

RESTRUCTURING & INSOLVENCY 2022

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RESTRUCTURING & INSOLVENCY 2022

Contributing editors**Catherine Balmond and Katharina Crinson**Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the 15th edition of *Restructuring & Insolvency*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, the Cayman Islands, Guernsey and Jersey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer for their continued assistance with this volume.

 LEXOLOGY**Getting the Deal Through**

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GENERAL

Legislation

- 1 | What main legislation is applicable to insolvencies and reorganisations?

In Thailand, the Bankruptcy Act BE 2483 (AD 1940) as amended (the BA) is the main law governing bankruptcy and reorganisation matters. Bankruptcy and reorganisation procedural matters are covered by the BA, the Establishment of and Procedures for Bankruptcy Court Act BE 2542 (AD 1999) (the EPB), and the Regulations for Bankruptcy Cases BE 2549 (AD 2006).

Excluded entities and excluded assets

- 2 | What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

Bankruptcy

A debtor not domiciled in Thailand or not operating its business in Thailand within a period of one year before the filing of a bankruptcy petition is excluded from bankruptcy proceedings (section 7 of the BA). Also, a bankruptcy filing before the Thai courts may not be made against a juristic person that is not indebted for more than 2 million Thai baht (section 9 of the BA).

While certain assets of natural person debtors, such as personal belongings necessarily required in accordance with their condition in life, are excepted, for juristic persons, most of the debtor's assets are subject to bankruptcy proceedings (section 109 of the BA).

Reorganisation

Previously, only limited companies, public limited companies and certain juristic persons included by ministerial regulations (the Credit Union Cooperative was one example) could be subject to reorganisation proceedings. In 2016, an amendment to the BA extended reorganisation proceedings to cover natural person debtors and other juristic persons if they can be categorised as small to medium-sized enterprises (section 90/91 of the BA).

The creditors in business reorganisation proceedings are repaid pursuant to the reorganisation plan accepted by the creditors' meeting and approved by the court.

Public enterprises

- 3 | What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There is no specific procedure or special remedy for creditors applying in the case of the insolvency of a state-owned enterprise.

Protection for large financial institutions

- 4 | Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

No. However, under the Financial Institution Business Act BE 2551 (AD 2008), before a commercial bank, finance company, or credit foncier company enters into reorganisation proceedings, the Bank of Thailand may take control of the financial institution and replace its management with a control committee. Similar control mechanisms are applicable to insurance companies and securities companies under the Life Insurance Act BE 2535 (AD 1992), the Non-Life Insurance Act BE 2535 (AD 1992) and the Securities and Exchange Act BE 2535 (AD 1992).

Courts and appeals

- 5 | What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Central Bankruptcy Court, the Regional Bankruptcy Court, the Court of Appeal for Specialised Cases and the Supreme Court, Bankruptcy Division, are the specialised courts that have jurisdiction to adjudicate bankruptcy and reorganisation matters.

In bankruptcy and reorganisation proceedings, there are three levels of court. The Central Bankruptcy Court is the court of first instance. Appeals against its judgment or order can be made to the Court of Appeal for Specialised Cases, subject to certain restrictions. If a party is dissatisfied with the judgment or order of the Court of Appeal, it may further appeal against the judgment or order to the Supreme Court, subject to certain restrictions.

Pursuant to section 25 of the EPBC, a judgment or order of the Central Bankruptcy Court cannot be appealed against unless the judgment or order is for:

- the dismissal of a petition for bankruptcy;
- the dismissal of a petition for business reorganisation;
- an approval or disapproval of the repayment of a debt, either in whole or in part;
- an absolute receivership; or
- civil cases relating to bankruptcy proceedings.

Despite the above, the Court of Appeal for Specialised Cases may grant leave to appeal in other cases if it finds that the request for appeal is in the interest of justice (section 26 of the EPBC).

Also, the judgment or order of the Court of Appeal for Specialised Cases may be further appealed against to the Supreme Court by requesting leave to appeal from the Supreme Court, subject to the conditions and requirements as prescribed by the Civil Procedure Code, as amended. The grounds for appeal to the Supreme Court include, for example, the fact that important legal issues ruled on by the Court of Appeal for Specialised Cases conflict with precedents of the Supreme Court or have never been considered by the Supreme Court.

There is no requirement to post security to proceed with an appeal.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

6 | What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

The BA does not allow for voluntary bankruptcy, except in the case of liquidation of a debtor where the liquidator finds out that the debtor has insufficient assets to settle all debts. In this case, the liquidator must apply to the court for the debtor's bankruptcy.

Voluntary reorganisations

7 | What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

To commence a voluntary reorganisation, a debtor must be insolvent or unable to pay its debts as they fall due and owe a definite amount of not less than 10 million Thai baht to one or more creditors (section 90/3 of the Bankruptcy Act BE 2483 (AD 1940), as amended (the BA)).

