



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.

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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 between mainland UAE and the free zones is that the property can be dealt with in the freezone without Court sanction in similar way to many common law jurisdictions where secured creditors can still take possession of, and dispose of a secured debt ie the secured creditor can enforce their rights notwithstanding the debtor default and insolvency.

In mainland UAE, whilst the creditors rights are not substantially affected by the insolvency, the creditor is required to seek Court sanction to deal with or dispose of the property. Primarily it appears so that the Court can ensure that there has been no collusion between the Debtor and the creditor.

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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) the Debtor
- b) The Court
- c) The Expert
- d) The **Trustee**

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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 in the circumstances between a debtor applying for Preventative Composition versus Bankruptcy would be whether or not:

- a) the assets of the debtor, at any given time, do not cover the liabilities; or
- b) where a debtor is deemed to have been insolvent upon cessation of payment of statutory debts as they fall due for more than 30 consecutive business **days**

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Does not address preventive composition

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 for a creditor regarding the commencement of a Preventative Composition or Bankruptcy of a debtor is that the creditor can initiate a bankruptcy proceeding where they cannot do so for a Preventative Composition.

Further, secured creditors are unable to vote on a proposed plan for a preventative composition, whereas unsecured creditors can vote on a plan, thus the class of creditor will also be a key difference in how the insolvency process is planned, and then **administered**.

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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.

The UAE Bankruptcy Law came into force on 29 December 2016 (the "Bankruptcy Law"). Historically, most corporate insolvencies in the UAE had been resolved through consensual restructuring of the debtor company's liabilities. The Bankruptcy Law was considered a major step forward in modernizing and streamlining UAE insolvency law, such that is hoped to:

- *place a new emphasis on the early restructuring of indebtedness for distressed companies.*
- *destigmatise business failure and,*
- *lead to the promotion of a more robust legal framework for entrepreneurs and an improved climate for investors (Norton Rose Fulbright Dec 2017).*

Thus providing greater focus on turnarounds and rehabilitation of companies whilst ensuring accountability remains for Directors of companies. The Bankruptcy Law applies to companies incorporated pursuant to the Commercial Companies Law, corporate entities and individuals trading for profit (such as lawyers and accountants), with certain key exceptions such as governmental bodies, and companies incorporated within free zones which have their own comprehensive insolvency laws that provide for composition, restructuring or bankruptcy procedures, such as the DIFC and the ADGM.

Whilst it has been received well in the UAE and provides structure and a degree of certainty for creditors around the insolvency process, it is too soon to say how well it has been applied due to the small number of bankruptcies that have taken place, and that some matters are still being dealt with by consensual agreement with creditors, which is not prohibited.

Commented [DJ12]: The influence of Dubai World on the developments and reform.
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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 Court is heavily involved in a restructuring process via the Bankruptcy Law, indeed it is very much a Court led process once the bankruptcy application has been made.

From the receipt of the application, and pursuant to Article 77 of the Bankruptcy Law, the Court will appoint an expert from an approved panel to prepare a report on the financial position of the debtor. The report must include their opinion on whether restructuring would be possible and whether the debtor's assets are sufficient to cover the costs of the process. The Court will decide whether to approve the application and start bankruptcy proceedings within 5 days of the report being received under Article 79.

If the bankruptcy is approved, the debtor is placed under the supervision of a court appointed Trustee. All fees and costs incurred by the Trustee are approved by the Court (article 85) and the Court can substitute or relieve a Trustee if it believes it is required.

If the Trustee believes there is a reasonable prospect of restructuring the debtor's business, a restructuring plan (following creditors opportunity to comment on the same) is submitted to the Court. It is the Court who will determine the final list of creditors (Article 94) rather than the Trustee and will review the report will direct the Trustee to hold a creditors meeting within ten days to consider the scheme. The Court will also examine the proposals made and within ten days, decide whether to initiate a restructuring process or proceed to full liquidation (article 98). The Court can also direct the Trustee to vary the proposal if it believes that all parties interests have not been properly considered (Article 103). The court may also direct the formation of committees and instruct on the appointment or conduct of their representatives (Article 104).

Following the creditors meeting approving the scheme also, the Court will approve or reject the scheme and its decision is final (Article 108). Whilst the Trustee is responsible for

implementing the scheme, a report is submitted to the Court every three months (Article 113). Upon completion of the scheme, the Court makes an Order confirming the same, which is advertised. (Article 115)

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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.

Although the level of Court involvement in the restructuring is unusual, I believe certain actions taken by it to be appropriate, particularly if dealing with large complex restructurings with many stakeholders.

