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# Insolvency

Second Edition

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# Law and Practice

*Contributed by Chandler MHM Limited*

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**Chandler MHM Limited** was established on 1 January 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 Tokyo-headquartered international law firms. Chandler MHM (CMHM) is therefore able to offer its clients the synergies of top Thai and international legal services. The team of more than 80 lawyers in Thailand combines decades of experience in the Thai legal environment with internation-

ally recognised legal expertise. CMHM acts for creditors, creditor committees and debtors on due diligence and restructuring of corporate debt, and advises on reorganisation proceedings under the amended Bankruptcy Act and under the Corporate Debt Restructuring Advisory Committee (CDRAC). The firm published an English translation of the amended law in 1999, as well as co-publishing Restructuring Eurobond Debt in Thailand.

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## 1. Market Trends and Developments

### 1.1 State of the Restructuring Market

Corporate insolvency in Thailand is principally governed by the Bankruptcy Act B.E. 2483, AD 1940, as amended, (Bankruptcy Act) and the Civil and Commercial Code (CCC). There are two types of insolvency proceedings available in Thailand: bankruptcy (including composition) and business reorganisation. These procedures are available for both private and public limited companies.

In recent years, there have been slightly fewer insolvency proceedings. According to the statistics of the Central Bankruptcy Court (Bankruptcy Court), the competent body to exercise jurisdiction in insolvency matters, 5,415 bankruptcy proceedings were filed in 2018 (compared to 5,587 cases in 2017). There has been an increase in reorganisation proceedings, with 23 proceedings initiated with the court in 2018 (as compared to 19 cases in 2017).

This trend is directly attributable to the enactment of several regulations aimed at expediting insolvency procedures, increasing accessibility to such procedures, and bringing insolvency procedures in line with international practice. The number of insolvency cases is still on the upward trend, corresponding to many initiatives taken in several sectors, specifically when compared to the first year of implementation of the Bankruptcy Act.

### 1.2 Changes to the Restructuring and Insolvency Market

The Thai restructuring and insolvency market has not experienced changes in financing, refinancing or restructuring strategies. The current plan, among many initiatives the Thai government has taken, is to raise the country's position and ranking in accordance with international practice. The number of insolvency matters filed with the Bankruptcy Court is continually increasing, especially since reorganisation procedures have been introduced to the Bankruptcy Act.

## 2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

### 2.1 Overview of Laws and Statutory Regimes

As mentioned above in **1.1 State of the Restructuring Market**, the competent body exercising jurisdiction in insolvency matters in Thailand is the Bankruptcy Court.

The main procedures encountered in corporate insolvencies are:

- bankruptcy (including composition); and
- business reorganisation.

A debtor or its creditors may file for business reorganisation. Bankruptcy proceedings, on the other hand, may only be initiated by creditors. Thai law does not provide for voluntary bankruptcy procedures to be initiated by the debtor.

Under the Thai legal system, a solvent liquidation may be undertaken by the dissolved company itself. However, an insolvent liquidation may only be conducted by the official receiver.

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

See **2.1 Overview of Laws and Statutory Regimes**.

### 2.3 Obligation to Commence Formal Insolvency Proceedings

There is no general requirement that obliges companies to initiate bankruptcy proceedings. However, in a case where a liquidator of a dissolved debtor discovers that the entire contribution or shares have been paid up and the assets are insufficient to cover liabilities, the debtor must initiate a voluntary winding-up. The liquidator may then begin bankruptcy liquidation. If the liquidator fails to do so, the liquidator 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 B.E. 2499, AD 1956 (Corporate Offences Act). The Corporate Offences Act does not provide a specific timeline for initiating a mandatory insolvency proceeding but merely states that the proceedings should be commenced without delay.

### 2.4 Procedural Options

In a case where the debtor company is obliged to commence formal insolvency proceedings in accordance with **2.3 Obligation to Commence Formal Insolvency Proceedings**, the liquidator of the debtor company must commence the proceedings without delay.

### 2.5 Commencing Involuntary Proceedings

As explained in **2.1 Overview of Laws and Statutory Regimes**, a debtor or its creditors may file for business reorganisation. Bankruptcy proceedings, on the other hand, may only be initiated by creditors. Thai law does not provide for bankruptcy procedures to be commenced by the debtor, except in the case of a mandatory petition filed by the liquidator of a dissolved debtor.

