



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7E**

**UNITED ARAB EMIRATES**

This is the **summative (formal) assessment** for **Module 7E** 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 7E.** 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: **[studentnumber.assessment7E]**. An example would be something along the following lines: 202021IFU-314.assessment7E. **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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. 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 **8 pages**.

## ANSWER ALL THE QUESTIONS

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

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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

The **most significant barrier**, historically, to the development of a culture of distressed business rescue in the UAE has been:

- (a) The failure of the responsible authorities to enact laws which would encourage a business rescue culture.
- (b) The low rate of business failure in the UAE.
- (c) The owners of failed businesses are liable as a matter of criminal law for the failure of their business.
- (d) There could be criminal law consequences for business owners arising from the security agreements which a business might have with its creditors.

#### Question 1.2

What is the **principal difference** between the “mainland” UAE Bankruptcy Law and the insolvency laws of the two financial centres (the DIFC and the ADGM)?

- (a) The insolvency laws of the financial centres govern the insolvency of financial service businesses only, while the Bankruptcy Law governs the insolvency all other businesses.
- (b) The insolvency laws of the financial centres have no application and cannot be enforced in the UAE “mainland” (that is, outside of the financial centres), while the Bankruptcy Law is the only applicable law governing insolvency in the UAE “mainland”.
- (c) The Bankruptcy Law drew on the experiences of a number of jurisdictions, while the insolvency laws of the financial centres are based on the insolvency laws of one other country.
- (d) The Bankruptcy Law incorporates substantial elements of Islamic law, while the insolvency laws of the financial centres are based on the common law.

#### Question 1.3

Which statement **correctly describes** the relationship between the Courts of the DIFC and the Courts elsewhere in the UAE?

- (a) The judgments and orders of the Courts of the DIFC are not enforceable outside of the DIFC.

(b) The judgments and orders of the Courts of the DIFC are enforceable elsewhere in Dubai only through the Dubai Courts.

(c) The judgments and orders of the Courts of the DIFC are enforceable elsewhere in Dubai only after recognition for enforcement by the Joint Judicial Committee.

(d) The judgments and orders of the Courts of the DIFC are not capable of enforcement outside of Dubai.

#### Question 1.4

As regards security in Mainland UAE a secured creditor's rights, both in relation to real and personal property security, are not substantially affected by any formal insolvency process; the secured creditor can generally enforce its rights notwithstanding the debtor's insolvency. Is this statement **True or False**?

(a) True.

(b) False.

#### Question 1.5

Which statement is **correct** in relation to the operation of security interests for both real and personal property in the DIFC?

(a) The law regulating security interests in land and personal property in the DIFC is based on Australian law.

(b) A mortgagee of land in the DIFC requires a court order to allow it to repossess land subject to a mortgage.

(c) The regulating security interests in land and personal property in the DIFC is based on English common law.

(d) There are separate registers in which security interests in both land and personal property in the DIFC can be registered.

#### Question 1.6

Which of the following statements is **incorrect** in relation to creditor rights following the Court's decision to commence preventive composition under the UAE Bankruptcy Law up until the approval of the scheme?

(a) All legal claims and proceedings and any judicial enforcement procedures against the debtor are suspended, unless otherwise decided by the Court.

(b) The commencement of preventive composition procedures will also suspend any criminal proceedings brought in relation to a dishonoured cheque, including against the signatory of the cheque.

(c) Creditors may not bring or pursue claims against persons jointly liable with the debtor or any guarantors of the debtor's debts.

(d) Secured creditors may enforce their securities provided they have obtained Court permission to do so.

**Question 1.7**

Which of the following **is not** a consequence or possible outcome of the commencement of Preventive Composition?

- (a) Interest on debts owed by the debtor stops accruing on the date of commencement of Preventive Composition.
- (b) The debtor can borrow further money during the period of preventive composition, with the Court's permission.
- (c) The debtor is not allowed to change its ownership in any way.
- (d) The Court can order the rescission of effective contract to which the debtor is a party.

