



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7E

UNITED ARAB EMIRATES

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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Well Done!

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

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

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

Question 1.4

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

(a) True.

(b) False.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

Question 1.8

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

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

Question 1.9

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

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

Question 1.10

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

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

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?

[When it comes to the registration and granting of mortgages over land each emirate maintains its own land registration system that, even though creates slightly different laws and procedures in each emirate, maintains the substance of the law in every Emirates, considering that the UAE law makes general provisions regarding the topic.

Besides the point above mentioned, there are various types of other financing structures available, many of which have their origins in Islamic finance, such as *musataha*, *ijara* and *Murabaha*.

As for the key difference between the sale of mortgaged real property following a debtor default in a case in which the real property is in a financial free zone or in a scenario in which the real property is in "mainland" UAE, is the fact that in the "mainland" when a Debtor is in default the creditor that holds the mortgage must first obtain a judgment for the debt and only then the creditor can take the asset for themselves.

Meanwhile, in the financial free zones the creditor has the right to take possession over the land when the debtor is in default, and after having provided a 60 days' notice – without the need for a court order (as it is needed in the "mainland").]

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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.

[The actors for the Preventive Composition under the UAE Bankruptcy Law are the following:

- (a) **A decision on any application to commence an insolvency process** – the responsible is the Court, upon receiving the application;
- (b) **A primary determination as to whether a debtor’s proposal should be adopted** - – the responsible are the creditors;
- (c) **Confirmation of the primary determination as to whether a debtor’s proposal should be adopted** – the responsible is the Court;
- (d) **For supervising the implementation of the insolvency process by the debtor** – the responsible is the trustee.

The actors for the Restructuring proceeding under the UAE Bankruptcy Law are the following:

- (a) **A decision on any application to commence an insolvency process** – the responsible is the Court, upon receiving the application;
- (b) **A primary determination as to whether a debtor’s proposal should be adopted** - – the responsible is the Court;
- (c) **Confirmation of the primary determination as to whether a debtor’s proposal should be adopted** – the responsible are the creditors;
- (d) **For supervising the implementation of the insolvency process by the debtor** – the responsible is 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)?

[When it comes to the commencement of the Preventive Composition the first difference that is important to be highlighted is that this proceeding can only be filled by the debtor, differently that the bankruptcy proceeding that can be filled by the creditors.

Secondly, when the debtor files for a Preventive Composition the company, even though in financial difficulties, has not yet reached the status of being in default with its obligations (scenario in which the Debtor should file for a bankruptcy proceeding).

As for the commencement of a Bankruptcy, the Debtor is in a different circumstance, considering that when the debtor commences such proceeding, they must be in default of its payment obligation for 30 (thirty) consecutive business days or if its creditor (that is also defaulted on receiving its credits for 30 days) requests the commencement of a bankruptcy proceeding.

Therefore and, differently than what happens at the commencement of a preventive composition, the Debtor is already in default when files for the bankruptcy proceeding.]

Commented [DJ8]: 2

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?

[From the creditor point a view, besides him having more influence over the proceeding (considering that they have to approve the preventive composition scheme first and then the scheme is homologated judicially) in a Preventive Composition the secured creditor may, upon court authorization, enforce their security.

Furthermore, the commencement of the Preventive Composition does not cause any of the debts owed by the debtor to fall due, nor does it result in a suspension of interest, being more beneficial for the creditors that hold some sort of credit before the Debtor.

As for the Bankruptcy Proceeding it is also relevant to highlight that they have less power when it comes to approving the restructuring plan, considering that the plan firstly has to be approved by the Court, and only afterward it has to be approved by the creditors.

Even though the above mentioned, differently that what takes place at the Preventive Composition, the creditor has the power and autonomy to, filled some objective requirements, file a Bankruptcy proceeding against the Debtor.]

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Creditor does not have the power to force preventive composition.

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

Commented [DJ10]: 10 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.

[Regarding the historical background of the insolvency legislation in the mainland UAE it is important to firstly highlight that the system was not developed until 2016 (being that insolvency proceeding were scarcely regulated by other laws such as Law n. 18 of 1993. It was only in the late 2016's, with the adoption of Federal Decree Law (n. 9) of 2016, related to bankruptcy, that insolvency proceedings were regulated.

Furthermore, in 2019, the mainland UAE adopted the Federal Decree Law (n. 19), that once and for all consolidated the insolvency regime as an option for the Companies who, until that point, didn't fall within the scope of the Bankruptcy Law adopted in 2016.

The gap was, therefore, completely filled in 2019 (even though it is difficult to measure the applicability of such laws, once there is only a handful of cases of insolvency proceeding in the Courts of the Mainland UAE.

As for what entities the Bankruptcy Law applies to Commercial and non-Commercial debtors, being that the formal restructuring proceeding only applies to Commercial Debtors, while the liquidation proceeding applies to Commercial and non-Commercial debtors.

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Answer incomplete
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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.

