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BANKRUPTCY LAW IN THE KINGDOM OF THAILAND

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I. Introduction

The 1997 Asian financial crisis had crippled many Asian economies in its wake, but it had also left behind it a lasting legacy to the economies that it ravaged. Faced with sharp economic slowdown and a wave of corporate defaults, Thailand revamped its banking and financial institutions including various legal infrastructures. For one, it made a major amendment to its antiquated bankruptcy laws to allow for corporate restructuring similar to the United States' Chapter 11. The amendment, which took the form of an additional section on Corporate Reorganization under Chapter 3/1, took effect in 1998. Over the years, various revisions have been made to fine-tune its provisions and principles.

While there is optimism that the present financial crisis in the US will not affect the Asian economies as it did in the late 1990s, it is nevertheless worthwhile to review Thailand's bankruptcy laws in anticipation of harder times ahead. This article examines the evolution of the Thai bankruptcy law and its basic provisions.

II. The Thai Bankruptcy System

A. Bankruptcy Court

The inclusion of reorganization proceedings in the 1998 Amendments necessitated 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 such enactment, a specialized court, known simply as the Central Bankruptcy Court, began operations on June 18, 1999. The Court has jurisdiction over all bankruptcy cases, as well as all civil matters pertaining to bankruptcy cases. More recently, the Central Bankruptcy Court was given jurisdiction over criminal matters pertaining to bankruptcy as well.

Prior to the 1999 Act, any civil court in Thailand could hear bankruptcy cases. However, all bankruptcy cases are now required to be heard by bankruptcy court judges. Thus, filing bankruptcy petitions with other courts is no longer allowed.

The Bankruptcy Courts are divided into the Central Bankruptcy Court and the Regional Bankruptcy Courts. The Central Bankruptcy Court has jurisdiction throughout the Bangkok Metropolitan Area, but all bankruptcy cases which occur outside such jurisdiction may be filed with the Central Bankruptcy Court. However, the Central Bankruptcy Court may, at its discretion, refuse to try any such cases. Regional Bankruptcy Courts may be established under Acts which stipulate the respective jurisdictions and locations of such Courts.

B. Bankruptcy Procedure

Bankruptcy procedures are governed by the Bankruptcy Act, as amended; the Act for Establishment and Procedure for Bankruptcy Court, as amended; the Rules on Bankruptcy Cases; and the Civil Procedure Code.

1. Proceedings in the Court of First Instance

The Bankruptcy Court proceeds with the trial of a case consecutively without adjournment, until completion thereof, unless there is unavoidable necessity. Thereafter, the Bankruptcy Court will make a judgment or issue an order as soon as possible. In the event that a party fails to appear in Court at any hearing, regardless of whether or not permission is given by the Court, it will be deemed that the party is aware of the court proceedings at that hearing. This proceeding is a substantial departure from the practice current at the time of the enactment of the 1999 Act whereby cases were generally heard on an installment basis at one-month intervals.

2. Appeal

A judgment or order of the Bankruptcy Court in respect of a business rehabilitation of a debtor, including civil and criminal cases associated with such a case, may be appealed to the Supreme Court within one month from the date when the judgment or order is pronounced. Appeals are accepted by the Bankruptcy Court which is responsible for passing them to the Supreme Court.

III. Liquidation – Absolute Receivership

A. 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.

B. Bankruptcy Process

1. Who can initiate a bankruptcy action and against whom?

Any creditor owed more than Baht 2 million by a corporate debtor or more than Baht 1 million by an individual debtor may file a bankruptcy action against such debtor. However, the debtor must first be proven insolvent. Under Thai law, a debtor shall be presumed insolvent if any of the following events occurs:

(a) the debtor transfers assets or rights in management of his assets to another person, for the benefit of all his creditors;
(b) the debtor transfers his assets dishonestly or fraudulently;
(c) the debtor transfers an asset or creates any right over it, which may be deemed a preferential transfer if the debtor were declared bankrupt;
(d) the debtor, in order to avoid paying creditors,
    (i) leaves Thailand or remains outside Thailand;
    (ii) removes his assets from the jurisdiction of the Court; or
    (iii) consents to a judgment ordering payment of money which he does not pat;
(e) the debtor's assets have been attached under a writ of execution, or there are no more assets for which attachment is possible;
(f) the debtor declares to the Court in any action that he cannot pay his debts;
(g) the debtor informs any of his creditors that he cannot pay his debts;
(h) the debtor submits proposals for compromising on his debts, to any two or more of his creditors; or
(i) the debtor receives demand letters from his creditors not less than twice, at intervals of not less than 30 days, and does not pay the debts.

