



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: **[studentID.assessment7E]**. An example would be something along the following lines: 202122-336.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 "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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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

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

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.

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- (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?

Each emirate maintains its own land registration system accordingly the registration and enforcement of mortgages can be subject to slightly different laws and procedures in each emirate.

In the mainland the right of a mortgagee to sell the mortgaged property must be exercised through the courts.

Under the DIFC there is a register of ownership and in the event of default by a debtor a creditor holding the mortgage can enter into possession of the land by providing 60 days notice.

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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;

The debtor

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- (b) A primary determination as to whether a debtor's proposal should be adopted;

The creditors

(c) Confirmation of the primary determination as to whether a debtor's proposal should be adopted;

Court

(d) For supervising the implementation of the insolvency process by the debtor.

Trustee

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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)?

Bankruptcy – A debtor is required to initiate bankruptcy proceedings if the debtor is in default of his payment obligations for 30 consecutive business days.

Preventative Composition – The debtor may apply to the Court pursuant to Article 6 of the Bankruptcy Law for the appointment of a composition trustee. This terminates the debtor's obligation to initiate bankruptcy proceedings. The Debtor must give the competent controlling body 10 days' notice prior to making the application (if the debtor is subject to the control of a competent controlling body).

The big difference is that a preventative composition pursuant to article 5 of the Bankruptcy Law "The purpose of the preventative composition procedures... is to assist the debtor reach settlements with his creditors under preventative composition scheme under the supervision of the Court, and by assistance of a composition trustee"

Accordingly, while a debtor may be forced into bankruptcy (whereby the creditor or the debtor may pursue restructuring), a proactive debtor may seek to avoid being forced into bankruptcy (where they may lose control of the proceeding) and commence preventative composition.

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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?

A creditor may commence bankruptcy proceedings when they have not been paid a debt for over 30 days, whereas they do not apply to the Court directly for a preventative composition. The Preventative Composition can be used by the debtor to remove their obligation to go to bankruptcy.

A secured creditor cannot enforce their security during a preventative composition without the permission of the Court. While creditors cannot be paid once bankruptcy has been commenced, however a secured creditor may with the permission of the court enforce its security.

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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.

Prior to the introduction of the Bankruptcy Law in 2016, the insolvency laws of the UAE were relatively undeveloped. The Law No 18 of 1993 had provisions, which related to commercial transactions. These were known as the Commercial Transaction Laws, which purported to govern the bankruptcy of traders. It provided a process for people and entities engaged in commerce to be pursued through the courts. However, it was a basic mechanism and was rarely used. These issues were identified in 2009 when Dubai World nearly defaulted.

The Bankruptcy Law applies to:

- 1) all companies governed by the Commercial Companies Law;
- 2) any companies which have by law or voluntarily submitted to the provisions of the Bankruptcy Law;
- 3) companies from the free zones and establishments not governed by other insolvency procedures
- 4) any person who is a "trader" under the law; and
- 5) licensed civil companies of a professional charter.

The Bankruptcy Law was introduced in 2016, with the adoption of Federal Decree Law (No 9) of 2016 and it repealed the bankruptcy provisions of the Commercial Transactions Law. While it addressed commercial insolvencies it did not address consumer insolvencies.

The Bankruptcy Law is still in its infancy and there have only been a few insolvency processes conducted pursuant to these new laws and accordingly their effectiveness is yet to be properly tested. However, on the whole, the introduction of these new laws has generally been well received by the commercial community.

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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 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 first step of the Court's involvement or engagement is after a debtor or creditor makes an application to the Court for an order initiating bankruptcy proceedings – Article 67 of the Bankruptcy Law (allows that it can end with restructuring or liquidation).

As a result of Covid-19, the UAE Court is allowed, following the application by a debtor whose financial condition is caused by the downturn triggered by COVID-19, to grant a short term protection of 40 days to allow the debtor to negotiate a settlement of the debts with its creditors. See Article 170 of the 2020 Bankruptcy Law Amendment.