### 2.6 Requirement for Insolvency

Insolvency is required to commence insolvency proceedings. For bankruptcy proceedings, a liquidity test is available; whereas in reorganisation proceedings, both the liquidity test and the balance sheet test are available. One of these tests needs to be triggered with an order to initiate the proceeding.

Under the Bankruptcy Act, a debtor is presumed to be insolvent where:

- the debtor declares to the Bankruptcy Court or informs its creditors that it cannot pay its debts;
- the debtor has submitted a proposal for composition of its debt to two or more creditors; or
- the debtor has received not less than two demand letters within 30 days and has not yet paid a sum according to the demand.

In addition to the tests relating to failure to pay, a debtor will also be deemed insolvent where:

- the debtor has transferred its assets or the rights to manage its assets to another person for the benefit of that other person's creditors;
- the debtor has transferred or delivered its assets with dishonesty or fraudulent intent;
- the debtor has transferred or created rights which would, in the situation of bankruptcy, be considered an act of preference;
- the debtor has:
  - (a) delayed its payment by closing its business;
  - (b) consented to a judgment order for a payment it should not make; or
  - (c) removed assets out of the court's jurisdiction; or
- the debtor's assets are attached under a writ of execution, or there are no assets capable of attachment.

## 2.7 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. As a general rule, corporate insolvency procedures are applied.

## 3. Out-of-court Restructurings and Consensual Workouts

### 3.1 Restructuring Market Participants

Under the Thai legal framework, business reorganisation is a court-supervised formal attempt to restructure the distressed enterprise. Consensual restructuring and/or informal financial restructuring do not have a legally binding effect. A formal (court-initiated) composition is available under the Bankruptcy Act. Although this is not a mandatory procedure, the Bankruptcy Court will generally recommend composition to parties in insolvency proceedings.

Composition works as follows: a debtor may submit a proposal for the composition of its debts, whereupon the official receiver must call a creditors' meeting as soon as possible to consider whether the proposal should be accepted, or whether the debtor should be declared bankrupt. If the

composition plan is accepted by the creditors, it must then be approved by the Bankruptcy Court, at which point it will become legally binding on all creditors.

### 3.2 Consensual Restructuring and Workout Processes

As explained in 3.1 **Restructuring Market Participants**, there is no formal legal framework governing consensual restructuring processes in Thailand.

### 3.3 New Money

Unless otherwise provided in the business reorganisation plan, the status of new funds provided during the reorganisation procedure can be separated into the following two categories:

- funds provided during the period between when the Bankruptcy Court issues an order for reorganisation of the business and when the Bankruptcy Court appoints the plan preparer. In order for a creditor to be entitled to repayment, the debt must only be incurred by the official receiver or interim executive, and the creditor must have a letter confirming the claims issued by the plan preparer. In this regard, creditors are not required to file a claim pursuant to the procedures under the Bankruptcy Act. Instead, creditors are entitled to repayment according to the time periods stipulated in the business reorganisation plan; or
- funds provided after the Bankruptcy Court has approved the plan for business rehabilitation pursuant to the plan. As above, creditors are entitled to repayment in accordance with the business reorganisation plan and are not required to file a claim pursuant to procedures under the Bankruptcy Act. A creditor who provides a loan will not be subject to the automatic stay of the Bankruptcy Act and may enforce its rights when the debt matures.

### 3.4 Duties on Creditors

Liability on a lender or creditor may arise from:

- involvement in a fraudulent act; or
- earning a benefit that constitutes undue preference.

The official receiver, the plan preparer and the plan administrator can file a motion with the Bankruptcy Court for an order to cancel a fraudulent act or undue preference.

Whether the fraudulent act or undue preference results in liability to the creditor will depend on the act itself. For example, if a debtor's property is transferred to a creditor to prevent other lenders from receiving payment, such an act would constitute an offence by the debtor and this carries a punishment of imprisonment for a period not exceeding two years or a fine not exceeding THB200,000. A creditor will also be deemed to have committed an offence where it

assists or supports the debtor in committing, or takes part in the commission of, such an act.

Moreover, if a creditor helps or supports the debtor to commit a fraudulent act or grants an undue preference, and this causes the loss of property or any other right of the other creditors, the offending creditor may be liable on the basis of tort under the CCC. Aggrieved creditors may take legal action against the offending creditor to recover their losses. An example of a fraudulent act is the creation of a non-existent liability or debt to dilute the proportional rights of the existing creditors.

