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Global Restructuring & Insolvency Guide

Thailand

Overview and Introduction

Following the Asian economic crisis, Thailand made significant revisions to the Bankruptcy Act (1940) and assigned a Bankruptcy Court dedicated to bankruptcy and reorganisation cases. These changes were designed to facilitate the handling of insolvency and reorganisation and bring Thailand's law closer to international concepts of bankruptcy practice. More recently, procedural reforms have been introduced to expedite bankruptcy proceedings and improve the efficiency and efficacy of official receivers and the courts. These reforms are ongoing. The Bankruptcy Act primarily covers two areas of bankruptcy law: insolvency and reorganisation.

Applicable Legislation

The applicable legislation includes the Bankruptcy Act B.E. 2483 (1940) and the Act Establishing Bankruptcy Courts and Bankruptcy Case Procedures B.E. 2542 (1999).

Personal Bankruptcy

Personal bankruptcy in the Thai system can only be commenced by a creditors' petition being filed with the Bankruptcy Court. There is no provision allowing voluntary bankruptcy under Thai law. If the petitioning creditor can verify the debtor's state of insolvency, and there are no reasons why the debtor should not be adjudged bankrupt, the court will issue an absolute receivership order. This order triggers the Official Receiver to locate and collect the debtor's assets, and remove the debtor's control of its assets.

Although there is no firm definition of "insolvent" under Thai bankruptcy law, Supreme Court decisions take "insolvent" to mean persons whose assets are less than their debts. As it can be rather difficult for a creditor to prove that the debtor's total assets are less than its total debts, the Bankruptcy Act provides certain presumptions of insolvency, such as a failure of the debtor to make repayment after receiving two notices with an interval period of 30 days. Once the creditor establishes one of the presumptions under the Bankruptcy Act, it shall be presumed that the debtor is insolvent. Then, the debtor will have the burden of proof to rebut such presumption.

One special feature under Thai law is the ability of a creditor to seek a temporary receivership order, through an ex parte injunction, in order to freeze the debtor's assets or require the debtor to provide security. This special pre-bankruptcy action is designed to prevent a debtor from liquidating its assets to the detriment of its creditors. After receiving the bankruptcy petition, the court will set a first hearing date at which objections to the bankruptcy petition will be considered. Following the hearing, and the examination of the bankruptcy petition and the acceptance of the petition by the court, the court will issue an absolute receivership order and the Official Receiver will seize and control all of the debtor's assets.

Prior to the first meeting of creditors, the debtor may propose a composition of debts to the Official Receiver, by which the debtor may propose the composition of debts or the method of management of business and assets and details of security. Subject to the composition meeting certain minimum requirements, creditors may agree to accept the proposal by special resolution of a meeting of creditors, requiring the approval of creditors representing 75% of the debt with a majority of the creditors attending the meeting. If the approval of a composition fails, the debtor will be declared bankrupt and the seizure and liquidation of the debtor's assets will be carried out by the Official Receiver and distributed according to the creditors' preferential ranking.

The debtor can be released from bankruptcy by a post-bankruptcy composition of debts and discharged from bankruptcy under the Bankruptcy Act and termination of bankruptcy on four grounds:

- that no creditor assists the Official Receiver in the collection of assets;
- the debtor should not be adjudged bankrupt;
- the debts of the bankrupt have been paid in full; and
- during the 10-year period after the closure of the bankruptcy action, the Official Receiver has been unable to collect any further assets of the bankrupt.

An individual debtor is automatically released from bankruptcy three years from the date the court adjudged the debtor bankrupt, unless there are special grounds based on the debtor's dishonest actions.

Corporate Insolvency and Restructuring

There are three types of procedure available for corporate debtors.

First, a creditor-initiated bankruptcy, whereby the successful verification of the debtor's insolvency by the creditor leads to a court order of absolute receivership and the process is under judicial supervision.

