



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).
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6. The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **10 pages**.

ANSWER ALL THE QUESTIONS

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

Commented [E1]: 7/10

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

One of the **most significant barriers** to the restructuring process 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 absence of a moratorium on creditor actions after the commencement of a bankruptcy proceeding inhibits the restructuring process.
- (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 DIFC and AGDM insolvency laws and regulations are primarily 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 in mainland UAE?

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

(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.

Commented [E2]: The correct answer is D.

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.

Commented [E3]: The correct answer is A.

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 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 disapples 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 incorrect?

- (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) A foreign judgment is enforceable in mainland UAE as long as there is reciprocity between the UAE and the foreign state issuing the judgment for which enforcement is sought.
- (c) The ADGM courts may recognise reciprocity with a foreign jurisdiction in the absence of an applicable treaty if the Chief Justice of the Courts is satisfied that substantial reciprocal treatment will be assured regarding recognition and enforcement in that foreign country of the judgments of the ADGM courts.
- (d) The DIFC courts will enforce judgments and arbitration awards from other countries, even if the debtor has no presence of any type in the DIFC.

Commented [E4]: The correct answer is B.

QUESTION 2 (direct questions) [10 marks in total]

Commented [E5]: 6/10

Question 2.1 [maximum 2 marks]

Commented [E6]: 2/2

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?

ANS:

A general provision for granting mortgages on land is provided in UAE in relation to real property. Each emirate maintains its own land registration system; however, these can be subject to slightly different laws. The basic substance of the law is same.

There is provision in law for the right of the mortgagee to sell the property if there is default of the debtor. This can be exercised by obtaining order from the court without first obtaining judgment in regard to the debt. The court's execution department will conduct the sale of the mortgaged property after obtaining the order.

The financial free zones which have distinct legal systems. Their own insolvency laws have developed to regulate insolvency in the free zones. The financial free zone insolvency laws are different from "mainland" insolvency law.

The law provides for the right of a mortgagee to sell the mortgaged property in case there is the debtor's default. This right must be exercised through the courts. It is to be seen whether the mortgagee must first obtain judgment for the mortgage debt before proceeding with sale.

The general approach adopted is that a mortgagee can petition the court for an order for sale without first obtaining judgment for the debt. After such order for sale is obtained, the court's execution department will conduct the sale of the mortgaged property.

The DIFC Real Property Law provides for a system of registration of interests in land, adopting the Torrens system from Australia.

A secured creditor need not apply to any court to enforce its security interest. Generally, a secured creditor would appoint a receiver or administrative receiver to collect and dispose of an asset which is subject to DIFC law security although the secured creditor could, if it wishes can take possession and dispose of the relevant asset itself.

In the case of non-payment by the debtor the creditor holding the mortgage over land can enter into possession of the land. For this he needs to give 60 days' notice to certain relevant parties. A court order is not needed. The creditor can sell the whole or a part of the land. There is also an option to receive rents and profits from the land and the proceeds such received can be applied in payment of mortgage debt.

Question 2.2 [maximum 4 marks]

Commented [E7]: 1/4

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. Which actor is responsible for each of the following processes?

(a) A decision on any application to commence an insolvency process.

ANS:

Only a debtor can seek Preventive Composition.

Commented [E8]: That's correct, but this question asks who makes the decision on an application to commence the process. The answer is the court.

A creditor may bring proceedings to have the debtor into some Bankruptcy process. The condition would be that the creditor is owed more than AED 100,000. The creditor is also required to have given notice to debtor to pay the debt. The debtor if has failed to discharge the debt within 30 days, the creditor may then apply to the court to commence Bankruptcy. Mentioned in Bankruptcy Law , Article 69

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

ANS:

The debtor makes proposal for preventive composition. A trustee is appointed for the purpose of Bankruptcy to proceed. The trustee is required to prepare the list of claimants. And detailed information and give his views as to claims are to be accepted or rejected as also any proposal regarding repayment.

The debtor or creditor may object to the list by way of application to the court.

At the creditors' meeting, the trustee and the debtor are required to explain the proposed preventive composition scheme. A creditor may propose amendments.