### **3.5 Out-of-court Financial Restructuring or Workout**

As described in **3.1 Restructuring Market Participants**, there is no formal legal framework governing out-of-court financial restructuring processes.

## **4. Secured Creditor Rights and Remedies**

### **4.1 Liens/Security**

In the context of insolvency, the following types of securities apply:

- mortgages;
- pledges;
- rights of retention; and
- preferential rights in the nature of a pledge.

A mortgage is security that can be taken on immovable property, while pledges and retentions are generally available for movable property. There are no floating charges or other security over movable property (with few exceptions), and no mortgages of leaseholds or reclaimed land. There is no “pledge substitution” concept.

In addition, Business Security Act B.E. 2558 was recently introduced in 2015 under which, in certain circumstances, a borrower can agree to provide assets to a lender as security for repayment of debt without the need to deliver the assets to the lender. The lender must be a financial institution or other lender as prescribed in ministerial regulations.

### **4.2 Rights and Remedies**

Secured creditors are entitled to enforce their security without filing a claim for repayment under the bankruptcy procedure. However, in order to be entitled to vote as a creditor under the bankruptcy procedure, a secured creditor is required to file a claim for repayment.

In addition, in the event that the petition for a reorganisation procedure is accepted, court approval for execution of the underlying security is required.

### **4.3 Typical Timelines**

See **4.2 Rights and Remedies**. In repayment processes, the secured creditors are entitled to enforce their security directly without filing a claim via bankruptcy procedures. The timeline for enforcement varies depending on the underlying security.

### **4.4 Foreign Secured Creditors**

Thai law does not differentiate between the procedures for foreign and local secured creditors. In respect of repayment proceedings, see **4.5 Special Procedural Protections and Rights**.

### **4.5 Special Procedural Protections and Rights**

In the context of insolvency proceedings, the petitioning creditor should be an unsecured creditor, while secured creditors are entitled to enforce their security without filing a claim for repayment under bankruptcy procedures. There are therefore generally no repayment proceedings available for secured creditors. Under certain circumstances, the secured creditor may file a bankruptcy petition if such creditor agrees to surrender the security for the benefit of all creditors once the debtor becomes bankrupt.

The proceeds from the realisation of the debtor’s assets will be distributed to the creditors in the following order of priority (on a pro rata basis if the proceeds are insufficient for any category):

- official receiver’s costs and expenses for managing and realising the debtor’s property;
- court fees for collecting the debtor’s property;
- fees of the petitioning creditor and counsel’s fees as the court or the official receiver may prescribe;
- taxes due within six months prior to the court order for receivership and wages of the debtor’s employees; and
- any other debts.

## **5. Unsecured Creditor Rights, Remedies and Priorities**

### **5.1 Differing Rights and Priorities**

Creditors within the same class under a reorganisation plan will receive the same treatment, unless a creditor in such class agrees otherwise by written consent. Legally, equal treatment among creditors in each class is a precedent condition for the court to consider granting approval to a reorganisation plan of the debtor.

### **5.2 Unsecured Trade Creditors**

Unsecured trade creditors will be able to obtain repayment through formal insolvency proceedings. No out-of-court or consensual repayment proceedings will be available, as discussed in **3.1 Restructuring Market Participants**.

In respect of continuing commercial relationships with trade creditors, under certain circumstances, if the official receiver learns that the assets of the debtor or rights and obligations of the debtor under a certain contract are more onerous than the benefit to the debtor, the official receiver is entitled to refuse to accept such assets or refuse to comply with the obligations of the debtor under such contract. In addition, the official receiver may recommend to the court cancellation or revocation of 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.

### **5.3 Rights and Remedies for Unsecured Creditors**

Unsecured creditors are not entitled to enforce their claim without filing a claim for repayment under insolvency procedures.

### **5.4 Pre-judgment Attachments**

An interim injunction to prevent the debtor's transfer of assets is available. The criteria and requirements under the CCC are applied mutatis mutandis. Interim injunction under the CCC includes 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 show there is sufficient evidence that the damage to the petitioner will continue if an interim injunction is not granted. The applicable criteria and requirements depend on the requested interim injunction.

### **5.5 Timeline for Enforcing an Unsecured Claim**

Unsecured creditors are not allowed to enforce their claim, so no timeline applies. Instead, they are required to file an application of repayment of debt under insolvency proceedings. The amount granted to them is dependent upon the court's discretion and the pool of assets.

