



**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.

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### 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.

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### Question 1.9

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

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

### Question 1.10

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

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

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

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#### Question 2.1 [maximum 2 marks]

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

Each of the seven Emirates maintains its own land registration system and while the substance of the law is generally the same, aspects such as registration and enforcement can be subject to slightly different laws and procedures.

For mortgaged real property post default in the FFZ the creditor holding the mortgage over the debtor property is at liberty to enter into possession by giving 60 days' notice to certain relevant parties, and without the need to first obtain an order of the court. The creditor can sell the whole or part of the land or receive rent in respect of the same. A mortgage creditor also has the option to seek an order for forfeiture by application to the DIFC.

By contrast, in 'mainland' UAE, the law provides for the sale of a mortgaged property by the mortgagee in the event of a debtor default, however this is subject to going through the court process. The general understanding is that a mortgagee need not first obtain judgement for the outstanding debt before proceeding with a sale. Once the order for sale is obtained, the court's execution department will undertake the process to sell the mortgaged property.

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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;

An application for Preventive Composition can be applied for by the debtor.

For Restructuring initiating the process is the prerogative of either the debtor or the creditor.

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

The creditors.

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

The court.

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

The trustee is responsible for the supervision of the implementation.

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a)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)?

A debtor can only apply for a restructuring (and is required to initiate bankruptcy proceedings) where it has failed to pay its debts for a period of 30 consecutive business days.

A preventive composition application may be made prior to the point in which the debtor has been over 30 days delinquent.

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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 creditor can initiate Bankruptcy (restructuring or liquidation) (subject to Federal Decree Law 21 of 2020 in connection with relief afforded to debtors due to COVID-19), whereas preventive composition is the preserve of the debtor alone. This can take place where the creditor (or group of creditors) is owed more than AED100,000 and have given notice requiring the debtor to make good on the debt and the debtor has failed to comply with this notice within 30 business days.

In a preventive composition the creditor's role in the commencement of this process is largely passive.

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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 Bankruptcy Law is a relatively recent development. Prior to 2016 in the UAE mainland the bankruptcy law and insolvency processes were embryonic. There was legislation pertaining to some elements of bankruptcy (Law No.18 of 1993) which related to commercial transactions governing a bankruptcy by traders and some basic procedures for insolvency of those engaged in business. This process, which was court based, was seldom utilised.

The lack of an insolvency infrastructure in the UAE was raised when Dubai World, an investment arm of the Dubai Government faced the prospect of defaulting on its obligations in 2009. This would have constituted one of if not the largest government default since 2001. Naturally, this created a considerable degree of international attention and concern. The case of Dubai World served as a cautionary tale and although Dubai World was able to address its issues with its creditors, the prospect of such a potentially catastrophic failure created the springboard in which to develop and establish a functioning insolvency infrastructure commensurate with modern commerce.

In 2016 the position changed fundamentally with the enactment of Federal Decree Law (No.9) of 2016 (as subsequently amended in 2019 and 2020) (the Bankruptcy Law). The Bankruptcy Law repealed the previous laws (Law No.18 of 1993) and consolidated the insolvency regime for commercial insolvencies in the UAE. It did not deal with consumer matters which were addressed in the Federal Decree Law (No. 19) of 2019 in relation to personal bankruptcy.

The Bankruptcy Law is applicable to companies governed under the Commercial Companies Law, any company who has by law or voluntarily submitted to the provisions of the Bankruptcy Law, free zone companies and establishments not governed by other insolvency procedures (in essence all free zone companies and establishments except those in financial free zones), any person engaged in commercial activities in a personal capacity (*i.e.* a trader) and licensed civil companies of a professional character (*e.g.* professional partnerships).

The law itself has been well received and welcomed in that it has given a degree of legitimacy and further confidence to trading in the region by putting in place a more robust insolvency infrastructure (by comparison to what came before it). It has been warmly welcomed by the business community, however there have, as yet, only been a handful of occasions where insolvency processed have been conducted pursuant to the Bankruptcy Law to the extent is remains difficult to empirically assess the impact these changes have made and the extent of their application to business practices in the UAE.