**Question 1.8**

Which of the following **is not** a basis for an application to the Court for the commencement of bankruptcy proceedings under the UAE Bankruptcy Law?

- (a) If a secured creditor, having security over all or substantially all of the assets of a debtor, takes steps to enforce its security.
- (b) If a creditor (or a group of creditors) has given notice to a debtor requiring the debtor to pay a debt of AED 100,000, and the debtor has failed to discharge the debt within 30 business days of that notification.
- (c) Following the annulment or rescission of Preventive Composition by the Court.
- (d) If a debtor is in default of its payment obligations for 30 consecutive business days.

**Question 1.9**

Rehabilitation is a new DIFC insolvency procedure introduced by the 2019 law, which allows companies unable to pay their debts but able to reach agreement with its shareholders and creditors to agree to a plan referred to as a Rehabilitation Plan to achieve a court sanctioned plan that binds creditors. In regard to the rehabilitation procedure, which of the following statements is **incorrect**?

- (a) In order to initiate the rehabilitation process the company is required to make an application to court submitting the rehabilitation plan and nominating the proposed rehabilitation nominee.
- (b) A moratorium comes into effect for an initial 180 days, preventing creditors from commencing or continuing legal action against the company.
- (c) The moratorium disappplies contractual provisions that would otherwise enable a contract to be terminated upon insolvency.
- (d) Any creditor materially prejudiced by the moratorium may apply to court seeking the disapplication of the moratorium in relation to a particular contract.

### Question 1.10

Which of the following statements **is not** correct?

- (a) The DIFC Courts will enforce judgments and arbitration awards from other countries in accordance with the Riyadh Convention (Riyadh Arab Agreement for Judicial Co-operation).
- (b) The DIFC Courts will enforce judgments and awards from other countries if there is a memorandum of understanding with the Courts of that country which enable the DIFC Courts to do so.
- (c) The DIFC Courts will enforce arbitration awards from other countries in accordance with the New York Convention for the Recognition and Enforcement of Foreign Arbitration Awards.
- (d) The DIFC Courts will enforce judgments and arbitration awards from other countries, even if the debtor has no presence of any type in the DIFC.

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

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#### Question 2.1 [maximum 2 marks]

What is the key point of distinction regarding the registration of real property interests, including mortgages, in the different emirates of the UAE? What is the key difference between the sale of mortgaged real property following a debtor default if that real property is in a financial free zone or if the real property is in "mainland" UAE?

Regarding real property, UAE law makes general provision to grant mortgages over land. Furthermore, it should be noted that each emirate maintains its own land registration system. The registration and enforcement of mortgages is subject to slightly different laws and procedures depending on the emirate, although the substance of the law is generally the same.

In the DIFC and in terms of the applicable legislation, in the event of non-payment or other default by a debtor, a creditor who is holding a mortgage over the debtor's land can enter into possession of the land by providing 60 days' notice to certain relevant parties. The creditor can sell the whole or party of the land, receive rents and profits from the land and apply the proceeds of sale in payment of the mortgage debt without the need for court order. A mortgage creditor may also apply to the DIFC Court for an order for forfeiture.

In the "mainland" UAE, the law provides for the right of a mortgagee to sell the mortgaged property after the debtor has defaulted, but these rights must be exercised through the Courts.

**2 marks**

#### Question 2.2 [maximum 4 marks]

Preventive Composition and Restructuring are both insolvency processes that an entity can adopt under the UAE Bankruptcy Law. They share a number of similarities regarding the entry into and conduct of each of the respective processes. While the processes are

different, various “actors” assume similar roles in each process. For all of the processes, which actor is responsible for each of the following:

- (a) A decision on any application to commence an insolvency process;
- (b) A primary determination as to whether a debtor’s proposal should be adopted;
- (c) Confirmation of the primary determination as to whether a debtor’s proposal should be adopted;
- (d) For supervising the implementation of the insolvency process by the debtor.
  - (a) The debtor is required to determine the application for the commencement of an insolvency process.
  - (b) The creditors determine as to whether the debtor’s proposal should be adopted.
  - (c) The Court would confirm the debtor’s proposal to be adopted after it has satisfied itself.
  - (d) The Court supervises the implementation of the insolvency process.

