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1.0 INTRODUCTION

The Thai Bankruptcy Act of 1940 was Thailand's first modern bankruptcy law. The purpose of the law was to allow for a fair and equal distribution of the debtor's estate among the creditors. The system was intended to provide for an orderly resolution of debts owed and the disposal of assets seized by the official receiver who takes over the management of the bankruptcy estate.

In 1998, the law was amended to add a new chapter to the old Act – Chapter 3/1 – which introduces alternative avenues for creditors to seek satisfaction for the amounts owed to them. The amendment contains a structure designed to rehabilitate a debtor's business and to render a distressed company viable while protecting the interests of the creditors.

2.0 LEGAL FRAMEWORK FOR CREDITOR RIGHTS

2.1. Types of Secured Interests

Mortgages over immovable property are a common form of security, and there is a system for registering mortgages in Thailand. Immovable property is registered at the land office. . Machines may also be mortgaged and registered. Extraordinary movables, such as sea vessels, floating houses, and even beasts of burden may also be registered. However, ordinary movables are pledged as security for performance of an obligation by delivering of the property to the pledgee. A pledge of personal property also requires possession by the lender. The right to a possessory lien arises in specific circumstances for unpaid amounts owed in respect of goods in the possession of creditors. It is not used as security for finance.

Share pledges are also relatively common. Pledges of company shares must be registered in the company books. A pledge of bearer certificates for shares or debentures must be registered either in the company books or with the stock exchange of Thailand, as appropriate.

2.2. Enforcement Outside the Bankruptcy Framework

When a secured debt comes due and the debtor is not in a position to repay, the secured lender may enforce the security by filing a case with the court. A mortgagee of immovable property may enforce its security by filing with the court to foreclose on the mortgage. Filing for foreclosure requires that the debtor be notified in writing to give him a reasonable time in which to comply with the terms of his obligation. Once the court enters its judgment, the mortgaged property is sold by public auction. This is the most commonly employed method of enforcement used by security holders. In certain cases where there is only one registered mortgage and the value of the property is not greater than the amount due, the mortgagee is entitled to foreclose on the mortgage if the debtor fails to pay interest for five years.

Auctions are conducted by the Legal Execution Department of the Ministry of Justice. The law does not prevent a related party bidding in a public auction of mortgaged property.

To enforce a pledge, the security holder must first notify the debtor in writing, giving a reasonable time in which to comply with the terms of his obligation. Should the debtor fail to comply, the pledgee is entitled to sell the pledged property, but only by public auction. In this

regard, the pledgor must be notified of the time and place of the auction.

Public auctions are the most commonly employed method of enforcement for both mortgaged and pledged property.

2.3. Enforcement Within the Bankruptcy Framework

Within the framework of a bankruptcy case, a creditor must file a claim in the two months following the date of publication of the absolute receivership order (see section 3.2 below). This two-month term may be extended for additional two months in the case of creditors residing outside the Kingdom of Thailand.

Naturally, secured creditors have rights over the asset given by the debtor as collateral at a time prior to the order of receivership, and need not file a claim for repayment under the bankruptcy case. Should the secured lender have already enforced the security and failed to obtain the full amount, he can lodge a claim for the balance of debt, if he is legally entitled to. If the security has not yet been enforced, the lender may ask the receiver in the bankruptcy case to sell the collateral by public auction or appraise it in order to lodge a claim for an outstanding balance. In the latter case, receiver is authorized to redeem the asset at the amount at which it was valued.

3.0 LIQUIDATION

3.1. Commencement

In Thailand, debtors cannot petition for their own bankruptcy. A creditor, or group of creditors, starts the process by petitioning the court for a declaration that the debtor is bankrupt. The creditor(s) must allege that the debtor is insolvent and, if an individual, has debts of a minimum of TB1,000,000, or, if the debtor is a company, that it has debts of more than TB2,000,000. Liquidators of a registered or limited partnership or company may also apply to the court to have it declared bankrupt if the assets of the entity is insufficient to meet all debts, even if the shortfall is less than TB2,000,000.