### **5.6 Bespoke Rights and Remedies for Landlords**

Landlords do not specifically have any bespoke rights or remedies under the Thai Bankruptcy Act.

### **5.7 Foreign Creditors**

Thai law does not differentiate between the procedures for foreign and local creditors.

### **5.8 Statutory Waterfall of Claims**

See 4.5 **Special Procedural Protections and Rights**.

### **5.9 Priority Claims in Restructuring and Insolvency Proceedings**

The priority of debts involves management of the debtor's assets. Therefore, if credit is provided for the purpose of management of the debtor's assets, a priority claim would be repaid prior to other ordinary creditor claims. In respect of the order of priority, see 4.5 **Special Procedural Protections and Rights**.

Specifically, under reorganisation proceedings, secured creditors will not be able to enforce their security without court approval. An automatic stay will continue until the reorganisation plan has either expired or been executed.

## **6. Statutory Restructurings, Rehabilitations and Reorganisations**

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

Reorganisation does not require consent from unanimous secured or unsecured creditors. If a debtor is indebted to one creditor or more for a definite amount of not less than THB10 million, such creditor is entitled to file a petition for reorganisation with the Bankruptcy Court. On the other hand, a debtor who is insolvent or unable to pay their debt is also entitled to file a petition for business reorganisation.

#### **Limitations**

The Bankruptcy Act provides that such debt must be a definite amount. This debt must be debt stemming from a juristic act (ie, a contract under which debt can be calculated until the filing date of such petition). However, a debt that cannot be specified or calculated definitively must be converted to a definite amount in accordance with 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 Reorganisation**

Reorganisation can be commenced if it appears that a debtor is indebted to one creditor or more 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. A debtor who is insolvent or unable to pay debt, or such creditor(s) are entitled to file a petition for business reorganisation with the Central Bankruptcy Court.

The objectives and purpose of reorganisation proceedings are to keep the debtor's business going, and to allow creditors to be repaid debt of not less than a judgment rendered in a bankruptcy case.

#### **Formal Restructuring/Reorganisation Proceedings**

Formal reorganisation is driven by a receiver who is an official of the Legal Execution Department. Formal reorganisation proceedings are a court-supervised process.

Once the creditor(s) or debtor have lodged a petition for reorganisation with the Bankruptcy Court, the court will schedule a hearing to consider the petition. If the court finds that the debtor is indebted for not less than THB10 million and there are reasonable grounds and prospects to achieve



reorganisation of the business of the debtor, the court will allow such petition. A plan preparer is then appointed and a plan has to be approved before proceedings can commence. An expedited process is unlikely.

#### *Creditors' claims*

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

Once the court has approved the reorganisation 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 reorganisation plan states otherwise, or the court cancels the order of reorganisation.

#### *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 plan preparer, 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 by another one month, twice) or five months in total after the order of appointment of a plan preparer is published in the Government Gazette, the plan preparer must submit a reorganisation plan to the receiver and the receiver will schedule a meeting of creditors to consider granting approval of the reorganisation plan. The receiver will send copies of the plan to all creditors along with notification of the date, time and venue of the meeting, including the agendas of the meeting to creditors who are entitled to vote, debtors and the plan preparer. Such information will be published in a daily newspaper not less than 15 days in advance of the meeting. If the meeting adopts a resolution approving the plan, the receiver then reports 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 plan

preparer to a plan administrator at the time of acknowledgment of such order.

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

An automatic stay will commence when the petition for reorganisation is submitted to the court in accordance with Section 90/12 of the Bankruptcy Act.

The company can continue to operate its business. However, if the court has made an order of reorganisation but not appointed a plan preparer, the court will appoint a person or an executive of the debtor to be the interim executive with the power and duties of managing the business and assets of the debtor under supervision of the receiver until a plan preparer is appointed. If the court has appointed a plan preparer, the plan preparer will have the power and duties of managing the business and assets of the debtor.

The company, a plan preparer, plan administrator, interim plan administrator or receiver may borrow 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**

The creditors who file the application for repayment of debt within the prescribed period will be put into separate classes – generally secured and unsecured creditors. However, each class of creditor can be divided into a number of 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 creditor committee empowered to monitor the performance of the reorganisation plan. Members of the creditor committee are selected from the creditors or representatives of the creditors. The number of members of the creditor committee shall not be less than three persons but not 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 plan preparer was published. In addition, the receiver shall send a document of such information to the address of the creditors by post.