**2 marks.** The correct answer is:

- (a) The Court.
- (b) The debtor’s unsecured creditors.
- (c) The Court.
- (d) The trustee.

**Question 2.3 [maximum 2 marks]**

Under the UAE Bankruptcy Law, for a debtor, what is the key difference between the circumstances which could give rise to an application to commence Preventive Composition or an application to commence Bankruptcy (whether leading to Restructuring or Liquidation)?

Preventive Composition is a debtor-led, court-supervised procedure available to a debtor who is in financial difficulties but not yet insolvent or has been insolvent for a period of less than 30 consecutive business days. The procedure aims to facilitate the rescue of a business by helping a debtor reach a settlement with its creditors.

A debtor is required to file for bankruptcy if it has ceased payment of due debts for over 30 consecutive business days due to financial difficulties or where the debtor’s assets are insufficient to cover due liabilities at any time.

**2 marks**

**Question 2.4 [maximum 2 marks]**

What is the key difference for a creditor regarding the commencement of Preventive Composition or Bankruptcy of a debtor?

An application for Preventive Composition can be made only by the debtor or ordered by the court.

While a creditor or group of creditors, who hold an unpaid debt of not less the 100,000 AED, if a statutory demand has been served on the debtor and has remain unpaid for at least 30 consecutive business days.

**2 marks**

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

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**Question 3.1 [maximum 5 marks]**

Briefly explain the historical background to the introduction of the Bankruptcy Law. Describe which entities the Bankruptcy Law applies to and how it has been received and applied in the UAE.

The insolvency law was undeveloped in the UAE mainland until 2016. Before the Bankruptcy Law came into effect in 2016, most corporate insolvencies in the UAE have been resolved through consensual restructuring of the debtor company's liabilities, since market participants were reluctant to rely on legislation that was largely untested. The Bankruptcy Law is a major step forward and is influenced by features of several insolvency law regimes in other jurisdictions, as well as international insolvency law trends. The bankruptcy laws have historically been influenced by French civil law traditions. The bankruptcy law has not tried to abandon those principles, but it has also incorporated modern French law mechanics, and best practice concepts found in German, English and US insolvency legislation.

In general terms, the Bankruptcy Law streamlines and modernized UAE insolvency law and, placed a new emphasis on the early restructuring of indebtedness for distressed companies. Certain features of the bankruptcy law seek to destigmatize business failure.

The commercial community in UAE has generally welcomed the introduction of the Bankruptcy Law and the Personal Bankruptcy Law. However, there are no official statistics available, anecdotally it is generally understood that there have only been a handful of insolvency processes conducted under these laws. There certainly have not been enough number to assess meaningfully how they will apply in practice.

The Bankruptcy Law is comprehensive and governs essentially all aspects of the insolvency process. The law applies to:

- (a) All companies governed by the Commercial Companies Law (the principal corporate legislation in mainland UAE).
- (b) Any companies established under other legislation who by law or voluntarily have submitted to the provisions of the Bankruptcy Law.
- (c) Free zone companies and establishments not governed by other insolvency procedures (which is essentially all free zone companies and establishments except those in the financial free zones);
- (d) Any person who is a "trader" who is engaged in commercial activities in her personal capacity; and
- (e) Licensed civil companies of a professional character (professional partnerships, etc).

The Bankruptcy Law is available to essentially all commercial entities and individuals who carry commercial activities, except for state-owned companies, unless they have opted into the application of the law.

**5 marks**

**Question 3.2 [maximum 8 marks]**

If a debtor company seeks to enter bankruptcy, describe the ways in which the Court is required to be actively engaged in the Restructuring in Bankruptcy Process (assume that a restructuring is possible, that there are no unusual features to the bankruptcy, there are no

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secured creditors and there has been no criminal conduct by any person involved in the debtor). Your answer should provide references to the legislation.

