Bankruptcy and Restructuring

Enactment of Bankruptcy Law

In 1998, Parliament approved the first amendment to the 1940 Bankruptcy Act in 15 years, and further amendments were made in both 1999 and 2000. These amendments reduce the bankruptcy period from ten years to three years and allow for the restructuring or reorganization of a company, similar to Chapter 11 provisions in the United States. The law sets forth the process of maintaining the viability of a distressed company by setting up a legal structure to maintain the debtors' assets and to rehabilitate its business on the one hand, while protecting the interests of the creditors, old and new alike, on the other. It had long been of concern that Thai courts may not have had the capacity or expertise to take on the immense volume of work and had no specialized branch to deal with business restructuring until 1999. As has been shown in the relatively swift resolution of complicated bankruptcy cases, however, this concern was largely unfounded.

Under a debt restructuring, only a company's debts are restructured (renegotiated and/or rescheduled). This may eventually proceed to a more comprehensive business restructuring, which involves the temporary or permanent reorganization of the company's business or management to ensure survival.

Two distinct means for pursuing restructuring exist: out-of-court and court-supervised restructuring.

Out-of-Court Restructuring

Under this category, there are three main subclassifications:

- *Informal restructuring.* Under informal restructuring schemes, lenders and borrowers with non-productive loans create their own plans to reformulate loan repayment. This is usually based on bilateral contracts between lenders and borrowers. The only guidelines to informal restructuring are the creditor's individual policies.
- *CDRAC framework.* In 1999, the Bank of Thailand, together with local and foreign financial institutions, formulated a binding framework of debtor-creditor and inter-creditor agreements. The Bank of Thailand established the Corporate Debt Restructuring Advisory Committee (CDRAC) to monitor the restructuring process and facilitate negotiation among all parties. CDRAC's work ended as of October 2008.
- *SET-Rehabco Restructuring Process.* In early 1999, a number of listed companies with balance sheet deficits were suspended from trading shares by the Stock Exchange of Thailand (SET). The SET put these companies into the Rehabco category, providing restructuring requirements upon the fulfillment of which the suspension will be lifted and trading can resume. Unlike the CDRAC, the SET does not process the restructuring, as Rehabcos generally undergo restructuring themselves.

Court-Supervised Restructuring

Under the law, the debtor, relevant government authority, or creditors that owe more than THB 10 million must first file a restructuring petition. Once the Court approves the petition, it declares a stay on legal proceedings, restricting the ability of creditors to take action against the company for recovery of sums owed to them. This stay prevents parties from commencing or continuing lawsuits against the company and prevents creditors from filing dissolution or bankruptcy petitions. Next, the creditors select a planner to draft a rehabilitation plan and to effectively take over the debtor's business. Within one month after the Court's approval of the planner, all creditors must submit their claims. Claims that are not submitted will be forfeited. The planner then drafts the plan and submits it to the creditors within three months, with a maximum of two one-month extensions. The law divides creditors into four groups (in order of repayment priority):

- Major secured lenders.
- Minor secured lenders.
- Unsecured lenders.
- Subordinate lenders.

The creditors must approve the plan by special resolution, which takes place when creditors representing at least 75% of the total indebtedness approve the plan, or upon approval by those representing 75% of the indebtedness of a single group of lenders, so long as those representing at least 50% of the total indebtedness approve the plan. Upon achieving special resolution, the plan is submitted to the Court for final approval. As of now, the Court must approve all plans that meet certain criteria, but a proposed amendment would allow the Court greater scrutiny in determining the planning process to ensure fairness. From the time the Court accepts a plan, it becomes binding on all creditors. The court-supervised plan administrator then manages the business and its assets, attempting to implement the plan within a five-year time frame, with a maximum of two one-year extensions. Within this time frame, if the Court deems the plan unsuccessful, it may order its termination and/or put the company under absolute receivership, leading to bankruptcy proceedings.

