



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7E

UNITED ARAB EMIRATES

This is the **summative (formal) assessment** for **Module 7E** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 7E. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment7E]**. An example would be something along the following lines: 202122-336.assessment7E. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

(a) True.

(b) False.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

Question 1.8

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

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

Question 1.9

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

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

Question 1.10

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

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

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [maximum 2 marks]

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

The key difference between the registration of real property interests in different emirates is that each emirate operates its own land registration system and that the registration and enforcement of mortgages may involve different laws and procedures.

The key difference between the sale of mortgaged real property from a debtor in default in a freezone and in 'mainland' UAE is that in the freezones, a creditor may enforce by taking possession of the property without a court order (following 60 days' notice to certain parties) and then sell the property or receive rents to discharge the secured debt. Conversely, in the mainland, a mortgagee can only sell the property after obtaining a court order to do so.

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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.

Preventative composition:

- (a) - the court
- (b) - creditors (2/3 of those eligible to vote)
- (c) - the court
- (d) - the trustee

Restructuring:

- (a) - the court
- (b) - creditors (2/3 of those eligible to vote)
- (c) - the court
- (d) - the trustee

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Question 2.3 [maximum 2 marks]

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

The key difference is that the debtor is that a debtor can make an application to commence a Preventive Composition voluntarily whereas a debtor is under an obligation to make an application to commence Bankruptcy if it is in default of a payment obligation for 30 consecutive business days. Another difference is that only the debtor can instigate a Preventive Composition, whereas an application to commence Bankruptcy can be made by either the debtor or a creditor.

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Question 2.4 [maximum 2 marks]

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

The key difference for a creditor is commencement of Preventive Composition does not trigger all debts of the debtor falling due and payable whereas commencement of a Bankruptcy does. A creditor therefore needs to submit a claim a Bankruptcy for the full amount of all debts due by the debtor, whereas Preventive Composition they only submit a claim for amounts due and payable at the date of commencement.

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Creditors have no right to compel a debtor to enter Preventive Composition. They may apply to the court to initiate bankruptcy if owed more than AED 100,000

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

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Question 3.1 [maximum 5 marks]

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

Prior to the introduction of the Federal Decree Law (No 9) of 2016, insolvency law in the UAE was of limited scope and nature. While there was a basic insolvency mechanism applicable to 'traders', it was very limited and rarely used.

Part of the reason for the previous regime's limited use, which continues to affect the Bankruptcy Act today, is the criminal sanctions that apply to the non-payment of debts. This

risk of criminal sanction means where a debtor is at risk of financial difficulty, they may be inclined to leave the UAE. This is prevalent given the very high proportion of expatriates that live in the UAE.

The need for an expanded and modernized insolvency system was demonstrated in 2009, when a large state-owned investment company, Dubai World, was at risk of defaulting on its debt. At the time, it would have been the largest government default globally since 2001. Dubai World resolved its financial difficulties without needing to enter an insolvency process. However, the threat of default highlighted the gap in regulation in the UAE. The Federal Decree Law (No 9) was brought into force. It has since been amended and updated to now be known as the Bankruptcy Law.

The Bankruptcy Law provides for several court supervised processes, spanning from rescue mechanisms to liquidation. It applies to largely all commercial entities and individuals carrying on business, including the following:

1. All companies governed by the Commercial Companies Law;
2. Any other countries that have by law or voluntarily submitted to the provisions of the Bankruptcy Law;
3. Companies incorporated and registered in the free zones and any other establishments not governed by other insolvency procedures;
4. Any 'trader'; and
5. Licensed civil companies of a professional character (e.g., professional partnerships).

The Bankruptcy Law does not apply to state owned companies, save in the case of submissions to the Bankruptcy Law.

Having been in place since 2016 only, the Bankruptcy Law has not been widely used in UAE. It is understood the courts have seen only a handful of applications pursuant to it. This is in part because of the attitudes which continue to arise from the overhang of the criminal sanctions attributable to certain debt offences (referred to above).

The implementation of the Bankruptcy Act has, however, already been seen to provide a level of certainty and predictability that assists commercial negotiations between debtors and creditors when a debtor is experiencing financial **distress**.