Once the application is made the Court must:

- 1) appoint an expert from a panel of experts to assess the financial condition of the debtor – see article 77. Noting the Court may reject the application if certain information isn't provided see article 79 or request further information see article 80;
- 2) Determine if other parties ought to be joined to the proceedings and consider making any interim orders regarding the property of the debtor (see article 81);

- 3) Within 5 days of either the application or receiving the experts report on the possibility of a successful restructuring the Court is required to determine the application for commencement of bankruptcy procedure (see Article 78).
- 4) the Court will be required to make determinations regarding the ability or otherwise of a secured creditor to enforce their security. In determining this, the Court must be satisfied that there is no collusion between the debtor and the secured creditor.
- 5) the Court, once it approves the commencement of the bankruptcy proceedings, must appoint a trustee;
- 6) the Court will determine the trustee's fees and authorise the payment from the funds deposited by the debtor when making the application.
- 7) the Court must determine any objections from interested parties related to the Trustee's fees;
- 8) the court is required to provide any information regarding the debtor to the Trustee;
- 9) the court also has the power to appoint a supervisor (see article 85).

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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.

It is important to have impartial oversight when going through an insolvency. This ensures that the interests of both the creditors and the debtor is adequately protected. The significant oversight by the Courts in the UAE at every stage of the process, even the with respect to a secured creditor enforcing its security, suggests that the Court and the legislation is aimed at ensuring the process does not prejudice anyone unduly.

However, while it is still in its infancy, it is too early to say whether this will have the desired effect or whether it will lead to other issues. For instance, while there are very few cases before the Courts they may be able to address all the issues within the timeframes prescribed. Though, as they get busier, this may become overly cumbersome leading to long delays and drawn out liquidations which end up prejudicing both the creditor and the debtor.

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

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BNE 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. BNE LLC owns a restaurant site which is under development, but the development is not expected to be completed for several months. The site had been purchased by one of BNE LLC's shareholders and was transferred to BNE LLC on the basis that payment for the site would be made by BNC LLC to the shareholder in full in 2025. 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.

Step 1 – BNE LLC makes an application to court pursuant to Article 6 of the Bankruptcy Law to enter preventative composition. This application will set out BNE LLC's position, its proposal for preventive composition and a proposed trustee;

Step 2 – The court is required to appoint an expert to prepare a report on BNE LLC's financial position and opine on whether BNE LLC has met the necessary criteria to accept preventive composition procedure – this takes no longer than 20 days post the expert being instructed

Step 3 – The court has 5 days post receipt of the report to determine the application;

Step 4 – The trustee has 5 days after its appointment to publish a summary of the court's decision to commence the preventive composition procedure and invite creditors to file claims within 20 business days of the publication (total 25 days);

Step 5 – The trustee is required to lodge a list claimants to the Court within 10 business days. This will include details of the debts and the supporting information including the trustee's views as to whether to accept or reject the claims;

Step 6 – The preventive composition scheme must be submitted within 45 days from the publication of the decision initiating the preventive composition scheme. This can be extended by an addition 20 business days.

Step 7 – the Court is required to review the draft scheme within 10 business days of its submission

Step 8 – The Court directs the trustee to issue invitations within 5 business days to the creditors for the purpose of attending a creditors meeting (to be held within 15 days of the date of the direction from Court) to discuss the scheme.

Step 9 – Once the scheme is approved by the creditors the trustee has 3 business days to put the scheme before the court for approval or rejection. The Court has 5 business days to make a determination.

Step 10 – the trustee has 7 business days to register the court's decision and publish a summary of the scheme.

Total days – 155 business days

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Question 4.2 [maximum 5 marks]

BNE 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.

If the scheme is rejected, the court may terminate the preventative composition and the debtor would be subject to bankruptcy procedures.

The trustee appointed for the preventative composition scheme would be terminated. However, he could potentially be reappointed as the bankruptcy trustee..