Secured creditors (such as mortgagees or pledges) may also petition for the debtor's bankruptcy, provided that they can prove to the court that more than TB1,000,000 is owed by an individual, or more than TB2,000,000 by a company, beyond the value of the security, or that the secured creditors would be willing to release their security for the benefit of all creditors.

If there are grounds for the action, the court will order the individual's or company's estate, or property, to be turned over to the official receiver for distribution amongst the creditors. Thai bankruptcy law establishes certain presumptions that demonstrate that the debtor is insolvent. Such presumptions include actions by the debtor to :

- Avoid payment of debts or otherwise prevent a creditor from receiving payment by:
 - Leaving Thailand;
 - Closing up the business or home and hiding from creditors;
 - Sending property outside Thailand to hide it from creditors; or
 - Consenting to a judgment for payment of money that is not in fact owed;

- Have a court order, or writ, that attaches all of the debtor's property or attaches it for more than its real value;
- Inform the court or creditors that the debtor is unable to pay the debts;
- Submit a proposal to two or more creditors for consolidation;
- Disregard two or more demands for payment sent by a single creditor, which demands are at least thirty days apart;
- Transfer all of the debtor's property to a third party for management or distribution to all creditors; or
- Transfer the debtor's property dishonestly or with fraudulent intent or in preference of one creditor over another.

The petitioners may ask the court for a number of measures to prevent the debtor from dealing with the assets prior to the adjudication of bankruptcy. The court may issue a temporary receiving order if there are sufficient grounds to warrant it, in which case the debtor's assets will be seized by the official receiver. The petitioner must provide a compensation bond before the order will be issued, however, so that the debtor can be compensated if the order was unwarranted and the debtor suffers damages as a result. If the petitioner can prove to the satisfaction of the court that the debtor might try to leave the jurisdiction or conceal his property, the court can order the debtor to provide security or even order the debtor to be detained.

3.2. The Receiving Order and the Official Receiver

After the petition is filed, the court will review the debtors' circumstances, and if warranted, order an absolute receiving order. Like the temporary receiving order, an absolute receiving order will also authorize the official receiver to seize the debtor's assets. However, no compensation bond is required of the petitioner when an absolute receiving order is issued.

The official receiver's responsibility is to gather all of the debtor's assets, determine the identity of the debtor's creditors and the amounts owed, manage the debtor's estate for the benefit of the creditors, and distribute the assets to the creditors. The official receiver is required to publish the receiving order in the government gazette and in at least one local newspaper to give notice to the debtor's creditors.

The official receiver will then summon the debtor for examination at the official receiver's office, to inquire into the debtor's assets, liabilities, etc. If the debtor is a company, the company officers will be examined. The purpose of the hearing is to investigate the cause of the insolvency, the debtor's conduct in relation to the business, and the state of the debtor's estate.

All creditors wishing to receive payment from a distribution of the debtor's assets must file their claims with the official receiver within two months of the date on which the receiving order is published. Although a secured creditor is not required to file a claim, he must allow the official receiver to inspect the secured property.

The official receiver is also responsible for holding a meeting with all the creditors to present a report of the debtor's business affairs and financial conditions and an accounting of the official receiver's management of the debtor's estate. The debtor must attend this and any subsequent meetings.

3.3. Composition / Bankruptcy

If the debtor has proposed a composition agreement, the creditors will be asked to decide by resolution whether they wish to accept the composition and submit it to the court for consideration, or to pursue the bankruptcy. A vote to accept the composition must be approved by a majority in number of creditors whose aggregate claims must not be less than three-fourths of the total claims of creditors attending the meeting. If the creditors approve the composition, the bankruptcy proceedings are suspended.

The official receiver must report the outcome of the meetings to the court, but he is not required to perform all resolutions of the creditors, especially if, in the opinion of the official receiver, the resolution is illegal or simply not in the common interest of the creditors. In such a case, the official receiver may ask the court to nullify the creditors' resolution. If the official receiver believes it to be in the best interests of all creditors not to wind up the debtor's business, the official receiver may request that the creditors approve the continued operation of the debtor by the official receiver, the debtor, or a third party.

