



**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.

Commented [DJ1]: TOTAL: 46 OUT OF 50  
Well Done!

Commented [DJ2]: 8 out of 10

Commented [DJ3]: d

(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.

Commented [DJ4]: b

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

Commented [DJ5]: 8 out of 10

#### 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, including mortgages, in the different emirates of the UAE is the governing law of each emirate which may differ, in one way or the other, as it relates to the registration and enforcement of such mortgages.

The key difference between the sale of mortgaged real property following a debtor if that real property is in a financial free zone or if the real property is in "mainland" UAE is that in "mainland" UAE the right to sell must be sanctioned by the court whereas court sanction is not required in a financial free zone.

Commented [DJ6]: 2

#### 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.

In respect of preventive composition:

- a) The debtor is responsible for a decision on any application to commence a preventive composition.
- b) An expert is responsible for the primary determination as to whether the preventive composition should be adopted.
- c) The court is responsible for confirmation of the primary determination as to whether the preventive composition should be adopted and officially commence.
- d) The court appointed trustee is responsible for supervising the implementation of the preventive composition by the debtor.

In respect of restructuring:

- a) The debtor or a creditor is responsible for a decision on any application to commence bankruptcy proceedings of which one of the two outcomes is restructuring.
- b) An expert is responsible for the primary determination as to the likelihood of a debtor successfully completing a restructuring.
- c) The court is responsible for confirmation of the primary determination as to whether bankruptcy proceedings should be commenced.
- d) The court appointed trustee is responsible for formally considering the likelihood of a successful restructuring and if likely (and directed by the court), preparing, developing, and supervising the implementation of the restructuring of the debtor.

### 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)?

Under the UAE Bankruptcy Law, for a debtor, 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):

- a) In respect of Preventive Composition, the court will accept an application only if the debtor is not in a state of cessation of payment for more than 30 consecutive business days as a result of the debtor's financial condition, and if the debtor is not over-indebted.<sup>1</sup>
- b) In respect of Bankruptcy, a debtor shall make a court application if the debtor has ceased to make payment of the debtor's debts on their respective due dates for more than 30 consecutive business days due to the debtor's distressed financial condition or if the debtor is in a state of over-indebtedness.<sup>2</sup>

### 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 Preventive Composition or Bankruptcy of a debtor is that it has no right to apply for the commencement of Preventive Composition whereas it does in respect of Bankruptcy of a debtor.

Commented [DJ7]: 2

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

Commented [DJ8]: 2

Commented [DJ9]: 2

<sup>1</sup> Federal Law by Decree No. (9) of 2016 on Bankruptcy, art 6(2).

<sup>2</sup> *Idem*, art 68(1).

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

Commented [DJ10]: 15 out of 15

**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 Bankruptcy Law was introduced in 2016. Prior to 2016, insolvency laws in the UAE were very minimal and only covered the basics as it related to those engaged in commerce. The process provided for required court approval but was only used very rarely.<sup>3</sup>

In 2009, the deficiency in the insolvency laws was highlighted where a government owned entity, Dubai World, was at risk of becoming insolvent due to a potential default. Due to the nature of the entity, being an investment company, international attention and concern arose. Ultimately, Dubai World was able to satisfy the outstanding creditor claims however, the uncertainty that resulted from a lack of developed insolvency laws highlighted the importance of such laws.<sup>4</sup>

Some six years later, in 2016, a comprehensive set of insolvency laws were introduced via the Bankruptcy Law.<sup>5</sup> The Bankruptcy Law applies to the following:<sup>6</sup>

1. Companies governed by the Commercial Companies Law.
2. Companies not established under the Commercial Companies Law and which are wholly or partly owned by the federal or local government, and which have enabling legislation, or memoranda or articles of association stipulating that the Bankruptcy Law applies.
3. Companies and Establishments in the Free Zones which are not governed by particular provisions regulating protective composition procedures, financial restructuring and/or bankruptcy.
4. Any individual who is a "trader" as defined under the Commercial Transactions Law.
5. Licensed Civil Companies carrying out professional activities.

The Bankruptcy Law was well received as the need for it was well understood. However, there have not been many insolvency processes commenced pursuant to the Bankruptcy Law. As such, there are currently insufficient statistics available to demonstrate its effectiveness or application in the UAE.<sup>7</sup>

Commented [DJ11]: 5

<sup>3</sup> Gambrill, Bill, *Module 7E Guidance Text: United Arab Emirates*, INSOL International (2021), pp 6-7.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Idem*, p 7.