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

A creditor is entitled to object to an application for repayment of debt of other creditors. The receiver will then consider whether the creditors should get paid or not, and how much the creditors are entitled to receive.

A dissenting class of creditors may file a petition to the Bankruptcy Court within seven days from the date of acknowledgment of the classification of the group of creditors. The

creditors will be informed of the classifications of creditors when the receiver calls for the creditors' meeting and circulates copies of the reorganisation plan to all the creditors. The court will consider whether amendments are needed. The court's order is final and no additional review or appeal is available.

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

Under the Bankruptcy Act, the reorganisation plan shall include the details of trading of claims or assignment of rights. Therefore, assignment of rights shall be in accordance with the reorganisation plan.

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

The restructuring procedures of a debtor do not extend to reorganisation of a corporate group because the debtor and others parties in a corporate group are different entities.

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

Under Section 90/12 of the Bankruptcy Act, the debtor is prohibited from disposing of, distributing or transferring the company's assets. The debtor is therefore prohibited from selling the company's assets. The debtor is entitled to use the assets as necessary to operate its normal business, but the debtor cannot consent to sales transactions, as such consent is contrary to the law and unenforceable.

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

The sale of assets or the business by the debtor is prohibited under Section 90/12 of the Bankruptcy Act, because the debtor is under an automatic stay. However, the debtor can dispose of assets if such disposal is in the ordinary course of business of the debtor. If the debtor would like to dispose of or sell company assets, the debtor can do so once it has submitted an application and received approval from the court. If any creditor would like to create encumbrances over the assets of the debtor, such creditor is 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 security for the benefit of all creditors during a formal reorganisation process.

## **6.10 Priority New Money**

Under the Bankruptcy Act, a debtor may not take any action which causes encumbrances over their assets except where such action is essential for the debtor to carry on business as normal, unless otherwise ordered by the court.

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

Creditors must prove grounds for the debt and present evidence to the receiver for consideration, and determination of the amount of the claim.

## **6.12 Restructuring or Reorganisation Agreement**

Under the Bankruptcy Act, a reorganisation plan is proposed to the creditors' meeting for approval. After that, the Bankruptcy Court must approve the plan.

## **6.13 Non-debtor Parties**

In Thailand, if any person is considered a non-debtor, such person shall not be subject to bankruptcy proceedings.

## **6.14 Rights of Set-off**

A creditor who is entitled to file an application for repayment of debt can exercise the right to set-off if at the time of issuance of the reorganisation order, the creditor owed debt to the debtor and the debtor owed debt to the creditor in the same amount.

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

If the terms of the agreed reorganisation plan are not complied with, such as the duration of the reorganisation plan, the bankruptcy court may issue an absolute receivership order against the debtor. The absolute receivership order does not affect any action that has been conducted honestly and in accordance with the reorganisation plan. In addition, the rights and duties of creditors remain unchanged as existing prior to the issuance of the reorganisation order.

## **6.16 Existing Equity Owners**

The existing equity owners are entitled to receive dividends after the debtor has repaid the debt owed to all the creditors under the plan. If the creditors have not been repaid, the existing equity owners are not entitled to receive their portion from the debtor.

# **7. Statutory Insolvency and Liquidation Proceedings**

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

Only involuntary bankruptcy procedures or insolvent liquidation, to be commenced by the debtor, are available under the Thai legal framework, see **2.1 Overview of Laws and Statutory Regimes**.

If a creditor is owed more than THB2 million by a debtor company, it 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 creditors.

In respect of the proceedings, 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 Royal Gazette. As a consequence, the debtor will be prohibited from dealing with its assets except by order of the Bankruptcy Court, with the approval of the official receiver or the creditors.

#### Limitations

Under bankruptcy proceedings, creditors must file a claim for repayment within two months from the date of publication of the order of absolute receivership, except where a force majeure has occurred and is continuing. 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 other creditors.

Non-resident 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 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 from the debtor where the creditor knew 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 reorganisation 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 the most convenient and for the benefit of the creditors, can also be implemented 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 are applied.

While under reorganisation proceedings, there is no provision regarding the sale of assets. The sale of assets would be included in the reorganisation plan, which should have already been approved by the creditors before execution of the plan to sell the assets.