Second, a debtor-initiated bankruptcy through voluntary liquidation as a result of a special resolution of shareholders, whereby liquidators of a registered partnership, limited partnership or limited company may, if its contributions or shares are fully paid up and where its assets are insufficient to meet its liabilities, apply with the court to have the entity declared bankrupt.

The issues regarding the meaning and establishment of insolvency noted in the section on "Personal Bankruptcy" are also applicable to corporate bankruptcy. Moreover, in the case of entities, Thai courts tend to rely heavily on the balance sheet of the company. As such, in cases where the debtor attempts to inflate its assets to create a positive balance sheet, creditors will require strong proof to convince the court that the debtor is insolvent.

Also applicable to corporate bankruptcy are the ability to seek a temporary receivership order, the ability of the corporate debtor to propose a composition of debt and the methods of release from bankruptcy. However, the automatic release from bankruptcy that is applicable in a personal bankruptcy, as mentioned above, is not applicable to a corporate bankruptcy.

As with personal bankruptcy, after receiving the bankruptcy petition, the court will set a first hearing date, at which objections to the bankruptcy petition will be considered. Following a hearing and its acceptance by the court, an absolute receivership order is issued and the Official Receiver will seize and control all of the debtor's assets.

The third type of procedure for corporate debtors is a business reorganisation procedure, either creditor- or debtor-initiated, with the objective of rehabilitating the business. A reorganisation planner (the "**Planner**") or plan administrator (the "**Administrator**") operates this procedure with judicial oversight.

A petition for business reorganisation may be submitted by the debtor, its creditor or relevant government authorities. Upon submission of the petition, and the court granting an order accepting the petition, an automatic stay will come into effect and parties will be prohibited from taking certain actions regarding the debtor, such as:

- commencing litigation or requesting that the court wind up the debtor;
- revoking the licences of the debtor to undertake various activities or ordering the debtor to cease such activities;
- commencing a civil case or arbitration regarding the debtor's assets with regard to debts incurred prior to the date that the court issues an order to approve the plan;

- commencing a bankruptcy action against the debtor;
- enforcing a judgment against the debtor's assets for debts incurred prior to the date that the court issues an order to approve the plan;
- enforcing security without court approval; or
- transferring, disposing of, leasing out or incurring debts, or undertaking any action that creates a burden over property unless this is necessary for normal trade activities.

As with a typical bankruptcy proceeding, the court will set an enquiry hearing at which objections to the petition will be considered. Following the court's order to reorganise the debtor's business, all powers to manage the debtor's company will pass to the Planner and then to the Administrator after the court approves the reorganisation plan. Unless the debtor acts as its own Planner or Administrator, the Planner and Administrator must be registered with the relevant authority. In the latter case, the party acting as the Planner or Administrator must place a deposit with the Business Reorganisation Office to guarantee that their performance does not damage the debtor or the creditors. After the Planner appointment order is published in the Government Gazette, creditors have one month to lodge their provisional creditor claims with the Official Receiver, failing which, creditor claims will be barred.

The plan must be approved by special resolution (75% of the debts in each group) of the creditors' meeting of every group of the creditors, or at least one group of creditors with the total debt of all creditor groups at the meeting tallying to not less than 50%. In this regard, the majority creditors can impose a plan on minority creditors, including a plan with a debt haircut. Under Thai law, any debt that is forgiven under a reorganisation plan is exempt from taxation.

Subsequently, the court must approve or reject the plan. In this regard, the court is required to examine any objections to the plan. In the event the plan is rejected, the court may simply revoke the order granting permission to reorganise and return the debtor to a state of normal business operation or, if there is a pending bankruptcy lawsuit against the debtor, the court will order to continue that bankruptcy lawsuit.

The Administrator must be named in the plan and approved at the creditors' meeting. After the plan is approved, the Administrator has a period of five years to successfully implement it. This period may be extended twice for additional one-year terms. In addition, the court may further extend the period of the business reorganisation, at its sole discretion, if it appears to the court that the reorganisation is close to successful completion. The Administrator has a duty to make a periodical report to the Official Receiver, who is a government official under the Ministry of Justice, and to the court. At the request of the committee of creditors appointed by the creditors' meeting, the debtor's executive, or the Official Receiver, the court has the power to remove the Administrator if there is any wrongdoing or if the Administrator is deemed to be incompetent.

