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# Insolvency 2021

Thailand: Law & Practice

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Chandler MHM Limited

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## Law and Practice

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## **1. STATE OF THE RESTRUCTURING MARKET**

### **1.1 Market Trends and Changes**

#### **Increase in Insolvencies**

In recent years in Thailand, there has been a slight increase in the number of submissions for insolvency proceedings (both bankruptcy proceedings and business rehabilitation proceedings). According to statistics released by the Central Bankruptcy Court (“Bankruptcy Court”), the competent body exercising jurisdiction in insolvency matters in Thailand, nearly 9,171 bankruptcy proceedings were filed in 2020 (compared to 8,398 cases in 2019). The number of submissions for business rehabilitation proceedings has also slightly increased, with 39 proceedings initiated with the court in 2020 (compared to 28 cases in 2019). The number of insolvency cases is still on an upward trend, as this approach to restructuring debt is increasing in popularity.

#### **Effects of COVID-19**

In 2021, the ongoing COVID-19 situation had an adverse effect on all business sectors across the board. The hospitality and tourism industry, including airlines, have been devastated due to the closure of the border, designated curfew orders and inter-domestic travel restrictions that the Thai authorities have intermittently implemented. A number of businesses had to enter business rehabilitation proceedings last year with the aim of resolving financial difficulties which have arisen as a result of the pandemic. Some high-profile examples are Thai Airways International PCL, the national airline operator of Thailand, and Nok Airlines PCL.

#### **Adoption of Electronic Systems**

Electronic systems have been adopted to facilitate insolvency proceedings during the pandemic, ensuring proper compliance with the legal requirements under the Bankruptcy Act. For

example, it is now permitted to serve Bankruptcy Court summons via electronic means, creditors may submit applications for debt repayment using the online system of the Legal Execution Department, and the method for holding and voting for approval in a creditors’ meeting was changed from physical meetings to video conferences.

## **2. STATUTORY REGIMES GOVERNING RESTRUCTURINGS, REORGANISATIONS, INSOLVENCIES AND LIQUIDATIONS**

### **2.1 Overview of Laws and Statutory Regimes**

Insolvency matters in Thailand are principally governed by the Bankruptcy Act BE 2483, AD 1940, as amended (“Bankruptcy Act”). The competent body exercising judicial power is the Bankruptcy Court. The main procedures encountered in insolvency proceedings are:

- bankruptcy proceedings (including composition); and
- business rehabilitation proceedings.

### **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**

As mentioned in **2.1 Overview of Laws and Statutory Regimes**, two types of proceedings are available under the Bankruptcy Act.

#### **Bankruptcy and Business Rehabilitation Proceedings**

Bankruptcy proceedings are court-supervised proceedings to realise the assets of the debtor and distribute the proceeds among its creditors. In such proceedings, after taking evidence and if the court is of the opinion that a debtor is

insolvent, an absolute receivership order will be issued against the debtor, as a result of which, all business operations of the debtor will be ceased.

Business rehabilitation proceedings are court-supervised formal attempts to restructure distressed enterprises where a moratorium (automatic stay) will be applied to protect the debtor from its creditors.

Within this legal framework, both the debtor and its creditors may file for business rehabilitation. Bankruptcy proceedings, on the other hand, may only be initiated by creditors. Thai law does not allow a debtor to commence voluntary bankruptcy proceedings.

In order to commence bankruptcy/business rehabilitation proceedings, a bankruptcy petition/rehabilitation petition must be filed with the Bankruptcy Court. The debtor must be proven to be insolvent. As there are certain levels of involvement by the courts, the official receiver and other competent authority(ies), bankruptcy/business rehabilitation proceedings tend to be complicated and time-consuming.

### **Solvent Liquidation**

A solvent liquidation process (winding-up) may be undertaken by a dissolved company per se out of court, in accordance with Thai company law, while an insolvent liquidation may only be done through court proceedings, ie, bankruptcy proceedings.

### **2.3 Obligation to Commence Formal Insolvency Proceedings**

Only in the following situation can a company enter into a solvent liquidation process (winding-up). If the liquidators of a dissolved company discover that the entire contribution of shares has been paid up but the assets are insufficient to cover liabilities, in this case only, the liquidators

must initiate bankruptcy proceedings for the company. If the liquidators fail to do so, they may be held criminally liable with penalties of up to THB50,000 in fines under the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations BE 2499, AD 1956 (“Corporate Offences Act”). The Corporate Offences Act does not provide a specific timeline for initiating mandatory insolvency proceedings but merely states that the proceedings should be commenced without delay.

Likewise, there are no mandatory timelines for business rehabilitation proceedings.