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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 role in the restructuring process is comparatively large relative to other jurisdictions.

When the application is made to the court for the commencement of the bankruptcy procedure the court is required under art.77 to appoint an expert from a panel of experts to assess the financial position of the debtor – the court is at liberty to reject any application should the specified information not be forthcoming. The court then is required further information to be provided if it deems necessary or to join other parties to the proceedings. The court is also at liberty to grant interim order in connection with the debtor's property under art 81. The court then must determine the application to commence the bankruptcy procedure and must do so



within 5 days of the application or of the expert's report (as applicable). Where the court has satisfied itself that the necessary conditions are met it will grant an order which commences the bankruptcy process.

The court is thereafter required to appoint a trustee, either as nominated by the debtor or a person enrolled in the table of experts appointed by the Financial Restructuring Committee (Art 82).

Under Art. 87 the court has discretion to appoint one or more supervisors to the process to act as representatives of the creditor(s).

Once the court has made the appointment of a trustee it is required to pursuant to Art. 88 to provide the trustee with all the information it holds about the debtor.

The court must then determine the list of creditors under Art. 94 having had the trustee submit the list prior, subject to any appeals creditors may lodge (in such cases the court may administer claims on an interim basis).

Under Art. 97 the court is obliged to review the trustee's report (provided for under Art.96) and confirm the report takes account of all creditor claims. The court thereafter directs the trustee to convene a meeting of the creditors and to prepare a restructuring scheme (where liquidation is not a more appropriate avenue).

The Court then required to review the proposed scheme prepared by the trustee within 10 days of the trustee submitting it to the court. The court is then at liberty under Art 103 to request that the trustee vary the scheme if in the court's view it does not properly reflect all parties' interest and to resubmit the proposal.

After review of the proposal the court must then request the trustee issue an invitation to creditors to meet to review the proposed scheme. Where the creditors approve the scheme the trustee puts the scheme before the court for approval. The court's determination on this is final under art 108. Where the court rejects a scheme it must be amended and returned to the court for approval or a decision to initiate the declaration of the debtor's bankruptcy and the liquidation of the debtor's assets pursuant to art 109.

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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.

Given the comparatively fledgling insolvency regime the UAE operates, it is perhaps understandable, if not desirable, for the court to have a greater level of security and involvement over the process. The legislation itself and procedures therein are highly prescribed and therefore will necessitate a greater degree of court involvement, by comparison with the FFZ's which afford greater flexibility generally. While it would be preferable for the courts to exercise a predominantly supervisory jurisdiction over proceedings, the active involvement of the courts under the Bankruptcy Law required a further degree of judicial participation given the mandated procedural role the courts play under this law. The legislation and the mechanisms in place requiring court intervention to assist with e.g. registering a charge or enforcing a security mean that court involvement is necessarily high. Although this

is appropriate in order to give statutory effect to the provisions of the Bankruptcy Law, it does appear to be a potentially inefficient use of judicial resource and increases the costs and inefficiency of the process as opposed to the adoption of common law practices which require far less pro-active participation from the bench.

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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.

1. Under Art. 9, the debtor makes an application to the court setting out its position, proposal for a preventive composition, the details for the proposed appointee to act as trustee over the preventive composition.
2. The court then appoints an expert to prepare a report on the financial position of the debtor. This must be provided within 20 business days from the date the expert is instructed (Art 13).
3. Within 5 business days of the application or the date of the experts report if the preventive composition process can commence.
4. If the application is approved, the court then requires to appoint a trustee under Art 17. Any creditor objection to the trustee's appointment must be made by application to the court within 5 business days of the publication of the appointment. The court will determine the application within 5 business days. In terms of timeline the preventive composition continues to run in the background while the application objecting to the appointment of the trustee is being determined.
5. The trustee is then required under Art.24 to take inventory of the debtor's assets and provide a report on the same to the court. A report is also required to be sent to the debtor's creditors.