2. Composition

(a) Composition prior to Bankruptcy

If both the creditors and the debtor wish to avoid a long, protracted and adversarial bankruptcy action, a composition during bankruptcy may be an attractive alternative. So, whenever the debtor desires to come to a settlement for the satisfaction of his debts by repayment of a part, or in any other manner, he may submit his proposed composition in writing to the receiver within seven days after the date of submission of his explanation of matters relating to his business, or within such period the receiver prescribes. The receiver then calls a meeting of the creditors to consider whether such proposal shall be accepted. The acceptance will not bind all creditors until the Court passes an order approving the composition.

The Court is not permitted to approve a composition in which no provision is made for repayment of debts, according to the order prescribed by the law relating to the division of the assets of a bankrupt. Further, the Court is not permitted to approve a composition of no benefit to creditors generally, or which gives preferential treatment to some creditors, or which indicates any fact which, if the debtor became bankrupt, would prevent the debtor from being discharged from bankruptcy. In the last case, however, there is an exception. The Court can approve such a composition if the debtor posts security for repayment of an amount of at least one-quarter of the total unsecured debt for which creditors can claim repayment.

Once the composition is approved by the creditors and the Court, it becomes binding on all creditors. However, a composition does not cause a person who is jointly liable with the debtor or who is a guarantor to be released from his liability.

If the debtor fails to repay his debt as agreed in the composition, if there is likelihood that such repayment will be delayed, or if such composition was obtained by fraud, then on the report of the receiver or on the motion of any creditor, the Court is empowered to terminate the composition and adjudge the debtor as bankrupt.

(b) Composition after Bankruptcy

After the Court's adjudication of bankruptcy, the debtor may (again) submit a proposal for a composition. However, if the debtor's previous composition was unsuccessful, he is not allowed to do so again within 3 months from the date the last failed. If the Court approves the composition, it is empowered to terminate the bankruptcy and may order the restoration of the power of the debtor to manage his business.

3. 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% of the assets have been paid to creditors and the bankrupt is not a dishonest person. Dishonesty will be presumed, for example, if the bankrupt carries on business knowing he is unable to pay his debts, if he has given preference to any creditor, if he has embezzled, or if he has engaged in borrowing that constitutes public fraud. In any event, a bankrupt who has been discharged from bankruptcy by court order still has the duty to assist in the realization and distribution of his assets, as the receiver may require. If he does not so assist, the Court may withdraw the discharge from bankruptcy.

An individual, and 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 will be automatically discharged after three years. However, if such a person has had a previous bankruptcy within five years, the automatic discharge period will be extended to five years. Also, in cases of dishonest bankrupts, the court may extend the period to ten years. However, for such bankrupts, the court is empowered to shorten the period to five years in cases of special circumstances on 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 do not release from liability a person who is a partner with the bankrupt, 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 those debts arising from dishonesty or fraud.

C. Proceedings in the Case where the Debtor is an Ordinary Partnership, a Limited Partnership, a Limited Company, or any other Juristic Person

Where the debtor is a juristic person, aside from creditors being able to file a bankruptcy action shown above, the liquidator of such juristic person may also submit a petition to the Court asking that such person be adjudged bankrupt if it appears that the contribution of shares has been fully paid up and the assets are insufficient to cover the debts. The Court then issues an order placing the juristic person immediately under absolute receivership, and the meeting of creditors shall appoint one creditor to have the rights and duties as that of a petitioning creditor. He, as well as the receiver, may file a motion for the adjudication of bankruptcy of persons who are found to be unlimited partners in such juristic person without filing a new action. The Court may then order a temporary receivership of the assets of any such person or persons. The petitioning creditor may be required to give security against loss in such amount as the Court may deem proper. If it appears later that the person was or is not an unlimited partner, the Court will terminate the receivership and if such person filed a motion to the Court, the Court has the power to order that the petitioning creditor who asked for the receivership pay compensation to such person in a sum as the Court may consider proper, or it may order that the receiver make such payment out of the assets of the juristic person.