### **2.4 Commencing Involuntary Proceedings**

A creditor may seek to initiate bankruptcy proceedings to realise the debtor’s assets and distribute the proceeds among its creditors. A creditor must demonstrate that the debtor is insolvent. See **2.5 Requirement for Insolvency**.

The Bankruptcy Act does not provide mandatory insolvency proceedings for both bankruptcy and business rehabilitation proceedings to be commenced by the debtor. There is only one provision for mandatory bankruptcy proceedings to be filed by the liquidator. See **2.3 Obligation to Commence Formal Insolvency Proceedings**.

### **2.5 Requirement for Insolvency**

An insolvency test is required to commence both types of insolvency proceedings. For bankruptcy proceedings, it is necessary to prove that the debtor is insolvent, whereas in business rehabilitation proceedings, an insolvency test and a liquidity test are both available. Only one of these tests needs to be triggered with an order to initiate the proceedings.

### **The Insolvency Test**

With respect to the insolvency test, it must be proved that the debtor has insufficient assets compared to its liabilities. There is also a list of presumptions under which the debtor will be presumed “insolvent”, for example, the debtor has transferred or delivered its assets with dishonesty or with fraudulent intent, etc.

### **The Liquidity Test**

With respect to the liquidity test, it must be proved that the debtor is unable to pay its debts as scheduled. This test can easily be triggered when the debtor faces financial distress, despite having more assets than liabilities.

The Bankruptcy Act also provides presumptions of “no ability to pay” for business rehabilitation proceedings for small and medium-sized enterprises (SMEs). One of the presumptions is that the debtor has failed to pay a debt within the due date, and upon receipt of a letter of demand from the creditor to pay such debt, the debtor fails to pay the debt within 30 days.

## **2.6 Specific Statutory Restructuring and Insolvency Regimes**

Under the Bankruptcy Act, there are no specific restructuring and insolvency regimes in respect of financial institutions, securities companies or insurance companies. The Bankruptcy Court applies general corporate insolvency procedures for such entities.

However, if the debtor’s business concerned is under the supervision of a government agency, for example, the Bank of Thailand (BOT) for financial institutions; the Office of the Securities and Exchange Commission (SEC) for securities companies; or the Department of Insurance for insurance companies, permission from such relevant government agency must be obtained before submitting a petition for business rehabilitation proceedings.

## **3. OUT-OF-COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS**

### **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**

Under the Thai legal framework, there is no specific law or regulation governing consensual and other out-of-court restructurings. There is merely a debt restructuring guideline issued by the BOT, with which financial institutions need to comply.

#### **Consensual Restructuring or Statutory Proceedings?**

Consensual restructuring is sometimes preferable for a business that does not have many creditors. In such a case, banks or other creditors are generally supportive in negotiating the terms and conditions of the debt restructuring (such as repayment terms, interest rate, etc) in order to mitigate the losses of all the parties concerned, including the creditors, the debtor and stakeholders. If there are many creditors, whose interests are not all aligned, statutory bankruptcy proceedings and business rehabilitation proceedings may be necessary.

#### **Out-of-Court Restructuring**

Out-of-court restructuring does not have any specific formalities or any formal process, as it depends solely on a commercial discussion between the creditors and the debtor. Parties are able to formulate their own restructuring plan that allows some flexibility in terms of conditions and the timeline for the restructuring. Therefore, parties may prefer to commence an out-of-court restructuring rather than in-court proceedings.

Thai law does not require a debtor and creditors to attempt to enter into a consensual restructuring prior to the statutory proceeding.

## 3.2 Consensual Restructuring and Workout Processes

There is no law governing consensual restructuring and workout processes. Consensual restructuring would normally be initiated by and carried out through negotiations between creditors and a debtor. Once the terms and conditions are agreed, a debt restructuring agreement would be executed by the parties and would have a binding effect on them.

## 3.3 New Money

New money may be injected by a bank for use in the ordinary course of business, which should entitle such bank to certain priority/ranking over other creditors. However, according to the BOT's debt restructuring guidelines, such new money must not be used to repay the existing debts of the debtor.

## 3.4 Duties on Creditors

There is neither a specific law or legal doctrine concerning informal restructuring, nor duties of the creditors in an informal restructuring process. Nevertheless, general laws under the Thai Civil and Commercial Code such as tort, fraudulent act, good faith doctrine, etc, will apply. As such, each relevant party involved in the process is required to act in good faith and not wilfully or negligently act in a way that could cause others loss or damage.