The procedural aspects described in respect of Preventive Composition process are also applicable to restructuring proceedings, however, the deadline for implementation of a restructuring is longer (five years which may be extended for another three years with majority creditor approval).

If the court decides to restructure the debts of the debtor, the trustee will prepare a draft restructuring plan within three months of the date of the court decision, which will outline the same elements as the preventive composition plan (e.g. profitability prospects of the debtor and the possibility of converting the debt into equity). The restructuring plan must include a timeline for its implementation, not exceeding five years, which can be extended for up to a further three years with the approval of two-thirds of the unsecured creditors. The draft restructuring plan will be voted on by the unsecured creditors who were included in the creditors list and, if approved by a two-thirds majority vote, will be referred to the court for a final approval. As with the preventive composition plan, secured creditors are not allowed to vote on the restructuring plan unless they waive their security, effective from the approval of the restructuring plan. The court will approve the restructuring plan if it meets the Liquidation Test. As with the preventive composition proceedings, the debt restructuring proceedings will impose an automatic stay on all criminal proceedings against the debtor predicated on issuing bounced cheques.

**2 marks.** This is what you should have written:

- The bankruptcy procedure is preceded by an application to the Court, by either a debtor or a creditor, for an order initiating bankruptcy proceedings. When a bankruptcy application is made, the Court is required to appoint an expert from the panel of experts to assess the financial condition of the debtor. The expert is required to report on the debtor's financial condition and to give an opinion on the possibility of the debtor successfully restructuring. If the Court is satisfied that the necessary conditions have been met, an order will be made whereby the bankruptcy procedures commence at that point.
- If the Court decides to accept the commencement of the bankruptcy procedure, the Court is required to appoint a trustee, being either a person nominated by the debtor or a person enrolled in the table of experts appointed by the Financial Restructuring Committee. Upon making an appointment, the Court is required to provide any information which it holds about the debtor to the trustee. The Court shall determine the trustee's fees and shall authorise payment from the funds deposited by the debtor when making the application.
- The Court may also appoint one or more supervisors. The procedure to be adopted for the appointment of supervisors is to be the same as is adopted for supervisors of preventive composition. Essentially, supervisors are representatives of the creditors.
- The Court must determine any application regarding whether a creditor should or should not be included in the list of creditors. The Court's decision may be appealed. The Court may admit the debt on an interim basis (although no debt may be admitted if the creditor has brought a criminal claim in relation thereto). The Court must finally determine the list of creditors.
- The Court should direct the trustee to prepare a restructuring scheme, but may not do so unless the debtor confirms its willingness to continue to carry on business and unless it appears that the proposed restructuring is viable.
- Once the trustee submits the proposed restructuring to the Court, the Court is required to review the proposed scheme and can request the trustee to vary the scheme if it does not properly observe all parties' interests and to re-submit the proposed scheme.

- Following that review, the Court must direct a meeting of the debtor's creditors to review the scheme. The Court may also direct the formation of committees representing classes of creditors and may give directions about the appointment or conduct of any representatives of those classes at the meeting of creditors.
- If the scheme is approved by creditors at the creditors' meeting, the trustee is required to put the scheme before the Court, for the Court either to approve or reject the scheme. Any creditor who voted against the scheme may object to the proposed scheme, with such an objection being determined by the Court.
- The Court is required to give its decision approving the scheme, provided that it is satisfied that all necessary conditions have been satisfied. The Court must be satisfied that all affected creditors will receive at least as much as the creditors would have received if the debtor's assets had been liquidated on the date of voting on the scheme.
- Upon the conclusion of a successful implementation of a restructuring, the Court is required to make an order confirming the complete implementation of the scheme, which is to be advertised.

### Question 3.3 [maximum 2 marks]

In any insolvency system that involves the forced compromising of individual creditor claims, the requirement for court involvement is to ensure that the rights of all parties, including individual creditors, are being protected. The UAE Bankruptcy Law requires a high degree of Court involvement. Briefly describe (100-150 words) whether you consider that the level of Court involvement in approving a restructuring to be appropriate. Provide reasons for your answer.

