

# Restructuring & Insolvency

*Contributing editors*

**Catherine Balmond and Katharina Crinson**



**2018**

**GETTING THE  
DEAL THROUGH**

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DEAL THROUGH 

# Restructuring & Insolvency 2018

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

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



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# Thailand

Suntus Kirdsinsap, Natthida Pranutnorapal, Piyapa Siriveerapoj  
and Jedsarit Sahussarungsi

Weerawong, Chinnavat & Partners Ltd

## General

### 1 Legislation

**What main legislation is applicable to insolvencies and reorganisations?**

In Thailand, the Bankruptcy Act BE 2483 (AD 1940) as amended (the BA) is the law governing bankruptcy matters. In the BA, there are also sections that directly deal with reorganisation matters. Bankruptcy and reorganisation procedural matters are stipulated in the BA, the Establishment of and Procedures for Bankruptcy Court Act BE 2542 (AD 1999) (EPB), and the Regulations for Bankruptcy Cases BE 2549 (AD 2006).

### 2 Excluded entities and excluded assets

**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?**

According to section 7 of the BA, the Thai court of jurisdiction may order that an insolvent debtor be declared bankrupt if such debtor is domiciled in Thailand or operates its business in Thailand within one year prior to the date that a bankruptcy case was filed. In addition, section 9 of the BA specifies that a creditor can file a bankruptcy case against a debtor if certain conditions are met. In order for a bankruptcy case to be filed, a juristic person is required to have indebtedness with one or more creditors of not less than 2 million baht in total. Therefore, an entity, including a foreign entity, who meets the above requirements, may be declared bankrupt by the Thai court.

Currently in reorganisation proceedings, only a debtor who is a limited company or public limited company can file for or be subject to involuntary reorganisation under the BA in accordance with the definition of debtor under section 90/1 of the BA. However, section 90/1 also opens the process to other juristic persons included in ministerial regulations. An interesting example is the Credit Union Cooperative which is included in the definition of 'debtor' in the Ministerial Regulation of the Ministry of Justice dated 5 August 2014 (published in the government gazette on 7 August 2014). Consequently, a Credit Union Cooperative entered into reorganisation proceedings and is now in the reorganisation plan process.

Excluded assets from bankruptcy proceedings are personal and necessary effects that the debtor, his or her spouse and his or her minor children reasonably require in accordance with their condition in life; and livestock, seeds, instruments and items for use in the debtor's occupation, of a total value not exceeding 100,000 baht.

### 3 Public enterprises

**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 in respect of the insolvency of a government-owned enterprise. If a government-owned enterprise enters into insolvency proceedings, they shall follow the same procedure as a private enterprise.

There is no special remedy for creditors of an insolvent public enterprise. Such creditor shall enjoy the same remedies as a private enterprise.

### 4 Protection for large financial institutions

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

Currently, there is no legislation enacted specifically to deal with the financial difficulties of institutions that are considered 'too big to fail'. However, under the Financial Institution Business Act, prior to entering into reorganisation proceedings in respect of a debtor that is a commercial bank, a finance company or a credit foncier company, the Bank of Thailand may take control over the said financial institutions. As such, the directors, officers and employees of the financial institutions will be prohibited from conducting further business of that financial institution unless authorised by the control committee. The control committee has the duty to undertake all business of the financial institution placed under control, including having the financial institution merged with or transferred to another financial institution when deemed appropriate. A similar control mechanism is applicable to insurance companies and securities companies under the Life Insurance Act, the Non-Life Insurance Act and the Securities and Exchange Act.

### 5 Courts and appeals

**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, Regional Bankruptcy Court, the Court of Appeal for Specialised Cases and 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. On the first level, the (Central or Regional) Bankruptcy Court are the courts of first instance. Any appeal of either the judgment or order (or both) thereof can be made to the Court of Appeal for Specialised Cases, subject to restrictions as prescribed by law. If a party is dissatisfied with the judgment or order of the Court of Appeal for Specialised Cases, he or she may further appeal such judgment or order to the Supreme Court, subject to restrictions as prescribed by law, by submitting a request to appeal to the Supreme Court.

Pursuant to the Act on the Establishment of and Procedure for Bankruptcy, a judgment or order of the (Central or Regional) Bankruptcy Court in respect of bankruptcy or business rehabilitation cannot be appealed except if the judgment or order is for:

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

Therefore, if the petitioner wants to appeal a judgment or order that is restricted to appeal, a petition must be filed to the Court of Appeal for Specialised Cases, within one month of the date of judgment or order, asking for an approval to appeal, together with the statement of appeal. Where the (Central or Regional) Bankruptcy Court considers that the appeal is restricted, it shall refer the statement of appeal and the request for approval to appeal to the Court of Appeal for Specialised Cases for further consideration and approval. The party who submitted the appeal may submit a request for an approval to appeal to the Court of Appeal for Specialised Cases within 15 days of the date of rejection by the (Central or Regional) Bankruptcy Court. However, if the (Central or Regional) Bankruptcy Court finds the appeal is not restricted, it shall allow the appeal. The Court of Appeal for Specialised Cases will allow the appeal if it finds the appeal for such case is not restricted or the request for appeal is in the interest of justice.