It may be a case when the court decides that restructuring will be appropriate, the trustee is given three months' time to prepare scheme and put forth. Satisfied with the scheme the court will require the trustee to invite creditors to discuss the scheme. Court also is an actor.

Commented [E9]: This is also right, but the question asks who makes the primary determination about adopting a debtor's proposal? The answer is the creditors.

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

ANS:

Once the proposed scheme has been prepared by the trustee, the trustee is required to submit

it to the court. The court is required to review the draft to confirm that it takes account of the interests of all interested parties.

Trustee is to issue an invitation to the creditors, to review the scheme, where the trustee and the debtor can explain the scheme. A majority of creditors holding two-thirds of the debtor's debt may approve the scheme.

If the scheme is approved by creditors at the creditors' meeting, the trustee is required to put the scheme before the court within three business days, for the court either to approve or reject the scheme. Creditors may raise objections if any. The court must make determination and its determination is final. The debtor, or any creditor whose debts are admitted, may object to the court's decision disapproving or amending the scheme. Any such objection must be made and if the court rejects the scheme the court may return it to the trustee for amendment within ten days.

(d) To supervise the implementation of the insolvency process by the debtor.

ANS:

Commented [E10]: The trustee supervises the implementation of the insolvency process.

The court may appoint one or more supervisors. These have to be from the body of the debtor's creditors. The court is to determine which creditor is to be the supervisor. If both secured and unsecured creditors have been nominated, one supervisor is to be appointed from each group. Any competent controlling body in relation to the debtor can also request to have a supervisor appointed representing that competent controlling body. The supervisor has to assist the Trustee and the court. They serve the general body of creditors.

The supervisors are not entitled to fees. Essentially, supervisors are representatives of the creditors.

The Bankruptcy Law creates a "Financial Restructuring Committee", appointed by the Minister of Finance, having a supervisory control over insolvency practice and procedure in the UAE.

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)?

ANS:

The Bankruptcy law provides for debtor led process i.e the 'preventive composition' as against formal process that can either lead to restructuring or liquidation. A creditor may bring an application to the court to commence the bankruptcy of the debtor. In most cases it will result in liquidation of the debtor's assets. There is this procedure available to consider the possibility of restructuring of the affairs of the debtor. A trustee appointed by the court has to prepare a report which must have a Statement of the debtor's commitment to continuing the business and there being a possibility of the business being sold as a "going concern". After the report has been submitted to the court the trustee is required to take steps to call and hold meeting of creditors for consideration of the report. If it is approved by a majority of the creditors holding two thirds of the debtors' debts then the scheme is given for court approval.

Commented [E11]: 1/2

Commented [E12]: This question is asking about the key difference that could give rise to an application for preventive composition and bankruptcy. Under the UAE Bankruptcy Law, a debtor has an option and is free to choose whether it wishes to commence preventive restructuring; while a debtor must initiate bankruptcy procedures if in default of its payment obligations for 30 consecutive business days.

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?

ANS:

A creditor, or group of creditors collectively, who are owed more than AED 100,000 , may apply to the court to initiate bankruptcy procedures if the creditor has given notice to the debtor requiring the debtor to settle the debt, and the debtor has failed to discharge the debt within 30 business days of any such notification.

If the court decides to initiate proceedings, the debtor will be placed under the supervision of a court-appointed trustee who will take control of the management of the company. He is granted wide-ranging powers in relation to dealing with assets and claims.

A moratorium comes into effect as in the case of preventive composition, all enforcement action relating to the debtor is automatically stayed. Secured creditors are required to obtain court approval to enforce their security over any secured assets.

An application for preventive composition can only be made by the debtor or ordered by the court and it cannot be made by creditors.

A moratorium on creditor action comes into effect until the preventive composition scheme in relation to the debtor has been approved. Secured creditors, however, are still able to enforce their security with the court's permission.

Commented [E13]: 2/2

Creditors who voted against the scheme of preventive composition, can be heard on application to the court for commencement of preventive composition.

The commencement of the preventive composition procedures results in the suspension of legal proceedings against the debtor until the earlier of the approval of the preventive composition plan or 10 months following the court's decision.