## 3.5 Out-of-Court Financial Restructuring or Workout

Normally, any change to a credit agreement would require the consent and agreement of all the parties. However, only majority lenders or super-majority lenders will require some alterations, waivers or consents in certain matters. For instance, in cases where the change to the credit agreement relates to certain matters which do not affect some creditors, it is possible that the change to the agreement would not require such creditors' consent and agreement.

In general, debt restructuring affects all creditors' rights in receiving debt repayments and, thus, such processes should require the consent of all the creditors. If there is a dissenting creditor to the consensual restructuring process, such consensual restructuring will not be binding for such dissenting creditor. By contrast, a formal rehabilitation process binds all the creditors, regardless of their disagreement.

## 4. SECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

### 4.1 Liens/Security

Under Thai law, there are three major types of security to be granted over assets, ie, mortgage, pledge and business security.

#### Mortgage

A mortgage is a non-possessory security in that a mortgage places immovable assets (eg, land, buildings, etc) or certain types of movable asset (eg, registered machinery, vessels, floating houses) as a security in favour of a creditor to secure performance of an obligation by the mortgagor itself or another third party, without having to deliver the secured asset to the mortgagee. A mortgage agreement must be made in writing and registered with the competent authority.

#### Pledge

A pledge is a possessory security where a pledgor places a movable asset as security in favour of a creditor to secure the performance of an obligation. A pledge can also be created over rights represented by instruments such as shares, bills of exchange, promissory notes and cheques. The perfection requirement of a pledge is that the pledged property must be delivered to the pledgee. For pledge over rights represented by instruments, the instrument must be deliv-

ered to the pledgee with notice being sent to the debtor of rights.

### **Business Security**

A business security is a non-possessory security under the Business Security Act 2018. Claims, movable property used in the ordinary course of business (machinery, inventory, raw materials, etc), immovable property (in the case of a real estate business operator), intellectual property and accounts can be placed as business security under the act. A business security agreement must be made in writing and registered with the competent authority. Subject to limited exceptions, only Thai financial institutions and foreign financial institutions that syndicate financing with Thai financial institutions are entitled to be a security receiver under a business security agreement.

## **4.2 Rights and Remedies**

### **Out-of-Court Restructuring**

Secured creditors are entitled to enforce security in accordance with the terms and conditions as prescribed in a security document, for example, when a secured obligation is in default. However, they will not be inclined to do so if the secured assets can be used in the normal operation of the debtor, which may be of importance for all parties concerned to achieve the goal of the debt restructuring agreement. An intercreditor agreement can be agreed among creditors to set out terms and conditions regarding enforcement of security, as well as how the proceeds from enforcement will be distributed among the creditors.

Secured creditors may not agree on the debt restructuring process but such disagreement should not affect or disrupt the process to be agreed by other creditors.

There is no automatic stay in the case of voluntary restructuring where the rights of secured

creditors would be limited, unless a standstill agreement is entered into among the parties, prohibiting the secured creditors from enforcing their security.

### **Statutory Bankruptcy and Business Rehabilitation Proceedings**

Secured creditors are entitled to enforce their security without having to file a claim for debt repayment. It is important to note that an official receiver is entitled to inspect the secured assets and if the receiver is of the view that such secured assets have a higher value than the secured debts, the official receiver is entitled to seize and sell the secured assets through a public auction, settle the debts and return the remaining proceeds to the asset pool of the debtor.

However, in order for secured creditors to be entitled to vote in the creditors' meeting under the bankruptcy proceedings, a secured creditor is required to file a claim for debt repayment.

Secured creditors may not block or disrupt the bankruptcy proceedings. It is only possible for the bankruptcy proceedings to be dismissed by a court judgment or by the withdrawal of the petition by the creditor that submitted the petition for bankruptcy proceedings.

Once the court accepts the rehabilitation petition, the automatic stay period commences and, as such, secured creditors are not entitled to enforce their security unless the court orders otherwise, or one year has passed since the court accepted the rehabilitation petition.

### **4.3 Special Procedural Protections and Rights**

There are no special procedural protections and rights in statutory insolvency and restructuring proceedings for secured creditors. However, as mentioned in **4.2 Rights and Remedies**,

secured creditors are entitled to enforce their security without having to file a claim for debt repayment under bankruptcy proceedings.

## 5. UNSECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

### 5.1 Differing Rights and Priorities

Creditors within the same class will receive equal treatment, unless a disadvantaged creditor in such class agrees otherwise in writing. Legally speaking, equal treatment among creditors in each class is a key condition for the court to consider granting approval to a debtor's rehabilitation plan.