Once the reorganisation petition is accepted for consideration by the court, an automatic stay will come into effect, barring the commencement and continuation of proceedings or enforcement against the debtor and affecting the debtor's ability to freely manage its own business and assets, among other things (section 90/12 of the BA).

Successful reorganisations

8 | How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

Creditors are divided into groups or classes in a reorganisation plan, as follows (section 90/42 bis of the BA):

- each secured creditor having secured debt of not less than 15 per cent of the total debt will constitute one group, while other secured creditors together will constitute another group;
- unsecured creditors may be divided into different groups, but unsecured creditors who have the same or similar rights or benefits will constitute one group; and
- creditors that, by law or contract, are entitled to receive payment only after other creditors have received repayment in full will constitute one group.

In a creditors' meeting, a reorganisation plan must be accepted by (section 90/46 of the BA), either:

- a resolution of each group of creditors by a majority in number of each group of creditors holding an amount of not less than two-thirds of the total debt of that group of creditors who are present at the meeting and cast their votes; or

- a resolution of at least one group of creditors by a majority in a number of the group of creditors holding an amount of debt of not less than two-thirds of that group of creditors who are present at the meeting and cast their votes, and, when counting the total amount of debt owed to all creditors who approve the reorganisation plan, the amount is not less than 50 per cent of the total debt owed to all creditors who are present at the meeting and cast their votes.

Thereafter, the reorganisation plan is referred to the court for its consideration and approval. The reorganisation plan approved by the court will bind both creditors that have submitted their debt repayment applications and those who could have done so but did not.

A reorganisation plan, accepted by a creditors' meeting and approved by the court, cannot release non-debtor parties from any liability arising before the date of approval of the plan (section 90/60 of the BA).

Involuntary liquidations

9 | What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

For a creditor to file a bankruptcy petition against a debtor, the debtor must be insolvent, and indebted to one or more creditors for at least 1 million Thai baht, in the case of a natural person debtor, or 2 million Thai baht, in the case of a juristic person (section 9 of the BA).

Once the court issues an order for absolute receivership against the debtor, the debtor is barred from managing its own business and assets. The power to do so will be transferred to the official receiver (sections 22 and 24 of the BA).

Involuntary reorganisations

10 | What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A single creditor or a group of creditors may file a reorganisation petition against a debtor if the debtor is insolvent or unable to pay its debts as they fall due, and owes a definite amount of not less than 10 million Thai baht to one or more creditors (section 90/3 of the BA). A state agency authorised to supervise a debtor's business, such as the Bank of Thailand or the Securities and Exchange Commission, may also file a reorganisation petition against the debtor (section 90/4 of the BA).

There are no other material differences between voluntary and involuntary reorganisations.

Expedited reorganisations

11 | Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The BA does not expressly provide for an expedited reorganisation procedure, but, in practice, the time-consuming nature of certain stages of reorganisation proceedings can be reduced by having the debtor and major creditors agree on the principles of a reorganisation plan before the filing of a reorganisation petition.

Unsuccessful reorganisations

- 12 | How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

If a reorganisation petition does not conform with conditions prescribed in the BA, the court will dismiss the petition. In this case, the automatic stay will be lifted (section 90/12 of the BA).

If the court issues an order for business reorganisation, but a reorganisation plan is not accepted by the creditors or not approved by the court, the court will then cancel the reorganisation order (sections 90/48 and 90/58 of the BA). Upon the cancellation of the reorganisation order, the automatic stay will terminate, the powers to manage the debtor's business and assets will revert from the planner to the debtor, and the debtor's shareholders will also again enjoy their legal rights (section 90/25 of the BA).

If a reorganisation plan is accepted by the creditors and approved by the court, but the plan cannot be implemented by the plan administrator within the period for implementation, the court will issue either an order to terminate the debtor's reorganisation or an absolute receivership order if the court considers that the debtor should be declared bankrupt (section 90/70 of the BA).

Corporate procedures

- 13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Yes. The liquidation of a company is governed by the Civil and Commercial Code (the CCC) and the BA. If a company wishes to enter into liquidation, normally the company will call a shareholders' meeting to approve the liquidation by a three-quarters majority of shareholders voting, and appoint a liquidator to settle the affairs of the company, pay its debts, and distribute its assets.

However, if the liquidator finds that, after all, shares have been paid up in full, the company's assets are insufficient to meet its liabilities, the liquidator must apply at once to the court to have the company declared bankrupt.

Conclusion of case

- 14 | How are liquidation and reorganisation cases formally concluded?

Bankruptcy

In bankruptcy proceedings, once the official receiver makes the final distribution of the debtor's assets, or has ceased to take action under a composition, or when the debtor has no remaining distributable assets, the official receiver can prepare a report of the business and accounts of receipts and expenditures, submit these to the court, and request a court order for closure of the case (section 133 of the BA).