A court appointed expert is instructed to review the financial status of the company, which ensures that there is complete transparency over the company's status as a going concern.

The report is reviewed by the Court, who also adjudicates on the final list of creditors. This may provide stakeholders with comfort that there is judicial oversight over the proposed plan, and in particular, creditors may regard their interests have been fairly considered, without prejudice.

With a Court appointed Trustee, the creditors may also believe that the nominated individual has been selected based on their credentials only and will truly be independent as they have not been nominated by the debtor or a group of creditors with competing self-interests.

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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.

Step 1: BNE LLC makes an application to the Court for a Preventative Composition

Step 2: The Court appoints a financial expert to prepare a report on the financial status of BNE LLC which must be provided no more than 20 business days from the appointment.

Step 3: The Court will decide within 5 business days of receipt of the report, whether to accept or reject the application.

Step 4: Acceptance of the PCP application: A Trustee will be appointed by the Court who will publish the Courts decision and invite creditors to submit their claims within 20 business days.

Within 10 business days of the lodging of creditor claims, the Trustee will create a list of claimants and provide it to the Court.

Step 5: Submit draft PCP: Within 45 business days from publication of the court's decision the Trustee will prepare and submit a draft PCP.

Step 7: Within 10 business days of the submission of the scheme, the Court reviews the draft submission and if approved, directs for notification of a creditors meeting to be held, that notification to be made within 5 business days.

Step 8: A creditors meeting is held within 15 business days of the notification.

Step 9: If the requisite majority is obtained at the creditors meeting, the trustee presents the PCP to the Court within 3 business days.

Step 10: Within 7 business days of the approval by the Court of the PCP, the Trustee is required to register the approval with the debtors governmental corporate register.

Maximum time-frame is 140 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.

Upon confirming BNE's financial position and the creditors rejecting both the PCP and a restructuring, the Court will provide an Order for its liquidation.

The Trustee may be the same Trustee that was appointed for the Preventative Composition pursuant to Article 126. The Trustee's appointment must be advertised within three days of the Order.

BNE's creditors will make their claims to the Trustee within 10 business days.

The Shareholder who is due to receive payment for the development site in 2025 over which he has a mortgage, will adjust his claim to that which is equivalent to legally payable interest.

As the Trustee is required to liquidate all of BNE's assets, its restaurants (along with other assets held eg equipment) if owned will be put to sale at public auction. It is possible that the sale process could be held over 6 months (and possibly extended by another 2) if in the public interest to do so. Bearing in mind the circumstances that led to its deterioration, being the impact of COVID, it may be the case that BNE is provided this extension.

The proceeds of the sales will be distributed in order of priority, after the payment of any security and the Trustees costs for the sale process.

Thereafter the proceeds will be distributed to court costs, Trustees costs, unpaid wages (to a maximum of three months), alimony debts, debts to government bodies and then to creditors. Thus in this situation, even though the employees have not been paid for 4 months, they will in fact only received 3 months, subject to there being sufficient surplus to distribute.

If the assets of the company are insufficient to pay 20% of the debts of the company, BNE's directors and managers may be required to pay those debts.

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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?

The DIFC Insolvency Law (DIFC Law No. 1 of 2019) (the 'Insolvency Law') sets out the procedures that result in the liquidation of an insolvent company.

BNE Ltd's creditors could seek a winding up in the DIFC (subject to passing a \$2000 threshold) by applying to the DIFC Court. As an aside, the Directors can also seek its winding up, as can the DIFC Authorities.

The liquidation must be formally approved by the DIFC courts and, will be binding on BNE and all of its creditors. Immediately following the issuing of a winding-up order by the court, no further proceedings may be brought against the debtor except with the permission of the DIFC court.

A DIFC-licensed liquidator will be appointed to realise BNE's assets and distribute surplus funds post the realisation of its assets. The liquidator will be responsible for the liquidation and will report to creditors on actions taken during its course. Although the liquidator will be appointed by the Court in the first instance, the creditors can nominate a liquidator at the creditors meeting, and if different to that of the Court or BNE's choosing, the creditors decision is implemented.

Once a liquidation has been approved by the court, creditors wishing to share in the proceeds of the liquidation will need to prove in the insolvency within a time-frame determined by the

court. The liquidator will call for claims and will adjudicate, pay and rank on the same. Creditors must provide a proof of debt claim setting out the claim in writing with supporting documentation.

The liquidator can also disclaim onerous property or unprofitable contracts. All debts are paid pari passu subject to the payment of preferential creditors and liquidators costs. In the event that the company has surplus funds post realisation of its assets, interest is paid on creditors claims if they are interest bearing.

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Type your answer here]

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