### 5.2 Unsecured Trade Creditors

In bankruptcy proceedings, if the assets of the debtor are insufficient to repay all the creditors in full (which is likely in most cases), the debtor's assets will be distributed among the creditors in accordance with the order of priority following the realisation of assets (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**). The unsecured trade creditors will be repaid after the creditors who have higher priority than them, such as secured creditors and the official receiver, etc. The factor in deciding how much the unsecured trade creditors will be repaid generally depends on the number and type of creditors, the size of the pool of assets, and the nature of the debts or obligations themselves.

In respect to an ongoing contract with trade creditors, under certain circumstances, if the assets or rights of the debtor under the contract are more onerous than the benefit to the debtor, it is possible that the official receiver in bankruptcy proceedings or the plan administrator in business rehabilitation proceedings, may refuse to accept such assets or rights.

In addition, any transaction or transfer of assets that constitutes a grant by the debtor to certain creditors that gives undue preference and is therefore found to be fraudulent, may also be revoked or cancelled within a certain period.

With respect to business rehabilitation proceedings, the planner will also have to decide how each creditor should receive the repayment, taking into consideration equal treatment among the same class of creditors.

### 5.3 Rights and Remedies for Unsecured Creditors

In the context of Thai insolvency proceedings (both bankruptcy and business rehabilitation), unsecured creditors are subject to automatic stay and are not entitled to enforce their claim without filing a claim for repayment.

### 5.4 Pre-judgment Attachments

An interim injunction is available to prevent the debtor's transfer of assets. The criteria and requirements under the Civil Procedure Code (CPC) are applied mutatis mutandis. Interim injunctions under the CPC include seizure, attachment or restraining orders, and physical arrest or detention.

The court will generally grant an interim injunction based on the ability of the petitioner to prove satisfactorily that damages will continue if an interim injunction is not granted. The applicable criteria and requirements depend on the requested interim injunction.

### 5.5 Priority Claims in Restructuring and Insolvency Proceedings

Assets in bankruptcy proceedings will be distributed to the creditors in the following order of priority:

- secured creditors;

- unsecured creditors of the following costs and debts –
  - (a) official receiver’s costs and expenses;
  - (b) court fees;
  - (c) fees of the petitioning creditor and counsel’s fees as the court or the official receiver may prescribe;
  - (d) taxes due within six months prior to the court order for receivership and the wages of the debtor’s employees; and
  - (e) any other debts;
- creditors who under the law or contract are entitled to receive repayment only after other creditors have received repayment in full; and
- a creditor who is the spouse of the debtor.

In business rehabilitation proceedings, unsecured creditors will receive repayment in accordance with the rehabilitation plan, and secured creditors will not be able to enforce their security without court approval or until one year has passed since the court accepted the rehabilitation petition (this period can be extended by the court no more than twice – with each period being six months).

## **6. STATUTORY RESTRUCTURING, REHABILITATION AND REORGANISATION PROCEEDINGS**

### **6.1 Statutory Process for a Financial Restructuring/Reorganisation**

#### **Consent for Commencing the Proceedings**

Business rehabilitation proceedings, under Thai bankruptcy law, do not require any consent from creditors to commence the proceedings. However, consent can be used to convince the court to grant a rehabilitation order if one or more majority creditors does give written consent/supporting letters.

#### **Limitations**

The Bankruptcy Act provides that such debt must be a definite amount. The debt must be debt stemming from a juristic act (ie, a contract under which debt can be calculated until the filing date of such business rehabilitation petition, regardless of whether it is due or conditional). However, a debt that cannot be specified or calculated definitively must be converted to a definite amount by a court judgment or a compromise agreement. In addition, such debt must not be contrary to the law or public order and good morals, such as a gambling debt or lending without documentary evidence of a loan.

#### **Basis for Commencing the Proceedings**

The business rehabilitation proceedings can be commenced if it appears that a debtor is indebted to one or more creditors for a definite amount of not less than THB10 million, regardless of whether such debt is due immediately or not, if there are reasonable grounds and the possibility to reorganise the business of the debtor. The objectives and purpose of business rehabilitation proceedings are to keep the debtor’s business going and allow creditors to be repaid debt of not less than the judgment rendered in the bankruptcy case.

#### **Overview of the Proceedings**

Formal business rehabilitation proceedings are driven by the official receiver who is an official of the Legal Execution Department. The proceedings are supervised by the courts. Once the creditor(s) or debtor have lodged a petition with the Bankruptcy Court, the court will schedule a hearing to consider the petition. If the court finds that the debtor is insolvent and indebted for not less than THB10 million, and that there are reasonable grounds and prospects to achieve rehabilitation of the business of the debtor, the court will allow such a petition. A planner, who formulates and prepares the rehabilitation plan for the debtor, is then appointed and a plan has to be

approved before implementation. An expedited process is unlikely.