#### 7.3 Failure to Observe Terms of Agreed/Statutory Plan

The court may terminate the reorganisation proceedings, declare the debtor bankrupt and order the commencement of bankruptcy proceedings, if there is a failure to observe

the terms of the reorganisation plan within the allotted time period.

#### 7.4 Priority New Money During the Statutory Process

Please see **3.3 New Money**. There is no restriction to securing new money with the debtor's asset.

#### 7.5 Insolvency Proceedings to Liquidate a Corporate Group

Under Thai law, the liability of each legal entity is separate. There is no special procedural rule that can be utilised to liquidate a corporate group.

#### 7.6 Organisation of Creditors or Committees

Under the Thai insolvency framework, a creditors' committee can be formed by a resolution of the creditors' meeting in order to manage and oversee 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 such creditors 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.

#### 7.7 Use or Sale of Company Assets During Insolvency Proceedings

Under bankruptcy proceedings, once the receivership order is rendered by the Bankruptcy Court, the debtor is prohibited from engaging in any activity involving their assets. The official receiver will be empowered to take control of the debtor and manage the debtor's business, including taking custody of the debtor's property and acting on behalf of the debtor in civil actions.

Under reorganisation proceedings, the use or sale of the debtor's assets shall be implemented in accordance with the approved reorganisation plan.

### 8. International/Cross-border Issues and Processes

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

Under the Bankruptcy Act, bankruptcy proceedings in another country are not recognised in Thailand and any bankruptcy proceedings under the laws of other countries have no effect on a debtor's assets in Thailand.

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

Protocols or any co-ordination in cross-border cases with foreign courts are not provided for under the Bankruptcy Act. Moreover, as mentioned above, the Bankruptcy Act

clearly stipulates that bankruptcy proceedings in another country are not recognised in Thailand and any bankruptcy proceedings under the laws of other countries have no effect on a debtor's asset in Thailand.

## 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 has a debt over 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 under such case requesting repayment of the debt within twomonths from the date of publication of the order of absolute receivership. A foreign creditor must comply with the following conditions under Section 178 of the Bankruptcy Act:

- such foreign creditor needs to 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 must report the amount of the asset or distribution that they have received, or are entitled to receive, from the same debtor's estate located outside Thailand, if any. If such asset or distribution exists, 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.

If such debtor has not yet been sued in a bankruptcy case, both the Thai and foreign creditors may file a petition for bankruptcy against the debtor provided that:

- the insolvent debtor is domiciled in Thailand, or operates a business therein, whether by themselves or by representative, while filing a petition to adjudge such debtor presently bankrupt, or within a period of one year previously; 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.

The debts may be determined in a definite amount, irrespective of whether they become due for payment immediately or at a future date.

## 8.4 Foreign Creditors

In a case where a creditor files a petition for bankruptcy against a debtor, both the foreign and Thai creditors must comply with the same bankruptcy proceedings.

However, in a case where a creditor files a claim into a pending bankruptcy case requesting repayment of debts, only a foreign creditor must additionally comply with Section 178 of the Bankruptcy Act – see **8.3 Rules, Standards and Guidelines**.

## 9. Trustees/Receivers/Statutory Officers

### 9.1 Types of Statutory Officers

When the Bankruptcy Court orders a debtor to be under receivership, a receiver will be appointed under the Bankruptcy Act. A trustee is not provided for under Thai law.

In the case of a business reorganisation, a plan administrator will be approved by the creditors' meeting and the Bankruptcy Court.

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

Once a debtor is under receivership, the receiver has full power in the management of any assets and rights relating to such 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 receiver is also responsible for compromises, and filing actions or defending actions relating to the debtor's assets.

### 9.3 Selection of Officers

Only the Legal Execution Department of the Ministry of Justice can appoint and relieve a receiver. A receiver who is a government officer will be assigned by the head of the Business Reorganisation Division to handle the bankruptcy case. The receiver will automatically be empowered by the Bankruptcy Act.