If no creditor attends the meeting, or if the creditors pass a resolution requesting that the court adjudge the debtor bankrupt, or the creditors reject the debtor's composition or fail to pass a resolution, the court will proceed with the bankruptcy. If the court proceeds and the debtor is adjudged bankrupt, the debtor must co-operate fully with the official receiver in the acquisition and distribution of assets. The expenses and debts of the bankrupt are to be paid in the following order:

- a) Expenses of administering a deceased debtor's estate;
- b) Expenses of the official receiver in managing the debtor's assets;
- c) Funeral expenses of the debtor;
- d) Official receiver's fees for gathering together the debtor's assets;
- e) Court fees of the petitioning creditor(s);
- f) Taxes that became payable within the six months prior to bankruptcy and payment due to the debtor's employees in consideration of services provided;
and
- g) Other debts.

3.4. Discharge

The bankrupt or any other interested party may apply for a discharge of the bankruptcy. The court may terminate the status of bankruptcy under the following circumstances:

- The debts have been paid in full;
- Where the debtor is a company, it has been ten years since the last distribution of assets and the official receiver is unable to gather further assets and there are no more creditors asking the official receiver to seize any further assets (where the debtor is an individual, the debtor will be discharged three years after the date on which the court adjudges the debtor bankrupt);
- It is not justified to adjudge the debtor bankrupt; or
- The petitioning creditor has failed to pay the required court fees or security deposit and no other creditor has offered to do so in his stead.

The court has the choice of granting an absolute discharge, a conditional discharge, or refusing the application altogether. A discharge order relieves the bankrupt from all debts except for taxes and debts that arose through fraud or dishonesty. The court will consider the bankrupt's behavior prior to and during the course of the bankruptcy in deciding whether to grant a discharge.

4.0 REORGANIZATION

The amendment of the Bankruptcy Act allows the following persons to initiate the process of reorganizing the debtor's business operations :

- Creditor(s) to whom the debtor owes not less than TB10 million;
- An insolvent debtor who owes a creditor or creditors not less than TB10 million.
- Certain government agencies responsible for supervising and administering the operations of the debtor, such as the Bank of Thailand, the Office of Securities Exchange Commission, or the Department of Insurance.

Any of the above parties may petition the court for the reorganization of the debtor's business operations. However, if the debtor's business operations are regulated by the government agencies, the petitioner must obtain prior written consent from the relevant authority. In the event that the relevant authority does not consent to the petitioner's request, the petitioner must appeal to the minister in charge of the authority within seven days. The minister is then required to make a decision within fifteen days. The decision of the minister is final.

4.1. Commencement

The process of reorganizing the debtor's business operations starts when a petitioner submits a petition to the court, clearly stating that the debtor is insolvent, the name(s) of the creditor or creditors to whom the debtor owes not less than TB10 million, the reasons for and methods of reorganizing the debtor's operations, the name and qualifications of a person whose job will be to plan the reorganization, and a letter of consent from the proposed planner. The planner may be an individual, a juristic person, group of persons, a creditor, or the debtor's administrator.

Once the court issues an order granting permission to reorganize the debtor's operations, the official receiver must publish the court order in the government gazette and daily newspapers, and inform the relevant corporate registrars of the order so that they can record the court's order in the official corporate registration documents of the debtor.

4.2. Appointment of the Planner

4.2.1. *Where No Objection is Made to the Planner Nominated by the Petitioner*

The court may appoint the person recommended by the petitioner to serve as the planner. However, if the court considers the recommended person to be ill suited as a planner, the court must notify the official receiver to hold a creditors' meeting as soon as possible to find a replacement. The date, time and place of the creditors' meeting must be announced in the daily newspaper, and be notified to the debtor and all creditors.

4.2.2. *Where an Objection is Made to the Planner Nominated by the Petitioner*

Should there be an objection to the planner nominated by the petitioner, the official receiver must convene a creditors' meeting.

