditors will be required to fill a claim form provided by the administrator. The administrator examines the company's books in order to trace the company's debtors and the amount of receivables, in addition to the existing assets already listed in the company's balance sheet. Per Art 46 of the CEBL, to instruct debtors to pay immediately since that article provides that the company's debt that is not due at the point of entering into the liquidation procedure is deemed to be due.

Where the existence of claims is contentious or numerous and the administrator is unable to agree on the amount of the claim with an individual creditor, the dispute will be litigated in the same court, with the final result of litigation being the finalised amount of the disputed claim.

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

Question 4.1 [maximum 8 marks] (7)

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.

China has not adopted the UNCITRAL Model Law. Consequently that there are two main approaches to recognition of foreign proceedings in China. First, through a judicial assistance treaty, and second, where there is no judicial assistance treaty, through the principle of reciprocity. Art 5 of the CEBL provides that a foreign court bankruptcy ruling binds the company's assets located in China. Such a foreign ruling must be recognised by a Chinese court before it can take effect in China.

Judicial assistance treaty

*Singapore and China signed the the Treaty on Judicial Assistance in Civil and Commercial Matters with China (the "Treaty"). Under the Art 3(1) of the Treaty, the 'Central Authority' helps each contracting party, with China's being the Ministry of Justice and Singapore's being the Supreme Court of Singapore. The Treaty stipulates the manner in which judicial documents must be served (Art 5 and 7), the form and language of the request (Art 6), and the receipt of a certificate of service (Art 9). The respective Central Authorities execute and serve these documents. In 2020, a maritime court in Xiamen, Fujian Province recognised a corporate bankruptcy order from Singapore, which facilitated the Singapore liquidator's efforts in collecting the company's assets located in China (*In re Xihe Holdings Pte. Ltd. et al.* (2020) Min 72 Min Chu No. 334 ((2020)闽 72 民初 334 号).*

Such requests for judicial assistance are also subject to the requested party's (China's) right of refusal on the ground that the request is "contrary to its sovereignty, security or national interest and shall promptly give the requesting party the reasons for the refusal" (Art 11(1)) and , turn on public interest reservations, such as that the recognition of the foreign court bankruptcy ruling should not infringe upon the fundamental principles of Chinese law (Art 5(1)).

The liquidator may seek assistance under Art 281 of the China Civil Procedure Law of 1991 ("CCPL") which allows for parties concerned with the recognition of foreign judgments may directly apply for recognition and execution to the intermediate People's Court with jurisdiction of the People's Republic of China. The foreign court may also, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and the People's Republic of China, or in accordance with the principle of reciprocity, request the people's court to recognize and execute the judgment or ruling. Under Art 281, the court ruling must be "legally effective" or in other words final and the party seeking recognition of a foreign bankruptcy judgment would have to do so in the Chinese local intermediate people's court where the company's assets are located; and that Art 281 provides for three routes to

recognition: (a) application to the intermediate People's Court with jurisdiction; (b) international treaty; or (c) the principle of reciprocity. This is subject to public interests reservations under Art 282 of the CCPL. If such judgment or ruling contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security or the public interest, the people's court shall refuse to recognize and execute the judgment or ruling.

Principle of reciprocity

There are instances where the Chinese courts have recognised foreign proceedings on the principle of reciprocity. In 2012, the Wuhan Intermediate People's Court recognised a bankruptcy procedure from Germany on the basis of reciprocity, which facilitated the German liquidator's efforts to deal with the company's assets in Wuhan. Although China has no doctrine of precedent following the civil law tradition, this is an example which may embolden the Singaporean liquidator in his application. The Chinese understanding of reciprocity begins with a Chinese judgment being recognised in that foreign country - the Chinese courts rarely take the first step to exercise reciprocity. In the context of Sino-Singapore relations, however, it would appear that reciprocity has been established.

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 may be converted into a reorganisation procedure pursuant to Art 70 of the CEBL. In the event of an involuntary liquidation procedure,

the debtor or its shareholders holding 10% or more of the company's equity (Naking) may apply to the court for a conversion from liquidation to reorganisation. However, the rate of conversion is low.

As the company is fully controlled by the court-appointed administrator and the company's own management is routinely dissolved after the commencement of liquidation, the board may thus not be able to exercise its right to raise a conversion request. That said, Naking holding more than 10% as a shareholder (at 32%) allows him to make the 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.

The plan is unlikely to be approved. The reorganisation plan needs to be confirmed by the court after being voted on by creditors and shareholders. Notwithstanding that 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. Whether the court may approve such a plan turns on whether it may cramdown on the voting group under Art 87.

Article 87 of the CEBL provides that the court may cram-down on a voting group if the reorganisation plan which has been voted down by secured creditors. A reorganisation plan seeking cram-down approval by the court must meet the conditions therein including being:

- (a) voted in favour of the secured creditor class, and if not, secured creditors must be fully paid out of the secured assets;*
- (b) voted in favour of by the employee and tax authority classes and, if not, these two classes must be paid in full;*
- (c) voted in favour of by the ordinary unsecured creditor class and, if not, this class of creditors must not be paid less than they would have received under a liquidation procedure;*

- (d) 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) capable of paying the stakeholders in the same class fairly, with the priority between shareholders and creditors upheld; and*
- (f) feasible.*

The plan must be voted in favour of by the shareholders where their equity is affected, or if not, that their treatment remains fair and equitable. It is therefore likely that the court will consider that the opposition against the cram-down from equity holders will affect the reorganisation place, since it cancels the shareholding of all previous shareholders with no compensation. The court will therefore not be able to approve the plan.

Final mark: 44/50

*** End of Assessment ***