<sup>6</sup> Federal Law by Decree No. (9) of 2016 on Bankruptcy, art 2.

<sup>7</sup> Gambrill, Bill, *Module 7E Guidance Text: United Arab Emirates*, INSOL International (2021), p 7.



### 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.

If a debtor company seeks to enter bankruptcy, the Court remains actively engaged throughout the entirety of the Restructuring in Bankruptcy Process from the determination of the application, to the appointment of the trustee, to the determination of whether to proceed with restructuring, to approving the restructuring plan, and to monitoring the implementation of the plan to completion. These are discussed in further detail below.

#### Determination of Application

1. In determining the application for opening bankruptcy procedures, to assist in the evaluation of the debtor's status, the Court may decide to appoint an expert to report on the debtor's financial position including the possibility of restructuring the debtor and whether the debtor's assets are sufficient to cover the restructuring costs.<sup>8</sup>
2. If the Court finds that the requirements to commence a bankruptcy proceeding are met, the Court shall accept the application and order its commencement.<sup>9</sup>
3. The Court may summon any person who may possess information relevant to the application.<sup>10</sup>
4. The Court shall decide whether to take necessary measures to maintain or manage the debtor's assets including sealing the premises of the debtor's business pending the determination of the application.<sup>11</sup>

#### Appointment of the Trustee

1. If the Court decides to accept the application, it shall appoint a trustee.<sup>12</sup>

#### Trustee's Report

1. The trustee shall prepare a report on the debtor's business and submit a copy to the court including an evaluation of the possibility of restructuring of the debtor's business and whether a restructuring plan should be submitted to its creditors.<sup>13</sup>

#### Determination of the Report

1. The court may decide to proceed with the restructuring and instruct the trustee to prepare a restructuring plan.<sup>14</sup> The court requires the trustee to submit the draft restructuring plan within 3 months (subject to an extension at the court's discretion) from the date of the decision.<sup>15</sup>

---

<sup>8</sup> Federal Law by Decree No. (9) of 2016 on Bankruptcy, art 77.

<sup>9</sup> *Idem*, art 78(2).

<sup>10</sup> *Idem*, art 80(1).

<sup>11</sup> *Idem*, art 81(1).

<sup>12</sup> *Idem*, art 82(1).

<sup>13</sup> *Idem*, art 96(1).

<sup>14</sup> *Idem*, art 98(3).

<sup>15</sup> *Idem*, art 99.

## The Restructuring Procedure

1. The trustee shall notify the court on a regular basis and at least once every 21 business days of the progress on the preparation of the draft restructuring plan.<sup>16</sup>
2. The court shall, within 10 business days from the date of submission of the draft restructuring plan, review the draft plan to ensure that it takes into consideration the interests of all parties. The court may instruct the trustee to make any necessary amendments. The court will then instruct the trustee to invite creditors to attend a meeting to discuss and vote on the draft restructuring plan.<sup>17</sup>

## Creditors' Committees

1. The court may, after consultation with the trustee, issue a decision to establish one or more committees of creditors holding ordinary debts (I am ignoring secured creditors for the purposes of this question).<sup>18</sup>
2. The court may invite creditors affected by any proposed amendments of the restructuring plan to additional meetings to consider such amendments, and the court may decide to approve or dismiss any of the proposed amendments.<sup>19</sup>
3. The court may, upon the recommendation of the trustee, also permit creditors whose debts are provisionally accepted to vote on the draft restructuring plan.<sup>20</sup>

## Approval of the Restructuring Plan

1. The trustee shall present a draft of the restructuring plan to the court for a decision approving or rejecting the plan. The court shall determine any objections received by creditors. The court shall issue its decision to approve the restructuring plan which shall be binding on all relevant creditors.<sup>21</sup> If the court refuses to approve the draft, the court may return the draft to the trustee requesting amendments thereof.<sup>22</sup>
2. If any of the debtor's assets are essential to the continuation of the debtor's business, the court may decide that such assets shall not be disposed of without its approval and to replace any security that the assets may be subject to.<sup>23</sup>

## Implementation of the Approved Restructuring Plan

1. Court approval is required for any substantial amendments considered necessary by the trustee during the implementation of the restructuring plan. The court shall, prior to determination of the application, by notice, invite comments on the proposed amendments by all relevant parties. The court may issue a decision permitting the amendment in whole or in part or rejecting the amendment.<sup>24</sup>
2. Upon the fulfilment of all the obligations provided for in the restructuring plan, the court shall issue a decision confirming completion of the implementation of the restructuring plan and conclusion of the restructuring procedures.<sup>25</sup>

Commented [DJ12]: 8

---

<sup>16</sup> *Idem*, 100.