Reorganisation

In reorganisation proceedings, the debtor's executives, plan administrator, interim plan administrator, or the official receiver, can request the court to issue an order to terminate the reorganisation upon completion of the implementation of the reorganisation plan. The court will issue that order if it considers that the plan has been successfully implemented (section 90/70 of the BA).

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

- 15 | What is the test to determine if a debtor is insolvent?

The debtor is considered insolvent if its liabilities exceed its assets. Also, there are certain circumstances where the debtor is presumed insolvent, for example, if a debtor fails to make payment after two demands for payment with an interval between them of not less than 30 days, or transfers assets that would be considered an act of preference if the debtor were bankrupt (section 8 of the Bankruptcy Act BE 2483 (AD 1940), as amended).

In practice, a debtor would have to prove that the amount of its assets exceeds its liabilities by referring to its audited accounts. At the same time, the petitioning creditor usually tries to challenge valuations specified in the accounts.

Mandatory filing

- 16 | Must companies commence insolvency proceedings in particular circumstances?

Thai law does not require directors of a company to commence bankruptcy or reorganisation proceedings. However, the board of directors of a company has a duty to call an extraordinary shareholders' meeting when the company has made a significant loss, ie, a loss equal to half of the company's capital.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

- 17 | If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

There is no liability for directors and officers of a company resulting from failure to commence proceedings, as this is not required under Thai law. However, should a company's board of directors fail to call an extraordinary general meeting of shareholders to assess a company's loss when the company has lost half of its capital, each director may be held criminally liable, with a penalty of up to 20,000 Thai baht under the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations BE 2499 (AD 1956).

Further, companies are not prohibited from carrying on business while insolvent. If a company's directors and officers operate the company while it is insolvent, without dishonest intention to deceive its creditors or avoid enforcement against the company's assets, the directors and officers will not be liable to the creditors.

Directors' liability – other sources of liability

- 18 | Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Directors and officers are not liable for their company's liabilities (section 820 and 1167 of the Civil and Commercial Code). However, the directors and officers may be liable to the company's creditors for damages if they act fraudulently.

A company's directors and officers may be subject to criminal liability if their actions or inactions result in the company committing a criminal offence.

Directors' liability – defences

19 | What defences are available to directors and officers in the context of an insolvency or reorganisation?

There are no defences, as there is no liability.

Shift in directors' duties

20 | Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No. The likelihood of bankruptcy or reorganisation proceedings does not cause a shift in directors' duties.

Directors' powers after proceedings commence

21 | What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Bankruptcy

After the commencement of bankruptcy proceedings, a company's directors and officers can still exercise their powers to manage the company's business until the court orders the company into receivership (sections 22 and 24 of the Bankruptcy Act BE 2483 (AD 1940), as amended).

Reorganisation

In reorganisation proceedings, after the court issues an order for a business reorganisation, the powers and duties of the debtor's executives in managing the business and assets of the debtor will cease and will be transferred to the interim executive, the receiver, or the planner, and, after the plan has been approved, to the plan administrator (sections 90/21, 90/25, and 90/59).

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION**Stays of proceedings and moratoria**

22 | What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Bankruptcy

In a bankruptcy case, the Bankruptcy Act BE 2483 (AD 1940), as amended (the BA) does not provide for the application of an automatic stay. If the court has not yet issued an absolute receivership against the debtor's assets, its creditors may still file civil complaints in relation to debts for which claims could be made in bankruptcy proceedings (section 26 of the BA). However, pending cases involving assets of the debtor under bankruptcy proceedings may be suspended at the court's discretion (section 25 of the BA).

Reorganisation

In a reorganisation case, an automatic stay applies upon the court's receipt of the petition for business reorganisation. Thereafter, creditors cannot file civil complaints or enforce judgments against the debtor for debts that occurred prior to the court's approval of the plan. Also, pending cases are suspended (section 90/12 of the BA).

However, the creditors can apply to the court for relief from those restrictions if the restrictions are not necessary for the debtor's reorganisation, or do not provide sufficient protection for secured creditors (section 90/13 of the BA). Further, during the automatic stay, enforcement is possible against perishable property, or in cases where delays

in enforcement might cause loss to the property or give rise to costs that might exceed the value of the property. That property will be sold by auction and the proceeds will be delivered to the plan administrator. Also, if a reorganisation plan has not been approved by the court, secured creditors can enforce their relevant security after one year from the court's receipt of the petition for reorganisation. This period can be extended twice, for not more than six months each time.

Doing business

23 | When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

Bankruptcy

The official receiver, acting on behalf of the debtor, can only continue the debtor's business strictly for the purpose of finishing up its remaining business (section 22 of the BA).

Reorganisation

During the reorganisation process, the debtor and, after the court issues a reorganisation order, the planner are allowed to continue carrying on the company's normal business operations (section 90/12(9) of the BA). After the court has approved a plan, the plan administrator will operate the debtor's business pursuant to the reorganisation plan. While the debtor is in the reorganisation process, the debtor, the planner, or the plan administrator, as the case may be, is allowed to make payments to creditors who supply goods or services in accordance with the normal course of its business and current terms and conditions of agreements.