### **Creditors' Claims for Repayment**

Creditors must submit applications for repayment of debt along with any supporting evidence to the official receiver within one month from the publication date of the order of appointment of the planner. Other creditors, debtors and the planner are entitled to object to an application for repayment of debt filed by a creditor. If there are any objections, the official receiver will examine and issue an order on the application to allow partial, full or no repayment to such creditor.

Once the court has approved the rehabilitation plan, the proceedings under the plan will bind all creditors, whether voting for or against the plan, or not voting. If unknown creditors or creditors of contingent claims have not filed an application for repayment of debt, such creditors will lose their rights to repayment unless the rehabilitation plan states otherwise, or the court cancels the order for business rehabilitation.

### **Confidentiality**

The procedures are confidential in principle. However, in practice, it is possible that outside persons could observe the proceedings, as a significant number of creditors may participate in the procedures, ie, in any meeting or hearing scheduled by the receiver or the court. Key commercial and economic terms are not required to be publicly disclosed.

### **Challenges**

A procedure may be challenged. For example, if the official receiver did not notify a creditor of the order of appointment of the planner, but all other procedural requirements have been fulfilled, such omission may be challenged.

### **The Procedure for Plan/Agreement Approval**

Within three months (which is extendable, twice, by one month) or five months in total after the order of appointment of a planner is published in the Government Gazette, the planner must submit a rehabilitation plan to the official receiver, who will then schedule a meeting of creditors to consider granting approval for such plan. The official receiver will send copies of the plan to all the creditors along with notification of the date, time and venue of the meeting, including the agenda for the meeting to creditors who are entitled to vote, the debtor and the planner. Such information will also be published in a daily newspaper not less than ten days in advance of the meeting. If the meeting adopts a resolution approving the plan, the official receiver will then report such resolution to the court. If the court issues an order to approve the plan, the power and duties to control the business of the debtor will be transferred from the planner to a plan administrator at the time of acknowledgement of such order.

### **6.2 Position of the Company**

An automatic stay will commence when the petition for business rehabilitation is accepted by the court. The company can continue to operate its business but it will be prohibited from disposing of or transferring its assets, paying or creating debts, or performing any act which creates unnecessary encumbrances over its assets without court approval or in the ordinary course of business. Once the court has made an order for business rehabilitation, the powers and duties of managing the business and assets of the debtor will be transferred to the interim executive, official receiver or planner, as the case may be.

After the petition for business rehabilitation is granted, the company may borrow new money to operate the business. The creditor who lends money to the company for such purpose will

be entitled to request repayment of that debt without filing an application for repayment to the receiver.

### **6.3 Roles of Creditors**

Creditors who file an application for debt repayment within the prescribed period will be put into separate classes – generally secured and unsecured creditors. However, each class of creditor can be divided into several sub-groups of creditors. For example, there could be secured banking creditors and secured commercial creditors.

A creditors' meeting may adopt a resolution to appoint a creditors' committee empowered to monitor the performance of the reorganisation plan. Members of the creditors' committee are selected from the creditors or representatives of the creditors. The number of members of the creditors' committee may not be less than three persons or more than seven persons.

The reporting process will be published in the Government Gazette and local newspaper, in the same way the order of appointment of the planner was published. In addition, the official receiver will send a document with this information to the creditors by post.

### **6.4 Claims of Dissenting Creditors**

The claims of creditors may be crammed down (given a haircut) without consent, either by the official receiver when they verify the merit of the application for debt repayment, or by the proposed rehabilitation plan prepared by the planner. The dissenting creditor may file a petition to appeal the decision of the official receiver/the planner to the court. The court will then consider whether amendments are needed.

### **6.5 Trading of Claims against a Company**

Under the Bankruptcy Act, the rehabilitation plan must include the details of trading of claims or

assignment of rights. Therefore, the assignment of rights must be in accordance with the rehabilitation plan.

### **6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group**

Business rehabilitation proceedings do not extend to the restructuring of a corporate group. Under Thai law, the debtor and other parties in a corporate group are treated as separate entities and must commence separate business rehabilitation proceedings.

### **6.7 Restrictions on a Company's Use of Its Assets**

The Bankruptcy Act prohibits the debtor's assets from being disposed of, distributed or transferred, unless:

- otherwise specified in the rehabilitation plan; or
- the debtor obtains approval from the court; or
- these acts are in the ordinary course of business.

The planner, the plan administrator, or the official receiver is entitled to challenge any transaction in court, which is done fraudulently or with the intention of giving specific creditors an undue preference. This may include special treatment for debt repayment outside the scope of the rehabilitation plan.