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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's supervisory jurisdiction is engaged in multiple places throughout the Bankruptcy process, and specifically as regards to interrogating the appropriateness of a Restructuring Proposal. Specifically:

1. The court's jurisdiction is initially engaged when it receives an application for bankruptcy (from either the debtor or a creditor(s) with over AED 100,000 in debt). The court will review the application to consider if it contains the requisite information. If it does not, it may refuse the application (Article 79, Bankruptcy Act). Otherwise, on receipt of the application, the court must appoint an expert (from the panel of experts compiled by the Financial Restructuring Committee (**FRC**)) (Article 77, Bankruptcy

Act), who will be responsible for reporting to the court on the debtor's financial condition and opining on whether a Restructuring is possible.

2. Within the five days of the later of (i) the application or (ii) the delivery of the expert's report, the court is required to determine whether the conditions for Bankruptcy have been met and therefore whether to grant the application to commence Bankruptcy. If granted, the court will appoint a trustee, which will be an individual nominated by the debtor or a person from the FRC's table of experts. The court may also appoint a supervisor / supervisors to represent the body of creditors in the Bankruptcy (Article 87, Bankruptcy Act).
3. The court is next required to engage with the Bankruptcy process in determining applications to dispute the admission of creditor claims and determining a final list of creditors (Article 95, Bankruptcy Law).
4. The court must then review the report produced by the trustee which outlines the debtor's financial position and addresses whether Restructuring is possible. The report will also address whether, if a sale is required, the debtor's assets can be sold as a going concern. The court must review that report and be satisfied it considers all creditor claims. If so, the court will direct (i) the trustee to convene a meeting of creditors within 10 business days of the trustee providing their report to creditors and, (ii) unless the court considers liquidation is appropriate and provided it the debtor confirms its consent to carry on business for the purposes of a Restructuring, the trustee to prepare a scheme within three months of their appointment (Article 99, Bankruptcy Act).
5. In progressing the Restructuring, the court is next engaged when it reviews the scheme prepared by the trustee (within 10 days of submission). The court will review the scheme to ensure that it properly observes all parties' interests. If it does not, it will require the trustee to amend and re-submit the proposed scheme within five business days (Article 103, Bankruptcy Act).
6. Once the court is satisfied with the scheme, it will ask the trustee to invite creditors to a meeting within 15 business days of the invitation being sent, at which the scheme will be considered. The court has the discretion to establish committees to represent certain classes of creditors and give such directions as it considers necessary to deal with the appointment and conduct of those committees (Article 104, Bankruptcy Act).
7. The scheme must be approved by two-thirds of creditors admitted by the court for voting purposes (by value). Once it is, the scheme will be again put before the court for final determination. The court is engaged to ensure that all affected creditors have received at least the amount they would have received had the debtor's assets been liquidated on the date of the voting. The court's decision at this stage is final, being the absolute condition for the scheme being implemented. It may accept the scheme entirely, accept it with amendments, or reject it. If rejected, the scheme goes back to the trustee for amendment. The updated scheme must be brought back before the court within 10 business days of the initial refusal. It will then be either accepted, or a decision made to proceed with liquidation.
8. The trustee will then have conduct of implementation to the scheme. The court may be engaged subsequently on ancillary issues (such as those set out below) during implementation. It will also be engaged to determine completion of the scheme or, if the scheme is failing, its rescission or annulment (on application from a creditor (Article 118, Bankruptcy Law)) or to terminate the Restructuring (of its own volition or on application of a creditor (Article 123, Bankruptcy Law)).

In addition to the above, the court's jurisdiction is engaged on an ongoing basis throughout process of seeking approval of the Restructuring and during its implementation. Examples of ancillary areas where the court may be engaged are:

- a. Determining whether to accelerate longer-term debts in giving final approval of the scheme;
- b. An application from a secured creditor to permit it to enforce its security;
- c. An application from the trustee to suspend interest or other penalties for non-payment of debt (Article 163, Bankruptcy Act); and
- d. An application from the trustee to rescind certain contracts (Article 163, Bankruptcy Act).

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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.

The extent of the court's involvement in restructuring is too extensive. Specifically, there are numerous points where the court 'rubber stamps' standard processes. Examples include the court:

1. settling the list of creditors;
2. directing the holding of creditors meetings; and
3. directing the appointment of supervisors.

As trustees are professionals appointed by the FSC, suitable obligations could require the trustee to carry out necessary steps and at all stages inform affected parties of their ability to approach the court if they are dissatisfied with the conduct of the restructuring.