Any claims arising after the court's reorganisation order will not be subject to the reorganisation proceedings. Creditors of debts created by the official receiver or interim executive, after the issuance of the order for reorganisation but before the appointment of the planner, with a debt confirmation letter from the planner and creditors of debts created by the planner, plan administrator, interim plan administrator or the official receiver, after the appointment of the planner, have the right to be repaid without having to file a claim for payment in the reorganisation proceedings (sections 90/27 and 90/62 of the BA).

Moreover, the debts of the creditors who supplied goods and services after the court's order for business reorganisation will be treated as first-rank privileged debt, a higher ranking than that of general unsecured creditors, in both cases of successful implementation of the plan and its failure that leads to the issue of an absolute receivership order against the debtor in bankruptcy proceedings (sections 90/62 bis, 90/75, and 90/77 of the BA).

After the reorganisation plan is approved by a creditors' meeting, the creditors can appoint a creditors committee to supervise the implementation of the plan by the plan administrator (section 90/55 of the BA).

Post-filing credit

24 | May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Bankruptcy

The official receiver can carry on the debtor's business only for the purpose of finishing up the remaining business. This, however, includes obtaining a loan, if necessary. The loan will be considered an expense of the official receiver, which has priority over unsecured creditors (section 130 of the BA).

Reorganisation

A secured loan can be made if it is necessary for the continuity of the debtor's normal course of business, if the plan administrator is empowered to do so in the plan or if it is allowed by the court. The debts incurred after the court's order for business reorganisation will be treated as first-rank privileged debt (sections 90/62 bis, 90/75 and 90/77 of the BA).

Sale of assets

25 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Bankruptcy

The official receiver is generally the only person permitted to sell the assets of the debtor. The sale of assets will be conducted through an auction or other selling method proven to be the most convenient and in the best interests of all creditors (section 123 of the BA). Claims and liabilities can be transferred with assets, depending on the terms and conditions of the sale.

Reorganisation

In reorganisation proceedings, the sale of the debtor's assets can be carried out by the plan administrator as specified in the plan or with the court's approval. However, it is highly unusual for the entire business of the debtor to be sold in reorganisation proceedings, as the court would not deem such a sale as corresponding to the purpose of business reorganisation under the BA.

Negotiating sale of assets

26 Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking-horse bids and credit bidding are not specifically prohibited under the BA. However, the official receiver or the plan administrator, in bankruptcy and reorganisation proceedings, as the case may be, have to ensure that sale procedures are conducted fairly and for the benefit of all creditors.

Rejection and disclaimer of contracts

27 Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Bankruptcy

The official receiver has the power to disclaim a contract within three months from the date the official receiver realises that the contract is unfavourable to the debtor (section 122 of the BA). A party affected by the disclaimer is entitled to file a debt repayment application in the bankruptcy proceedings.

If the debtor breaches the contract after the bankruptcy petition is filed against the debtor but before the court issues an absolute receivership order, the party sustaining damages from the breach can apply for debt repayment in the bankruptcy proceedings.

Reorganisation

The plan administrator has the power to disclaim an unfavourable contract as specified in the reorganisation plan. The disclaimer must be

exercised within two months of the date on which the court approves the plan (section 90/41 bis of the BA). A party affected by the disclaimer is entitled to file an objection to the court within 14 days of becoming aware of the disclaimer. If the court reaffirms the disclaimer, the party can file for debt repayment in the reorganisation proceedings.

After the court accepts a reorganisation petition for consideration, the creditors are barred from commencing a civil case against the debtor concerning breaches of contracts that occurred before the court's approval of the plan (section 90/12(4) of the BA). Thus, the creditors can proceed according to the following scenarios:

- if the breach occurs before the issue of the reorganisation order, the creditors can file a claim in the reorganisation proceedings;
- if the breach occurs after the issue of the reorganisation order but before the court's approval of the plan, the creditors can request the court for leave to take action against the debtor in a civil case; or
- if the breach occurs after the court's approval of the plan, the creditors can take action against the debtor in a civil case without the court's approval.

Intellectual property assets

28 May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There is no specific provision under the BA for termination of intellectual property usage rights or extent of usage during bankruptcy or reorganisation proceedings.

Personal data

29 Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

There is no specific provision under the BA to restrict the usage of personal information or the collection of customer data of an insolvent company.

However, there exists the Personal Data Protection Act BE 2562 (AD 2019) (the PDPA), which applies to the collection, use, or disclosure of personal data in Thailand. As personal information and customer data are generally considered personal data under the PDPA, their use and transfer without the consent of the relevant persons would be prohibited by the PDPA.

Arbitration processes

30 How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is not used in liquidation or reorganisation proceedings. However, claims can be filed for the payment of arbitration awards that occurred before the commencement of bankruptcy or reorganisation proceedings.

CREDITOR REMEDIES

Creditors' enforcement

31 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

No.