However, secured creditors may enforce their securities provided they have obtained court permission to do so. The court is required to determine any such creditor's application within 10 working days of the date the application is made.

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

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.

ANS:

The United Arab Emirates, is a federation of seven emirates in the North-East of the Arabian Peninsula, The UAE came into existence on 2 December 1971 as a federal union of six emirates.

The constitution of the UAE provides for the federal government of the country.

Federal law is made in the name of the President of the UAE

In addition to Federal laws, there are decrees and cabinet directives that have legal effect

The individual emirates have all created "free zones", particularly industry or sector specific free zones in which, to encourage foreign investment,

Most free zone authorities can create their own laws and regulations regarding corporate and other businesses.

Under an amendment made to the Constitution in 2004, the Federation has right to establish financial free zones. Under federal laws, the UAE has established financial free zones in both Dubai and Abu Dhabi. These are the Dubai International Financial Centre

(DIFC), established in 2004, and the Abu Dhabi Global Market (ADGM) in 2013. while the remainder of the UAE will be described as "mainland" UAE.

Commented [SE14]: 9/15

Commented [SE15]: 1/5.

This question is also looking for a discussion of the evolution and application of the bankruptcy law and its reception in the UAE.

The UAE legal system outside of the financial free zones draws elements of Islamic law.

The DIFC and the ADGM are common law legal systems and draw on the laws of England and Wales for the laws applicable in the free zones.

Each of the financial free zones also has its own separate judiciary, i.e the DIFC courts and the ADGM courts

Until 2016, in the UAE mainland, insolvency law was undeveloped. There were provisions in Law Number 18 of 1993 relating to commercial transactions (the Commercial Transactions Law) governing a bankruptcy by traders. The law provided for a basic mechanism for insolvency for those engaged in commerce, which was a process to be pursued through the courts, but these procedures were rarely, utilised.

Commented [SE16]: Direct copy/paste from guidance text.

The Bankruptcy Law came into force on 29 December 2016, replacing the insolvency regime previously contained in the UAE's Commercial Code (Federal Law No. 18 of 1993). The aim was streamlining and modernizing insolvency processes.

Article 2 of the Bankruptcy Law states:

This Decree-Law shall be applied on the following:

- 1- The companies subject to the provisions of the Commercial Companies Law.
- 2- The companies that are not established according to the Commercial Companies Law and owned in whole or in part by the Federal or local government, stipulate that they shall be subject to the provisions of this Decree-Law.
- 3- The companies and establishments in the free zones that are not subject to special provisions.
- 4- Any person having the capacity of a merchant according to the provisions of the Law.
- 5- Licensed civil companies of professional nature."

If the Bankruptcy Law applies, it provides for:

- (i) Preventative Composition Procedure (under Chapter 3 of the Bankruptcy Law): This is debtor-led process which aims to rescue struggling businesses by helping them reach a court-supervised settlement with their creditors. Here the debtor retains the right to run the business during this process, supervised by a court-appointed trustee.
- (ii) Bankruptcy itself is split into two separate processes:
 - (A) a rescue and rehabilitation process (restructuring): A court-approved restructuring scheme where a debtor is insolvent, but the court determines their business is capable of rescue, company's management has shown willingness to try and recover the business, and its assets are sufficient to cover the restructuring
 - (B) a formal liquidation and distribution procedure: If the answer to either of the two Bankruptcy Tests is "yes", and the debtor has stopped paying debts for 30+ consecutive days then it will be considered insolvent and the Bankruptcy Law places an obligation on them to file for bankruptcy within 30 days under either Bankruptcy Test. A request for commencement of bankruptcy proceedings under the Bankruptcy

Law may be made by the debtor itself, a creditor or creditors with a debt of at least AED 100,000 owed to them, any relevant competent supervisory body and the public prosecution of the application.

Bankruptcy Tests:

- (i) Has the company ceased payment of debts due for 30+ successive days?
- (ii) Do the company's assets not cover its liabilities?

Recent amendments to the Bankruptcy Law have addressed "Emergency Financial Crisis" a new chapter to the Bankruptcy Law

Question 3.2 [maximum 8 marks]

Commented [SE17]: 8/8

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.