IV. Business Reorganization

A. Overview

The proceedings for business reorganization are governed by Chapter 3/1 of the Act. The procedures under Chapter 3/1 start with the filing of a petition for restructuring by the debtor, the creditor(s) owed more than Baht 10 million, or 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. The stay also prevents creditors from filing dissolution or bankruptcy petitions. After the Court's approval of the application, the creditors are next 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. The creditors may approve the plan through a special resolution passed by the creditors who are grouped into various categories. Once approved by the creditors, the plan is submitted to the Court for its final approval. From the time the Court approves the plan, it becomes binding on all creditors. The plan is then implemented within a five-year time frame after the Court's approval, with two one-year extensions allowed. Within this time frame, if the Court decides that the plan is not successful, it may order its termination and/or put the company under absolute receivership, leading to bankruptcy proceedings.

B. Filing of Petition for Business Reorganization

1. Who can initiate a business reorganization action and against whom?

The debtor, or the creditor or creditors owed more than Baht 10 million, or a relevant government authority, may file a petition for reorganization of the debtor's business regardless of whether a lawsuit for bankruptcy has been filed against the debtor. However, it must be established that the debtor is insolvent and that there is reasonable ground and prospect to reorganize the business.

Filing a petition for reorganization will not be allowed in the event that:

(a) the Court has ordered the debtor to be under absolute receivership; or
(b) the Court or the registrar has ordered a dissolution or revocation of the registration of juristic person of the debtor, a registration of dissolution of such juristic person is made, or the juristic person must be dissolved for other reasons.

2. Specifics of the Petition

The petition for business reorganization must clearly set out:

(a) the insolvency of the debtor;
(b) list and address of all creditors to whom the debtor is indebted alone or altogether for an amount of at least Baht 10 million;
(c) reasonable grounds and prospects to rehabilitate the business;
(d) the name and qualifications of the plan preparer; and
(e) a letter of consent of the plan preparer.

If a creditor is the petitioner, it shall annex the data of other known creditors; if the debtor is the petitioner, it shall annex the list of all of its existing assets and debts, including data of the creditors.

3. Automatic stay

When the Court approves the application for reorganization, 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 debtor. The stay also prevents creditors from filing dissolution or bankruptcy petitions. Once the automatic stay commences, it means a severe limitation for the secured creditor on the enforcement of its securities. Basically, a secured creditor cannot file an action in a civil case against a debtor in respect of the debtor's assets without the Court's approval. If there has already been a judgment, the execution of such judgment over the assets of the debtor cannot also be carried out without the Court's dispensation. In order to apply for an amendment or annulment of the limitation, the secured creditor will have to prove that the stay or limitation is not necessary for the business reorganization, or that the rights of secured creditors are not sufficiently protected. On the other hand, the protection shall be deemed sufficient if there has been a repayment of debt to secured creditors in an amount equal to the amount of decrease in the value of the assets used as security, if security has been given to secured creditors so as to compensate for the original security in an amount equal to the decrease in the value of assets used as security, or if secured creditors have consented to, or the Court approves, any other procedure which will allow the secured creditors to receive repayment for their claims at the

value of the assets used as security at the time the petition for business reorganization was submitted, including interest and contractual benefits, on termination of the procedure(s).

C. Plan Preparer, Plan Administrator and Receiver

1. Plan Preparer

When the Court approves the application for reorganization, a plan preparer must be appointed to make a plan for reorganization of the business.

The plan preparer need not have any special qualifications. It may be a company or a committee, and since there is no such formal occupation as a professional insolvency specialist in Thailand as exists in other jurisdictions, the plan preparer can practically be any person, company or committee nominated by the debtor or creditor, and approved by the Court.

The plan preparer has the two-fold function of continuing the business and preparing a plan. His roles are very broad and powerful. Once appointed by the Court, the powers and duties of the debtor's directors in managing the business, as well as all the legal rights of the debtor's shareholders (except the right to receive dividends), are vested in the plan preparer. In this way, the plan preparer is given a wide range of administrative powers to enable him to take over the business effectively.

Primarily, the party requesting reorganization has the prerogative in appointing the plan preparer. If there are no objections from the debtor or creditor, the Court, if it is of the opinion that the person is suitable to be the plan preparer, will appoint the person nominated by the petitioner. However, if there are objections from either the debtor or creditor, the debtor then gets the prerogative to nominate the plan preparer. If the debtor does not do so, a meeting of the creditors will be called by the receiver. The receiver will then publish an advertisement fixing the day, time and place of the meeting of the creditors for the purpose of selecting the plan preparer at least seven days in advance in at least one daily newspaper. He will also notify the debtor and all known creditors.