Unsecured credit

32 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In bankruptcy proceedings, apart from the power of the creditor plaintiff to request the court to investigate the debtor's assets, order the debtor to place security, or detain the debtor in certain circumstances, which might prejudice the prospect of repayment to creditors (section 16 of the Bankruptcy Act BE 2483 (AD 1940), as amended (the BA), and to apply to the court for an interim receivership order (section 17 of the BA), unsecured creditors are protected by the fact that all powers to manage the debtor's business and assets are transferred to the official receiver. There are no other specific remedies for unsecured creditors.

In reorganisation proceedings, the overall protection that unsecured creditors will receive is an automatic stay.

In civil proceedings, remedies available to unsecured creditors include obtaining interim injunctions to prevent the debtor from disposing of its assets or a final court judgment to request properties of the debtor to be seized and sold in a public auction. However, obtaining a final court judgment to be in a position to request the Legal Execution Department to seize the debtors' properties to be sold in a public auction is time-consuming and could take over five years.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Bankruptcy

In bankruptcy proceedings, the following notices are required to be given to creditors:

- notice of the court's issuance of receivership order and the deadline for submission of debt repayment applications (this notice is posted in the Royal Gazette, not sent directly to the creditors);
- notice of the date for review and objection to creditors' debt repayment applications;
- notice regarding the official receiver's consideration of each respective creditor's debt repayment application;
- notice to convene the first creditors' meeting;
- notice to convene the creditors' meeting to consider any composition; and
- notice of the court hearing for the consideration of the composition.

During the creditors' meeting, information concerning the debtor's composition, if any, and its assets will be available to the creditors. Also, creditors will have an opportunity to review and object to claims against the debtor filed for debt repayment by other creditors in bankruptcy proceedings.

Also, the official receiver has the duty to report to the court on the administration of the debtor's assets and the conduct of the bankrupt person.

Reorganisation

In reorganisation proceedings, the following notices are required to be given to creditors:

- notice of the court's receipt of business reorganisation petition;
- notice of the deadline for submission of debt repayment applications;
- notice to convene the creditors' meeting and a copy of the proposed reorganisation plan;
- notice to convene the creditors' meeting for consideration of an amendment to the reorganisation plan, and a copy of the proposed amendment; and
- notice of the court hearing for consideration of the reorganisation plan or its amendment.

Similar to bankruptcy proceedings, details of the debtor's business, assets, and claims are also available to the creditors. Also, the plan administrator must report the progress of implementation of the plan to the official receiver every three months (section 90/66 of the Bankruptcy Act BE 2483 (AD 1940), as amended (the BA).

Creditor representation

34 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

Bankruptcy

In bankruptcy proceedings, a creditors' meeting may pass a resolution to appoint a creditors' committee (section 37 of the BA). The creditors' committee has the following powers and duties:

- to question the debtor regarding its business and assets;
- to grant approval to the official receiver to sell the debtor's assets by means other than public auction; and
- to grant approval to the official receiver on other matters, such as revoking the debtor's rights and settling the debtor's claims and lawsuits.

The creditors' committee may retain advisers at its own cost.

Reorganisation

In reorganisation proceedings, a creditors' meeting may pass a resolution to appoint a creditors' committee (section 90/55 of the BA) to act on behalf of all creditors in monitoring the implementation of the plan. The powers and duties of the creditors' committee are usually detailed in the plan. However, the BA prescribes the right of the creditors' committee to file for dismissal of the plan administrator (section 90/67 of the BA).

It is possible for the plan to specify that proper expenses be paid to advisers of the creditors' committee.

Enforcement of estate's rights

35 If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

Bankruptcy

In bankruptcy proceedings, the official receiver is empowered by the BA to pursue the estate's remedies (rights to claim repayment or demand the delivery of an asset) against third parties. The official receiver is

entitled to submit a petition requesting the court to compel persons who admit that they are indebted to the debtor or have assets of the debtor in their possession to pay the debt or turn over those assets (section 118 of the BA). However, if those persons do not admit that they are indebted to the debtor or have assets of the debtor in their possession, the official receiver will need to take further action (section 119 of the BA). The fruits of these remedies will be added to the debtor's pool of assets and distributed among the creditors.

Reorganisation

In reorganisation proceedings, the planner, the plan administrator, and the official receiver have similar means of pursuing the estate's remedies (sections 90/38 and 90/39 of the BA). Any amount obtained will belong to the debtor.

Claims

36 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

Bankruptcy

All creditors must file a debt repayment application to the official receiver within two months from the date on which the court's receivership order is published in the Royal Gazette (section 91 of the BA). That period may be extended for creditors domiciled outside of Thailand, at the official receiver's discretion, for a period of not exceeding two months. If a creditor fails to file a debt repayment application, the creditor will not be entitled to receive its share of the bankruptcy proceeds.