ANS:

The primary legislation Federal Law No. 9/2016 i.e the "Bankruptcy Law" governs insolvency and restructuring proceedings in the UAE. The Bankruptcy Law applies to the majority of UAE companies, covering all companies established under the UAE Commercial Companies Law (Federal Law No.2 of 2015)

The Bankruptcy Law provides for two options for businesses in financial distress: Preventive composition and Bankruptcy. Both processes can be initiated through an application to the court. Preventive composition is a process initiated by the debtor asking for the court's assistance in settling debts with its creditors. The ultimate aim is getting over the financial hardship, to recover the business.

whereas bankruptcy proceedings can involve either a rescue procedure or a liquidation. Under the Bankruptcy Law.

The director of the company must file for bankruptcy where the company fails the Bankruptcy Test. Article 68 of the Bankruptcy Law sets out a strict obligation on a debtor to file for bankruptcy if it fails either limb of the Bankruptcy Test.

A creditor with a debt in excess of AED 100,000, and which has not been paid for 30 business days after final demand, may also petition the court for bankruptcy to recover the debt due to it.

Preventive composition is a process only available for companies that do not meet the formal Bankruptcy Test, but where the directors feel that they will be unable to trade out of their existing indebtedness. In a preventive composition, the company would make an application to the court supported by a detailed overview of its trading position and net assets and other requisite information. and their plan to proceed to enable them to settle their debts . Then begin business as usual again.

If the court accepts the application, the company's debt obligations will be suspended, during which time the court will appoint a trustee to supervise the directors' management of the

company-Art 17. There can be three trustees appointed. The trustee would present a plan for the company to trade out of its existing position. The plan would require the approval of a majority of its creditors holding not less than two thirds of the value of the total outstanding debts of the company. The trustee is also required to produce a report on the debtor's creditors and submit the report to the court -art 25. The trustee may take steps or action on behalf of the debtor in his interest-art 26. A court order may be obtained by the trustee to obtain finance. The commencement of preventive composition procedures will also suspend any criminal proceedings brought in relation to a dishonored cheque, including against the signatory of the cheque-art 212. Any decision by the court to commence the preventive composition does not cause any debts owed by the debtor to fall due, nor does it result in a suspension of interest- art 33

The court is responsible for finally determining the list of creditors. The list has to be published.

The court is required to review the draft scheme within 10 business days from the date of submission.

Only creditors whose debts have been admitted may vote on the scheme. If the court directs that creditors whose debts have been admitted on an interim basis may vote-art 45

The trustee, with assistance of the court, would oversee implementation of the preventive composition plan over a period of up to 3 years. During the term of the plan, the company is restricted from taking steps as settling claims that arose prior to commencement of the plan, taking on new debt or disposing of its assets etc. It is to manage the business in accordance with the terms of the court-approved plan and under the supervision of the trustee and the court.

If at any time during the implementation of the plan, the company fails the Bankruptcy Test or the court determines that the plan is impossible to implement, it may terminate the plan and convert it into a declaration of bankruptcy.

The initiation of liquidation proceedings is at the court's discretion within the bankruptcy proceedings as provided in Federal Law No. 23 of 2019

Under Formal restructuring the initial view to be taken by the court on an application for bankruptcy is to assess whether the company can be restructured, settle its debts, and become profitable again. So, similar to the preventative composition, an expert and trustee are appointed to determine the company's financial position, compile a complete list of creditors, and assess whether the company can be restructured in order to become profitable once more. Any such plan presented to the court requires the approval of the company and the approval of a majority of its creditors holding not less than two thirds of the value of the total outstanding debts of the company. The trustee and company then implement the restructuring plan, in a similar way to the preventative composition plan, but with the trustee taking a more executive role.

A trustee and potentially an expert are appointed in the court order ordering the opening of preventative composition and bankruptcy proceedings. It is the trustee, with the court's approval, that oversees or administers the company's dealings during such proceedings.