<sup>17</sup> *Idem*, art 103.

<sup>18</sup> *Idem*, art 104(1).

<sup>19</sup> *Idem*, art 105(3).

<sup>20</sup> *Idem*, art 106(3).

<sup>21</sup> *Idem*, art 108.

<sup>22</sup> *Idem*, art 109(1).

<sup>23</sup> *Idem*, art 112(1).

<sup>24</sup> *Idem*, art 114(3).

<sup>25</sup> *Idem*, art 115.

**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.

The high degree of court involvement in approving a restructuring pursuant to the UAE Bankruptcy Law is appropriate. The Bankruptcy Law is relatively new and not highly tested so uncertainty surrounding the procedures contained therein, including those relating to restructuring, is still present amongst creditors.

The court's involvement includes appointing an expert at the outset to make an initial evaluation of the possibility of restructuring, deciding on the application for bankruptcy procedure based on such evaluation, appointing a qualified trustee to administer the procedure, deciding on whether to proceed with a restructuring based on the trustee's initial report, monitoring the preparation of the draft restructuring plan and its approval by creditors, sanctioning the restructuring plan, and monitoring the implementation and completion of the plan.

Such heavy involvement will give comfort to creditors that due process is followed and that the restructuring is administered by qualified and experienced individuals.

Commented [DJ13]: 2

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

Commented [DJ14]: 15 out of 15

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.

The 10 specific steps that would be used by BNE LLC to implement a Preventive Composition are as follows:

1. BNE LLC would apply to the court to commence the Protective Composition Procedure.<sup>26</sup>
2. For the purposes of this question, it is implied that the Court will appoint an expert to prepare a report on the financial position of BNE LLC, including an assessment as to whether the conditions to accept the application are met, which is to be submitted no later than 20 business days from the date of appointment.<sup>27</sup>
3. The Court shall decide on the application within a period not exceeding 5 business days from the date on which the expert submits the report.<sup>28</sup> For the purposes of this question, it is implied that the Court will approve the application and order the commencement of the Protective Composition Procedure.
4. Upon acceptance of the application, the Court will appoint a trustee and shall notify the trustee of the appointment by no later than 1 business day after the issuance of the order.<sup>29</sup> Within 5 business days of the date of receiving a notice of appointment, the trustee shall publish notice of decision to commence the Protective Composition Procedure and invite any creditors to submit their claims no later than 20 business days from the date of publication.<sup>30</sup>
5. After the 20 business days, the trustee shall prepare a list of the creditors who have submitted claims including the initial outcome of their adjudication of claims and deposit the list with the Court within 10 business days.<sup>31</sup>
6. The Protective Composition Plan must be submitted to the Court within 45 business days from the date of publication of the commencement order.<sup>32</sup>
7. The Court shall, within 10 business days from the date of submission of the draft Protective Composition Plan, review it to ensure that it takes into consideration the interest of all parties. For the purposes of this question, it is implied that the Court will find the draft plan satisfactory after which it shall instruct the trustee to invite the creditors to a meeting to discuss and vote on the draft within 5 business days.<sup>33</sup>
8. The meeting shall be held within 15 business days from the date of publication of the invitation.<sup>34</sup>
9. The draft Protective Composition Plan shall be approved by the majority vote of the creditors provided that such majority holds in the aggregate at least two thirds of the accepted value of the total ordinary debts.<sup>35</sup> The trustee shall, within 3 business days from the date of approval, present the draft plan to the Court for an order approving or rejecting the plan.<sup>36</sup>
10. Within 7 business days from the date of the Court's approval of the Protective Composition Plan (as implied would be done by the Court), the trustee shall register the Court's decision approving the plan in the commercial or professional register, as the case may be, and shall publish notice of the decision.<sup>37</sup>

---

<sup>26</sup> *Idem*, art 6(1).

<sup>27</sup> *Idem*, art 13.

<sup>28</sup> *Idem*, art 14(1).

<sup>29</sup> *Idem*, art 17(5).