The official receiver will review the debt repayment applications, along with the objections against them and other evidence, and decide whether to allow the debts to be repaid in bankruptcy proceedings (section 106 of the BA). Even in a case where the amount claimed is contingent or unliquidated, the official receiver will consider the amount of the claim based on evidence provided by the creditors and objections to it.

The affected parties may file an objection to the official receiver's order with the court within 14 days after becoming aware of the order. If the creditors wish to object to the court's order, they may appeal to the Court of Appeal for Specialised Cases.

There is no specific provision under the BA that prohibits the transfer of claims. However, as the transfer must be disclosed to the official receiver, it will be subject to the official receiver's discretion. The fact that the claims are acquired at a discount will not affect the amount of repayment that the transferee will receive in bankruptcy proceedings.

Interest accruing after the court orders the receivership of the debtor cannot be claimed (section 100 of the BA).

Reorganisation

All creditors must file a debt repayment application to the official receiver within one month from the date on which the appointment of the planner is published in the Royal Gazette (section 90/26 of the BA). If a creditor fails to file a debt repayment application, the creditor will not be entitled to receive repayment under the plan and has no further recourse against the debtor, unless the reorganisation plan provides otherwise or the court cancels the reorganisation order (section 90/61 of the BA).

Similar to bankruptcy, the official receiver will consider each creditor's debt repayment application, and any objection against the official receiver's order must be filed with and then appealed to the court and the Court of Appeal for Specialised Cases, respectively. The transfer

of claims is subject to the official receiver's discretion. Also, a repayment application can be filed for a claim acquired at a discount at its full face value.

In relation to claims for interest, creditors are not prohibited from claiming interest accruing after the issue of the reorganisation order. However, as payment of interest is subject to the terms of the plan, it may be severely restricted.

Set-off and netting

37 To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Bankruptcy

If a creditor who is entitled to claim for repayment of its debt is indebted to the debtor at the time of issue of the receivership order, even if the grounds of indebtedness are not the same, or the debts are subject to certain conditions or terms, the debts may be set off against each other, unless the creditor's right of claim against the debtor accrued after the order of receivership of the debtor's assets (section 102 of the BA)

Reorganisation

If a creditor who is entitled to apply for repayment of its debt is indebted to the debtor at the time of issuance of the reorganisation order, the creditor may exercise the right of set-off, unless the creditor acquires the claim against the debtor after the court issues the reorganisation order (section 90/33).

Modifying creditors' rights

38 May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

No. The ranking of creditors' claims is prescribed by law and the court is unable to change their priority.

Priority claims

39 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Under Thai law, secured debts have priority over unsecured debts.

For unsecured debts, distributions will be made in the following order:

- expenses of administering the debtor's estate;
- expenses incurred by the official receiver in managing the debtor's assets;
- funeral expenses of a deceased debtor appropriate to his or her status;
- fees incurred in collecting assets;
- fees of the petitioning creditor and counsel's fees, as the court or the official receiver, may prescribe; and
- taxes that have become due for payment within six months before the order for receivership and amounts owed to employees for service under the labour protection law within four months before the order for receivership, being no more than 100,000 Thai baht per employee.

These items rank ahead of the claims of ordinary unsecured creditors.

Employment-related liabilities

40 | What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Normal employee claims, such as severance pay, will arise if an employment is terminated during bankruptcy or reorganisation proceedings. While wages have priority in bankruptcy or reorganisation proceedings, employees' pension plans or schemes do not. The procedure for termination during the proceedings is in accordance with Thai labour law.

Pension claims

41 | What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Under Thai law, there is no specific remedy for pension-related claims against employers in insolvency proceedings.

Environmental problems and liabilities

42 | Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The BA does not specifically impose additional responsibilities or liabilities regarding environmental problems on the official receiver, interim executive, planner, plan administrator, the debtor's officers and directors, or any third parties.

Liabilities that survive insolvency or reorganisation proceedings

43 | Do any liabilities of a debtor survive an insolvency or a reorganisation?

Bankruptcy

The liabilities of the debtor may survive bankruptcy proceedings in two cases: discharge from and cancellation of bankruptcy.

A debtor can be discharged from bankruptcy in two different ways: by courts order and by the expiry of a three-year period (sections 68 and 81/1 of the BA). A bankruptcy discharge order will not relieve the debtor from debts related to tax, debts that have arisen as a result of the debtor's dishonesty or fraud, and debts for which creditors did not file for repayment due to dishonesty or fraud in which the debtor was involved (section 77 of the BA).

Bankruptcy proceedings can be cancelled by the court if (section 135 of the BA):

- the creditor plaintiff, who initiated the bankruptcy case against the debtor, does not cooperate with the official receiver;
- the debtor should not be adjudged bankrupt;
- the debts are paid in full; or
- the official receiver could not find the debtor's assets to be distributed to the creditors for 10 years, and there is no creditor requesting the official receiver to accumulate any other assets of the debtor.

