



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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Well Done!

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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.

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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?

The key point of distinction regarding the registration of real property interests in the different emirates of the UAE is security as the substance of the law in relation to mortgage is considered similar in each emirate and each emirate takes responsibility for maintaining their own land registration system.

The key difference between the sale of mortgaged real property following a debtor default is that in the mainland UAE, the mortgagee is given the right to sell but this right must be exercised through the courts. The regulations in financial free zones are based on the United Kingdom Insolvency Act 1986 and therefore there is greater flexibility and efficiency in enforcement.

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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;
- (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) In Preventive Composition, Debtors are responsible for the decision on any application to commence insolvency proceedings and in Restructuring it can either be the debtor or creditor. However, under the recent bankruptcy Law Amendment, as of 31 July 2021, creditors can no longer initiate bankruptcy proceedings.
- (b) In Preventive Composition, the Court makes the primary determination as to whether the debtor's proposal should be adopted. The Court may also therefore request that amendments are made to the scheme if it does not consider all interest parties. In Restructuring, the primary determination of the scheme is also done by the Court.
- (c) In both the Preventive Composition and Restructuring, confirmation of the primary determination as to whether the debtor's proposal should be adopted is done by the Creditors at a Creditors Meeting convened by the trustee. However only creditors whose debts have been admitted are allowed to vote on the scheme and secured creditors are not allowed to vote unless they have surrendered their security.
- (d) In Preventive Composition and Restructuring, the supervisory role of the insolvency process is done by the Trustee. The trustee is also in charge of communicating any failures in the scheme to the Court and also to report to the court every three **months**.

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- a)The Court
- b)The debtor's unsecured creditors
- c)The Court

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)?

The key difference is that in the application to commence Preventive Composition the debtor must set out in their application the position, proposal details and proposed appointee trustee details to oversee the engagement. In the application to commence Bankruptcy, if the applicant is a debtor, the application should include specific document relating to the financial position, proposed appointee trustee to oversee engagement. If the application is made by a creditor, that creditor should produce with their application a copy of the notice of the demand for payment of debt along with all documents to support their **notice**.

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Your answer does not address the brief and fails to reference the circumstances that could give rise to the application.

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?

The key difference is that in Preventive Composition, this can only be initiated by the debtor, not by the creditor as it is referred to being "debtor led". In Bankruptcy however, the application can be made by either the debtor or the creditor. Also, Preventive Composition is different because this could be sought as an option, but Bankruptcy is an alternative to **liquidation**.

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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.

Insolvency laws were considered underdeveloped until 2016. In 2009, when a company invested by Dubai Government faced issues of defaulting on its debt, it was clear that appropriate insolvency regimes were necessary. Therefore in 2016, Dubai adopted the Federal Decree Law (No 9), which has been amended twice since being adopted. Historically, there were basic provisions made or Insolvency in Commercial Transactions Law No 18 of 1993 which was superseded by the laws introduced in 2016. In 2019, they then adopted the Federal Decree Law (no 19) which aimed to cover personal bankruptcy law. It is said that both Bankruptcy Laws have been welcomed by the commercial community.

In an article posted in the Arabian Business in 2017 (a year after the law was adopted), it is quoted that "the drafting of the legislation was sound" and it was also considered to be "a very good law". The article also mentioned that "This bankruptcy law is more geared towards punishing people who fail, rather than simply trying to protect genuine cases of failure", however there has not been a sufficient number of insolvencies to assess how the Laws meaningfully work in practice.

The Bankruptcy Law applies to the following groups (which do not include state-owned companies, unless they have opted to use this law):

- All companies that are governed by the Commercial Companies Law
- All companies that are established under other legislations but have voluntarily submitted to the provisions of the Bankruptcy Law
- Companies located in the free zone that are not governed by other insolvency procedures
- Any person who is engaged in commercial activities in a personal capacity, a "trader"
- A licensed civil company of a professional partnership

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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 in a Restructuring in Bankruptcy process involves an application to Court, which is initiated by a debtor or a creditor. There are various pieces of information that are required to be provided to the Court including information relating to the debtor's financial position for the Bankruptcy application can be made, and the Court has the right to reject any application that does not include such information. The court is also required to appoint an expert to assess the financial information provided by the debtor, for accuracy and to prepare a report which will be reviewed by the court and make a determination on whether bankruptcy proceedings should be commenced within 5 business days of receiving the report from the expert.

Once bankruptcy proceedings have commenced, the court may appoint a supervisor and is required to appoint up to three trustees. The appointment of the trustees may be subject to objection, which should be actioned within 5 business days of the announcement of the trustee's appointment and the court is then therefore required to make a final determination 5 days later.

Once the trustees have been appointed, they are required to prepare and issue a report to the court which should address matters including the possibility for restructuring and whether the assets of the debtor may be sold. Once the report has been reviewed by the court and the creditors and a meeting of creditors has been convened, the court makes the final determination as to whether the debtor should then be restructured. The scheme for a proposed restructuring will be prepared by the trustee and the court is obligated to review and

approve the scheme before it goes to the creditors and a meeting of creditors is once again. Once approved by the creditors, the court will then have the final approval.

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5

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.

