

Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



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DEBT RECOVERY PROCEDURES

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In times of economic recession there is usually an increase in the volume of litigation cases, as many companies struggle to pay their debts and creditors are often forced to pursue civil or bankruptcy claims in an attempt to recover payment. Although Thailand is not in recession, the number of bankruptcy claims filed and the number of court orders for absolute receivership has drastically risen over the last few years. In 2009, there were 23,975 orders for absolute receivership compared to 9,978 the previous year, according to statistics from the Central Bankruptcy Court. This article examines the strategies and procedures available for recovery of debts in Thailand.

Initial considerations

An important initial consideration is to ensure that any claim is filed within the relevant prescription period. Prescription periods vary depending on the type of claim. Sending a demand letter is not enough—a claim must actually be filed to court within the prescription period. If the prescription period has expired, this will be a successful defense to a claim. However, if the defendant does not raise the issue of prescription in the defense, the civil court cannot dismiss the claim on the ground of prescription. In contrast, the Bankruptcy Court will dismiss the bankruptcy petition if the underlying claim is time barred.

A demand letter should be sent to the debtor prior to commencing court action, as this may be enough to produce payment or start a dialogue leading to a negotiated settlement, thereby avoiding the costs of litigation. In addition, demand letters can be used to establish a debtor's insolvency in order to file a bankruptcy petition. Under Section 8 of the Bankruptcy Act, a debtor will be presumed insolvent if the debtor receives at least two demand letters from a creditor at least 30 days apart and does not pay the debt. The threat of a bankruptcy petition in a demand letter may be added pressure on the debtor to settle the debt.

Litigation costs relative to the amount of the debt are also a major factor as to whether it is worth pursuing a civil claim. Although the court has discretion to award legal costs to be paid by an unsuccessful party to the successful party, large fee awards are not common. The maximum the court can award is 3 percent of the claim amount and usually only a small fraction of actual costs will be recovered. Therefore, a fee estimate for the legal costs of representing the creditor in the claim may be important to help the creditor determine whether it is cost effective to proceed with a claim.

The available assets of the defendant against which any judgment may be enforced will ultimately determine whether a civil claim or bankruptcy petition is the appropriate action to take, or whether to take any action at all. If there are little or no available assets against which to enforce a judgment, it is unlikely to be worth incurring litigation costs in obtaining judgment if that judgment cannot ultimately be realized. Equally if there are some assets, but the creditor is aware that there are several other creditors of the debtor, it may be important to act quickly to try to obtain a judgment and enforce it against available assets before a bankruptcy petition is filed by another creditor. However, another factor may be writing off bad debts for tax benefits, which requires the filing of a claim to the court.

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In a bankruptcy, all creditors will share in the available assets and no priority is given to the petitioning creditor or to judgment creditors if they are not secured creditors. A civil judgment may assist in proving the debt to the official receiver in any bankruptcy, but if the creditor has sufficient evidence to establish the debt, it is not likely to be worth the costs of obtaining a civil judgment first simply to prove the debt. If a court grants an order for absolute receivership in bankruptcy proceedings, all other court proceedings will cease, and the creditors must file debt repayment applications in the bankruptcy proceedings. Therefore, a check should be made as to whether any bankruptcy petition has already been filed to the court in respect of the debtor, as it may be advisable to wait and file a debt repayment application in the bankruptcy rather than unnecessarily incur the costs of a civil claim if the debtor's bankruptcy is imminent.

Civil proceedings

Civil proceedings are commenced by filing a complaint and request for summons to the relevant court of first instance with the court filing fee. The court officer will attempt to serve the summons on the defendant. Depending on the means of service, the defendant has 15 to 30 days from the date of service to file an answer to the complaint. Frequently the court grants one or two extensions of time upon a request by the defendant giving reasons for the need for an extension.

If the defense is filed within the specified deadlines, the court will schedule a hearing for the settlement of the issues in dispute and scheduling of trial hearings. The court may try to mediate between the parties and may schedule one or more mediation hearings prior to the commencement of the trial hearings.

Disclosure of documents is limited and the parties may attach any documents they wish to rely on to the complaint. Any additional documents must be listed and the list of evidence and witnesses must be submitted to the court and copied to the opposing party seven days before the first trial hearing. Either party can subpoena documents they know to be in existence from the other party or third parties. The parties will each have the opportunity to present their witnesses and documentary evidence at the hearings and to cross-examine the other party's witnesses.

At the conclusion of the trial hearings, the lawyer may request permission to file a written closing statement to summarize the law and evidence in support of its case. The court will set a deadline for submission of closing statements. If no request for written statements is made, the court will decide the case on the basis of the complaint, defense and trial hearings. The court will schedule a judgment hearing at which the judgment will be read.

Once a judgment is obtained, if the defendant fails to pay in accordance with the judgment, the claimant must file a request for enforcement to the Execution Officer. It is the claimant's responsibility to identify the defendant's

assets for the Execution Officer to attach. The attached assets will then be sold at auction.

Bankruptcy proceedings

Under Section 9 of the Bankruptcy Act, a creditor may only file a bankruptcy petition against a defendant where:

1. The debtor is insolvent;
2. The debtor is indebted to one or more creditors in an amount of at least THB 1 million for individual debtors or THB 2 million for juristic person debtors; and
3. The debts may be determined in a definite amount whether due for payment immediately or in the future.

Section 8 deals with the events which will lead to a presumption of insolvency, one of which, as mentioned above, is that the debtor receives at least two demand letters from a creditor at least 30 days apart and does not pay the debt.

The proceedings are commenced by the creditor filing a bankruptcy petition to the Bankruptcy Court with the appropriate court fee and at least THB 5,000 in respect of security for costs (the court may order that additional security is deposited in its discretion). The court will fix a date for the hearing. At the hearing, the creditor must prove that the elements of Section 9 are all satisfied. If the

“ knowledge of a debtor's assets can be crucial in determining the success or otherwise of civil proceedings ”

court finds the facts are proved, it will issue an order for absolute receivership. If the facts are not proved, or the debtor can prove his ability to pay the debt in full, the court will

dismiss the petition.

If an order for absolute receivership is issued, the court will appoint an official receiver, who must publish the order in the *Government Gazette*. All creditors must submit a debt repayment application within two months of the date of the order for absolute receivership (the period may be extended by up to two months for creditors residing outside the Kingdom). In accordance with Section 31 of the Bankruptcy Act, the official receiver will call the first creditors' meeting at which any proposal for composition submitted by the debtor will be considered by the creditors. If the proposal is rejected, the official receiver will gather the debtor's assets and will call a meeting of all creditors to discuss management of the debtor's assets and repayment of debts to the creditors. If the creditors resolve to ask the court to adjudge the debtor bankrupt, or no resolution is passed or the creditors do not attend the meeting, the court will adjudge the debtor bankrupt and the official receiver is then empowered to manage the debtor's assets and distribute them to the creditors.

In conclusion, it is apparent that knowledge of a debtor's assets can be crucial in determining the success or otherwise of civil proceedings. Those creditors who have carried out some form of due diligence regarding the assets of those with whom they intend to do business will be in a better position if they later default on payment. Creditors who cannot identify any assets of a debtor may have to rely on bankruptcy proceedings instead, provided they can prove the insolvency of the debtor. 🧑🏻‍⚖️