

# Responding to crisis



Illustration: Johnnie Au

*Whilst Thailand's bankruptcy laws have come some way on the domestic front since the Asian financial crisis, the recognition of foreign insolvency proceedings remains out of reach. Cynthia M. Pornavalai of Tilleke & Gibbins explains.*

**T**he 1997 Asian financial crisis crippled many Asian economies in its wake, but it also left behind a lasting legacy to the economies that it ravaged. Faced with sharp economic slowdown and a wave of corporate defaults, Thailand felt compelled to revamp its banking and financial institutions, including various legal infrastructures. Such action included amending its antiquated bankruptcy law in 1998 to allow for corporate restructuring similar to the procedures under Chapter 11 in the United States. Since that time, various revisions have been made to fine-tune the bankruptcy law's provisions and principles.

Interestingly, despite this restructuring regime being in place for the past decade, statistical trends indicate that debtors and creditors alike have not taken to corporate restructuring as one would have expected in an economy that is continuously being threatened by non-performing loans. During the period from 1999 - 2007, there were a total of 554 corporate restructuring cases filed at the Central Bankruptcy Court, compared with 50,595 straight bankruptcy cases filed during the same period. A similar

trend in favour of straight bankruptcy cases has continued during the past year.

Given there is optimism that the present financial crisis will not affect the Asian economies as did the financial crisis of the late 1990s, it is surprising that so many companies are opting to begin bankruptcy proceedings when corporate rehabilitation is now available. Putting this jurisdictional trend to one side however, companies conducting business in Asia should still be aware of various insolvency and restructuring laws around the region in the event that they encounter cross-border insolvency proceedings. This article examines the evolution of Thai insolvency and restructuring laws, as well as the Thai perspective on cross-border insolvency proceedings.

## **The Thai Bankruptcy Court**

Bankruptcy law in Thailand is principally governed by the *Thai Bankruptcy Act* of 1940 (the Act), which was originally based on the *English Bankruptcy Act* of 1914. The Act has undergone seven amendments to date, with the most recent one being the *Bankruptcy Act (No. 7) 2004*. The most signifi-

cant amendment to the Act took place in 1998 in the form of additional provisions under Section 90 (Chapter 3/1) which allow for the restructuring or reorganisation of a company.



**“The inclusion of reorganisation proceedings in the 1998 amendments necessitated the appointment of specially trained judges**

**with an understanding of the process and appropriate knowledge of business practices”**

Cynthia M. Pornavalai  
*Tilleke & Gibbins*

The inclusion of these reorganisation proceedings in the 1998 amendments necessitated the appointment of specially trained judges with an understanding of the process and appropriate knowledge of business practices. As a result, the *Establishment of Bankruptcy Court and Procedure for Bankruptcy Cases Act* was enacted in 1999, following which a specialised court – known simply as the Central Bankruptcy Court – began operations on 18 June 1999. The Central Bankruptcy Court (the Court) has jurisdiction over all bankruptcy cases as well as all civil matters pertaining to bankruptcy cases. More recently, the Court was given jurisdiction over criminal matters pertaining to bankruptcy as well.

Unless there is an unavoidable necessity to do otherwise, the Court will proceed with the trial of a bankruptcy case consecutively, without adjournment, until it is completed. This practice is a substantial departure from that which prevailed at the time of the enactment in 1999, when cases were generally heard on an installment basis at one-month intervals. In addition, appeals now go directly to Thailand’s Supreme Court.

### **Liquidation – absolute receivership**

#### **Overview**

Under Thai law, bankruptcy is an involuntary act whereby the law causes the property of a company/debtor to be distributed

among its creditors. Any creditor owed more than 2 million baht (approximately US\$58,800) by a corporate debtor, or more than 1 million baht (approximately US\$29,400) by an individual debtor (a natural person), may file a bankruptcy action against such debtor. However, the debtor must first be proven insolvent. Under Thai law, a debtor’s insolvency is principally assumed if he declares an inability to pay his debts, avoids the payment of his debts, or does not pay his debts after receiving at least two demand letters from his creditors at intervals of not less than 30 days. A company is deemed essentially insolvent when its book value of total liabilities exceeds the market value of its assets.