4.3. Resolution by the Creditors' Meeting

The number and characteristics of the creditors entitled to accept or reject the selection of the planner depends on who has nominated him. If the planner was nominated by the debtor, the court will appoint that person to serve as the planner unless a resolution rejecting the debtor's planner is passed by creditors holding at least two-thirds of the total debts of all creditors who vote at the meeting. If the planner was nominated by others, a resolution appointing the planner must be passed by creditors holding a majority of the total debt of all creditors who vote at the meeting.

A planner who is selected at the creditors' meeting must also be approved by the court. If the court disagrees with the planner selected by the creditors' meeting, another creditors' meeting must be held to select a different planner. If a resolution selecting a planner is passed by the creditors' meeting and the court agrees, the court will appoint that person. In the event that the creditors are unable to pass a resolution to select a planner, the official receiver must call another creditors' meeting. If a resolution cannot be passed at the second creditors' meeting or the court disagrees with the planner selected by the second creditors' meeting, the court will revoke the permission to reorganize the debtor's operations.

4.4. Submission of Claims for Repayment

Creditors who wish to claim repayment under the reorganization plan must file their claims with the official receiver within one month from the date that the appointment of the planner is announced in the government gazette. Secured creditors may obtain payment by enforcing their security without submitting claims for payment along with the other creditors. However, such secured creditors must first allow the official receiver to inspect the collateral. In the event that the claim of any creditor is in foreign currency, it must be calculated in Thai baht at the exchange rate applicable on the date that the court renders the order granting permission to reorganize the operations.

Copies of all claims submitted to the official receiver must also be forwarded to the planner. The debtor, the creditors, and the planner may examine and lodge objections with the official receiver to any claim within fourteen days after the final date specified for submitting a claim for repayment.

The official receiver will consider each claim submitted within the time limit, and render a decision in regard to which creditors are entitled to obtain repayment under the plan, and to what extent. Any creditor who disagrees with the decision of the official receiver may file an objection with the court within fourteen days from the date of learning of the official receiver's decision.

4.5. Approval by the Creditors

Upon receiving the reorganization plan, the official receiver must call a creditors' meeting to consider whether to accept the reorganization plan prepared by the planner, or, if not, the manner in which it should be revised. A request to amend the plan must be submitted to the official receiver at least three days in advance of the date of a meeting.

The resolution by the creditors' meeting to approve the plan must be a special resolution, i.e. it must be a resolution passed by a majority of creditors in number and holding at least three-quarters of the debt of all the creditors who attend and vote at the meeting. In the event that the creditors' meeting does not pass a special resolution, or does not pass any resolution, or if no creditor attends the meeting, the official receiver must immediately report such event to the court. The court will then call an urgent hearing in order to examine all evidence in the file and to listen to the explanation, if any, given by the official receiver, the creditors, and the debtor. After considering the evidence, the court must render one of the following orders:

- If the court finds that the debtor should be placed into bankruptcy, it will issue an absolute receiving order for the control of the debtor's assets; or
- If the court finds that the debtor should not be placed into bankruptcy, it will revoke the order granting permission to reorganize the operations.

4.6. Court Approval

In the event that the creditors' meeting passes the special resolution accepting the plan, the official receiver must report such resolution to the court, and ask the court to approve the plan. The court will then schedule a hearing to consider the matter without delay. The court will generally approve the plan unless there is specific reason to reject it, for instance if the plan is incomplete pursuant to the law or the proposals for payment under the plan give an unfair advantage to certain creditors without obtaining the consent of the other creditors. If the court finds such reasons to disapprove the plan, it will attempt to remedy the problem, for instance, to reconcile those creditors placed at a disadvantage and the planner in order to revise the proposals for payment. If reconciliation cannot be reached amicably, the court will reject the plan unless the court finds that it is able to condition its approval on measures to protect the disadvantaged creditors.

If the court rejects the plan, the court will schedule a hearing to determine whether the debtor should be placed into bankruptcy. The court may issue an absolute receiving order to control

the debtor's assets, or otherwise revoke the order granting permission to reorganize the operations.