There are various stakeholders who have interests in the restructuring of the debtor. The stakeholders include amongst others the unsecured creditors, government agencies such as taxman, secured creditors, and employees. Therefore, the role of the court is to protect the interest of all the stakeholders. The court ensures that all processes are adhered especially when it comes to the payments. The courts and the trustee are paid first, then follows preferential claims such as workers and government entities such as taxman, secured creditors and then unsecured creditors. Furthermore, it should be noted that since the Bankruptcy Law is relatively new in UAE, when approving restructuring, it requires close monitoring by the court.

**1 mark.** You have not really answered the question. What the lecturer was looking for:

The level of Court involvement in restructuring is excessive. Ultimately, the question of whether a debtor-entity should engage in a restructuring should be a matter for the entity's creditors. However, even for a restructuring which all of the creditors support, the process of assessing the viability of restructuring requires an initial report to the Court by the expert, the submission of a restructuring scheme to the Court by the trustee before a creditors' meeting, and a final approval after that meeting by the Court. There is inevitably cost to that process, the funds for which would be better used in paying creditors.

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

VGK LLC operates a restaurant chain in various locations in Dubai. It was a thriving and successful business but had to cease operations temporarily due to the effects of COVID-19. It has exhausted all available funds and has no cash to pay creditors. VGK LLC owns a restaurant site which is under development, but the development is not expected to be completed for seven months. The site had been purchased by one of VGK LLC's shareholders and was transferred to VGK LLC on the basis that payment for the site would

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be made by VGK LLC to the shareholder in full in 2024. In the meantime, the shareholder holds a mortgage over the property for the unpaid purchase price.

**Answer the questions that follow:**

**Question 4.1 [maximum 5 marks]**

The process of Preventive Composition requires adherence to a number of time-frames. Briefly outline the necessary steps and 10 specific steps that will determine the maximum time taken between making an application (the first step) and the registration of the scheme following final approval (the tenth and final step before its implementation).

Assume that: an expert's report is required by the Court; there are no disputes about whether a creditor is accepted or not; there are no amendments to the proposed scheme by the Court; the scheme is accepted by the creditors without the requirement for any adjournment of the creditors' meeting; the scheme is approved by the Court following the meeting; and there are no other extensions.

Upon receipt of the Preventive Composition Application, the Court is required to appoint an expert to prepare a report on the financial position of the debtor. The report must be delivered within 20 days from the date of the expert appointment.

The Court is required to decide on the Preventive Composition Application within five business days from the date of receiving the expert's report.

After the Court has accepted the Preventive Composition Procedure and received the expert's report, the Court must appoint a trustee.

The trustee is required to produce a report on the debtor's creditors and submit the report to the Court. The trustee is entitled to seek information from persons holding information about the debtor.

The Court may also appoint one or more supervisors from the body of the debtor's creditors.

Within five business days of the trustee's appointment, the trustee is required to publish a summary of the Court's decision to commence the preventive composition procedure (all advertisements and publications of notifications by the trustee require the trustee to publish any such notifications in two wide-read newspapers, one newspaper publishing in English and the other publishing in Arabic). The notice is also required to invite creditors to file claims within 20 business days from the date of publication. The trustee is also required to notify all known creditors with known addresses within the same period. The creditors are required to provide any documents verifying their claims to the trustee including the details thereof within the period stated.

Following the expiry of the period for lodging claims, the trustee is required to prepare a list of claimants. The list includes the details of the debts and the supporting information. The trustee is required to lodge the list with the Court within 10 business days from the date of the period for lodging claims. The trustee is also required to advertise the list.

The Court is responsible for finally determining the list of creditors.

The preventive composition scheme must be submitted to the Court within 45 business days from the date of publication of the decision to initiate the preventive composition procedure.

The period for the implementation of a preventive composition scheme may be no more than three years from the date of approval.

As part of the implementation of the scheme, the debtor may offer a secured creditor alternative security.

If certain assets are essential to the operation of the debtor's business, the Court may direct that those assets are not sold, without the Court's permission, for any specified period during the scheme.