In any Insolvency system, it is my belief that the Courts involvement in approving restructuring are important and necessary. Liquidators are officers of the Court and are appointed to maintain the highest level of honesty and integrity. However, there are some creditors that may require the extra confirmation on any restructuring schemes from the Judge further to the scheme being approved by the creditors. Not all creditors are allowed to vote on the scheme, and this may be the reason why the Court is still required to intervene and seal the deal. In the Court remaining involved in the process, all creditors' interests are safeguarded and not just a selective few.

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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 BNE 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.

The step-by-step process for Preventative Composition is as follows which will determine the maximum time taken for the entire process is as follows:

- The application is made to the Court and upon receipt the Court reserves the right to request additional documents.
- The court is then required to appoint an expert to prepare a report on the financial position of the debtor (to ensure this is in line with what has been reported in the

application). Once prepared, the report must be delivered within **20 days** from the appointment of the expert.

- The court is then obligated to make a decision on the application within **5 business days** of the date of the experts' report.
- Once the court moves to approve the scheme, the court will then appoint a Trustee. The Trustee is appointed to take stock of the assets of the debtor and produce a report for the creditors. Within **5 business days** of the appointment of the trustee, the trustee is required to publish a summary of the court's decision to commence proceedings and invite creditors to submit their claims within **20 business days** of the publication.
- Once the period for submission of claims have passed, the trustee is to prepare a list of all claimants and file the list within **10 business days** from the end date for lodging claims. The court will then have **10 business days** to accept or reject the list of creditors.
- The Preventive Composition scheme must be submitted within **45 business days** from the date of the Courts publication approving the proceedings.
- The Court should make a ruling on the scheme submitted within **10 business days** from the date the scheme was submitted. Once approved, the Trustee will publish a notice calling a meeting of creditors within **5 business days** from the Courts initial approval of the scheme and the meeting must be held within **15 business days** from the date of the notice.
- Once the creditors have approved the Scheme, the Trustee will issue the scheme approved by the creditors to the Court within **3 business days** of the meeting. The Court will then have **10 business days** to approve the scheme.
- **7 business days** after the Court has approved the scheme, the Trustee will then be required to register the Courts decision in the debtor's government corporate register and publish a summary.
- The Scheme once approved should be implemented within **3 years** from the date of approval.

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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.

There are different reasons as to why a creditor would not approve a scheme of arrangements. If for any reason the debtor has committed an act of bankruptcy (being in default for 30 days before the preventive composition application) or if the scheme would lead to the debtor being unable to pay their debts for an additional 30 days. Once the scheme has been rejected, the debtor can be automatically obligated to enter into bankruptcy proceedings. Bankruptcy Proceedings can also be commenced irrespective of no creditor support as debtors can also initiate bankruptcy proceeding in Dubai. A debtor may initiate bankruptcy proceedings if the debtor is in default of its payment obligations for 30 consecutive days. Once the court accepts the bankruptcy procedure, they will appoint a trustee. The trustee may be a person nominated by the debtor or an individual that is appointed by the Financial Restructuring Committee. The individual appointed as trustee can be a natural or legal person and any three persons can be appointed to act at the same time. A trustee cannot be a creditor, a relative or spouse of the debtor, a person who has been convicted of dishonesty felonies or a person who had a commercial relationship with the debtor in the previous 2 years.

Winding up proceedings can also be entered into. The definition of winding up as quoted in the Guidance Text is "a process whereby a liquidator is appointed to realise the

assets of the company and to distribute those assets as required by law". As BNE LLC has exhausted all cash to pay creditors, the Company will possibly be subject to compulsory winding up procedures, which is pursuant to an order made by the DIFC court as the company is deemed unable to pay their debts as they become due. As the creditors of the BNE LLC are not supporting the process, the application to the Court can be made by the Company or its directors.

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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? 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?

BNE Limited can be wound up in the DIFC, which can be conducted by the voluntary method as BNE is unable to pay their debts. The creditors can seek to proceed with a creditors voluntary winding up and in commencing those proceedings, the creditors will nominate a liquidator. Once the resolution is signed by the creditors, the liquidation process has commenced, and the company will cease to continue trading and the directors will cease to have any power. The liquidator will then be obligated to wind up the affairs of the company and to realise and distribute any assets to the creditors of the Company and investigate the affairs of the Company to ascertain what caused the Company to fail, the powers of which are described in Schedule 3 to the law. Following the investigations, if there is any further information that is required, the liquidator can request that this information is provided. The Liquidator will also be responsible for calling claims from creditors, with the additional responsibility of proving, ranking and paying out creditor claims. During the liquidation, it is the responsibility of the Liquidator to ensure that they report to the creditors and provide regular updates. Any claims submitted should take into account any set-offs and may take into account any accrued interest to date of the commencement of winding up. The Liquidator has a right to request additional documents from creditors, on in turn reject any claims. Any creditor that is unsatisfied with their claim being rejected, can appeal the decision within 21 days of the receiving the notice of the decision.

The Liquidator will then be obligated to declare a dividend and distribute this amongst the creditors. In a voluntary winding up, the expenses of the liquidation are paid out of the assets of the Company in priority to all other claims. In the instance that all creditors have been paid in full (including interest payments on their claim), any remaining assets will be paid to the shareholders as per the Company's constitution.

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*** End of Assessment ***