The restructuring of a company, if properly executed, can result in improved efficiency and flexibility with regards to operations, and can bring about financial improvements. However, to obtain optimum results, it is imperative that the reasons behind the restructuring, the objectives that need to be achieved and the legal framework of the UAE are precisely identified.

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 to 150 words) whether you consider that the level of court involvement in approving a restructuring to be appropriate. Provide reasons for your answer.

ANS:

If there are dissenting creditors, they on approaching the court might get relief in their favour as there is provision for them to submit application if their claims are not well considered. The moratorium period may be misused therefore a check is kept under the supervision of trustee keeping the developments being informed to the court. The creditors can disrupt the arrangement by holding up their rights.

The current role of the court is key to protecting creditors in a restructuring, and if these reform proposals go ahead, the court's role will need to be further developed to deal with the additional constraints on creditors' rights. The role of the court in taking up issues of creditors who do not consent or have any objections to the scheme helps them as there is more likelihood for desired changes in the scheme.

The role of the court in Markas case led to development in law on liability of directors after the appellate court sent back the case to court of first instance for reconsideration.

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

RZA LLC operates a restaurant chain in various locations in Dubai. It was a thriving and successful business but has been negatively impacted by the increase in global food prices. It has exhausted all available funds and has no cash to pay creditors. RZA LLC owns a restaurant site which is under development, but the development is not expected to be completed for seven months. The site had been purchased by one of RZA LLC's shareholders and was transferred to RZA LLC on the basis that payment for the site would be made by RZA LLC to the shareholder in full in 2024. In the meantime, the shareholder holds a mortgage over the property for the unpaid purchase price.

[Type your answer here]

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).

Commented [SE18]: 0/2

The question is asking for your view regarding the level of court involvement.

Commented [SE19]: 13/15

Commented [SE20]: 5/5

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.

ANS:

The process for requesting Preventive composition includes making an application with the court. This should be accompanied by documentation showing the financial position of the company. Details regarding assets, creditors, debtors and employees, accounts also to be submitted.

Upon receipt of the preventive composition application, the court is required to appoint an expert to prepare a report on the financial position of the debtor, which should include the expert's views on whether the debtor has met the criteria necessary to accept the preventive composition application procedure. The report must be delivered no later than 20 business days.

The court is required to decide on the preventive composition application within five business days of application (if the application meets all necessary criteria) or from the date of the expert's report. If the court accepts the application, the preventive composition procedure commences.

Then the proposal for preventive composition can be sent. A Trustee is nominated who will after compiling lists of creditors, their obligations put together a draft plan which has to be submitted within 45 days from the date of acceptance of the application. The draft plan has to be approved by majority of the creditors entitled to vote provided the majority holds two thirds of the total debt value. Then it is submitted to the court and if it gets ratification, then it becomes binding on the unsecured creditors. If the court rejects the plan a request is made to the trustee to submit an amended plan or commence proceedings under Bankruptcy law.

Here in the given facts this is not the case i.e no disputes regarding creditor being accepted, no amendments, adjournments of meetings of creditors. So simply the plan is prepared and voted and accepted by court for implementation.

If the court decides to accept the preventive composition procedure, the court is required to appoint a trustee, being either a person nominated by the debtor or a person enrolled in the table of experts appointed by the Financial Restructuring Committee .

Any creditor may object to the appointment of a trustee within five business days of the date of publication of the appointment; the objection is by way of application to the court, which is required to determine any objection within a further five business days, on a final basis. The preventive composition procedure will continue during the period of any such objection and determination.

The trustee is required to register the decision in the debtor's governmental corporate register and publish a summary of the scheme within seven days of the approval by the court.

Question 4.2 [maximum 5 marks]

Commented [SE21]: 3/5

RZA 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.

ANS:

The court is required to make an order for the bankruptcy of the debtor and the liquidation of the debtor's assets in certain prescribed circumstances, out which the following are:

Commented [SE22]: Company has to make an application

- if the restructuring procedures are inappropriate for the debtor
- if the expert's or trustee's report concludes that restructuring in bankruptcy is impossible
- if the court rejects it or if the restructuring is rescinded or annulled
- if the creditors do not approve the restructuring

If the court makes an order for liquidation, the court is required to appoint a trustee to undertake the liquidation.