Within 10 business days from the date of submission of the scheme, the Court is required to review the draft to confirm that it takes account of the interests of all interested parties.

After the Court has satisfied itself with the terms of the proposed scheme, the Court is required to direct the trustee to issue invitations by way of public advertisement as well as any other means directed by the Court within five business days to be given to the debtor's creditors for the purpose of attending a creditors' meeting to discuss the proposed scheme. The trustee is required to provide the creditors with a copy of the proposed scheme. The meeting is to be held within 15 working days of the date of direction to invite creditors.

The trustee and the debtor are required to explain the proposed preventive composition scheme at the creditors' meeting.

Only creditors whose debts have been admitted may vote on the scheme; except that the Court may direct that creditors whose debts have been admitted on an interim basis may vote, if proposed by the trustee, subject to any terms and conditions imposed by the Court. There are no provisions governing the rights of priority creditors, other than secured creditors, in any scheme.

Secure creditors may not vote on the scheme, unless they have surrendered their securities. If a secured creditor does vote on a scheme, such an action is deemed to be a surrender of the security.

The draft scheme is approved by a majority of creditors holding two-thirds of the debtor's debt including those temporarily admitted. If the requisite majority is not achieved, the meetings is adjourned for seven days.

Once the scheme has been approved, the trustee is required to put the draft scheme before the Court within three business days, for the Court either to approve or reject the scheme.

The Court is required to give any decision approving or rejecting the scheme urgently.

Within seven business days of the date of approval of the scheme by the Court, the trustee is required to register the Court's decision confirming the approval in the debtor's governmental corporate register and publish a summary of the scheme.

The trustee is responsible for the supervising the implementation of the scheme. The trustee is required to monitor progress and inform the Court of any failure of implementation and to report to the Court every three months.

The trustee is responsible to ensure that any assets of the debtor be sold as part of the scheme at the best price possible in the market prevailing on the date of sale. The trustee is required to deposit any funds received for the sale of any assets, subject to any security being paid to the creditors holding the security.

The Court is required to confirm the complete implementation of the scheme after the discharge of the obligations provided for in the scheme.

**Good answer – 5 marks**

**Question 4.2 [maximum 5 marks]**

VGK LLC's creditors rejected the proposed Preventive Composition scheme after a process of nearly four months. During that time, creditors, including staff, were not paid. The owners consider that without creditor support, restructuring would be impossible and liquidation is the only option available. With specific reference to the facts described above, describe the process that would be followed as part of any liquidation and, in particular, considering who could be appointed as trustee.

The bankruptcy procedure is preceded by an application to the Court, by either a debtor or the creditor, for an order initiating bankruptcy proceedings.

A debtor is required to initiate bankruptcy procedures if the debtor is in default of its payment obligations for 30 consecutive business days. The debtor is required to produce specified documents, including a description of its financial position, specified financial information and the name of a trustee proposed to oversee the bankruptcy procedure.

The Court is required to make an order for the bankruptcy of the debtor and the liquidation of the debtor's assets in certain prescribed circumstances, including:

- a. On the termination of a preventive composition as provided for under the Bankruptcy Law;
- b. If debtor has applied for preventive composition in bad faith;
- c. If the restructuring procedures are inappropriate for the debtor;
- d. If the expert's or trustee's report concludes that restructuring in bankruptcy is impossible;
- e. If the creditors do not approve the restructuring;
- f. If the Court rejects it or if the restructuring is rescinded or annulled.

The Court is required to appoint a trustee to undertake the liquidation if the Court has made an order for liquidation. The Court can order that any expert or trustee previously appointed in relation to any other procedure should continue in office.

The appointed trustee must advertise the trustee's appointment within three business days after the liquidation order.

The debtor's correspondence must state that the debtor is subject to bankruptcy order. The trustee is required to report to the Court monthly on the progress of the liquidation of the debtor's assets and in relation to the bankruptcy.