<sup>30</sup> *Idem*, art 35(1).

<sup>31</sup> *Idem*, art 37(1).

<sup>32</sup> *Idem*, art 40(1).

<sup>33</sup> *Idem*, art 42.

<sup>34</sup> *Idem*, art 42(4).

<sup>35</sup> *Idem*, art 47(1).

<sup>36</sup> *Idem*, art 49(1).

<sup>37</sup> *Idem*, art 54.

In respect of the above 10 specific steps, the maximum time taken between step 1 and step 10 would be 116 business days.

Commented [DJ15]: 5

**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.

The Court may decide to terminate a Protective Composition Procedure and to convert it to a declaration of bankruptcy of BNE LLC in the following two cases:<sup>38</sup>

1. Where it is proven that BNE LLC has ceased payment for more than 30 successive business days as a result of its distressed financial position or where BNE LLC is in a state of over-indebtedness. Based on the facts of the case, the creditors of BNE LLC have not paid for nearly four months which would satisfy the 30 business day requirement.
2. Where the Protective Composition plan is impossible to implement and terminating the Protective Composition Procedure would result in a cessation of payment by BNE LLC for more than 30 successive business days as a result of its distressed financial position, or BNE LLC is in a state of over-indebtedness. Based on the facts of the case, it appears impossible for any plan to be implemented and, as mentioned in point 1 above, BNE LLC has missed payment for more than the 30 business days.

If the Court orders the termination of the Protective Composition Procedure and converts it to a declaration of bankruptcy of BNE LLC, the following will result:<sup>39</sup>

1. The appointment of the composition trustee shall be terminated, unless the Court decides to keep the appointed trustee as the trustee for the bankruptcy procedure and liquidation of BNE LLC's assets. Should the appointment of the composition trustee be terminated, the Court may appoint a trustee nominated by BNE LLC, a natural or juridical person registered in the Experts' Panel, or another expert, if the Court does not find an expert with the required expertise on the Expert Panel.<sup>40</sup>
2. The Court shall carry on with the bankruptcy procedure and liquidation of BNE LLC's assets.

The trustee shall, within 3 business days from the date of issuance of the judgment declaring the bankruptcy of BNE LLC and the liquidation its assets, publish a copy.<sup>41</sup> In addition, the trustee shall instruct creditors to submit any final claims not previously submitted within 10 business days from the date of publication.<sup>42</sup>

---

<sup>38</sup> *Idem*, art 65.

<sup>39</sup> *Idem*, art 66.

<sup>40</sup> *Idem*, art 82(1).

<sup>41</sup> *Idem*, art 128.

<sup>42</sup> *Idem*, art 129(1).

The trustee shall liquidate all of BNE LLC's assets by auction or otherwise, upon the approval and under the supervision and control of the Court.<sup>43</sup> The trustee shall distribute the proceeds according to the priority among creditors:<sup>44</sup>

1. **Secured Creditors** – It should be noted that upon the declaration of bankruptcy and liquidation of BNE LLC's assets, the holders of secured debts shall rank in priority to ordinary creditors.<sup>45</sup> In this case, BNE LLC's shareholder is a secured creditor as it holds a mortgage over the restaurant site for the unpaid purchase price. The trustee is able to recover reasonable costs and fees incurred during the sale of the secured asset.<sup>46</sup> Where there is a surplus from the proceeds, the surplus shall be held in the interest of BNE LLC, otherwise, the shortfall would be considered an ordinary debt against BNE LLC.<sup>47</sup>
2. **Preferred Debts** – The following debt categories, as appears to be relevant or potentially relevant to BNE LLC based on the facts of the case, shall be considered preferred and repaid in the stated order:<sup>48</sup>
  - a. Any court costs or fees including the trustee's fees.
  - b. The outstanding wages and salaries of BNE LLC's staff, not exceeding the wage or salary for 3 months.
  - c. The amounts payable to government authorities.
3. **Ordinary Debts** – Upon payment of the secured creditor(s) and preferred debt(s), payment of ordinary claims against BNE LLC will be made. Any surplus thereafter will be reimbursed to BNE LLC.<sup>49</sup>

Upon completion of the final distributions to creditors, the Court shall issue a decision to close the bankruptcy procedure and the trustee shall return to BNE LLC all documents in their custody.<sup>50</sup>

Commented [DJ16]: 5

#### 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?

#### Commencement of winding up and appointment of liquidator

One of the circumstances in which a company may be wound up by the Court is where the Company is unable to pay its debts.<sup>51</sup> A company is deemed unable to pay its debts if:<sup>52</sup>

- a) A creditor of a sum exceeding \$2,000 which is due and payable has served a written demand on the company requiring it to pay the sum due and the company has for 3

<sup>43</sup> *Idem*, art 132.