In addition, the judgment or order of the Court of Appeal for Specialised Cases may be further appealed to the Supreme Court, within one month of the date of judgment or order, by requesting for an approval of 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 includes important legal issues decided by the Court of Appeal for Specialised Cases that conflict with or have never been decided by the Supreme Court.

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## Types of liquidation and reorganisation processes

### 6 Voluntary liquidations

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

Thai law does not allow voluntary bankruptcy to be commenced by the debtor, except in the case that a liquidator of a dissolved debtor files a bankruptcy case where such dissolved debtor has insufficient assets to settle all debts.

### 7 Voluntary reorganisations

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

An insolvent debtor owing a definite amount not less than 10 million baht to one or more creditors is entitled to file a reorganisation petition in accordance with sections 90/4 and 90/3 of the BA. Once the reorganisation petition is accepted by the court, certain activities involving the assets of the debtor will be subject to section 90/12 of the BA (see further details in question 21).

### 8 Successful reorganisations

#### 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?

The reorganisation plan must be approved by resolution of the creditors' meeting. The BA provides a voting system whereby creditors are, according to section 90/42 bis, divided into the following groups or classes:

- each secured creditor having a secured debt of not less than 15 per cent of the total debt for which a claim for repayment may be filed will be classed as one group. Other remaining secured creditors shall be classified in the same group;
- unsecured creditors may be classified in different groups. Unsecured creditors who hold the same or similar rights or benefits will be classified in the same group; and
- creditors that, under the law or contract, are entitled to receive payment only after other creditors have received payments in full.

The reorganisation plan must be approved by:

- in the case of a meeting of every group of creditors, a majority of the creditors' meeting with an amount of debts of not less than two-thirds of the total debts of the creditors present at the meeting, in person or by proxy; or
- in the case of a meeting of at least one group of creditors, a majority of the creditors' meeting with an amount of debt of not less than two-thirds of the creditors present in the meeting, in person or by

proxy, and, when counting the total amount of debts owed to all creditors who approved the reorganisation plan, such amount must not be less than 50 per cent of the total debts owed.

In addition, the creditors' approval of the reorganisation plan must be confirmed by the relevant court. The reorganisation plan confirmed by the court will bind both creditors that are not required to submit proofs of claims and those that must submit proofs of claims.

Practically, the reorganisation plan may contain the clause to release non-debtor parties from any liability arising out of the implementation of the plan. Nevertheless, any specification to limit the liability of non-debtor parties will not relieve them from the liability arising out of a wrongful act or gross negligence. Meanwhile, the reorganisation plan cannot release non-debtor parties from any liability arising prior to the reorganisation.

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### 9 Involuntary liquidations

#### 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?

Under section 9 of the BA, a creditor is eligible to file for bankruptcy against a debtor.

To do so, the insolvent debtor must be proved to be indebted to one or more creditors in the amount of at least 1 million baht in total (in the case of an individual debtor) or indebted to one or more creditors in the amount of at least 2 million baht in total (in the case of a corporate debtor).

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### 10 Involuntary reorganisation

#### 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 the insolvent debtor if such insolvent debtor has a definite amount of debt of not less than 10 million baht. A state agency authorised to supervise the business of the debtor as prescribed by the BA (eg, the Bank of Thailand, the Securities and Exchange Commission, etc) may also file such a reorganisation petition. Once the reorganisation petition is accepted by the court, certain activities involving the assets of the debtor will be subject to section 90/12 of the BA (see further details in question 21).

Under the BA, there are no material differences between proceedings opened voluntarily and involuntarily.

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### 11 Expedited reorganisations

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

There is no expedited reorganisation under Thai law but, in practice, the debtor can reduce the time-consuming nature of certain stages of the reorganisation by having major creditors agree on the principles of the reorganisation plan prior to the application for reorganisation.

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### 12 Unsuccessful reorganisations

#### 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 the reorganisation plan is not approved by the creditors or is approved by the creditors but not confirmed by the court, the court will then cancel the reorganisation order. Upon a reorganisation cancellation order, the automatic stay will end and the powers and duties in managing the debtor's business and assets will devolve to the debtor's executive, but any acts done by the receiver, interim executive, plan preparer, plan administrator or interim plan administrator before such order will not be affected. The debtor's shareholders will also again enjoy their normal legal rights. Moreover, the receiver, interim executive, plan preparer, plan administrator or interim plan administrator, as the case may be, must hand over the assets, seals, accounting ledgers and documents

relating to the assets and business operation to the debtor's executive promptly.

If the reorganisation is not successfully implemented in accordance with the reorganisation plan and the maximum period prescribed under the BA has elapsed, the court will either render an absolute receivership order if the court deems that the debtor should be declared bankrupt, or render an order to terminate the reorganisation.

### 13 Corporate procedures

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

The liquidation of the company is governed by the Civil and Commercial Code (the CCC) and the BA. If the company wishes to enter the liquidation in a normal situation, the company must call a shareholders' meeting and appoint a liquidator to settle the affairs of the company, to pay its debt and distribute its assets.