The appointed trustee must advertise the trustee's appointment within three business days, upon the making of the liquidation order. The trustee is required to report on the progress of the liquidation of the debtor's assets.

The Creditors are required to make their claims with the trustee within 10 business days from the date of the judgment

The trustee has to consider the claims made, unless the debtor's assets are insufficient to pay legal fees and secured creditors. All debts owed by the debtor fall due upon the order for bankruptcy. A trustee appointed under the bankruptcy procedures may request for and the court may suspend interest and other penalties for non-payment.

If the debtor is unable to perform its obligations of any contract, the other party may apply to the court for an order for rescission of the contract

The trustee is required to liquidate all of the debtor's property by public auction, under the supervision of the court.

The trustee is required to notify the court, any supervisors and the debtor of any proposals received for the purchase of the debtor's business.

The proceeds of sale of the liquidation of the debtor's assets are distributed by the trustee to creditors. The trustee must pay claims in the order provided for in the law, subject to court approval for the distribution and approval of payment on the basis of priorities.

In the given facts of the case if the company is incorporated under DIFC as it mentions is a Dubai based company.

Under the DIFC Insolvency Law, the liquidation of a company is addressed by Winding Up. Any DIFC-incorporated company can be wound up under the DIFC Insolvency Law, as can a DIFC-registered branch of any foreign company. The DIFC Insolvency Law's application is also extended to other DIFC registered or incorporated entities, such as limited liability partnerships.

UAE law makes general provision for the granting of mortgages over land, each emirate maintains its own land registration system; the registration and enforcement of mortgages can be subject to slightly different laws and procedures in each emirate.

While the law provides for the right of a mortgagee to sell the mortgaged property if the debtor is at default. This right must be exercised through the courts. The general approach adopted appears to be that a mortgagee can petition the court for an order for sale without first obtaining judgment for the debt. Once an order for sale is obtained, the court's execution department will conduct the sale of the mortgaged property.

The DIFC has a separate register of ownership and other interests in land, including mortgages and other charges. Under the applicable legislation. The mortgage contract must include a power of sale in the event of a default by the mortgagor.

In the event of non-payment or other default by a debtor, a creditor holding a mortgage over the debtor's land can enter into possession of the land by providing 60 days' notice to certain relevant parties and without the need for a court order. The creditor has an option to sell the whole or party of the land, receive rents and profits from the land and apply the proceeds of sale in payment of the mortgage debt. In the given facts of the case the The restaurant site had been purchased by one of RZA LLC's shareholders and was transferred to RZA LLC on the basis that payment for the site would be made by RZA LLC to the shareholder in full in 2024. Now in the given circumstances the land can either be sold or taken in possession by the shareholder. This shareholder may be nominated as the trustee as he would be aware of the affairs of the company and would be able to prove to be beneficial for the creditors as well as his own debt which is owed by the company.

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Question 4.3 [maximum 5 marks]

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RZA LLC incorporated and registered a fully-owned subsidiary company in the DIFC to operate a restaurant in the DIFC. The subsidiary is called RZA Limited and it is incorporated as a DIFC company. RZA Limited is also unable to pay its debts. What actions can RZA Limited's creditors take if they wish to see RZA Limited liquidated in the DIFC? In particular, who can take such actions and what steps would have to be taken? If the RZA 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?

ANS:

The subsidiary is called RZA Limited and it is incorporated as a DIFC company. RZA Limited is also unable to pay its debts. The DIFC Law 1 of 2019 in its chapter 6 provides for liquidation. The winding up of a company may either be voluntary or by the order of the court. (Ref: DIFC INSOLVENCY LAW, DIFC LAW 1 of 2019)

The provision is as under:

A Company may be wound up voluntarily:

- (a) in circumstances as may be provided for in the articles of the Company and where the Company has passed an Ordinary Resolution for it to be wound up; or
- (b) if the Company resolves by special resolution that it should be wound up voluntarily.

The Board of Directors of the DIFCA may make such Regulations in relation to the obligations and liabilities of Shareholders, former Shareholders, Directors, former Directors, and other persons to Contribute to the assets of a Company which is being wound up.