Creditors are required to submit their claims with the trustee within 10 business days from the date of the judgement, claims lodged later are not admissible unless the Court accepts the reason for any failure to claim. The trustee is required to consider the claims made, unless the debtor's assets are insufficient to pay legal fees and secured creditors. All debts owed by the debtor fall due upon the order for bankruptcy. Future debts can be adjusted for an amount equivalent to legally payable interest and foreign currency claims must be converted to UAE currency at the rate prevailing at that date.

The trustee is required to liquidate all of the debtor's property by public auction under the supervision of the Court.

The trustee is required to notify the Court, any supervisors and the debtor of the substance of any proposals received for the purchase of the debtor's business. If any interested party objects to any proposed sale, the Court is the party to determine the objection. The debtor and certain related people are ineligible to purchase the assets of the debtor from the trustee.

The proceeds of sale of the liquidation of the debtor's assets are distributed by the trustee to the creditors. The trustee must pay claims in the order provided for in the law, subject to Court approval for the distribution and approval of payment of priorities. Claims for debts which have not been admitted are to be held by Court pending determination of the claims. The proceeds of sale of any assets sold subject to a security interest are to be applied in any payment of the debts owed to the secure creditor, less the trustee's costs of sale. Any surplus after sale of the assets must be returned to the debtor.

The order of priority is the payment of the Court costs and the trustee's costs, unpaid wages and salary up to a maximum amount of three months' salary, alimony debts under a judgement against the debtor, amounts due to governmental bodies and the costs incurred in supplying the debtor with goods and services following the commencement of the bankruptcy.

The Court must make an order confirming the conclusion of the liquidation procedure, including the final list of creditors and the amounts remaining unpaid. The decision is to be advertised. The trustee is required to return all documents to the debtor after completion of the liquidation. Following completion of the liquidation, any creditor may enforce any debts remaining unpaid against any remaining assets of the debtor.

**Good answer – 5 marks**

**Question 4.3 [maximum 5 marks]**

VGK LLC incorporated and registered a fully-owned subsidiary company in the DIFC to operate a restaurant in the DIFC. The subsidiary is called VGK Limited and it is incorporated as a DIFC company. VGK Limited is also unable to pay its debts. What actions can VGK Limited's creditors take if they wish to see VGK Limited liquidated in the DIFC? In particular, who can take such actions and what steps would have to be taken? If the VGK was to be wound up, who would be responsible for it and what process would be adopted for addressing creditor claims in the winding up?

Federal Decree No. 35 of 2004 created the DIFC as a Financial Free Zone in Dubai (the DIFC Law). In terms of the DIFC Insolvency Law, the liquidation of a company is addressed by Winding Up. Any DIFC-incorporated company, DIFC registered or incorporated entities, such as limited liability partnerships and non-profit incorporated organisations, or DIFC-registered branch of any foreign company can be wound up under the DIFC Insolvency Law.

Winding up is the process which involves the appointment of the liquidator, who then realise the assets of the company and distribute those assets as required by law. There are two methods of winding up, either voluntarily or compulsory. The voluntary winding up happens after the resolution of the company's shareholders, while the compulsory winding up happens following an order made by the DIFC Courts. It should be noted that there are two forms of voluntary winding up, namely creditors' voluntary winding up for insolvent companies and members' voluntary winding-up for solvent companies.

The winding up is deemed to commence at the time of the passing of a resolution to wind up the company. The commencement of the winding up process automatically triggers the company to stop carrying on with the business which happens after the passing of the

resolution. But the company continues to exist and have legal personality during the winding up. The powers of the directors cease upon the appointment of the liquidator.

The creditors' voluntary winding up process unfolds as follows: When the resolution to commence the winding up is passed, the company or the creditors may nominate a liquidator to be appointed. Upon the appointment of the liquidator, the directors' powers cease. The creditors may also appoint a liquidation committee at the meeting of creditors, to exercise the functions conferred on the committee under the DIFC Insolvency Law.

The court-ordered winding up process unfolds as follows: This process is called a "compulsory winding up", the court has jurisdiction to order the winding up of a company if the company has passed a resolution to that effect, if amongst others it is unable to pay its debts when they fall due.