In addition, under section 1266 of the CCC and section 88 of the BA, if the liquidator of the company finds that after the whole of the contributions or shares has been paid up the assets are insufficient to meet the liabilities, the liquidator must apply at once to the court to have the company declared bankrupt.

### 14 Conclusion of case

#### How are liquidation and reorganisation cases formally concluded?

Bankruptcy proceedings are concluded according to section 133 of the BA. Once the official receiver has made the final distribution of the assets of the debtor, or has ceased to take action under a composition, or when the debtor has no distributable asset, the receiver makes a report of the business and accounts for receipts and expenditures in the action for submission to the court and requests a court order for closure of the action.

Reorganisation proceedings are concluded according to section 90/70 of the BA if the debtor's executive, plan administrator, interim plan administrator, or the official receiver, as the case may be, finds the reorganisation of the business has been successfully completed pursuant to the plan. He or she must promptly report this to the court and request the court to order the termination of the reorganisation. If the court views that the company has successfully implemented the plan, the court will render the order to terminate the reorganisation.

### Insolvency tests and filing requirements

#### 15 Conditions for insolvency

##### What is the test to determine if a debtor is insolvent?

The test of insolvency is mainly whether a debtor has debt greater than his or her assets. In addition, under the BA, there are presumption of facts as to whether a debtor is insolvent as prescribed in section 8 of the BA. For example: a debtor transfers his or her assets or creates any right over such assets that, if the debtor were a bankrupt, would be deemed as an act of preference, whether such act is carried out within or outside Thailand, or the debtor transfers his or her asset to other persons for the benefit of all creditors, whether such act is done within or outside Thailand. These examples are only presumptions that the debtor is entitled to rebut by proving that he or she is solvent. In practice debtors would have to prove that they have assets of a value that exceeds their liabilities by referring to their audited accounts.

#### 16 Mandatory filing

##### Must companies commence insolvency proceedings in particular circumstances?

There is no Thai law that requires directors to commence bankruptcy and reorganisation proceedings. Nevertheless, the board of directors has a duty to call for an extraordinary general meeting of shareholders when the company is significantly at loss (ie, loss equal to a half of the company's capital).

### Directors and officers

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

##### 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 are no liabilities incurred for directors and officers resulting from the failure to commence proceedings as it is not required under Thai law. However, should a company's board of directors fail to call for an extraordinary general meeting of the shareholders to assess the company's loss as detailed in question 16, each director may be held criminally liable with a penalty of up to 20,000 baht under the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations BE 2499 (AD 1956).

Companies are not prohibited from carrying on business while insolvent. However, in a case where the unsecured creditor has known that the company (debtor) is insolvent at the time and yet still allows it to create debt, such debt (excluding debts that the creditor allowed to be created so that the debtor's business can continue its operations) may not be claimed for repayment if insolvency proceedings are subsequently commenced.

#### 18 Directors' liabilities – other sources of liability

##### 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?

Under Thai law, the liability of the directors and officers is separate from the liability of the company.

#### 19 Shift in directors' duties

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

After the insolvency proceedings are commenced by or against the corporation, the directors and officers are not prohibited from exercising the powers in connection with the management of assets or business of the corporation. However, as prescribed by section 24 of the BA, once the court has ordered the debtor to be under receivership, the powers of the directors in connection with their corporation's asset or business will cease and are, by virtue of law, transferred to the official receivers.

Pursuant to section 826 of the CCC, the powers of the officers empowered by the directors to act as their agent shall also terminate once the debtor becomes bankrupt. Nonetheless, the officers (agents) are obligated to take all necessary steps to protect the interests entrusted to them until the representatives of the principle can protect such interests.

In reorganisation proceedings, after the court orders a business reorganisation, the power and duties of the debtor's executive in managing the business and assets will cease and will be transferred to the interim executive, the receiver or the plan preparer. Nevertheless, the debtor's business will not cease to operate during this procedure and, ultimately, once the court has issued an order approving the plan, the plan administrator will carry on the debtor's business to disburse the debtor's debts within the scope set out by the business reorganisation plan.

#### 20 Directors' powers after proceedings commence

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

After the insolvency proceedings are commenced by or against the debtor, the directors and officers are not prohibited from exercising the powers in connection with the management of assets or business of the debtor. However, as prescribed by section 24 of the BA, once the court has ordered the debtor to be under receivership, the powers of

the directors in connection with their corporation's asset or business will cease and are, by virtue of law, transferred to the official receivers. Pursuant to section 826 of the CCC, the powers of the officers empowered by the directors to act as an agent of the debtor shall also terminate once the debtor becomes bankrupt. Nonetheless, the officers (agents) are obligated to take all necessary steps to protect the interests entrusted to them until the representatives of the principal can protect such interests.

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### Matters arising in a liquidation or reorganisation

#### 21 Stays of proceedings and moratoria

**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?**

There are proceedings similar to a stay (automatic stay) as stipulated in section 90/12 of the BA. An automatic stay permits the debtor to continue to conduct business during the implementation of reorganisation proceedings by suspending existing lawsuits brought by creditors and prohibiting civil claims or actions to be filed against the debtor. Creditors may seek permission from the bankruptcy court to file claims.

