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Bankruptcy, Insolvency & Rehabilitation Proceedings in Thailand

ILN RESTRUCTURING & INSOLVENCY GROUP



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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER THAI LAW

Introduction

The law of Thailand regarding insolvency, bankruptcy and rehabilitation proceeding are stipulated and applied through Thai Bankruptcy Act B.E.2483 (A.D. 1940) (“Bankruptcy Act”) and its amendments No.10, B.E.2561 (A.D. 2018).

This paper offers an understanding of the insolvent debtors and their qualification to the protection under Bankruptcy Act and its amendments, as granted by the law and/or by the court’s decision or order granted thereunder debtors who initially stated on expressed that they are facing with financial dilemma, bringing them to the point of being insolvent, or they are under the process of negotiation with creditor on an agreement for rehabilitation.

To emphasize the criteria of insolvency in Thailand, Chapter 1 of the Bankruptcy Act prescribes the circumstances in which a debtor can be found insolvent ¹, e.g.,

- (1) The debtor transfers his property or the right to manage his property to other person for his creditors’ benefit.
- (2) The debtor fictitiously or fraudulently transfers or delivers his property to another person.
- (3) The bankrupted debtor transfers his property or creates any right on his property
- (4) The debtor carries out any of the following acts purportedly delaying

payment or preventing a creditor from receiving the debt payment:

- a. leaving or remaining outside the Kingdom
- b. leaving or concealing himself in his residence or absconding by any other means or closing his business site.
- c. diverting the property out of the territorial jurisdiction
- d. surrendering himself to be subjected to a judgment compelling payment which he ought not to make

By considering the facts presumed to be insolvent under these criteria, it is crucial that such facts be existed at the time the lawsuit was filed.

The Comparison between the bankruptcy and rehabilitation under the Bankruptcy Act and its amendments:

1. The Person who is eligible to file the case/ petition with the Court

Bankruptcy Case

- The Creditor (there have 2 types of creditors which are unsecured creditor and secured creditor²).
- The Debtor by its Liquidator, if after the completion of liquidation process, the assets of the company are less than the liabilities of the company.

¹ Section 8 of the Bankruptcy Act B.E.2483.

² Section 6 of the Bankruptcy Act B.E.2483 defines secured creditors as creditors who have preferential rights over a debtor’s (e.g., a mortgage, a pledge, or a right of retention), to receive satisfaction of a claim from

the proceeds from disposal of assets. Hence, the secured creditor holds priority on debt collection from the property on which it holds a lien, while the unsecured creditor gets no such protection.



Rehabilitation Case

- The Creditor.
- The Debtor.

2. The conditions for filing the petition

Bankruptcy Case

For unsecured creditor

- i. The Debtor is insolvent
- ii. The Debtor is an individual person or juristic person
- iii. The debt amount is not less than THB 1,000,000 (USD 28,485.16) for individual debtor, or not less than THB 2,000,000 (USD 56,970.32) for corporate debtor.

For secured creditor

- i. The Debtor is insolvent
- ii. The Debtor is an individual person or juristic person
- iii. The secured creditor must not be a person who is prohibited from forcing debt repayment against the debtor's property in excess of their security
- iv. The secured creditor must refer in the petition that the secured creditor will give up the liens/security³ for the benefit of all creditors; or

the secured creditor must refer the appraisal of the liens/security in the petition, which when deducted from the amount of the debt, the amount of debt repayment would be lack for individual debtor in the amount of not less than THB 1,000,000 or a corporate debtor in the amount of not less than THB 2,000,000.

³ Under Thai law, there are 3 major types of security to be granted over assets, i.e., mortgage, pledge, and business security.

Rehabilitation Case

- i. The Debtor is insolvent
- ii. The Debtor is a limited company/public company or any juristic which is specify in ministerial regulations
- iii. The debt amount is not less than THB 10,000,000 (USD 284,851.60)
- iv. a reasonable cause and prospect for the reorganisation of the debtor's business (debtor must not be placed under absolute receivership)
- v. Filing petition in good faith

3. The effect by the Court Order

Bankruptcy Case

Upon the Court issues an absolute receivership order against the debtor, only the receiver has the authority to manage the business and collect all assets of the debtor for distribution to the eligible creditors who file their claims for repayment of debt within the time frame as specified by the law.

Rehabilitation Case

Upon the Court accepting the petition for rehabilitation, the automatic stay of the debtor under Section 90/12 shall be applied.

4. The Operation when entering the process/ the effect by the Court Order

Bankruptcy Case

The debtor shall file proposal for a composition in satisfaction of debts in the creditors meeting

If there is no Proposal or any Approval for a composition in the meetings, the official



receiver has to report to the Court and the Court shall have to order that the debtor is bankrupt.

After 3 years from the order's date, the order might be dismissed under some conditions specify by the law, for example, there is no further asset to be seized.

Rehabilitation Case

In case of accepting the rehabilitation plan by the Court, the plan administrator shall operate the implementation of the plan which shall not exceed 5 years. The implementation of the plan shall be extended 2 times which shall not exceed 1 year per each extend.