### **Discharge from bankruptcy**

A bankrupt may be discharged from bankruptcy by court order or by automatic discharge. The debtor may submit an application by way of a motion to the Court asking for an order of discharge from bankruptcy. The discharge will be granted if at least 50 percent of the debtor’s assets have been paid to creditors and the bankrupt is not deemed to be a dishonest person.

An individual – but not a business – may also be discharged from bankruptcy based on the tolling of automatic discharge periods, which start running as of the date a debtor is adjudged bankrupt. A bankrupt individual will be automatically discharged after three years. However, if such a person has had an earlier bankruptcy within the previous five years, the automatic discharge period will then be extended to five years. In cases of dishonest bankrupts, the Court may extend the discharge period to ten years, yet it is empowered to shorten the period to five years in cases of special circumstances, at the request of the bankrupt or the receiver. Finally, in cases of public fraud, the automatic discharge period is a full ten years.

Whether discharge takes place via court order or automatically, an order for discharge is published in the *Government Gazette* and at least one daily newspaper. Such means of discharge does not release from liability a person who is a partner with the bankrupt, a person who is jointly liable with the bankrupt, or who guarantees or is in the position of a guarantor of the bankrupt. Similarly, neither means of discharge will release tax debt nor will they release those debts arising from dishonesty or fraud.

### **Business reorganisation**

#### **Overview**

The proceedings for a business reorganisation are governed by

Chapter 3/1 of the Act. Proceedings may start with the filing of a petition for restructuring by any creditor(s) owed more than 10 million baht (approximately US\$295,000), or by a relevant government authority. When the Court approves the application for restructuring, it gives the debtor protection by declaring an automatic stay which restricts the ability of creditors to take action against the company to recover any sums owing to them. The stay prevents any form of legal process being commenced or continued against the company, and also prevents creditors from filing dissolution or bankruptcy petitions.

After the Court's approval of the application, the creditors are required to select a plan preparer to draft a rehabilitation plan. The creditors' choice of plan preparer must be approved by the Court. Within one month after the Court's appointment of the plan preparer, all creditors must submit their claims. The plan preparer must then draft the plan, which must be submitted to the creditors for their consideration within three months. Grouped into various categories, the creditors may approve the plan through passing a special resolution, following which the plan can then be submitted to the Court for final approval.

From the time the Court approves the rehabilitation plan, it becomes binding on all creditors. The plan is then implemented by a plan administrator who is principally vested with the duties of managing the business and assets of the debtor according to the business reorganisation plan. Following the Court's approval, the plan must be implemented within a five-year timeframe, with two one-year extensions allowed. If the Court decides that the plan is not successful within this timeframe, it may order its termination and/or put the company under absolute receivership, leading to bankruptcy proceedings.

#### **Rehabilitation plan**

The plan preparer must draft a plan which, at a minimum, contains the following information:

- The reasons for reorganising the business;
- Details concerning the assets, liabilities, and other binding obligations of the debtor at the time the Court orders business reorganisation;
- The principles and methods of the business reorganisation;
- Redemption of collateral in cases where there are secured creditors and liabilities of a guarantor;
- Ways to solve problems stemming from a temporary lack

**“When the Court approves the application for restructuring, it gives the debtor protection by declaring an automatic stay which restricts the ability of creditors to take action against the company...”**



of liquidity during the plan's implementation;

- Action to be taken in cases in which a claim or debt is assigned;
- The name, qualifications, and letter of consent of the plan administrator, as well as information about his or her compensation;
- The appointment of the plan administrator and his or her release from the position;
- The time period in which the plan will be implemented, which must not exceed five years;
- The refusal of assets of the debtor or refusal of contractual rights, in a case in which the assets of the debtor or contractual rights have obligations which exceed the benefits to be derived therefrom.