This ensures the court retains supervisory jurisdiction and is available to protect parties' rights but is cheaper and more time efficient. Importantly, court engagement would continue to book-end the process (being engaged to start the restructuring process and to obtain final approval). This is important to ensure meritless restructurings are not instigated (incurring costs) and the final scheme is properly assessed before sanction.

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

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BNE LLC operates a restaurant chain in various locations in Dubai. It was a thriving and successful business but had to cease operations temporarily due to the effects of COVID-19. It has exhausted all available funds and has no cash to pay creditors. BNE LLC owns a restaurant site which is under development, but the development is not expected to be completed for several months. The site had been purchased by one of BNE LLC's shareholders and was transferred to BNE LLC on the basis that payment for the site would be made by BNC LLC to the shareholder in full in 2025. In the meantime, the shareholder holds a mortgage over the property for the unpaid purchase price.

Answer the questions that follow:

Question 4.1 [maximum 5 marks]

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

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

The steps required to commence a Preventative Composition are set out below. The ten steps that will determine the maximum time taken between the application being made and the registration being approved are:

1. BNE LLC must make an application to the Dubai court, thereby terminating its obligation to initiate bankruptcy proceedings. BNE must set out its financial position, its proposal for preventative composition and the name a proposed trustee that will oversee the preventative composition. The court must appoint an expert to prepare a report on the financial position of BNE LLC. That report must be produced to the court **within 20 business days** of the expert being instructed.
2. **Within 5 business days** of the later of (i) application or (ii) date of the expert's report, the court must either accept or reject the application for preventative composition. If it accepts, this commences the procedure. Once commenced, the court will appoint a trustee(s) to oversee BNE LLC's preventative composition. The trustee will take an inventory of BNE LLC's assets and prepare a list of creditors, both of which will be documented in a report to the court (Article 22 and Article 24, Bankruptcy Act).
3. **Within 5 business days** of the trustee's appointment, the trustee must publish a summary of the court's decision commencing the preventative composition procedure. In the notice creditors will also invite creditors to file claims **within 20 business days** of the date of publication, along with verifying documents.
4. After period expires, the trustee must prepare a list of creditors and details of their debts which will be lodged with the court **within 10 business days** (subject to any court order providing for an extension). The list of creditors must also be advertised. As there is no dispute as to admission of creditor's debts, the court will determine the final list of creditors without having to hear any applications contesting the trustee's decision.
5. **Within 45 business days** of the publication of the commencement the process, the preventative scheme must be submitted to the court, including the list of information specified at Article 40, Bankruptcy Act.
6. **Within 10 business days** of receiving the scheme, the court must review it and confirm it takes account of the interests of interested parties (Article 42, Bankruptcy Act). Here, the question assumes the court does not require any amendments and will approve the scheme on first review.
7. On approval, the court will direct the trustee to **within 5 business days** give creditors notice of a meeting to creditors.

8. The creditors meeting must be held **within 15 business days** of the court's direction. At the creditors' meeting, the (admitted, unsecured) creditors will vote on whether to accept the scheme. Two thirds of the creditors must vote in favour of the scheme. Here, the question assumes the creditors approve the scheme at the first meeting.
9. **Within three business days** of the creditors approving the scheme, the trustee must put the draft scheme before the court to either approve or reject. This decision is required urgently. Here, the question assumes the court approves the scheme without any amendment. The scheme will therefore have effect.
10. **Within seven business days**, the trustee must register the court's approval of the scheme in the governmental corporate registers operated by the government and publish a summary of the **scheme**.

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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.

As an application for preventative composition has failed, the court is required to make an order for the bankruptcy of BNE LLP and the liquidation of its assets pursuant to Article 124 of the Bankruptcy Act. In doing so, the court will appoint a trustee to undertake the liquidation. This may be the trustee that supervised the preventative composition proceedings (Article 126, Bankruptcy Act).

The trustee must advertise their appointment within three business days from the order appointing them and creditors must make their claims in AED for all debts due upon the order for bankruptcy to the trustee within 10 business days of the order. Those claims can include claims for future debts (subject to adjustments for interest etc). A failure to submit a claim within that deadline may render any claim the creditor has inadmissible absent special circumstances.