6. Within 5 business days of the trustee's appointment the trustee is required to publish a summary of the court's decision to commence the preventive composition in two widely-read newspapers, one in English and one in Arabic inviting creditors to file claims within 20 business days from the date of publication.
7. Once the period for lodging claims has lapsed the trustee is to prepare a list of claimants and details of their claims and lodge the same with the court within 10 business days and to advertise the same. The court then has 10 business days from the lodging of the list to determine whether this is accepted.
8. The Preventive Composition scheme must be submitted to the court within 45 business days of the publication of the decision initiating the preventive composition procedure – this can be extended by up to 20 days at the request of the debtor or trustee.
9. Within 10 business days the court is required to review the scheme and confirm that it takes account of the various creditors' parties' interest. The creditor meeting directed by the court is to take place within 15 business days of the direction.
10. Upon creditor approval the trustee then puts the scheme back before the court for their approval, within 3 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.

Where the preventive composition is rejected by the creditors the court is required to make an order of the bankruptcy of the debtor and the liquidation of the BNE's assets pursuant to Art. 124.

Where the scheme fails and pursuant to the instigation of bankruptcy procedures following that failure the trustee appointed in connection with the Preventive Composition also terminates unless the trustee is also appointed as the bankruptcy trustee. The appointment of the trustee is to be a person nominated by the debtor or from an enrolled member of the table of experts appointed by the Financial Restructuring Committee. The trustee can be a natural person or legal person (and up to three can be appointed jointly at any given time). The trustee cannot be a creditor so the shareholder holding the security, or any other creditor are not eligible, nor can the trustee be a party who has a prescribed commercial relationship with BNE over the previous two years.

Upon the bankruptcy order, the trustee is required to liquidate the debtor's assets via public auction, again with the necessary court supervision and the trustee may request the sale is conducted over a longer period (up to 6 months) where it would be in the public or creditor interest to do so – for example where a higher price can be obtained for an asset by delaying the sale. The shareholder holding security over the site will be paid in priority to all other claims.

In connection with the staff wages that are unpaid these are paid in priority (up to three months) after court costs and trustee costs – excluding any other secured creditors.

Once BNE's assets are liquidated the court will grant an order concluding the liquidation.

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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 law differs to the mainland law in that the DIFC Insolvency Law provides for winding up (Part 6). The DIFC registered company (BNE Limited) is subject to the provisions of the DIFC Law. Under this law the creditors can apply for a winding up – here the court will order the winding up of the company where the court finds it just and equitable to do so or if a CVA moratorium has ended without approval of an arrangement.

In the above scenario the matter will likely be a creditor winding up that BNE Limited's creditors can instigate. Here the creditors can appoint a liquidation committee at the meeting of creditors to exercise the functions given to them pursuant to Art. 69 of the DIFC Insolvency Law.

Where BNE Limited is wound up an IP would be appointed pursuant to Part 10 of the law. The liquidator will tend to the affairs of BNE Limited and realise and distribute the assets of BNE Limited once these have been gathered.

The liquidator would be responsible for creditor claims, to prove and thereafter rank these claims. The creditors will require to submit claims for the amount sought to the liquidator under ref. 6.16.0 this will take the form of a 'proof of debt' (also applicable to a creditor's winding up or members winding up). Where a debt cannot be determined, under Reg.6.25 the liquidator must estimate the value of the claim, including accounting for any set off between a company and a creditor and can include any interest accrued by the creditors prior to the winding up commencing. The liquidator is also required to account for a creditor who can prove a future debt, as provided for under Reg. 6.29.

Once the proofs of debt have been received and collated, the liquidator may thereafter require further information as necessary to determine and assess the claim. It is then for the liquidator to accept or reject (in whole or in part) any proofs for the purpose of determining what payments, if any, are to be made to each creditor. If one of BNE Limited's creditors was unhappy with the determination, it has the right to appeal the decision within 21 days of receiving notice of the same.

Any contracts that are partially performed, such as with the shareholder in the example highlighted in Q.4.2, are determined via the general law of liability and are not provided for via specific provisions in the DIFC Insolvency Law.

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**\* End of Assessment \***