If the debtor's bankruptcy is cancelled by the court as a result of the first two scenarios, the debtor will not be relieved from its liabilities (section 136 of the BA).

Reorganisation

Cancellation of reorganisation as a result of successful implementation of the plan will free the debtor from all debts for which the creditors did not file a claim for repayment and for which the plan does not suggest otherwise (section 90/75 of the BA).

However, cancellation of the reorganisation order will not release the debtor from unpaid debts.

Distributions

44 | How and when are distributions made to creditors in liquidations and reorganisations?

Bankruptcy

Once the assets of the debtor are sold, the proceeds will be distributed to creditors by the official receiver.

Reorganisation

Repayment will be made according to the reorganisation plan that has been accepted by the creditors' meeting and approved by the court.

SECURITY

Secured lending and credit (immovables)

45 | What principal types of security are taken on immovable (real) property?

Under Thai law, security can be created over immovable property by way of a mortgage under the Civil and Commercial Code (the CCC), and by way of a business security agreement under the Business Security Act BE 2558 (AD 2015) (the BSA). However, the only immovable property that may be subject to a business security agreement is land on which the security provider directly operates a business of immovable property.

Under the CCC, a mortgage must be made in writing and registered with the competent authority. The CCC also prescribes certain details that must be specified in the mortgage agreement, for example, the amount secured and details of the secured obligations. A title document in respect of mortgaged property is not required to be delivered to the mortgagee to perfect a mortgage. However, in practice, original land title deeds of mortgaged properties are usually required to be in the possession of the mortgagee throughout the term of the mortgage agreement.

The same asset may be subject to several mortgages in favour of several mortgagees, which have different rankings depending on the time of registration of the mortgage. The mortgage registered first is considered as the first in priority, and the first mortgagee will be entitled to receive repayment in priority to the second or subsequent mortgagees. A creditor who takes a mortgage is regarded as a secured creditor in bankruptcy and reorganisation proceedings under the Bankruptcy Act BE 2483 (AD 1940), as amended.

Secured lending and credit (movables)

46 | What principal types of security are taken on movable (personal) property?

Certain moveable assets may be mortgaged, for example, ships of five tonnes and over, floating houses, beasts of burden, machinery registered under the Machine Registration Act BE 2530 (AD 1987), or any moveable assets that can be mortgaged under a specific law.

Pledges under the CCC may be taken over movable property, which requires the delivery of the property to the creditor or its agent to perfect the pledge. If the debtor needs to retain possession of the property for its business, a pledge will not be possible. While strictly not

a pledge, security in the nature of a pledge can be taken over scrippless, uncertificated, shares and debt securities.

Business security under the BSA can be taken over the following types of property:

- a business;
- a right of claim, which includes a right to receive performance of obligations and any other rights, but excludes a right represented by a written instrument;
- movable property used in a business, such as machinery or an inventory;
- intellectual property; and
- other assets as prescribed by ministerial regulation.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

- 47 | What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Upon the written petition of the official receiver, in the case of bankruptcy, or the planner, plan administrator, or official receiver, in the case of reorganisation, the court may order cancellation of the following types of transfers:

- transfers of the debtor's assets or transactions carried out with the debtor's knowledge that this will prejudice creditors, except in the event the person benefitted was not aware that the act or transaction would prejudice the debtor's creditors (fraudulent transfer) (sections 90/40 and 113 of the Bankruptcy Act BE 2483 (AD 1940), as amended (the BA)); or
- transfers of the debtor's assets that intentionally provide preference to one or more of its creditors over other creditors, which are made in the three-month period before the commencement of insolvency proceedings, or, if the creditors granted the preference are insiders, within one year before the commencement of the proceedings (preferential transfer) (sections 90/41 and 115 of the BA).

Also, there is a rebuttable presumption that the debtor and the beneficiary are aware that the transfer or act would prejudice the debtor's creditors, and thus is a fraudulent transfer, if the relevant transfer or act was made in the year before the filing of a bankruptcy petition or reorganisation petition, as the case may be, or the transfer was gratuitous or a transfer from which the debtor received an unreasonably small amount.

Equitable subordination

- 48 | Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Under Thai law, there is no specific restriction barring related parties or non-arm's length creditors from claiming debt repayment in bankruptcy and reorganisation proceedings.

GROUPS OF COMPANIES

Groups of companies

- 49 | In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Under Thai law, the doctrine of a separate legal entity is strictly upheld. Hence, a parent or affiliated corporation can be held responsible for the liabilities of subsidiaries or affiliates only if the parent or affiliated

corporation has guaranteed the entity's debts, or where it has made itself a co-debtor with its subsidiaries or affiliates.

Combining parent and subsidiary proceedings

- 50 | In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Under Thai law, there is no procedure for combining a parent company and its subsidiaries. Consequently, none of the assets and liabilities can be pooled for distribution purposes.