In the Case that, the creditors meeting and the Court reject the plan, Court will order to dismiss the rehabilitation order, or order the debtor in bankrupt.

To summarize, the main differences between the Bankruptcy and Rehabilitation are as follows:

- *the existence of the business of the debtor;*
- *the repayment of debt to the creditors;*
- *the effect of the court's order; and*
- *the protection granted under the law.*

The protection granted to the debtor against its creditors

What kind of protection is granted? (e.g., the creditors may not enforce any court decision against the debtor's assets etc.)

In the bankruptcy case, there is no protection for the debtor upon the Court has the order to place the debtor under absolute receivership. According to the Bankruptcy Act, only the receiver who has the authority to manage business or assets of the debtor for the purpose of collecting all the debtor's asset and sell in the public auction in order to share net amount after deducting expenses and fee to all eligible creditors who file their claim for repayment of debt within the time frame as stipulated in the Bankruptcy Act.

Regarding rehabilitation under the Bankruptcy Act, the business of the debtors shall be existed, the Plan preparer has the duty to prepare the rehabilitation plan while the Plan Administrator has the duty to implement the rehabilitation plan.

In addition, once the Court orders accepting the rehabilitation petition for further inquiry, there are several protections to the debtor under Section 90/12 of the Bankruptcy Act, e.g.,

- (1) No action or application shall be brought before or filed with the Court for a judgment or an order dissolving the corporate debtor. Should the action or application be brought before or filed with the Court, the Court shall stay the trial of such case. ⁴
- (2) No civil action shall be instituted against the debtor in connection with the debtor's property and no dispute in which the debtor may be liable or suffer loss shall be referred to arbitration for a decision. ⁵ (However, the Creditor could execute a civil action on the joint debtors of his debtor or his debtor's guarantor).
- (3) A judgment creditor shall not have any execution undertaken against the

⁴ Section 90/12 (1) of the Bankruptcy Act B.E.2483.

⁵ Section 90/12 (4) of the Bankruptcy Act B.E.2483.



debtor's property if the obligation to which the judgment relates arose before the date of the Court's order approving the plan.⁶

- (4) A secured creditor shall not exercise enforcement for payment of the debt against property given as security unless upon permission by the Court receiving the petition.⁷
- (5) A creditor legally entitled to exercise self-help enforcement for payment of the debt shall not seize or sell the debtor's property.⁸
- (6) A public utility provider, e.g., electricity, water, or telephone, shall not suspend services supplied to the debtor. (Unless upon permission by the Court accepting petition).⁹

What is the extent of the protection? (e.g., it includes all of the debtor's assets; Is it limited to several assets for which the debtor may ask for protection? Is it at the court's discretion to include any asset? etc.)

The extent of all debtors' asset protection is already prescribed by the law. There is no requirement for the debtor to ask the protection from the Court as there is an automatic stay under Section 90/12 as prescribed above, while there is no protection against the debtor's assets granted by the Court if the debtor is already placed under absolute receivership order and/or bankruptcy judgment.

Does the protection include only the debtor, or may it cover other persons as well (e.g., guarantors)?

⁶ Section 90/12 (5) of the Bankruptcy Act B.E.2483.

⁷ Section 90/12 (6) of the Bankruptcy Act B.E.2483.

The protection shall be applied only the debtors, it does not cover to the guarantors in accordance with Section 90/60

“Section 90/60 *The plan approved by the Court binds the creditors who may make applications for repayment of debt in the business reorganisation and the creditors who are entitled to repayment of debt in the business reorganisation, in accordance with section 90/27.*

The Court's order approving the plan does not have any effect of varying liabilities of persons who are the debtor's partners or bear joint liability together with the debtor or stand surety for or are in the same position as the surety for the debtor, in respect of the debts existing before the date of the Court's order approving the plan and does not have any effect of rendering such persons to be liable for the debts created under the plan as from the said date unless such persons, with evidence in writing, give consent thereto.”

For how long is the protection granted?

Until the Court has the order to dismiss rehabilitation order.

Which creditors are bound by the protection?

It is bound to all creditors who are the eligible creditors on the date the Court issues the rehabilitation order.

It is worth noting that under the Bankruptcy Act, there are no specific rehabilitation or bankruptcy procedures regarding financial institutions, securities firms, or insurance firms. The Bankruptcy Court applies general corporate insolvency procedures for such entities.

Nevertheless, should the debtor's business be under the supervision of a government agency,

⁸ Section 90/12 (7) of the Bankruptcy Act B.E.2483.

⁹ Section 90/12 (11) of the Bankruptcy Act B.E.2483.



i.e., the Office of the Securities and Exchange Commission (SEC) for securities businesses; the Bank of Thailand (BOT) for financial institutions; or the Office of Insurance Commission (OIC) for insurance businesses, it is necessary that the permission from such relevant government agency be obtained before submitting a petition for business rehabilitation proceedings.