The BA does not specifically provide for the application of an automatic stay in a bankruptcy case. The pending case involving assets of the debtor under bankruptcy proceedings may be suspended at the court's discretion.

#### 22 Doing business

**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?**

The debtor is allowed to continue operating its normal business operation during a reorganisation pursuant to section 90/12(9) of the BA. However, the powers and duties of the debtor's executive in managing the business and assets shall cease once the court has ordered business reorganisation and the court may appoint any persons or the debtor's former executive to be an interim executive until the plan preparer is appointed. The debtor's assets cannot be sold except in the normal course of business unless such sale of assets is approved by the court. The debtor is allowed to make payment to creditors who supply goods or services according to normal and current terms and conditions of agreements. Any claims arising after the court's reorganisation order will not be subject to reorganisation proceedings, and if the debtor has incurred such obligations in the normal course of business and as required for the continuation of its operation, the debtor can pay such claims.

Creditors of debts created by the receiver or interim executive with a debt confirmation letter from a plan preparer and creditors of debts created by the plan preparer, plan administrator, interim plan administrator and receiver have the right to be repaid without having to file an application for repayment of debts for business reorganisation.

Under the BA, if the business reorganisation plan is successfully implemented and the court orders the termination of the reorganisation process, the debts of the creditors who supply goods and services after filing (created by the plan preparer, plan administrator, interim plan administrator, and receiver) will be treated as a first-rank privileged debt. In the event that the business reorganisation plan fails and the court orders the absolute receivership of the debtor, the debts of the creditors who supply goods and services after filing (created by the plan preparer, plan administrator, interim plan administrator, and receiver), will be treated at the rank of the expenses incurred by the receiver in the management of the assets of the debtor.

The creditors and the court have roles in supervising the debtor's business activities as the creditors are entitled to file a petition requesting the court to revoke any transaction in breach of section 90/12(9).

If the creditors approve the business reorganisation plan, they can be represented by a creditor committee to be selected at a creditors' meeting. The creditor committee will supervise the implementation of the plan by the plan administrator.

#### 23 Post-filing credit

**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?**

In bankruptcy proceedings, when the court has ordered the debtor to go into receivership, the debtor is prohibited from carrying out any act relating to its assets or business, except those performed under the order or approval of the court, the official receiver, the administrator of the asset or of a creditors' meeting (as the case may be), as prescribed in the BA. Accordingly, the debtor is prohibited from incurring any additional debt, otherwise the transaction in breach will be void.

In reorganisation proceedings, the debtor is prohibited from undertaking certain activities during the term of automatic stay, such as incurring additional debt that is not done during the normal course of business, whether secured or unsecured. An automatic stay becomes effective on the date the court issues an order accepting the reorganisation petition.

#### 24 Sale of assets

**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?**

In bankruptcy proceedings, under section 24 of the BA, after the rendering of the court's receivership order, the debtor is prohibited from engaging in any activity involving his or her assets, including sale of the assets, unless such engagement is approved by the court, the official receiver, the administrator of the asset or of a creditors' meeting. The official receiver is generally the only person permitted under the BA to sell the assets of the debtor. The sale of assets will be conducted through auction or other selling methods proved to be the most convenient and for the best interests of all creditors as stipulated in section 123 of the BA.

The claims and liabilities can be passed with assets depending on the terms and conditions of the sale.

In reorganisation proceedings, under section 90/12(9) of the BA, the debtor is also prohibited from selling the assets out of the ordinary course of business throughout the process, unless it is provided otherwise in the plan approved by the court.

#### 25 Negotiating sale of assets

**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 prescribed under Thai law.

#### 26 Rejection and disclaimer of contracts

**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?**

Under section 90/41 bis of the BA, only the plan administrator shall have the power to reject an unfavourable contract as specified in the reorganisation plan. The rejection right must be exercised within two months of the date on which the court approves the plan. Whoever suffers damages therefrom will have the right to file an objection with the court within 14 days of becoming aware of such rejection. If the court reaffirms the rejection, whoever suffers damages therefrom shall be entitled to apply for the repayment of debt for such damages under reorganisation proceedings.

Once the court issues an order accepting the petition for business reorganisation, section 90/12 of the BA prohibits the creditors from commencing a civil case in respect of the assets against the debtor if the obligation arises before the day on which the court approves the



plan. If a breach of contract occurs, the creditors can choose to take action as follows:

- if the breach occurs before the court issued the order to reorganise the business, creditors can file an application for debt repayment with the official receiver;
- if the breach occurs after the day on which the court orders the reorganisation of business but before the day on which the court approves the rehabilitation plan, the creditors can ask the court for permission to take action against the debtor in a civil case; or
- if the breach occurs after the day on which the court approves the rehabilitation plan, the creditors can take action against the debtor in a civil case without having to seek permission from the court.

## 27 Intellectual property assets

**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 the termination of IP usage or the extent of IP usage during the bankruptcy and reorganisation proceedings. Accordingly, the termination of IP usage or the extent of IP usage is governed by the terms of the agreement between the licensor and the licensee.

There is no provision under the BA prescribing the right to use the IP after the termination of the IP agreement.

## 28 Personal data

**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 use of personal information or the collection of customer data of the insolvent company. Therefore, if such information is not recognised as a trade secret, it can be transferred.