### **6.8 Asset Disposition and Related Procedures**

As mentioned in **6.7 Restrictions on a Company's Use of Its Assets**, the disposition of assets or the business by the debtor is prohibited under the Bankruptcy Act due to the automatic stay, unless otherwise specified in the rehabilitation plan, or approval is obtained from the court, or such disposition is in the ordinary course of business.

To create encumbrances over the assets, the debtor is also required to apply for approval from the court. Without court approval, any transaction or deal is void and unenforceable.

## **6.9 Secured Creditor Liens and Security Arrangements**

A secured creditor may release a lien/security for the benefit of all creditors during the business rehabilitation proceedings.

## **6.10 Priority New Money**

New money may be injected for the purpose of being used in the ordinary course of business, which should also entitle such creditor to certain priority/ranking over other creditors. A debtor may not take any action which causes encumbrances to be created over its assets in response to obtaining priority new money, except where such action is essential for the debtor to carry on business as normal, or as otherwise ordered by the court.

## **6.11 Determining the Value of Claims and Creditors**

During business rehabilitation proceedings, creditors must prove the grounds for their debt claim and present evidence to the official receiver to determine and qualify but will be subject to objections by the debtor, the planner or other creditors. If a dispute arises, the official receiver or the Bankruptcy Court, as the case may be, will decide upon a creditor's petition.

## **6.12 Restructuring or Reorganisation Agreement**

A rehabilitation plan will be prepared by the planner and proposed to the creditors' meeting for approval and then the Bankruptcy Court will determine whether the proposed plan is in line with the Bankruptcy Act.

## **6.13 Non-debtor Parties**

The fact that the debtor has entered into business rehabilitation proceedings will not affect the liabilities of non-debtor parties.

## **6.14 Rights of Set-Off**

A creditor can exercise the right to set-off at any time, as long as this is before the rehabilitation plan is approved by the court and providing both debts arose before the time of issuance of the rehabilitation order.

## **6.15 Failure to Observe the Terms of Agreements**

If the terms of the approved rehabilitation plan cannot be complied with, the Bankruptcy Court may issue an order for cancellation of the rehabilitation order or issue an absolute receivership order against the debtor. This does not affect any action that was previously conducted honestly and in accordance with the rehabilitation plan. In addition, the rights and duties of the creditors remain unchanged, as they existed prior to the issuance of the rehabilitation order.

## **6.16 Existing Equity Owners**

The existing shareholders are entitled to receive dividends only after the debtor has successfully repaid the debt owed to all the creditors under the rehabilitation plan.

# **7. STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDINGS**

## **7.1 Types of Voluntary/Involuntary Proceedings**

### **Overview**

Only statutory bankruptcy proceedings to be commenced by the creditor, are available under the Thai legal framework. The Bankruptcy Act

does not allow the debtor to submit a petition for voluntary bankruptcy proceedings.

Under the Bankruptcy Act, if a creditor is owed more than THB2 million by a debtor company, the creditor may commence bankruptcy proceedings against the insolvent debtor by filing a petition or claim with the Bankruptcy Court. The main objective of bankruptcy proceedings is to place the debtor into receivership and appoint an official receiver to liquidate the debtor company and distribute the proceeds to the creditors. The Bankruptcy Court will schedule a hearing to examine witnesses and if, by the end of the hearing, the Bankruptcy Court issues an absolute receivership order, it will be published in the Government Gazette. As a consequence, the debtor will be prohibited from dealing with its assets except by order of the Bankruptcy Court, or with the approval of the official receiver or the creditors' meeting.

### **Limitations**

All creditors must file a claim for repayment within two months from the date of publication of the order of absolute receivership, except where an event of force majeure has occurred and/or is still occurring. In this case, a creditor may file a claim after the two-month period by providing satisfactory evidence that they could not file the claim within two months due to an event of force majeure. However, such creditor may only receive repayment from a residual fund after the allocation of the debtor's assets to the other creditors.

Non-resident creditors (foreign creditors) may be granted an additional two-month extension; however, they must prove that Thai creditors would generally enjoy reciprocal rights to participate in similar proceedings in their respective countries, and they must agree to relinquish any of the debtor's property outside Thailand for the benefit of all the creditors.

A creditor cannot file a claim for repayment if the creditor knew, in fact, that the debtor was insolvent at the time the debt was incurred, unless the debt was incurred in order for the debtor's business to be able to continue its operations.