Special Powers to Cancel Fraudulent Acts, Acts of Undue Preference and Executory Contracts

An important feature of both the bankruptcy and reorganisation laws is the ability to have fraudulent acts, acts of undue preference, and executory contracts invalidated during the bankruptcy or reorganisation process.

The Planner, Administrator or Official Receiver may ask the court to cancel a fraudulent act by filing a motion with the court. A fraudulent act is defined as an act conducted by the debtor with the knowledge that such act would prejudice its creditor. However, this nullification does not apply if the third party who received the benefit from such an act gave fair value for the act and did not know, at the time of the act, that such an act would prejudice creditors. The prescription period to request nullification is within one year from the time the creditor knew of the cause for nullification of the act or within 10 years from the occurrence of the act. If the alleged fraudulent act was conducted within one year before the filing of the application for bankruptcy or reorganisation, it shall be presumed that the debtor and the third party had knowledge that it would prejudice creditors.

When it appears there has been a transfer of assets or any other act that the debtor has committed or allowed to be committed within the period of three months before the filing of the petition and thereafter, with the intent to place any creditor in an advantageous position over the other creditors, the Planner, Administrator or Official Receiver may file an application with the court requesting nullification of such transfer or such act.

In addition, within the time period of two months from the date the Administrator is informed of the court's approval of the reorganisation plan, the Administrator has the right to refuse to accept rights under a contract whereby the obligations exceed the benefits to be received, provided that such rights were included as part of the reorganisation plan approved by the creditors' meeting and the court.

Therefore, when entering into an agreement with, or receiving any assets from, a debtor who is insolvent (e.g. receiving repayment for a loan, receiving a letter confirming a debt or damages), a party should take into consideration the risk that the transaction may be nullified as a fraudulent act or as displaying undue preference. It should be noted that, for undue preference, even if the creditor who receives the assets or repayment is acting in good faith, the act is still subject to nullification. The law focuses only on whether or not such an act gives preference to one creditor over other creditors, which also means that the creditor who receives the assets or repayment must be the existing creditor at the time the act is committed and that the debtor is in an insolvent status at the time the act is committed.

Appellate Procedure

At present, appeals against orders of the Bankruptcy Court or the Official Receiver, in both bankruptcy and reorganisation cases, are made directly to the Supreme Court and are limited to certain circumstances, such as an appeal against an order dismissing the petition, an appeal against an order on a creditor claim, or the rendering of an absolute receivership order. However, legislation has been announced to establish a specialist division of the Court of Appeal which, once it has been established, will have jurisdiction over such appeals.

Small and Medium Enterprises

On 25 May 2016, legislation implementing a streamlined reorganisation process for small and medium enterprises ("**SMEs**") came into force. The regime applies to individuals, juristic bodies, ordinary partnerships (registered and unregistered), limited partnerships, and limited companies, provided they are registered with the Office of SME Promotion.

Eligibility for reorganisation is subject to the entity or person proving illiquidity as a result of debts from their business operations. Those debts must total at least THB 2 million for individuals, and THB 3 million for juristic persons. For limited companies who qualify as SMEs, the debts must not exceed THB 10 million, or the standard reorganisation procedure will apply.

Under the SME regime, the petitioner is required to file a reorganisation plan, supported by creditors holding a total of two-thirds of the overall debt, at the same time as it files a business reorganisation petition. The court can therefore approve both at the same time, allowing the SME to implement the plan much more quickly than under the standard reorganisation procedure.

Out-of-Court Mechanisms

The Thai Bankruptcy Act does not include provisions for workout mechanisms or pre-court options such as settlement of debt.

Criminal Penalties

It is also noteworthy that Thai bankruptcy law provides specific criminal penalties for the bankruptcy and reorganisation processes, and the Bankruptcy Court is empowered to administer these penalties.

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