INTERNATIONAL CASES

Recognition of foreign judgments

- 51 | Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Thailand is not a signatory to any treaties on international insolvency or the recognition of foreign judgments. Foreign judgments or orders with respect to insolvency proceedings in other countries are not recognised under Thai law, although the judgments may be relied upon as evidence in Thai proceedings.

As Thailand is a party to the New York Convention 1958, foreign arbitration awards may be enforced in Thailand, subject to the Arbitration Act BE 2545 (AD 2002).

UNCITRAL Model Law

- 52 | Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Thailand has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Adoption has been under consideration for several years but progress should not be expected.

Foreign creditors

- 53 | How are foreign creditors dealt with in liquidations and reorganisations?

Bankruptcy

Foreign creditors who are domiciled outside of Thailand can claim for repayment of debts if the creditors can prove that creditors in Thailand can file for debt repayment in bankruptcy proceedings in the foreign creditors' jurisdiction, and the foreign creditors agree to contribute any recoveries from the debtor's assets outside of Thailand to the debtor's pool of assets in Thailand (section 178 of the Bankruptcy Act BE 2483 (AD 1940), as amended (the BA)).

Reorganisation

Foreign creditors can file for repayment and receive repayment under the reorganisation plan in Thailand.

Cross-border transfers of assets under administration

- 54 | May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

A foreign bankruptcy or administrative order regarding a debtor's assets in Thailand has no effect on Thai proceedings. Thai law does not provide for cross-border transfers of assets under administration.

COMI

- 55 | What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

COMI is not a concept used in Thai law.

Cross-border cooperation

- 56 | Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

There is no legislation providing cross-border cooperation in bankruptcy and reorganisation proceedings. Also, Thailand is not a signatory to any international treaties on insolvency or recognition of foreign judgments. Consequently, there would be no cooperation between Thai and foreign insolvency proceedings.

Cross-border insolvency protocols and joint court hearings

- 57 | In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

No.

Winding-up of foreign companies

- 58 | What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

A foreign company may be subject to a Thai court's jurisdiction and could be wound up in bankruptcy proceedings if the business of the company has been conducted in Thailand, whether by the company or its representatives, at the time a petition for bankruptcy is made against the company or during the previous year (section 7 of the BA). However, the winding up will only involve the company's assets located in Thailand (section 177 of the BA).

UPDATE AND TRENDS**Trends and reforms**

- 59 | Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Apart from measures issued by the Bank of Thailand and financial institutions, for example, applying a stay of repayment or reduction of repayment of principal and interest to help distressed debtors survive the covid-19 pandemic, and the fact that proceedings and hearings (not including witness examinations) held by the Central Bankruptcy Court, and particularly creditors' meetings in reorganisation proceedings, can be held via an online platform, as a result of the pandemic, there are

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no other significant developments in the area of bankruptcy and reorganisation. Note, however, that the current trends of online proceedings, hearings and creditors' meetings might change once the pandemic crisis has passed.

In the rehabilitation proceedings for Thai Airways, and other subsequent reorganisation cases, the official receiver has shifted the submission of debt repayment claims and voting in creditors' meetings to an online platform or mobile phone application. Nonetheless, meetings and hearings for consideration of the debt repayment claims, in the case of objection, conducted by the official receiver, will still be carried out physically.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Thailand	
Applicable insolvency law, reorganisations: liquidations	Bankruptcy Act applies to bankruptcy and reorganisations.
Customary kinds of security devices on immovables	Mortgages and Business security under the Business Security Act in the case of developer's land.
Customary kinds of security devices on movables	Mortgages of certain movables that are capable of registration, pledges on property that can be delivered to the creditor or its agent, and business security under the Business Security Act.
Stays of proceedings in reorganisations/liquidations	In bankruptcy, the official receiver handling the bankruptcy may apply to the court for proceedings to be stayed; in reorganisations, there will be an automatic stay from the time of acceptance of a petition by the court for consideration until completion of the plan or termination of the reorganisation.
Duties of the insolvency administrator	In bankruptcy, to realise assets of the insolvent and distribute the proceeds to creditors; in a reorganisation, to carry out the plan accepted by creditors and approved by the court.
Set-off and post-filing credit	Set off is possible for creditors in both bankruptcy and reorganisation; post-filing credit is not possible in bankruptcy, but possible in reorganisation with the court's approval.
Creditor claims and appeals	In bankruptcy, creditors must file claims within two months of publication of receivership order; in a reorganisation, creditors must file claims within one month of publication of appointment of the planner. If its claims are disclaimed, a creditor can appeal the official receiver's order regarding its claims to the court, and then the court of appeal, and supreme court.
Priority claims	Secured creditors, the official receiver's expenses, expenses of reorganisation, taxes due in the last six months, and amount owing to employees for four months.
Major kinds of voidable transactions	Fraudulent transactions and preferences.
Operating and financing during reorganisations	In a reorganisation, the debtor's business must continue in its ordinary course unless the court or the plan suggests otherwise.
International cooperation and communication	None.
Liabilities of directors and officers	None.
Pending legislation	None.

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