[Firstly, the Court must start its role right from the start, from the moment the Debtor files for the bankruptcy proceeding, appointing an expert from the panel of experts, to assess the financial conditions of the Debtor. From that point on, if the assessment is not satisfactory, the Court could apply requesting for a different person to provide further clarification.

Furthermore and, after analysing the reports, the Court is required to commence or deny the request for a bankruptcy proceeding and, if the decision is in the sense of grant the request for a bankruptcy proceeding to be initiated, the Court must continue to act in a very active manner, being obligated to appoint a trustee to oversee the proceeding.

Afterwards and arguably, the most relevant role that the Court must play, it is necessary that the Court approves the restructuring scheme elaborated by the trustee and the Debtor and, if not approved, needs to be changed and amended until a version that pleases the Court is reached.

Only once such version is completed and approved by the Court that the creditors can vote on the scheme and approve the restructuring plan.

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4

Question 3.3 [maximum 2 marks]

In any insolvency system that involves the forced compromising of individual creditor claims, the requirement for court involvement is to ensure that the rights of all parties, including individual creditors, are being protected. The UAE Bankruptcy Law requires a high degree of Court involvement. Briefly describe (100-150 words) whether you consider that the level of Court involvement in approving a restructuring to be appropriate. Provide reasons for your answer.

[In my opinion the level of influence that the Court has on a restructuring procedure can be overwhelming, especially if considered that the restructuring scheme elaborated by the trustee and the Debtor first needs to be approved by the Court, and only then (and if approved) can go to the creditors for their approval.

I have this opinion taking into account that the party that is most affected by the restructuring plan that is going to be proposed is the Creditor, that needs to be paid under the terms of the scheme, and only the creditor can tell what provisions are good or bad for his interest and its creditors.

I consider to be reasonable, and extremely important for the Court to give its legal opinion and decide whether the terms of the plan proposed are legal, but only after the Plan was approved (as it happens in the Insolvency System in Brazil, for example).

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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 first step is for BNE LLC to apply, before the court, for a preventive composition, being that the following step (second step) is the Court to appoint an expert to prepare a report on the financial position of the debtor. The report must be delivered before the court no later than 20 business days from the moment that the expert was instructed to prepare the report.

After the report was delivered (third step), the Court, satisfied with the report, accepts the preventive composition procedure, and appoints a trustee (fourth and fifth steps). Afterwards the Court will determine the trustee's fees and authorises the payment from the funds deposited by the debtor when making the application.

Upon being appointed the trustee needs to take an inventory of the debtor's assets and produce a report of the assets and regarding the debtor's creditors and present it before the court (sixth step). Besides the obligation to produce a report, the trustee must also publish a summary of the court's decision to commence the preventive composition procedure and invite creditors to file claims within 20 business days from the date of the publication (seventh step).

Following the expiry of the period for lodging claims the trustee must prepare a list of claimants, while the Court is the body responsible for establishing the final creditor list. The eighth step is the submission of a preventive composition scheme before the Court, taking into account that the document must be elaborated by the trustee and the Debtor, jointly. Within 10 business days from the date when the scheme was submitted a creditor's meeting must be called in, and the creditors should approve, or disapprove the scheme proposed by the Debtor (ninth step).

Once the creditors approve the scheme it comes the final, and tenth step, the Court must homologate the result, accordingly to the results of the creditor's meeting and the content 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.

[In case the Preventive Composition scheme gets rejected by the creditors, and BNE LLC only option is to go into liquidation, being that following the failure of the preventive composition the BNE LLC will be lead, automatically, into a liquidation procedure.

Following the initiation, the bankruptcy proceeding a trustee must be appointed (it can be a different trustee that the one appointed at the Preventive Composition or the same person). Specially regarding the appointment of a trustee (that must happen after the Court officially commences the bankruptcy procedure), it can be a person nominated by the debtor or an expert appointed by the Financial Restructuring Committee.

The trustee can be a natural or legal person, and up to three different people can be appointed for the trustee function, and they can act jointly at any one time. The trustee must not be a creditor, a relative/spouse of the debtor, a person who has been convicted of certain dishonesty offences and any person who has had prescribed commercial relationship with the debtor in the previous two [years].

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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?

[A creditor is allowed to file a request for the liquidation of BNE Limited, under the laws applicable in the DIFC, especially taking into account that the most common grounds for a compulsory winding up is that the Company is not able to pay its debts – in the same way that is happening to BNE Limited.

Once the creditor files for the liquidation of the Company before Court, is up to them to decide whether the liquidation will be commenced, as well as nominate a liquidator to take care of the Debtor's affairs, including its assets and debts, and especially when it comes to paying its creditors. The liquidator is also responsible for the selling of the Debtor's assets, as well as investigating the causes of the crisis that lead BNE Limited into its financial difficulties and defaulted obligations.

As soon as the liquidator has done everything necessary to wind up the affairs of the Company, the liquidator may seek to have the company dissolved, whereby BNE Limited legal existence is brought to and end.]

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*** End of Assessment ***