A plan administrator will be approved by the creditors' meeting and the Bankruptcy Court, as mentioned in **9.1 Types of Statutory Officers**. The plan administrator appointed under the reorganisation plan must be registered with the consideration committee of the plan preparer and plan administrator under Ministerial Regulations re: Registration and Qualifications of Plan Preparer and Plan Administrator B.E. 2545 (2002) and its amendments B.E. 2558 (2015). The plan administrator can be an individual or corporate entity, but is usually the latter. The following is required of the plan administrator:

- the purpose of its business must be to operate as an administrative work adviser;
- the purpose of its business must be to operate as a managing service of others' businesses and assets;
- it must have a working line on business administration and have at least three employees who work full time, half or more of whom are Thai. All employees must hold a bachelor's degree, have three years' work experience,

and at least one employee must have experience in business administration;

- an executive of the corporate entity must have ability and experience in the business activities of the debtor, and have no criminal record;
- it must have succinct, reliable rules and guidelines for work activities;
- it must have registered paid capital of not less than THB5 million; and
- it must never have been under an absolute receivership order.

The plan administrator will commence its duties upon acknowledgement of the court's approval order of the reorganisation plan.

## 10. Advisers and Their Roles

### 10.1 Typical Advisers Employed

In bankruptcy processes, the receiver is empowered to employ lawyers to act in the proceedings in court on the receiver's behalf. In addition, under Part 4: Collection and Disposal of Assets, Chapter 4: Management of Assets of Debtor of the Bankruptcy Act, if there are reasonable grounds for continuing the business of the debtor, with the approval of the creditor's meetings, the receiver may appoint any person to be a manager to operate the business to facilitate gradually winding it up. The creditors' meeting or the receiver will fix consideration.

In a business reorganisation, employment of a consultant or professional adviser will be specified in the reorganisation plan together with consideration for approval by the creditors' meeting.

### 10.2 Compensation of Advisers

According to Section 90/42 of the Bankruptcy Act, the reorganisation plan shall include the details of assets, debts and any undertakings during the reorganisation period. Expenses for compensation of advisers are required to be mentioned in the reorganisation plan. These payments should be made by the debtor.

### 10.3 Authorisation and Judicial Approval

See 10.1 Typical Advisers Employed.

### 10.4 Duties and Responsibilities

In bankruptcy proceedings, the professional adviser appointed in the course of proceedings will be empowered to manage the debtor's assets for the purposes of facilitating winding-up of the debtor's company.

The duties and responsibilities of professional advisers appointed under a reorganisation plan will be prescribed under that reorganisation plan.

## 11. Mediations/Arbitrations

### 11.1 Utilisation of Mediation/Arbitration

In Thailand, insolvency proceedings are conducted in court. The Thai legal framework does not allow for the resolution of insolvency proceedings by arbitration.

### 11.2 Mandatory Arbitration or Mediation

As mentioned in 11.1 Utilisation of Mediation/Arbitration, arbitration is not used in insolvency proceedings in Thailand.

Under the Thai legal framework, to avoid being declared bankrupt, composition is available. A debtor may submit a proposal for composition of its debts, whereupon the official receiver must call a creditors' meeting as soon as possible to consider whether the proposal should be accepted, or whether the debtor should be declared bankrupt. If the composition plan is accepted by creditors, it must then be approved by the Bankruptcy Court, at which point it will become binding on all creditors. Once the Bankruptcy Court approves the composition plan, the debtor will not be at risk of being declared bankrupt, other than for claims relating to tax and the debtor's fraudulent behaviour, if any. Incumbent management will retain control of the company subject to the direction of the Bankruptcy Court.

### 11.3 Pre-insolvency Agreements to Arbitrate

See 11.1 Utilisation of Mediation/Arbitration.

### 11.4 Statutes Governing Arbitration/Mediation

See 11.1 Utilisation of Mediation/Arbitration.

### 11.5 Appointment of Arbitrators

See 11.1 Utilisation of Mediation/Arbitration.

## 12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

### 12.1 Duties of Directors

Under the CCC, 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.

Similarly, in relation to a public company, a director has a duty to conduct business in compliance with all laws, the objects and articles of association of the public company, and the resolutions of shareholder meetings. 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 public company or its shareholders can make a claim against

the director under the Thai Penal Code, in relation to fraud, or under the Corporate Offences Act, where a director does not comply with obligations. This includes, for example, a director who does not summon an extraordinary meeting under the CCC, or conceals from the meeting a material matter relating to the company's financial statements.

In addition, where the company is a listed company, the directors must also comply with applicable securities laws which impose a fiduciary duty on directors towards the company and criminal sanctions if the directors fail to comply.

Note that the liability of the directors is generally separate from the liability of the company under Thai law.