## 29 Arbitration processes

**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?**

Bankruptcy and reorganisation proceedings will be initiated and proceed only in the courts, not in arbitration proceedings. No insolvency disputes are resolved by arbitration.

Under the BA, no creditors, including the creditors who initiate the bankruptcy of the debtor, can initiate a new bankruptcy case against the debtor in court after the court renders the absolute receivership order. In civil cases and arbitration proceedings, the BA does not specifically prohibit creditors from initiating these cases or proceedings. In practice, however, after the court renders the absolute receivership order on the debtor, the official receiver may ask the court or tribunal to dispose of the pending civil cases or arbitration proceedings.

In reorganisation proceedings, all actions against the debtor are put on stay and the creditors are prohibited from initiating arbitration or court proceedings against the debtor unless such prohibition is not necessary for the reorganisation proceedings.

## Creditor remedies

### 30 Creditors' enforcement

**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, there is no process by which some or all of the assets of a business may be seized outside of court proceedings. However, secured creditors naturally have rights over the assets for which security is afforded to them by the debtor prior to the order of receivership of such debtor's

asset, and need not file a claim for a repayment of debt provided that the secured creditor allows the official receiver to inspect such asset.

### 31 Unsecured credit

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

In bankruptcy and reorganisation proceedings, as unsecured creditors do not have any right over the assets to be enforced for their sole benefit, the only means therefore available for unsecured creditors to obtain the repayment of debts lies with their rights to file an application for the repayment of debt. Subject to section 90/27 and section 91 of the BA, unsecured creditors are entitled to file an application for repayment of debt in both bankruptcy and reorganisation proceedings.

The procedure to prove the validity of such an application for the repayment of debt is not complicated. Still, the duration of these proceedings may vary depending on the case's complications and the availability of the court's docket. Practically, it would take up to three months for the official receiver to consider and make an order on the application for the repayment of debt.

There are measures provided under Thai law that prevent the debtor's transfer of assets. In bankruptcy proceedings, temporary receivership is available under section 17 of the BA and an interim injunction under section 254 of the Civil Procedure Code is applicable *mutatis mutandis* by virtue of section 14 of the EPB prior to the rendering of the court's absolute receivership order.

## Creditor involvement and proving claims

### 32 Creditor participation

**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?**

In bankruptcy proceedings, certain notices are to be given to creditors:

- notice to convene the first creditors' meeting;
- notice to convene the creditors' meeting for the composition prior to or after being declared bankrupt; and
- notice of the court hearing for the consideration of the composition.

Certain information will be available to creditors or creditors' committees, for example, details of the composition and details of the debtor's estate and business. 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.

Under Thai law, the estate is included in the assets of the debtor and only 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.

Under the BA, only the liability of the debtor can be released under the reorganisation plan. In addition, according to section 90/60, paragraph 2, the liability of the guarantors or the joint debtors of the debtor cannot be released under the reorganisation plan.

### 33 Creditor representation

**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?**

In bankruptcy proceedings, under section 37 of the BA, the creditors' meeting may pass a resolution to appoint a committee of creditors in the matter relating to the management of the debtor's assets as prescribed in the BA.

In reorganisation proceedings, under section 90/55 of the BA, the creditors' meeting may pass a resolution to appoint a committee of creditors to act on behalf of all creditors in monitoring the implementation of the plan. In practice, the plan may specify that proper expenses be paid to the advisers of the creditors. There are cases where the court

approved reorganisation plans that contained the payment of proper expenses to the advisers of the creditors.

### 34 Enforcement of estate's rights

**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?**

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.

In reorganisation proceedings, under section 90/38 of the BA, the planner, the plan administrator or the official receiver is entitled to submit a petition requesting the court to compel those 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. On the contrary, if such persons do not admit that they are indebted to the debtor or they have assets of the debtor in their possession, the planner or the plan administrator must notify the official receiver to proceed with any further actions in accordance with section 90/39 of the BA.

### 35 Claims

**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?**

In bankruptcy proceedings, in general, all creditors must file an application for the repayment of debt with the official receiver within two months of the date on which the court's order appointing the official receiver is published in the government gazette (the period may be extended at the official receiver's discretion, in the event such creditor is domiciled outside Thailand, for a period not exceeding two months). If a creditor fails to file an application for the repayment of debt, except for limited exceptions (ie, tax claims), such creditor will not be entitled to receive its share of the bankruptcy proceeds.

The official receiver shall submit the applications for debt repayment of all creditors along with his or her opinion for the consideration of the court and whether the creditors will be granted repayment of the debt is at the court's discretion. 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 prescribes the transfer of claims. The transfer of claims is possible but subject to the discretion of the official receiver. The transfer of claims must be disclosed to the official receiver.

In reorganisation, all creditors must file an application for the repayment of debt within one month of the publication of the order for the appointment of the planner in the Government Gazette. If a creditor fails to file an application for the repayment of debt, it will not be entitled to receive payment under the plan and has no further recourse against the debtor, unless the reorganisation plan provides otherwise, or the court cancels the reorganisation order.