By virtue of the COVID-19, BNE LLC could apply to the Court for a short 40 day period of protection to attempt to negotiate a settlement with its creditors (see Article 170 of the 2020 Bankruptcy Law Amendment).

However, regarding the creditors and staff who were not paid – once the court makes an order commencing the bankruptcy procedures BNE LLC is no longer allowed to manage its assets or pay creditors.

Further the Court is required to appoint a trustee. As mentioned, it could be the same trustee appointed for the purpose of preventative composition scheme or another person nominated by the debtor or enrolled in the table of experts appointed by the Financial restructuring Committee and can be either a natural or legal person. The court has the discretion to appoint up to 3 to act jointly. However, the creditors are not allowed to act a trustees and neither is a relative or a spouse or anyone who has had a prescribed commercial relationship with BNE LLC in the previous 2 year.

Interestingly, given the payments are outstanding, the trustee may apply to the court to suspend interest and other penalties for non-payment. Given the employees are not being paid, the trustee can apply to the court to rescind the employment contracts (however the commencement of a restructuring does not automatically rescind a contract).

With respect to the land which on which BNE LLC has a restaurant site, the shareholder is secured by a mortgage and while the trustee in a liquidation scenario is required to liquidate all the assets the proceeds of the sale of land are to be applied to the debt owed to the secured shareholder/creditor, minus the costs of sale. However, any surplus from the sale is returned to BNE LLC.

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Question 4.3 [maximum 5 marks]

BNE LLC incorporated and registered a fully-owned subsidiary company in the DIFC to operate a restaurant in the DIFC, The subsidiary is called BNE Limited and it is incorporated as a DIFC company. BNE Limited is also unable to pay its debts.

What actions can BNE Limited's creditors take if they wish to see BNE Limited liquidated in the DIFC? In particular, who can take such actions and what steps would have to be taken?

There are a few options. In short:

- 1) they could seek a creditor's voluntary winding up on the basis that it is insolvent. If the creditors sought a voluntary winding up, it would commence once the company passes a resolution to wind up.; or
- 2) they could seek a compulsory winding up under the supervision of the court. For a compulsory winding up, the court can order this if:

- a) the company has passed as resolution to that effect;
- b) if it is unable to pay its debts;
- c) if a moratorium under the Company Voluntary Arrangement has ended without being approved;
- d) under provisions of the DIFC Insolvency Law; or
- e) if the court considers it just and equitable.

The creditors could bring an application to the court seeking that it be wound up compulsorily. If the creditors have a debt over US\$2,000 they can apply to the court for an order even if the company is in VL.

If BNE Limited 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?

Liquidators are responsible for liquidating the debtor's assets and distributing to the creditors (and where possible members) of a debtor. When distributing a dividend to the company's creditors the liquidator may withhold sufficient funds to pay the costs of the liquidation including its fees.

Following which the creditors would nominate a liquidator to be appointed following which the directors would cease to have any powers. Further, the creditors can appoint a liquidation committee the first meeting of the creditors. The LC is provided functions under the DIFC Insolvency Law.

Under a compulsory winding up the Court will appoint the liquidator. The court appointed liquidator may choose to stay on as liquidator or call a creditors meeting for the purpose of appointing a new liquidator.

The creditors are required to submit in writing to the liquidator a claim for the amount of its debt (the "proof of debt"). This must be supported by sufficient information to allow the liquidator to verify the claim.

Once the liquidator has done everything he can to wind up the company (including realising all the assets and distributing the proceeds) the liquidator will seek to have the company dissolved. This is done by an application to the DIFC Registrar of Companies.

Where there are insufficient assets to the cover all of the debts, the liquidator may give the creditors and contributories 28 days notice of his intention to dissolve the company.

Irrespective, the liquidator must call final meeting of the creditors at which the liquidator will seek a final release against any further obligations in relation to the winding up. If the creditors refuse, the liquidator will need to apply to the court for a release.

The company is considered to be dissolved three months after the final account was sent to the creditors.

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*** End of Assessment ***