Any liquidator appointed must be an insolvency practitioner, as provided for in Part 10 of the Insolvency Law. The liquidator's role is to wind up the affairs of the company and to gather, realise and distribute the company's assets. A liquidator has the powers set out in Schedule 3 of the law. The liquidator can amongst other powers carry on the business of the company to the extent that it is beneficial to winding up, conduct litigation in the name of the company, sell the company's property and do anything else which may be necessary for the winding up of the company.

In terms of the DIFC Insolvency Regulations, a creditor wishing to recover a debt in the liquidation of a company being wound up by the court has to submit a claim for the amount in writing to the liquidator.

Furthermore, the creditor has to provide the supporting information for the liquidator to verify the claim. If the debt cannot be verified, the liquidator may estimate its quantum. A proof of debt must consider any set-off which exists between the creditor and the company and may take account of accrued interest up to the date of the commencement of the winding up. A creditor may prove for future debts and for a debt in a foreign currency, converted into US dollars. A secured creditor may only prove for the balance owing, or which is estimated would be owing, following realisation of any security interests.

The liquidator may then admit or reject in whole or in part any proofs of debt for the purpose of determining whether to make a payment to the creditor. If the creditor is dissatisfied with liquidator's decision regarding a proof, the creditor may then appeal against the decision within 21 days of receiving notice of that decision by application to the Court.

There are no specific provisions governing contracts which have not been fully performed upon the commencement of a winding up.

In terms of the law, the liquidator may declare a dividend and distribute that dividend among the company's creditors when there is sufficient funds. The liquidator is entitled to retain funds sufficient to pay the costs of the liquidation, claims which the liquidator believes could still be lodged and disputed claims. A creditor who has not proved his debt by the time a dividend is paid, may not disturb a dividend paid previously but, if there are funds available for the liquidator to do so, the creditor is entitled to be paid for any dividend he has failed to receive previously.

All debts of an insolvent company rank equally in any distribution, unless they are preferential debts as provided for by regulation. In a voluntary winding up, the expenses of the winding up, principally the liquidator's expenses, are payable out of the assets of the company in priority to all other claims. In a compulsory winding up, if the company has

insufficient assets to satisfy its liabilities, the Court may make such order as to payment of the expenses of the winding up in such priority as it thinks just.

Preferential creditors' claims are governed by the Preferential Creditor Regulations 2008. These regulations provide that after payment of the expenses of the winding up, preferential creditors' claims should be paid in priority to unsecured claims and in priority to claims secured by a security interest over all or substantially all of the assets of the company.

In the event that the company has sufficient assets to pay all creditors in full for the creditors' claims determined to date of the commencement of the winding up, the company must then pay interest on those creditors' claims as are interest-bearing. In the event that all creditors including those entitled to interest have been paid in full, any remaining assets are paid to the shareholders and other contributories of the company in the manner provided for in the company's constitution.

The liquidator may, by notice to the creditors, declare a final distribution without considering the claim of any person who has not yet proved their claim. The Court may, on application by any person, postpone the date of a final dividend.

After the liquidator has completed the winding up the affairs of the company, the liquidator may seek to have the company dissolved, whereby the company's legal existence is ended.

If the company has insufficient assets to cover the costs of the winding up and the affairs of the company do not require investigation, the liquidator may give the creditors and contributories 28 days' notice of intention to do so and may then apply to the DIFC Registrar of Companies for an early dissolution of the company.

The liquidator is required to call a final meeting of the creditors prior to dissolution to prepare a final account of the winding up for presentation to the creditors at the relevant meeting, and to provide the final account to the creditors and the shareholders. At the final meeting of creditors, the creditors may give the liquidator a release against any further obligations in relation to the winding up. If the creditors do not do so, the liquidator may apply to the Court for release. Upon the expiration of three months from the date on which the final account was sent to creditors, the company is deemed to be dissolved, although the Court may defer the dissolution date on application by any interested party.

**Too long for 5 marks! You have dealt with a lot of irrelevant aspects. 3 marks**

**\* End of Assessment \***