In reorganisation proceedings, the official receiver has a duty to approve the application for the repayment of debt, including the contingent or unliquidated amounts. Such contingent or unliquidated amounts will be determined by the official receiver based on evidence and the creditor's proof of claim. An interested person may appeal the decision of the official receiver for the consideration of the relevant court within 14 days.

In general, the transfer of claims in reorganisation proceedings is subject to the discretion of the official receiver or the court, depending on the stage of the consideration of the application for the repayment of debt.

Under Thai laws, a claim acquired at a discount can be enforced for its full face value.

In regard to interest calculation, in bankruptcy proceedings, interest incurred after the date on which the court orders receivership cannot be claimed pursuant to section 100 of the BA. In reorganisation proceedings, on the other hand, creditors are not prohibited from

claiming interest incurred after the court orders the reorganisation of the debtor's business.

### 36 Set-off and netting

**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?**

In bankruptcy proceedings, under section 102 of the BA, if a creditor who is entitled to claim for repayment of his or her debt is indebted to the debtor when the court issues the order placing the asset under receivership, even if the grounds for the indebtedness of the two parties are not the same, or are subject to the conditions or terms, such 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 asset.

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

### 37 Modifying creditors' rights

**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?**

Under the BA, the court is unable to change the rank (priority) of a creditor's claim prescribed in the BA.

### 38 Priority claims

**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 debt has priority over unsecured debt. For unsecured debt, repayment will be distributed in the following order:

- expenses of administering the debtor's estate;
- expenses incurred by the 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 fee, as the court or the receiver may prescribe;
- taxes that have become due for payment within the six months prior to the order for receivership; and
- other debts.

### 39 Employment-related liabilities

**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 (eg, severance pay) will arise if the employment is terminated during the reorganisation proceeding. The procedure for termination during the reorganisation proceeding is then in accordance with Thai labour law. Also, the employee pension plan or scheme does not have any priority in the bankruptcy or reorganisation proceedings in Thailand.

### 40 Pension claims

**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. Employees, along with other creditors, are required to file applications for the repayment of debt with the official receiver within two months of the date on which

the court's order appointing the official receiver is published in the government gazette. This period of two months may be extended at the official receiver's discretion in the event that any creditors are domiciled outside Thailand for a period of up to two months. No priorities are attached to such claims.

#### 41 Environmental problems and liabilities

**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?**

Before the court orders the debtor to be under receivership, the directors are the persons responsible for controlling the environmental problem and for remediating the damage.

When the court has ordered the debtor to be under receivership, on the other hand, section 24 of the BA prohibits the debtor from taking action in relation to his or her assets or his or her business. Rather, pursuant to section 22 of the BA, the official receiver is entitled to do any necessary act to complete any pending business of the debtor. As such, if environmental problems, or any other circumstances in which the debtor is obligated by law to perform certain actions, occur, the official receiver has the authority to control the problem and to remediate the damage caused. The liabilities to compensate for the damages incurred will be imposed on the debtor.

#### 42 Liabilities that survive insolvency or reorganisation proceedings

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

In bankruptcy proceedings, the liabilities of the debtor will survive in two cases: discharge from and termination of the bankruptcy.

In the case of discharge from the bankruptcy, there are two types of discharge: discharge from bankruptcy according to a court's order; and discharge from bankruptcy after the lapse of a three-year period as prescribed in the BA. An order of discharge from bankruptcy will not relieve the debtor from debts related to tax or land tax and debts that have arisen through the dishonesty or fraud of the bankrupt, or debts for which creditors have not filed claims owing to dishonesty or fraud to which the bankrupt person is a party.

If the bankruptcy is terminated by the court because of the creditors' failure to cooperate with the official receiver, the debtor will not be adjudicated bankrupt and will not be relieved from its liabilities.

In reorganisation proceedings, the debts incurred prior to the rendering of the court's reorganisation order, which had been applied for, will be released after the implementation of the plan. After the rendering of the order to terminate the reorganisation, the debtor will be freed from all debt repayment that could be applied for in reorganisation proceedings. However, if the court revokes the reorganisation proceedings, all remaining debts that have not yet been repaid will remain.

#### 43 Distributions

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

In bankruptcy proceedings, once the assets of the debtor are sold, the distribution will be made to the creditors who have been granted the court's final order to receive the repayment of debt.

In reorganisation proceedings, distributions will be made according to the reorganisation plan approved by the court.

### Security

#### 44 Secured lending and credit (immoveables)

**What principal types of security are taken on immoveable (real) property?**

Under Thai law, an immoveable (real) property can be taken as security by way of mortgage under the CCC, and security under the Business Security Act BE 2015 (the BSA). Thailand has recently launched

new legislation, the BSA, which came into force on 2 July 2016. The BSA makes significant changes to the regime for creating security in Thailand by, among other things, expanding the types of assets that Thai entities can use as security for their financing, and establishes a new method of creating security: the business security agreement.

Depending on the type of mortgage, security can be in the form of:

- immoveable property such as lands and buildings;
- certain moveable assets (ie, ships of five tonnes and over, floating houses, beasts of burden); and
- any other moveable properties with regard to which the law may provide registration for that purpose such as machinery that is registered with the Central Office for Machinery Registration, the Department of Industrial Works in Thailand under the Machine Registration Act BE 2530, or any moveable assets that can be mortgaged under a specific law.