In nominating a plan preparer in the meeting of the creditors, a letter of consent from the nominated person must first be supplied. However, if the debtor proposes a plan preparer to which the creditors object, the creditors may only override the debtor's choice and replace him with their own nominee if they are owed at least two-thirds of the debt. Voting is limited to creditors who have requested repayment under the business reorganization.

In order of priority, the parties that have the right to appoint a plan preparer are first, the petitioner; second, the debtor; then third, the creditor. It can be seen that the creditor does not have absolute power in choosing the plan preparer, albeit this is not of much concern to large creditors who can unilaterally control the procedures for nominating the plan preparer. However, it poses a problem for small creditors who have a smaller voice or none at all.

If the Court has ordered a business reorganization but has not yet appointed a plan preparer, all legal rights of the debtor's shareholders shall be suspended with the exception

of the right to receive dividends. Said rights shall be vested in the interim executive or the receiver, as the case may be, until a plan preparer is appointed.

2. The Plan Administrator

The plan administrator is principally vested with the duties of managing the business and assets of the debtor according to the business reorganization plan. His appointment, tenure, qualifications and compensation are specifically contained in the plan. His duties commence upon the Court order approving the plan. He may propose a revision of the plan and/or an extension of the plan implementation period. Such extension may be made only two times at no more than one year each. If, however, it is clear that the plan has almost been fulfilled, the plan administrator may request an extension as long as necessary. The plan administrator, pursuant to the plan, may request the Court to permit the amendment or the establishment of new Articles of Association or a new Memorandum of Association of the debtor. The law requires him to report regularly to the receiver and the Court with regard to the implementation of the plan. Specifically, he has to let the Court know of his views as to whether the reorganization of the business has been completed.

3. The Receiver

The receiver is a government official. He acts in an administrative capacity, being responsible for calling meetings and receiving claims for payment. Such meetings include the creditors' meeting for selecting the plan preparer and creditors' meeting to consider the plan. Before the formal appointment of the plan preparer, the receiver is also vested with the duty to take over the business of the debtor. During plan implementation, the receiver is entrusted with the duty of supervising the actions of the plan administrator, who can be removed by the Court at the receiver's recommendation. Generally, where the plan preparer or plan administrator for any reason does not exist, his rights and duties fall on the receiver.

D. Claim for Repayment

The law stipulates that all applications for repayment must be made within one month after the Court's appointment of the plan preparer is published. All creditors, including secured, unsecured, and judgment creditors, must file according to the same procedures. If a creditor eligible for repayment does not apply within this period, he forfeits his right to receive payment, unless the plan provides otherwise, or the Court cancels the business reorganization order. The debts for which repayment can be claimed will only be those that occurred before the Court issued the reorganization order, regardless of whether the debt has matured or is conditional. For debts that were created between the time that the Court issued the order to reorganize the business and the appointment of the plan preparer, the creditors have rights according to the time periods stipulated in the plan without having to apply for repayment of debt under business reorganization. These creditors must, however, send a letter to the plan preparer asking him to issue a letter for their claim prior to the meeting to discuss the plan. As for the actual repayment of debts, the receiver has the authority to authorize payments. However, debts that can be repaid are limited to those that have not been opposed by the plan preparer, the other creditors, or the debtor. If any person opposes an application filed, the receiver shall investigate the matter and issue approval,

partial approval, or dismissal of such application. Any objections to the orders issued by the receiver may be filed with the Court within 14 days after learning of the issued order.

For foreign creditors, of particular concern is the currency of payment. If the debt applied for is in foreign currency, the amount must be converted into Thai Baht. The computation shall be based on the exchange rate on the day the Court issued the order to reorganize the business. In these times of fluctuating exchange rates, one can envision the huge amount of gains or losses that could be made just because of this particular rule.

New creditors, or those injecting fresh funds into the company for its reorganization, are given the right to repayment in accordance with the plan. This procedure is one of the major changes to the old bankruptcy law. Under the 1940 Act, a new creditor lent money at his own risk. This was because the 1940 Act prohibited the repayment of a debt created when the creditor was aware of the debtor's insolvency. This particular provision of the 1940 Act was one of the primary issues making business restructuring virtually infeasible. The 1998 and 1999 Amendments addressed this issue by allowing the new creditor to have the right to repayment in accordance with the plan. However, unlike other jurisdictions where new creditors enjoy "super priority", the Thai legislation does not automatically entitle these new creditors to have priority over all other creditors.