In anticipation of the wave of rehabilitation proceedings, in April 2022, the OIC, the regulatory authority which oversees the insurance industry, released a regulation regarding the business rehabilitation of non-life insurance firms to accord with the requirements of the Bankruptcy Act that, before commencing the rehabilitation proceedings, a debtor who operates an insurance firm must obtain written consent from the OIC.

In addition, Thailand insurance firms has been filing for bankruptcy after suffering losses from selling low-cost COVID-19 insurance policies. In May 2022, SET-listed Syn Mun Kong Insurance (SMK) had filed for a rehabilitation petition with the Central Bankruptcy Court and was reported to have sold 1.95 million COVID-19 insurance policies. 16 of 52 Thailand insurance firms had offered COVID-19 insurance with 4 insurers (Asia Insurance, The One Insurance, Southeast Insurance, Thai Insurance) already shut down due to insufficient premiums and capital reserves to pay out the claims.

SMEs Rehabilitation in Thailand

To clarify the SME Rehabilitation in Thailand, it is required that the understanding of the characteristics of SME in Thailand ¹⁰ be made, i.e.,

Business Characteristics	Operation Types/ Sectors	Employment rate per year (persons)	Annual revenue
Small enterprise	Manufacturing	< 50	< THB 100 million
	Service providers/ wholesalers/ retailers	< 30	< THB 50 million
Medium enterprise	Manufacturing	50 < X < 200	100 million < X < 500 million
	Service providers/ wholesalers/ retailers	30 < X < 100	50 million < X < 300 million

Definition of the SMEs Debtor ¹¹

- i. The Debtor who is individual person, group of persons, unregistered partnership, registered partnership, limited liability partnership, limited company, or other juristic person under the ministerial regulation
- ii. Such Debtor operates its business as a SME in accorded with Small and Medium Enterprises Promotion Law.
- iii. The SMEs Debtor must have been registered with Office of Small and Medium Enterprises Promotion (OSMEP) or other government agencies.

¹⁰ Ministerial Regulations on the Designation of the Characteristics of Small and Medium Enterprises Promotion Act B.E. 2562, A.D. 2019.

¹¹ Section 90/91 of the Bankruptcy Act B.E.2483.



The criteria to which SMEs debtor be deemed insolvent¹², e.g.,

- (1) His property is less than his amount of debt.
- (2) Failure to pay debts within the deadline.
- (3) The debtor has defaulted on debt repayment + having the circumstances that they are in default with other creditors as well.
- (4) Insufficient cash flow to pay debts.

By considering the facts presumed to be insolvent under these criteria, it is crucial that such facts be existed at the time the petition was filed.

The person who is eligible to file the SMEs rehabilitation petition with the Court¹³

- Creditor (unsecured creditor or secured creditor).
- SMEs Debtor.

The conditions for filing the petition¹⁴

- i. The SMEs Debtor is insolvent
- ii. The SMEs Debtor is an individual person, group of persons, partnership, or juristic person
- iii. The debt is caused by business operation of such Debtor
- iv. The debt amount is not less than THB 2,000,000 (USD 57,685.94) for individual debtor;
not less than THB 3,000,000 (USD 86,528.91) for the debtor who is a group of persons, unregistered partnership,

¹² Chapter 3/2, Section 90/92 paragraph 2 of the Bankruptcy Act B.E.2483.

¹³ Section 90/93 of the Bankruptcy Act B.E.2483.

registered partnership, limited liability partnership, or other juristic person under the ministerial regulation; or

not less than THB 3,000,000 (USD 86,528.91) but not more than 10,000,000 (USD 288,429.70) for limited company debtor.

The circumstances preventing the eligible person to file the petition¹⁵, e.g.,

- (1) The Court issued an absolute receivership order against the SMEs Debtor.
- (2) The Court or the Registrar has issued an order for the dissolution or revocation of the juristic registration of such SMEs Debtor.
- (3) The Court had dismissed the rehabilitation of such SMEs Debtor within 6 months prior to the filing of new petition.

Since the beginning of 2020, the Thai economy has faced many challenges from the COVID-19 pandemic. The broader economy is expected to recover gradually, although some sectors are showing first signs of recovery.

Thailand's economy is expected to gradually recover to its pre-COVID-19 levels. However, the recovery may be uneven, especially for small businesses with limited access to capital. Continued and rising levels of uncertainty have further impacted financial access for affected businesses. Those with outstanding debt also find it more difficult to negotiate a debt restructuring if they have no projections of future income and cash flow.

¹⁴ Section 90/92 of the Bankruptcy Act B.E.2483.

¹⁵ Section 90/94 of the Bankruptcy Act B.E.2483.



In 2016, the law was amended to make reorganization accessible to SMEs. The debt threshold was reduced, the preparation and approval of plans was simplified, and subject to a shorter implementation period.

In August 2021, the Thai Cabinet approved a set of *proposals for legislative amendments* that could increase the functionality of these

procedures, such as increasing the debt threshold up to a maximum of THB 50 million, allowing SMEs not registered as such to use the procedure and to commence reorganization without a prepared plan, and a faster procedure for approval of the reorganization plan. However, such amendment hasn't yet come into force.