For example, ships of sixty tonnes gross or over for the purpose of a sea voyage can be mortgaged under the Mortgage of Ships and Maritime Lien Act BE 2537.

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 mortgaged amount is required to be in Thai baht (except for ships mortgaged pursuant to the Mortgage of Ships and Maritime Lien Act BE 2537 where the mortgaged amount can be in foreign currency) and the details of the secured obligations. A title document in respect of mortgaged property is not required to be delivered to the mortgagee in order to perfect a Thai law mortgage. However, in practice, the original land title deeds of mortgaged property are usually required to be in the possession of the mortgagee throughout the term of the mortgage agreement.

It is important to mention that 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 first registration of the mortgage is considered as the first in priority, and the first mortgagee will be entitled to first receiving debts payment in priority over the second or other mortgagee. The creditor who accepts the mortgage is regarded as a secured creditor under the Thai bankruptcy proceedings under the BA.

Apart from mortgage, immoveable property can be taken as security by way of security under the BSA; see further details in question 457. It is worth noting that the land that can be used as security by way of a business security agreement under the BSA is only the land on which the security provider operates the business of immoveable property directly and the security receiver must be a financial institution or any other person to be prescribed in a ministerial regulation. At present, since the BSA is very new, we understand that there is no precedent involving a financial institution taking the land of the security provider who operates the business of immoveable property as a security under the BSA.

#### 45 Secured lending and credit (moveables)

**What principal types of security are taken on moveable (personal) property?**

Under section 6 of the BA, a secured creditor means 'the creditor holding rights over the asset of the debtor in a mortgage, pledge or a right of retention, or a creditor possessing preferential rights in the nature of a pledgee'. Practically, the pledge and the right of retention are currently the principal types of security taken on moveable (personal) property. It is vital to note that a creditor holding rights over the asset of the third person or holding any other kind of security of a third person is not recognised as a secured creditor under the bankruptcy proceedings. However, such creditor still has the right to enforce such security under the civil procedure.

In general practice, a pledge under the CCC can be taken as security over the following moveable properties and the following perfection actions are required to be carried out.

#### Moveable property

The perfection of the pledge over moveable property or rights with respect to a moveable property requires the delivery of the pledged property to the pledgee or to a third person acting on behalf of the

pledgee. As Thai law requires the possession of the pledged property by the pledgee throughout the term of the pledge in order to maintain the valid pledge, the pledge over moveable property that is still used in the business of the pledgor is not practical.

#### **Right represented by a written instrument (eg, a bill of exchange)**

The perfection of the pledge over a right represented by a written instrument requires the delivery of such instrument to the pledgee and the pledge being notified in writing to the relevant obligor. The pledge cannot be set up against third parties unless its creation is endorsed upon the instrument.

#### **Shares in script or certificate form**

The perfection of the pledge over shares (in script form) requires: delivery of the share certificate to the pledgee or to a third person acting on behalf of the pledgee; and the pledge to be recorded in the register of shares of the issuing company.

In the case of a listed company, the registrar of the shares is the Thailand Securities Depository Co, Ltd (the TSD). The parties must notify and register the pledge with the TSD by submitting an application together with required documents to the TSD.

Under Thai law, the pledge over the above assets is not required to be made in writing or in any special form. However, it is common to have a pledge agreement in writing signed by the parties.

#### **Security under the BSA**

Under the BSA, a security may be created over certain assets under a business security agreement, such assets are:

- 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);
- moveable property used in a business such as machinery or inventory;
- immovable property used directly in a business;
- intellectual property; and
- other assets as prescribed by a ministerial regulation.

A business security agreement must be made in writing and registered online with the Business Security Registration Office. The BSA also prescribes certain details that must be specified for the registration of a business security agreement; for example, enforcement events and the debt secured. In the case of a business security agreement over a business, the security receiver must file the consent of the security enforcer when registering the agreement.

It is important to note that the security receiver must be a financial institution or any other person to be prescribed in a ministerial regulation. A creditor that accepts a business security agreement is regarded as a secured creditor under Thai bankruptcy proceedings.

In relation to the priority established, this is similar to a mortgage. That is to say, the same asset may be subject to several business security agreements in favour of several security receivers (that have different rankings depending on the time of registration of the business security agreement); the security receiver who is registered first shall be entitled to receive debts payment before the security receiver who is registered thereafter.

If any asset that is already used as security under the BSA has also been mortgaged as a security to secure the debts, the rank of the security receiver and mortgagee shall be in the respective order of the day and time of registration, whereby the security receiver or mortgagee who is first registered shall be entitled to receive debt repayment before the security receiver or mortgagee who is registered thereafter.

#### **Clawback and related-party transactions**

##### **46 Transactions that may be annulled**

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

Under the BA, transfers involving assets of a reorganised company can be voided by court order.