### **7.2 Distressed Disposals**

Under bankruptcy proceedings, the sale of assets will generally be conducted through public auction by the official receiver. Other sale methods, including pre-negotiated sales transactions, which prove to be more convenient and of more benefit to the creditors, can also be implemented. This is provided that approval is obtained from the creditors' committee. There is no restriction preventing the creditor from bidding or participating in a public auction. No special rules apply.

### **7.3 Organisation of Creditors or Committees**

According to the Bankruptcy Act, the creditors' committee can be formed by a resolution of the creditors' meeting in order to manage and oversee the realisation and distribution of the debtor's assets. A special resolution of the creditors' meeting is required to proceed with the composition of debts.

A creditors' committee must have not less than three, but not more than seven members, and each member must be qualified and approved by the official receiver to receive repayment of debts. Reimbursement of expenses shall, from time to time, be approved by the creditors' meeting.

## 8. INTERNATIONAL / CROSS-BORDER ISSUES AND PROCESSES

### 8.1 Recognition or Relief in Connection with Overseas Proceedings

Thai bankruptcy law does not recognise any insolvency proceedings (either bankruptcy or business rehabilitation proceedings) in another country and any insolvency proceedings or court orders regarding absolute receivership or an automatic stay under the laws of other countries have no effect on a debtor's assets in Thailand.

### 8.2 Co-ordination in Cross-Border Cases

Thai bankruptcy law has also not equipped the Bankruptcy Court with any specific means to enforce its orders abroad. Protocols or arrangements for enforcement of its orders abroad are based on reciprocal arrangements between Thailand and the relevant countries.

### 8.3 Rules, Standards and Guidelines

Under the Bankruptcy Act, foreign creditors are defined as being "foreign creditors who are domiciled outside Thailand". If a foreign creditor is owed a debt by any debtor in Thailand who has been under the Bankruptcy Court's order of absolute receivership, such foreign creditor is entitled to file a claim for repayment of the debt within two months from the date of publication of the order of absolute receivership providing that:

- such foreign creditor can prove to the Bankruptcy Court that any creditor in Thailand is similarly entitled to claim for repayment of debts in bankruptcy proceedings in a bankruptcy court under the laws of the country of which the foreign creditor is a national; and
- such foreign creditor reports the amount of the asset or distribution they have received, or are entitled to receive, from the same debtor's estate located outside Thailand, if

any (should such asset or distribution exist, the foreign creditor must agree to deliver the asset or distribution from the debtor's said estate outside Thailand to be added to the debtor's estate in Thailand).

In addition, if such debtor has not yet been subject to a petition for bankruptcy proceedings, the foreign creditors may file a petition for bankruptcy against the debtor in a Thai Bankruptcy Court provided that:

- the insolvent debtor is domiciled in Thailand, or operates a business there, whether by themselves or through a representative, while they are filing a petition for bankruptcy proceedings, or within a year before filing for bankruptcy proceedings; and
- such debtor is a natural person and is indebted to one or several plaintiff creditors in an amount not less than THB1 million, or the debtor is a juristic person who is indebted to one or several plaintiff creditors in an amount not less than THB2 million.

### 8.4 Foreign Creditors

Both foreign and Thai creditors would enter into bankruptcy proceedings in a similar way, but foreign creditors would be required to comply with certain additional requirements, see **8.3 Rules, Standards and Guidelines**.

### 8.5 Recognition and Enforcement of Foreign Judgments

The Bankruptcy Act does not recognise any foreign judgment in respect of insolvency proceedings, orders regarding absolute receivership or moratoria under the laws of another country, see **8.1 Recognition or Relief in Connection with Overseas Proceedings**. The parties must bring a de novo trial before the competent courts in Thailand, where such foreign judgments or orders may serve as supportive evidence in Thai proceedings.

## 9. TRUSTEES/RECEIVERS/ STATUTORY OFFICERS

### 9.1 Types of Statutory Officers

In bankruptcy proceedings, an official receiver is appointed under the Bankruptcy Act to supervise the realisation and distribution of the debtor's assets.

In the case of business rehabilitation proceedings, a planner is appointed by the Bankruptcy Court to prepare the rehabilitation plan and to take over the powers and duties of the debtor's executive management. An official receiver is also appointed to supervise the proceedings. Once the creditors' meeting has adopted a resolution approving the proposed rehabilitation plan, it is up to the court to confirm the plan, then issue an order to approve the plan. At that point, the powers and duties of controlling the debtor's business will be transferred (from the planner) to a plan administrator to execute the approved plan.

The concept of trustee is not provided for under Thai bankruptcy law.