<sup>44</sup> *Idem*, art 137(1).

<sup>45</sup> *Idem*, art 185(1).

<sup>46</sup> *Idem*, art 185(2).

<sup>47</sup> *Idem*, art 188.

<sup>48</sup> *Idem*, art 189.

<sup>49</sup> *Idem*, art 137.

<sup>50</sup> *Idem*, art 138.

<sup>51</sup> Insolvency Law DIFC Law No 1 of 2019, art 81(a).

<sup>52</sup> *Idem*, art 82.

weeks thereafter, neglected to pay the sum or agree terms relating to its payment to the reasonable satisfaction of the creditor.

- b) Execution or other process issued on a judgment, decree or order of any court in favour of a creditor is returned unsatisfied in whole or in part.
- c) It is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
- d) It is proved to the satisfaction of the Court that the value of the company's current assets is less than the amount of its current liabilities, taking into account its contingent and prospective liabilities.

An application to the Court for the winding up of BNE Limited may be presented by, among others, any creditor including any contingent or prospective creditor.<sup>53</sup> Based on the facts of the case, BNE Limited is unable to pay its debts. As such, the creditor's application would be on the basis of BNE Limited's inability to pay its debts.

In respect of choice of liquidator, the winding up order shall identify the person who is to act as such immediately upon the order being made. That person may either continue the liquidation or seek nomination from BNE Limited's creditors for the purpose of choosing a person to be the liquidator.<sup>54</sup>

Assuming the winding up application is granted, upon the making of a winding up order, no action or proceeding shall be commenced or continued against BNE Limited or its property, except by leave of the Court.<sup>55</sup>

#### **Role of the liquidator**

The general functions of the liquidator of BNE Limited would be to ensure that its assets are got in or otherwise secured, realized and distributed to its creditors and, if there is a surplus, to the persons entitled to it.<sup>56</sup>

Should a creditor(s) not file a proof of claim in the liquidation (discussed further below) despite the liquidator taking the necessary steps to give notice of the liquidation, the Court may fix a time(s) after which such creditor(s) will be excluded from the benefit of any distribution made before such debts are proved.<sup>57</sup>

During the winding up, BNE Limited's preferential debts shall be paid in priority to all other debts.<sup>58</sup> In addition, in the event of BNE Limited's assets being insufficient to satisfy its liabilities, the Court may make an order as to the payment of the expenses incurred in the winding up out of BNE Limited's assets, in such order of priority as the Court thinks fit.<sup>59</sup>

#### **Creditor Claims**

In respect of creditors, during the winding up of BNE Limited, a creditor wishing to recover its debt in whole or in part must submit their claim in writing to the liquidator. Information and documentation in support of the claim (including in respect of the amount of claim, particulars

---

<sup>53</sup> *Idem*, art 83.

<sup>54</sup> *Idem*, art 90(1).

<sup>55</sup> *Idem*, art 88(2).

<sup>56</sup> *Idem*, art 93.

<sup>57</sup> *Idem*, art 97.

<sup>58</sup> *Idem*, art 99.

<sup>59</sup> *Idem*, art 98.

of how and when debt was incurred, and particulars of any security interest) must be included.<sup>60</sup>

In respect of secured creditors, if a secured creditor realizes his security interest, he may prove for any balance remaining. If, however, the secured creditor voluntarily surrenders his security interest, for the general benefit of creditors, he may prove for the entirety of the debt as an unsecured creditor.<sup>61</sup>

Upon receipt and review of the proofs of debt, the liquidator may admit or reject the amounts claimed, in whole or in part, as deemed necessary.<sup>62</sup> Creditors may apply to the Court for any such decision of which they may be dissatisfied to be reversed or varied.<sup>63</sup>

Commented [DJ17]: 5

**\* End of Assessment \***

---

<sup>60</sup> DIFC Insolvency Regulations, reg 6.16.

<sup>61</sup> *Idem*, reg 6.23.

<sup>62</sup> *Idem*, reg 6.19.

<sup>63</sup> *Idem*, reg 6.20.1.