Termination/Absolute Receivership

If the Court does not approve the restructuring plan or terminates the reorganization and orders absolute receivership, the debtor undergoes bankruptcy procedures. Should this occur, creditors apply for repayment with the Court receiver within two months after the Court publishes the absolute receivership. This deadline is extended to four months for foreign creditors. Next, the receiver schedules a meeting of potential creditors to examine their claims. The Court may approve claims that are not disputed by the debtor, creditors, or receiver. Upon approval, the receiver distributes assets exceeding those reserved for fees and expenses to the creditors. The bankrupt party shall remain in bankruptcy for three years.

Should the Court terminate the restructuring plan rather than place the debtor under receivership, the company is restored to its former state. 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. The time frame for the whole procedure from the date of filing the application to actual realization of assets is approximately 44 weeks if not appealed.

2004 Amendments

In June 2004, further amendments to the Bankruptcy Act were enacted. The major amendment was with regard to the procedure for discharge from bankruptcy. Previously, the Act merely stipulated the power of the Court to give orders granting or refusing the discharge from bankruptcy. In addition, it prohibited the Court from ordering the discharge if it was found that the bankruptcy was a dishonest one, unless there was a special reason for doing so, and the debtor had been bankrupt for not less than five years. The 2004 amendments specified that the discharge from bankruptcy would be granted if at least 50% of the debtor's assets had been distributed to creditors and the Court did not find the bankrupt to be dishonest. A discharge would also be granted after the lapse of three years from the date of adjudication, barring several disqualifying criteria.

The 2004 amendments also repealed Part 12 "Appeals" in Chapter 3/1 regarding the proceedings relating to reorganization of debtor's business and Section 90/79 of the Bankruptcy Act. Section 90/79 provided that an interlocutory order or a court order giving a decision regarding business reorganization could not be appealed except for an order dismissing the petition, an order allowing a creditor to receive payment, an order to place the debtor under absolute receivership, and any other order that the Chief Judge of the Court of First Instance or Chief Judge of the Region having jurisdiction deemed appropriate. Pursuant to the 2004 Amendments, it was therefore possible to file an appeal against any interlocutory order or Court order giving a decision regarding business reorganization.

The 2004 amendments also resulted in a reduction of the maximum asset collection fee from 5% of total debt amount to 3% in case of a composition of the debts, and from 3.5% to 2% for assets that had been secured but not yet sold. Filing fee rates were also revised based more on a flat fee for each type of filing, rather than on the debt amount.

2005 Amendment

The 2005 amendment grants the Bankruptcy Court the power to also consider bankruptcy cases that involve criminal matters. Previously, bankruptcy cases involving criminal matters had to be filed with another relevant court, not with the Bankruptcy Court. However, because solutions to bankruptcy issues require specific knowledge in bankruptcy and reconstruction, the exclusion of bankruptcy cases involving criminal matters from the Bankruptcy Court's consideration was inefficient. Therefore, the 2005 amendment was enacted to allow the Bankruptcy Court to also consider bankruptcy cases involving criminal matters as aforementioned.

Rules on Bankruptcy Cases

The Rules on Bankruptcy Cases B.E. 2549 (A.D. 2006) sets out procedural rules that focus on accelerating Bankruptcy Court proceedings and hearings. The Rules encourage the use of electronic equipment and express mail in communications between Courts and require the Provincial Courts that receive bankruptcy petitions, including bankruptcy petitions involving criminal matters, to deliver such petitions to the Bankruptcy Court as soon as possible. The Provincial Court has the power to issue a search warrant and arrest warrant, and to imprison or release a defendant.

Further amendments to the Bankruptcy Act are currently under consideration. Such amendments may include allowing the filing of a bankruptcy petition by the debtor itself, clarifying the definition of insolvency, granting more protection to new creditors to companies undergoing restructuring, and setting up measures to expedite the bankruptcy and restructuring process.