E. Annulling a Juristic Act Already Executed

The plan preparer or receiver may ask the Court to cancel a fraudulent act pursuant to the Civil and Commercial Code by filing a motion to that effect. If the juristic act subject to this motion arose within the period of one year before the date of filing of the petition, if it is a gratuitous act, or if it is an act in which the debtor received compensation in an amount less than appropriate, it is deemed an act which the debtor and the person who was enriched thereby had the knowledge that it would prejudice third creditors. If it appears that there was a transfer of assets committed within three months before the petition or thereafter, with the intent to put a creditor in an advantageous position, the Court has the power to order the cancellation of such act. If the person taking advantage is an insider of the debtor, cancellation can be effected if the act was done within one year before the petition was filed.

F. The Plan

1. Specifics of the Plan

At a minimum the plan must contain:

(a) the reasons for reorganizing the business;
(b) details concerning the assets, liabilities, and other binding obligations of the debtor at the time the Court orders business reorganization;
(c) principles and methods of business reorganization;
(d) redemption of collateral in the case where there are secured creditors and liabilities of a guarantor;
(e) ways to solve problems stemming from a temporary lack of liquidity during plan implementation;
(f) action to be taken in cases in which a claim or debt is assigned;

(g) the name, qualifications, and letter of consent of the plan administrator as well as information about his compensation;
(h) the appointment of the plan administrator and his release from the position;
(i) time period in which the plan will be implemented, which must not exceed five years; and
(j) 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 there from.

2. Creditors Meeting for Approval of the Plan

The plan preparer, after having been officially appointed by the Court and announced in the Government Gazette, will proceed to draft the plan. This task must be completed within three months, with two possible extensions of one month each. The plan is then sent to all related parties. After receiving the plan, the receiver will call a meeting of the creditors in order to discuss whether to accept the plan or how to revise it. A creditor, the debtor, or the plan preparer may request revision of the plan by submitting an application to the receiver at least three days in advance of the meeting.

The resolution approving the plan must be a special resolution passed by the creditors according to their classifications as explained below.

(a) Secured creditors having secured debts of not less than 15% of the total debts;
(b) Other secured creditors not included above;
(c) Unsecured creditors;
(d) Preferred creditors (i.e. creditors under Sec. 130 bis).

For the approval of the plan, each group of creditors enjoys equal rights. The plan must have been approved by a special resolution of a meeting of either:

(a) Each group of creditors, or
(b) A group of creditors (other than those described in Sec. 90/46 bis below) owed at least 50% of the total debt (Sec. 90/46).

These voting rules also apply to actions to revise the plan, remove the plan administrator, and appoint the creditors' committee for implementation of the plan. There are three types of creditors that are excluded from the aforementioned classification and are deemed to have accepted the plan. These are:

(a) Creditors to be repaid in full within 15 days of the plan, such that the debtors will be deemed to have never been in default;
(b) Creditors who will receive payment under existing contracts;
(c) Subordinated creditors (Sec. 130 bis).

3. Proceedings after the Court Accepts the Business Reorganization Plan

Once the Court accepts a plan, it becomes binding on all creditors. The plan administrator is principally vested with the duties of managing the business and assets of the debtor

according to the business reorganization plan. His appointment, tenure, qualifications and compensation are specifically contained in the plan. The plan is then implemented within a five-year time frame, which begins running on the Court's approval of the plan. Two one-year extensions are allowed. If, however, it is clear that the plan has almost been fulfilled, the plan administrator may request an extension as long as necessary. The law requires him to report regularly to the receiver and the Court with regard to the implementation of the plan. Specifically, he has to let the Court know of his views as to whether the reorganization of the business has been completed.

4. Plan Implementation--Creditors' Committee

During this time, the creditors may pass a resolution to appoint a committee of creditors to monitor plan implementation. The committee of creditors must include at least three but not more than seven members. They must be from the group of creditors, or those assigned by the creditors, to act on their behalf. No one creditor may have more than one representative.

G. Termination/Absolute Receivership

If the Court does not approve the plan, or decides to terminate the business reorganization and decides not to place the debtor company under receivership, but instead merely terminates the restructuring plan, the company is restored to its former state. This means that all rights and liabilities of the former shareholders and directors are reinstated. In such circumstances, the stay is lifted, reinstating all rights and liabilities of the former shareholders and directors. Secured creditors may then decide to foreclose on the debtor's assets.

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