## 12.2 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 dissent, it must be made through the official receiver.

Under the Bankruptcy Act, subject to specific circumstances, the debtor, an officer, a liquidator, a director, representative or employee of the debtor can be liable to imprisonment or a fine for:

- fraudulently tampering with accounts or documents relating to the business of the debtor;
- omitting to record material matters or making false entries in the accounts or documents relating to the debtor's business or assets;
- pledging, mortgaging or disposing of property which was obtained on credit and for which the price has not been paid (unless in the ordinary course of business and in the absence of any intentional fraud); and/or
- receiving goods on credit under false pretences.

## 12.3 Chief Restructuring Officers

In reorganisation proceedings, a plan preparer and plan executor will be appointed who will play a major role in the success of the reorganisation. Both officers are appointed by either the Bankruptcy Court or by the creditors' meeting, depending on the circumstances.

The qualifications of a plan preparer and plan executor are broadly described under the Bankruptcy Act. In practice, the Bankruptcy Court or the creditors' meeting (as the case may be) will normally appoint a qualified professional firm to be plan preparer and/or plan executor of the reorganising company.

An official receiver will supervise the conduct of the plan preparer and plan executor, who must provide the official receiver with quarterly reports. Both the plan preparer and plan executor will, from time to time, be questioned by the

Bankruptcy Court or by the creditors' meeting regarding their work-in-progress.

## 12.4 Shadow Directorship

There is no concept of shadow directorship in Thailand. Those who are responsible for the business operations of the dissenting debtor shall be considered as insiders of the debtor under the Thai Bankruptcy Act. The timeline for cancellation or revocation of fraudulent or preferable transfers, or assets or transactions, will be longer where the beneficiaries are insiders of the debtor.

## 12.5 Owner/Shareholder Liability

The concept of piercing the corporate veil is not well implemented by Thai courts. The liability of the shareholders is generally separate from the liability of the dissenting company under Thai law. Shareholders' liabilities are strictly limited to the payment of subscribed shares in the dissenting company.

# 13. Transfers/Transactions That May Be Set Aside

## 13.1 Historical Transactions

### Fraudulent Acts

Under insolvency proceedings, the official receiver may recommend to the court to cancel or revoke any transaction which is found to be fraudulent, provided that such fraudulent act arose within a time period of one year before the filing of the application to commence proceedings. The Bankruptcy Act also provides a presumption that transactions that are gratuitous or an act for which the debtor has received less-than-appropriate compensation, are activities that prejudice creditors.

### Granting a Preference

The Thai bankruptcy legal framework also empowers the official receiver to recommend to the Bankruptcy Court to cancel or revoke the transfer of assets or any act by which the debtor intended to give undue preference to certain creditors, provided that such act arose within three months before the filing of the application to commence the proceedings.

In addition, if the official receiver learns that the assets of the debtor or rights and obligations of the debtor under a certain contract are more onerous than the benefit to the debtor, the official receiver is entitled to refuse to accept such assets, or refuse to comply with the obligations of the debtor under such contract.

## 13.2 Look-Back Period

See 13.1 Historical Transactions.

### 13.3 Claims to Set Aside or Annul Transactions

The appointed official receiver is entitled to recommend cancellation or revocation of transactions or transfers of assets by filing a petition with the Bankruptcy Court requesting an order to cancel or revoke such transaction. Similar entitlement is applicable in both restructuring and insolvency proceedings.

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## 14. Importance of Valuations in the Restructuring and Insolvency Process

### 14.1 Role of Valuations

In reorganisation proceedings, the Bankruptcy Court will accept an application for reorganisation only to the extent that there are reasonable grounds to reorganise a business, which can be presented to the Bankruptcy Court by the debtor. The valuation of the debtor's assets will generally be one of the substantive tests that the Bankruptcy Court will consider before granting approval to the reorganisation application. It is necessary that the valuation indicates the advantage to the creditors of recovering their debts in reorganisation proceedings. The amount recoverable should be higher in a reorganisation proceeding than in a bankruptcy proceeding.

There is no specific legal framework which stipulates requirements for valuations in the Bankruptcy Court. In practice, a professional firm will be retained by either the debtor or creditor for this particular purpose before the submission of a reorganisation application.

### 14.2 Initiating a Valuation

Please see **14.1 Role of Valuations**.

### 14.3 Jurisprudence

Please see **14.1 Role of Valuations**.