4.7. Termination

4.7.1. The Reorganization is Successful

Even though the period of time for implementing the plan may not have expired, if the debtor's previous management, the plan administrator, or the official receiver feels that the reorganization of the debtor's business has been achieved in full, that person must report to the court and request that the court enter an order terminating the reorganization. In such case, the court will schedule a court hearing to examine the outcome of the implementation pursuant to the plan. If it is determined that the business reorganization was accomplished, the court will order the reorganization terminated. Upon learning of such order, the executive committee or the manager of the debtor will be entitled to resume management of the debtor's business operations and assets.

If the period for implementation of the plan has expired, but it appears that implementation of the plan is close to success, the court may extend the period as appropriate. If it appears that the implementation of the plan has not been successful, the court can decide whether to order the plan administrator to continue with the plan or not.

4.7.2. The Reorganization is Unsuccessful

If implementation of the plan was not successful, the court will consider the evidence in the file as well as explanations by the official receiver, the creditors, and any objection given by the debtor, to determine whether the debtor should be placed into bankruptcy. If the court deems that the debtor should be placed into bankruptcy, it will issue an absolute receiving order. Otherwise, if there are reasonable grounds for keeping the debtor from bankruptcy, the court may order the business reorganization to be terminated. In that case, the executive committee or the manager of the debtor will be entitled to resume management of the debtor's business operations and assets, in the same manner as if the plan had been achieved.

5.0 INSTITUTIONAL FRAMEWORK FOR INSOLVENCY

As bankruptcy cases differ in essence from general civil cases, and may affect the economy as a whole, it was necessary to create a forum in which the cases are heard by judges with special knowledge of business and financial matters. The Thai Act Establishing the Bankruptcy Court and Bankruptcy Case Procedure that came into force on June 18, 1999 established a court specifically to hear bankruptcy cases. The Act created a Central Bankruptcy Court and set out the procedures to be followed in the handling of such cases, mandated the appointment of judges, allowed the Bankruptcy Court limited authority to develop some of its own procedures, and established provisions to deal with existing cases that arose prior to the establishment of the Bankruptcy Court. In addition to the judges with specialized experience and training in the areas of law concerned, specialists may also be called to comment on matters of the case.

Another advantage presented by the Act Establishing the Bankruptcy Court and Bankruptcy Case Procedure is that hearings of bankruptcy cases are now expedited. Previously, only one

trial date per month was set for each case. This prolonged the case for months or even years, generating excessive costs for creditors and encouraging debtors to avoid paying off their debts because the time frame worked to their advantage. Currently, cases concerning the reorganization of businesses are required to be heard on a daily basis until completion, and the court avoids postponing hearings. This has allowed cases to be completed within one month of the date of filing. Moreover, an appeal against any judgment or order of Bankruptcy Court with respect to a reorganization case could be submitted directly to the Supreme Court. Cases have also been expedited by allowing writs or notices of summons to now be served by mail; they no longer have to be physically presented to defendants.

6.0 CROSS-BORDER INSOLVENCY

Creditors who live outside Thailand will be given an extension of time in which to file a claim with the official receiver. To make a claim, a foreign creditor who is not domiciled in Thailand must:

- Prove that Thai creditors are given reciprocal treatment for bankruptcy claims in their home country; and
- Be prepared to surrender any of the debtor's property in their possession that is located in their country for the common benefit of all creditors.

A branch office of a foreign company doing business in Thailand is not considered to be a foreign creditor. If the debtor's transaction was directly with the head office of the foreign company, the head office must file its claim for payment as a foreign creditor, regardless of whether it has a branch in Thailand.

A debtor who is not domiciled in Thailand, but conducts business there, may also be adjudged a bankrupt under the jurisdiction of the Thai court, provided that the debtor was carrying on business in Thailand one year prior to, or at the time the petition was filed. Only assets located in Thailand will be subject to a bankruptcy proceeding before a Thai court. Similarly, Thai assets are protected from a bankruptcy adjudication in a foreign jurisdiction.