

BANKRUPTCY LIABILITY FOR BUSINESS PARTNERS

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A partnership begins with a splash of optimism, a toast to the future and a plan for capitalising on business opportunities. But what happens when it all goes wrong? Aggressive creditors may force a partnership into bankruptcy and certain individual partners may be required to follow. This article is a primer on the bankruptcy liability of partners.

Two types of partnership may be registered in Thailand: ordinary and limited. Thai law imposes unlimited liability for all of the obligations of the partnership on all partners in ordinary partnerships, which partners are considered to be "unlimited partners", and on unlimited partners in limited partnerships.

Liquidation proceedings against partnerships and partners: Thailand's Bankruptcy Act 1940 (as amended) provides for two types of bankruptcies: business reorganisation and liquidation (debt repayment). The general process of a liquidation proceeding initiated by creditors is as follows:

First, a creditor may file a bankruptcy charge against a partnership and its partners, provided the creditor and the partnership meet certain criteria in the Bankruptcy Act. The liquidator of such partnership may also submit a bankruptcy petition to the court if it appears that the contribution of shares has been fully paid up and that the assets are insufficient to cover the debts.

Second, the Bankruptcy Court may order the partnership and its partners into "absolute receivership", whereby all ownership and control of the debtors' property is vested with the Official Receiver for administration and ultimate distribution (if possible) to creditors.

Third, where creditors file a bankruptcy petition against the partnership (only) and after the court has issued an order to place the partnership into absolute receivership, the petitioning creditors or the official receiver may file a motion for the adjudication of bankruptcy against all unlimited partners, without having to file a new claim against such persons (Bankruptcy Act, section 89).

Determination of bankruptcy: To determine whether a partner must be adjudged bankrupt, according to section 89, Thailand's Supreme Court concluded a court shall consider only whether such person was a partner in the partnership at the time that the partnership was petitioned or sued for bankruptcy. The court is not required to consider whether such partner is actually insolvent, as in other bankruptcy actions.

The Supreme Court has further held a partner cannot prevent a determination of personal bankruptcy by proving that he or she is solvent and not bankrupt. This conclusion seems unfair to the partner and is still arguable. Some legal professionals believe that the partner should be entitled to avoid personal bankruptcy on proof that the partner has sufficient personal assets to settle the debts of the partnership.

Partner's personal assets placed under receivership: Following the filing of a motion for the adjudication of bankruptcy against a partner, the petitioning creditor or the official receiver may file a second motion to place the partner's personal assets under temporary receivership. Before issuing such an order, the court may require the petitioning creditor to give security against loss in such amount as the court may deem appropriate (Bankruptcy Act, section 90).

If it subsequently appears that the person is not a partner (as defined above), the court must issue an order terminating the receivership. The court is also empowered, on the filing of a motion by the non-partner, to order the creditor who requested the receivership to pay compensation to the non-partner in such sum as the court may deem proper. The court may also order the official receiver make such payment out of the partnership's assets (Bankruptcy Act, section 90).

Recommendations: Despite section 89 and its interpretation, a partner in a bankrupt partnership might not be adjudged bankrupt if the partner can reach a compromise with the creditor(s) or can settle all debts owed to the creditor(s). The Supreme Court has considered such arrangements to be sufficient grounds for not adjudging the debtor to be bankrupt. Under the Bankruptcy Act, where there exists a reason why the debtor should not be adjudged bankrupt, the court shall terminate the bankruptcy action.

The better solution, however, is for all partners to carefully consider the structure of their business. For example, it may be preferable to register the business as a limited company because, for juristic person debtors, only limited companies (and not their directors) can be petitioned or sued for bankruptcy. By protecting themselves at the outset, business partners can share in the success of the venture, while protecting their personal assets from creditor claims and bankruptcy.