#### **Claim for repayment**

The debts for which repayment can be claimed will only be those that occurred before the Court issued the reorganisation order, regardless of whether the debt has since matured or is conditional. However, new creditors, or those injecting fresh funds into the company for its reorganisation, are given the right to repayment in accordance with the plan. This procedure is one of the major changes to Thailand's original bankruptcy law, with the 1998 and 1999 amendments revising the prohibition under the 1940 Act against the repayment of a debt created when the creditor was aware of the debtor's insolvency.

If the Court does not approve the rehabilitation plan or decides to terminate the business reorganisation but not place the debtor company under receivership, the company is restored to its former state. As such, the stay is

lifted and all rights and liabilities of the former shareholders and directors are reinstated. Secured creditors may then decide to foreclose on the debtor's assets.

In the event that the Court orders absolute receivership, the day the Court accepts the petition for consideration shall be deemed the day that it is requested that the debtor be adjudged bankrupt. The creditors must first apply for repayment from the receiver within two months following the date of publication of absolute receivership. For creditors residing outside Thailand, the deadline is extended by an additional two months.

**Treatment of cross-border insolvencies in Thailand**

**Foreign insolvency decisions and foreign creditor claims**

Thailand is not a member of any treaty or convention that recognises foreign insolvencies, and the receivership of assets or a bankruptcy action under foreign laws has no effect as to the assets of the debtor in Thailand. Similarly, Thailand's insolvency laws make no claims as to jurisdiction over assets of a corporate debtor situated abroad. The Act states that it only applies to a debtor's property located within Thailand.

In order for a foreign creditor's claims to be admitted in Thailand, proof must be presented to the Court that creditors in Thailand are similarly entitled to so claim under the

laws of the country in which the foreign creditor resides. In addition, in reporting the amount of assets or distribution that a foreign creditor is entitled to receive from a debtor's assets located abroad, the foreign creditor must agree to deliver such portion of the debtor's property to be added to the debtor's property in Thailand.

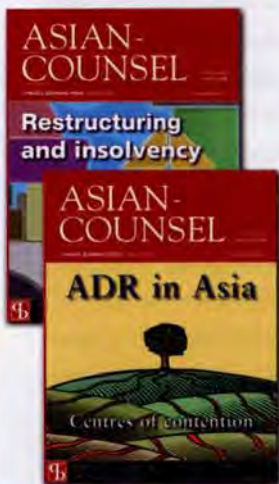
**The UNCITRAL model law**

Although Thailand participated in the UNCITRAL Model Law on Cross-Border Insolvency working group, it has yet to consider adopting the guidelines into the country's domestic legislation. The principal stumbling block for Thailand towards acceptance of the UNCITRAL Model is the recognition of foreign insolvency proceedings. Foreign judgments in civil cases are not recognised in Thailand, and making an exception with respect to foreign bankruptcy proceedings would be a major legislative hurdle.

[cynthia.p@tillekeandgibbins.com](mailto:cynthia.p@tillekeandgibbins.com)  
[www.tillekeandgibbins.com](http://www.tillekeandgibbins.com)

**IN-HOUSE OPINION:** If you are an in-house counsel and you have a comment or an opinion you'd like to share either on this article or its subject matter, contact us at: [in-house@pbpress.com](mailto:in-house@pbpress.com) with the article title in the subject line, stating clearly if you wish your comments to remain 'Private' or 'Anonymous'.

**COMPLETE AND RETURN FORM TO SUBSCRIBE TODAY**



YES, I would like to receive a hard copy of every issue of **Asian-Counsel** magazine (published 10 times a year) at the special discount price of HK\$2,100/US\$270 p.a. (usual price HK\$2,330/US\$299 p.a.)

Name (Mr/Ms/Mrs) \_\_\_\_\_ Job Title \_\_\_\_\_  
 Company \_\_\_\_\_ Email \_\_\_\_\_  
 Address \_\_\_\_\_  
 Tel \_\_\_\_\_ Fax \_\_\_\_\_  
 Date \_\_\_\_\_ Signature \_\_\_\_\_

Return by fax to: (852) 2575 0004 or Email: [publications@pbpress.com](mailto:publications@pbpress.com)