### 9.2 Statutory Roles, Rights and Responsibilities of Officers

#### Official Receiver

In bankruptcy proceedings, the official receiver has full power to manage any assets and enforce any rights relating to the assets of the debtor, such as disposing of assets, and collecting and receiving money and assets that belong to the debtor or which the debtor is entitled to receive from others. The official receiver is also responsible for compromises, for filing or defending actions relating to the debtor's assets, and for reviewing the merit of claims for debt repayment filed by creditors.

In business rehabilitation proceedings, the official receiver will be appointed to supervise the

proceedings and to review the merit of the claims for debt repayment filed by creditors.

#### Planner

The planner is appointed by the Bankruptcy Court in rehabilitation proceedings to be responsible for preparing the rehabilitation plan and to have the power and duty to control the business of the debtor once appointed.

#### Plan Administrator

The plan administrator is appointed under the rehabilitation plan to execute the approved plan.

### 9.3 Selection of Officers

Only the Legal Execution Department of the Ministry of Justice can appoint and relieve an official receiver. An official receiver is a government officer who is assigned to handle bankruptcy and business rehabilitation proceedings. The receiver is automatically empowered by the Bankruptcy Act.

A planner and plan administrator are approved by the creditors' meeting and the Bankruptcy Court. The planner and plan administrator appointed under the rehabilitation plan must be registered and qualified under the Ministerial Regulations re: Registration and Qualifications of Plan Preparer and Plan Administrator BE 2545 (2002) and its amendments BE 2558 (2015). The planner will commence duties upon appointment by the Bankruptcy Court while the plan administrator will commence duties upon acknowledgement of the court's approval order of the rehabilitation plan.

## 10. DUTIES AND PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF FINANCIALLY TROUBLED COMPANIES

### 10.1 Duties of Directors

The general rule of the fiduciary duty of directors is applicable. There are no specific duties for the directors of dissenting or insolvent companies. As a general rule, a director has a duty to conduct the business of the company with the diligence of a careful businessman. If a director causes loss to a company through non-compliance with this duty, the company or its shareholders can claim against the director for the loss suffered. Directors must also act in good faith and with care to preserve the interests of the company. If a director fails to discharge these duties, the company or its shareholders can bring a claim against the director under the Thai Penal Code, in relation to fraud, or under the Corporate Offences Act.

### 10.2 Direct Fiduciary Breach Claims

Creditors can assert their claims directly against the directors of a company. In a case where a claim is asserted for the purpose of the debtor company in insolvency proceedings, it must be made through the official receiver.

## 11. TRANSFERS/ TRANSACTIONS THAT MAY BE SET ASIDE

### 11.1 Historical Transactions

#### Bankruptcy Proceedings

The official receiver may file a petition to the Bankruptcy Court to cancel or revoke:

- the transfer of the debtor's assets during the three-month period before the petition for

- bankruptcy proceedings was filed, if it has been proven that the debtor intended to give undue preference to a certain creditor(s); or
- any fraudulent acts that were committed by the debtor within a one-year period from the date that such fraudulent acts became known to the official receiver.

The Bankruptcy Act also provides the presumption that where the debtor received compensation in an amount that was less than reasonable, this was done so as to prejudice the rights of the creditors to be repaid.

### Business Rehabilitation Proceedings

The plan preparer, the plan administrator and the official receiver may file a petition to the court to cancel or revoke:

- the transfer of the debtor's assets during the three-month period before the rehabilitation proceedings petition was filed, where it has been proven that the debtor intended to give undue preference to a certain creditor or creditors; or
- any fraudulent act committed by the debtor, where the intention of the debtor, who received less than a reasonable amount in a transaction within a one-year period before the business rehabilitation petition or after it was filed, is presumed to prejudice the rights of the creditors to be repaid.

The Bankruptcy Act also provides that the cancellation or revocation of certain transactions in accordance with the above will not affect the rights of the third parties who acquired the assets in good faith and for valuable consideration before the proceedings started.

### 11.2 Look-Back Period

See **11.1 Historical Transactions**.

### **11.3 Claims to Set Aside or Annul Transactions**

The Bankruptcy Act does not provide direct means for creditors to set aside or annul transactions on their own, see **11.1 Historical Transactions**.

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**Chandler MHM Limited** (CMHM) was established in 2017 when Chandler & Thong-ek Law Offices Limited, one of the leading law firms in Thailand, integrated its practice with Mori Hamada & Matsumoto, one of the largest, full-service international law firms in Tokyo. The firm is therefore able to offer its clients the synergy of best-in-class Thai and international legal services. The team of more than 90 lawyers in Thailand is internationally recognised for its legal expertise in banking and project financing, corporate, M&A, foreign direct investment into Thailand, energy and natural resources, real es-

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