

BANKRUPTCY LAW IN THAILAND

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Commercial**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.

The Thai Bankruptcy Court and Procedure

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 and following such enactment, a specialized court known simply as the Central Bankruptcy Court was established. 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.

The Bankruptcy Court proceeds with the trial of a case consecutively without adjournment, until completion thereof, unless there is unavoidable necessity. 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. In addition, appeals go directly to the Supreme Court.

Liquidation – Absolute Receivership

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 Baht 2 million by a corporate debtor or more than Baht 1 million by an individual (natural person) debtor may file a bankruptcy action against such debtor. However, the debtor must first be proven insolvent. The article by Chusert Supasitthumrong and Sally Wrapson that follows in this publication expounds on the procedure for filing bankruptcy cases and for debt repayment claims under bankruptcy proceedings.

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.

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.

Business Reorganization

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 by a plan administrator who is principally vested with the duties of managing the business and assets of the debtor according to the business reorganization plan. The plan must be 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.

The plan preparer must draft a plan which in minimum must contain:

- The reasons for reorganizing the business.
- Details concerning the assets, liabilities, and other binding obligations of the debtor at the time the Court orders business reorganization.

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- Principles and methods of business reorganization.
- Redemption of collateral in the case where there are secured creditors and liabilities of a guarantor.
- Ways to solve problems stemming from a temporary lack of liquidity, during plan 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 compensation.
- The appointment of the plan administrator and his release from the position.
- 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.

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. However, 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. The 1998 and 1999 Amendments amended 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 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. ♦