When a Company has passed a Resolution for Voluntary Winding Up, it shall, within fourteen (14) days after the passing the resolution, give notice of the resolution by advertisement in an Appointed Publication.

In case of a voluntary winding up, the Company shall from the commencement of the winding up cease to carry on its business, other than any business for the purpose of winding up of the Company.

Where it is proposed to wind up a Company voluntarily, the Directors (or, the majority of them) may make a statutory declaration to the effect that they have made a full inquiry into the Company's affairs and that, having done so, they have formed the opinion that the Company will be able to pay its debts in full within such period, not exceeding twelve (12) months from the commencement of the winding up, as may be specified in the declaration.

The declarations shall be delivered to the Registrar

Appointment of Liquidator

1. (1) In a Members' Voluntary Winding Up, the Shareholders of the Company, by Ordinary Resolution in accordance with the Articles of Association or any applicable laws, shall appoint one (1) or more Liquidators for the purpose of winding up the Company's affairs and distributing its assets.
2. (2) On the appointment of a Liquidator all the powers of the Directors cease, except so far as the Company, by Ordinary Resolution in accordance with

Articles of Association or any applicable laws, or the Liquidator sanctions their continuance.

The Liquidator is given wide powers as given below are to:

- (a) summon a person to be examined before the Court concerning the affairs of the Company;
- (b) inspect books and records of the Company;
- (c) direct an officer of the Company to deliver to the Liquidator all books and records in the officer's possession.
- (d) direct an officer of the Company to give to the Liquidator such information about the Company's business, property, affairs and financial circumstances as the Liquidator may require; and
- (e) direct an officer of the Company to attend upon the Liquidator to provide books and records, information, or other assistance as the Liquidator may reasonably require.

Liquidation may be proposed by the debtor itself or by any creditor. The following criteria should have been satisfied:

- the debtor has resolved that it be wound up;
- the debtor is unable to pay its debts (either on a cash flow or balance sheet basis or following a failure to pay a debt of more than USD2,000 within three weeks of formal demand);
- a Rehabilitation Plan has not been approved by the court
- a DIFC court is of the opinion that it is just and equitable that the debtor be wound up.

Any liquidation must be formally approved by the DIFC courts and, if so approved, will be binding on the debtor and all of its creditors.

If approved, a DIFC-licensed liquidator (**Liquidator**) will be appointed to realise the assets of the debtor and distribute the proceeds to the creditors. The creditors may request that an alternative liquidator or a liquidation committee be appointed to carry out such duties).

Once a liquidation has been approved by the court, creditors wishing to share in the proceeds of the liquidation will need to prove in the insolvency.

Immediately following the issuing of a winding-up order by the court, no further proceedings may

be brought against the debtor except with the permission of the DIFC court.

(1) The creditors may according with the Regulations appoint a committee i.e "the Liquidation Committee" of not more than five (5) persons to exercise the functions

1. On the appointment of a Liquidator, all the powers of the Directors cease, except so far as the Liquidation Committee sanctions their continuance.
2. In the event of the winding up continuing for more than one (1) year, the Liquidator shall provide the creditors and the Shareholders of the Company with an account of his acts and dealings, and of the conduct of the winding up, during the previous year:

In an insolvent liquidation, secured creditors will rank ahead of unsecured creditors to the extent of the value of the relevant secured asset

Amounts owing to certain preferential creditors limited to end of service gratuity payments and certain other forms of employee remuneration, will, rank ahead of amounts owing to a creditor which are secured against all or substantially all of the assets or the debtor.

As soon as the Company's affairs are fully wound up the Liquidator shall make up an account of the winding up, showing all financial details.

The Liquidator shall, before the end of the period of fourteen (14) days beginning with the day on which the account is made up:

1. (a) send a copy of the account to the Company's Shareholders, and
2. (b) send a copy of the account to the Company's creditors.

In the case of a Creditors' Voluntary Winding Up where the Liquidator has produced an account of the winding up under Article 74, the Liquidator vacates office as soon as the Liquidator has complied with Article 74(3).

* End of Assessment *

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