The trustee will then liquidate BNE's assets through public auction and under the court's supervision over a period of six months (albeit that can be extended by a further two months). Once assets have been liquidated, the proceeds will be distributed in accordance with the statutory priority set out in law. Realisations from secured assets will first be paid to the security holder. In this case, subject to any action to set aside the shareholder's security, the proceeds from the sale of the development site owned by BNE would be applied to discharge the shareholders secured debt.

Realisations from any other assets of BNE and the surplus of sale proceeds from the development site would be applied first to satisfy court and trustee's costs and then to repay the wages of the unpaid employees up to a maximum of three months. The remaining one month of the employee's claim would then rank as a lower ranking claim for the provision of goods and services to the debtor, which falls below other costs such as judgment debts and debts due to the government.

Prior to concluding the liquidation, the trustee may also investigate previous transactions of BNE and increase realisations for the benefit of unsecured creditors. Specifically, the trustee may review all transactions in the two years prior to the commencement of the preventative

composition, all of which will be void unless and until approved by the court on public interest grounds or on the basis the counterparty was acting in good faith. Notably, depending on the timing of the creation of security, this may invalidate the grant of a mortgage in favour of the shareholder. Particularly because the provision which operates to automatically deprive BNE of assets on the event of its insolvency indicates a lack of good faith.

If less than 20% of BNE's debts can be discharged from the realisations made, the court may also require BNE's directors or managers to pay the debts of the company, provided the court is satisfied they are the persons responsible for those losses.

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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?

As BNE Limited is incorporated in the DIFC, it can be liquidated by Winding Up pursuant to DIFC Insolvency Law Pt 6.

The court has jurisdiction to wind up BNE Limited if (i) the company has passed a resolution to that effect, (ii) it is unable to pay its debts as they fall due, (iii) a temporary moratorium under a Company Voluntary Arrangement has come to an end without the arrangement being approved, (iv) under any other DIFC law or (v) if the court considers it just and equitable to do so. Where a creditor seeks to wind up BNE Limited on the grounds of an unpaid debt, the ground it will seek to establish is that BNE Limited is unable to pay its debts as they fall due (option (ii)).

Only creditors owed at least USD 2,000 have the power to seek to wind up BNE.

The creditor will benefit from a presumption that BNE Limited is unable to pay its debts as they fall due if they have made demand for payment of the debt (over USD 2,000), which has remained unsatisfied for at least three weeks. While there are various other basis on which the creditor can establish a presumption of insolvency, as DIFC Insolvency Law broadly follows the England and Wales insolvency regime, it is expected that this process of issuing a statutory demand will be the most well used and is therefore the one that a creditor of BNE Limited ought to follow in DIFC.

Following expiry of the statutory demand, the creditor may file its application wind up the company with the court.

If approved, the court will grant an order appointing a liquidator in respect of BNE Limited. The liquidator must be a registered insolvency practitioner under Part 10 of the DIFC Insolvency Law. From the passing of that order, there will be a stay on all proceedings against BNE Limited, including proceedings already commenced.

The initial liquidator can then decide whether to proceed with the appointment or whether to convene a meeting at which contributories of BNE Limited will vote on the appointment of a new liquidator. Any new liquidator must also be a registered insolvency practitioner.

The liquidator that takes forward conduct of BNE Limited's liquidation will be responsible for gathering, realising and distributing BNE Limited's assets to its creditors.

In determining BNE Limited's creditors, the liquidator may call for all claims within a specified period. Such claims must be submitted to the liquidator in writing (reg 6.17, DIFC Insolvency Regulations), usually in the form of a proof of a debt. That proof must include the amount claimed and documents supporting the claim which allow the liquidator to verify it. Claims can include interest up to the date of commencement of the liquidation (reg. 6.28, DIFC Insolvency Regulation), future debts (reg 6.29) and debts in a foreign currency (provided they are converted into USD for the purpose of proving (reg 6.26). A secured creditor should only prove for any unsecured shortfall on its debt.

The liquidator will review proofs of debts submitted by creditors and determine whether to admit or reject them (either in whole or in part). In doing so, the liquidator will also consider whether the creditor owes the debtor any amounts that can be 'netted off' under DIFC Law No 2 of 2014. The liquidator may also request further information or documents in support of the claim. A creditor dissatisfied with the liquidator's decision as to whether to admit or reject its claim (in whole or in part) can apply to the court to challenge that decision within 21 days of receiving notice of the liquidator's decision.

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