Upon the written petition of the planner, a plan administrator or the official receiver, the court may order the cancellation and void the following transfers:

- a transfer of assets or transactions (or both) involving assets of the debtor carried out with the debtor's knowledge that it will prejudice creditors (except in the event the relevant beneficiary is not aware that such act or transaction would prejudice the debtor's creditors) (fraudulent transfer); or
- a transfer of the debtor's assets that intentionally provides preference to one or more of its creditors over other creditors, which is made in the three-month period prior to the commencement of proceedings under the BA or, in the event the creditors granted such preference are linked in some way to the debtor, within one year prior to the commencement of such proceedings (preferential transfer).

The BA provides that the following events, both in bankruptcy and reorganisation, invoke the presumption that the debtor and the beneficiary are aware that such a transfer or act would prejudice the debtor's creditors, and thus is a fraudulent transfer: 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.

##### **47 Equitable subordination**

**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 the BA, an 'insider' is defined as, inter alia, a director, a shareholder holding more than 5 per cent of the total number of the issued shares of the debtor's business, and their spouses and minor children. 'Non-arm's length creditors' are not defined in the BA.

Under Thai law, there is no specific restriction barring insiders or non-arm's length creditors from initiating insolvency claims.

#### **Groups of companies**

##### **48 Groups of companies**

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

Currently, under Thai law, there are two types of company: private limited companies and public limited companies. The liability of shareholders in both legal entities is limited only to the amount, if any, unpaid on the shares that are subscribed by them. Under Thai jurisdiction, the doctrine of separate legal entity is strictly upheld. Hence, a parent or affiliated corporation can be held responsible for the liabilities of subsidiaries or affiliates only in the event that such parent or affiliated corporation has personally guaranteed the entity's debts or where it has made itself a co-debtor with its subsidiaries or affiliates.

##### **49 Combining parent and subsidiary proceedings**

**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 the parent company and its subsidiaries, thus, none of the assets and liabilities can be pooled for distribution purposes. The assets are not allowed under Thai law to be transferred from an administration in Thailand to an administration in a foreign country.

#### **International cases**

##### **50 Recognition of foreign judgments**

**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?**

With respect to insolvency proceedings, Thailand follows the territoriality principle (as opposed to the universality principle). Foreign

judgments or orders with respect to insolvency proceedings in other countries are not recognised under Thai law. Thailand is not a signatory to any treaties on international insolvency or on the recognition of foreign judgments.

#### 51 UNCITRAL Model Law

**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.

#### 52 Foreign creditors

**How are foreign creditors dealt with in liquidations and reorganisations?**

Under section 178 of the BA, foreign creditors who are domiciled outside the kingdom can claim for repayment of debts in a bankruptcy action upon compliance with certain conditions.

#### 53 Cross-border transfers of assets under administration

**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 order for control of a debtor's estate has no effect on the debtor's assets in Thailand. Thai law does not provide for cross-border transfers of assets under administration.

#### 54 COMI

**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?**

Thai courts do not recognise the COMI but rather regard each debtor company as a separate entity from its group of companies. To determine jurisdiction, Thai courts consider whether the debtor is domiciled in Thailand, or operates business therein, whether by him or herself or by representative, at the time an application is made to adjudicate such debtor bankrupt, or within a period of one year prior to that, as prescribed by section 7 of the BA. If this appears to be the case, the debtor can be adjudged bankrupt by Thai courts, which will only have jurisdiction over assets of the debtor that are situated within Thailand, pursuant to section 177 of the BA.

#### 55 Cross-border cooperation

**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?**

Under Thai law, there is no legislation providing cross-border cooperation. Therefore, according to section 177 of the BA, a foreign bankruptcy or order for control of a debtor's estate has no effect on the debtor's assets in Thailand. In addition, Thai law does not provide for the recognition of foreign judgments. However, a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and be considered as 'best evidence', provided the judgment is:

- final and conclusive;
- not contrary to Thai public policy; and
- given by a court of competent jurisdiction.

Thailand is not a signatory to any international treaties on insolvency or the recognition of foreign judgments.

#### 56 Cross-border insolvency protocols and joint court hearings

**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?**

While Thailand is not a party to any international treaty on insolvency or recognition of foreign judgments, it is generally accepted that a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and shall be considered as the 'best evidence' for consideration of the court. It should be noted that foreign judgments should be final and conclusive, not contrary to Thai public policy, and given by a court of competent jurisdiction.

The Legal Execution Department under the Ministry of Justice has, however, recently amended the BA by adding new provisions that are in line with the UNCITRAL'S Model Law on Cross-Border Insolvency, including access for foreign creditors and foreign representatives, recognition of foreign proceedings and relief, cooperation and communication, and concurrent proceedings. This new legislation will enhance the enforcement of debtors' assets in cross-border matters.

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WEERAWONG, CHINNAVAT & PEANGPANOR LTD.

Suntus Kirdsinsap  
Natthida Pranutnorapal  
Piyapa Siriveerapoj  
Jedsarit Sahussarungsri

suntus.k@weerawongcp.com  
natthida.p@weerawongcp.com  
piyapa.s@weerawongcp.com  
jedsarit.s@weerawongcp.com

22nd Floor, Mercury Tower  
540 Ploenchit Road  
Lumpini, Pathumwan  
Bangkok 10330  
Thailand

Tel: +66 2 264 8000  
Fax: +66 2 657 2222  
www.weerawongcp.com

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