Asia Pacific Guide to Lending and Taking Security - Thailand

If things go wrong

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# 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

**Personal bankruptcy**

Personal bankruptcy in the Thai system commences exclusively by a creditors' petition being filed with the Bankruptcy Court. Thai law does not provide for the institution of voluntary bankruptcy proceedings. After receiving a bankruptcy petition, the court will set a first hearing date at which objections to the bankruptcy petition will be considered. At the hearing, the court will examine the bankruptcy petition. If the petitioning creditor can verify the debtor's state of insolvency and there are no reasons why the debtor should not be adjudged bankrupt, the court will accept the bankruptcy petition and issue an absolute receivership order. This order triggers the official receiver to locate and collect the debtor's assets and remove the debtor from having control over its assets.

One special feature of Thai law is the ability of a creditor to seek a temporary receivership order, through an ex parte injunction, to freeze the debtor's assets or require the debtor to provide security. This special pre-bankruptcy action is designed to prevent a debtor from liquidating its assets to the detriment of its creditors.

Prior to the first meeting of creditors, the debtor may propose to the official receiver a compromise of debts (i.e., an arrangement that specifies the amount that creditors will receive (which would be a lesser amount than they are owed)) or the method of management of the business and assets, and provide details of any security. Creditors may agree to accept a compromise of debts by a special resolution of a meeting of creditors, requiring the approval of creditors representing 75% of the debt by a majority of the creditors in attendance at the meeting. If the approval of a compromise of debts fails, the debtor will be declared bankrupt, and the seizure and liquidation of the debtor's assets will be carried out by the official receiver and distributed according to the creditors' preferential ranking.

The debtor can be released from bankruptcy by a post-bankruptcy compromise of debts and discharged from bankruptcy under the Bankruptcy Act B.E. 2483 (1940) (as amended) on any of the following four grounds:

That no creditor assists the official receiver in the collection of assets

That the debtor should not be adjudged bankrupt

That the debts of the bankrupt have been paid in full

That during the 10-year period after the closure of the bankruptcy action, the official receiver has been unable to collect any further assets of the bankrupt entity

**Corporate bankruptcy**

There are three types of procedures available for corporate debtors as set out below. The features of the three types of procedures are also discussed below.

**Creditor-initiated bankruptcy**

Under a creditor-initiated bankruptcy, the successful verification by the creditor of the debtor's insolvency leads to a court order of absolute receivership and the process falls under judicial supervision.

**Debtor-initiated bankruptcy**

A debtor-initiated bankruptcy occurs through voluntary liquidation. The shareholders may by a special resolution, if its contributions or shares are fully paid up and if its assets are insufficient to meet its liabilities, apply to the court through a liquidator to have the entity declared bankrupt.

**Business reorganization procedure**

A business reorganization procedure, either creditor-initiated or debtor-initiated, is available with the objective of rehabilitating the business. A reorganization planner ("**Planner**") or plan administrator ("**Administrator**") operates this procedure with judicial oversight.

**Features of a debtor-initiated bankruptcy and a creditor-initiated bankruptcy**

Thai courts tend to rely heavily on the balance sheets of the company. Therefore, in cases where a debtor attempts to inflate its assets to create a positive balance sheet in relation to a debtor-initiated bankruptcy, creditors will require strong proof to convince the court that the debtor is insolvent.

The ability to seek a temporary receivership order, the ability of the corporate debtor to propose a compromise of debts, and the methods of release from bankruptcy are also applicable to corporate bankruptcy.

The process for corporate bankruptcy is the same as it is for a personal bankruptcy. After receiving the bankruptcy petition, the court will set a first hearing date, at which objections to the bankruptcy petition will be considered. If the bankruptcy is accepted by the court, an absolute receivership order will be issued, and the official receiver will seize and assume control over all of the debtor's assets.

**Features of a business reorganization procedure**

The debtor, its creditor or relevant government authorities may submit a petition for a business reorganization. On the submission of the petition and the court's acceptance of the petition, an automatic stay will come into effect and parties will be prohibited from taking certain actions regarding the debtor. These actions include the following:

Commencing litigation proceedings or requesting the court to wind up the debtor

Taking a bankruptcy action against the debtor

Enforcing a judgment against the debtor's assets for debts incurred prior to the date that the court issues an order to approve the reorganization or rehabilitation plan

Transferring, disposing of, leasing out, incurring debts or undertaking any action that creates a burden over the debtor's property, except as is necessary for normal trade activities

Similar to typical bankruptcy proceedings, the court will set an enquiry hearing date at which objections to the petition will be considered. Following the court's order to reorganize the debtor's business, all powers to manage the debtor company will pass to the Planner and then to the Administrator after the court approves the reorganization or rehabilitation plan (except where the debtor acts as its own Planner or Administrator). After the Planner's details are published in the Government Gazette, creditors have one month to lodge their creditor claims with the official receiver, failing which, their creditor claims will be barred.

The reorganization or rehabilitation plan must be approved by the affirmative votes of the following:

A simple majority of creditors (i.e., 50% of creditors where each creditor has one vote) in each group of creditors, provided that the creditors voting in favor of the plan in each group hold debts representing at least two-thirds of the debts owed to that group

A simple majority of the creditors in at least one group of creditors provided that: (i) the creditors in that group hold debt representing at least two-thirds of the debt owed to that group; and (ii) the total debt owed to creditors in all groups who voted in favor of the plan represents at least 50% of the total debt owed to all creditors in all groups

In this regard, the majority creditors can impose a plan on minority creditors, including a plan relating to any difference between the amount of a particular debt and the security relating to that debt. Under Thai law, any debt that is forgiven under a reorganization or rehabilitation plan is exempt from taxation.

Subsequently, the court must approve or reject the reorganization or rehabilitation plan. In this regard, the court is required to examine any objections to the plan. If the plan is rejected, the court may simply revoke the order granting permission to reorganize the debtor's business and return the debtor to a state of normal business operations, or if there is a pending bankruptcy lawsuit against the debtor, order those pending bankruptcy proceedings to continue.

**Clawback**

An important feature of both the Thai bankruptcy and reorganization laws is the ability to have fraudulent acts, acts of undue preference and executory contracts invalidated during the bankruptcy or reorganization process.

The Planner, Administrator or official receiver may ask the court to cancel a fraudulent act by filing a motion with the court. A "fraudulent act" is defined as an act conducted by the debtor with the knowledge that the relevant act would prejudice its creditors. However, this nullification does not apply if the third party that received the benefit in relation to that act gave fair value for the act and did not know, at the time of the act, that the act would prejudice the debtor's creditors. The prescription period to request nullification of a fraudulent act is within one year from the time the creditor knew of the cause for nullification of the act or within ten years from the occurrence or commission of the act. If the alleged fraudulent act was conducted within one year of the filing of the application for bankruptcy or reorganization, it is presumed that the debtor and the third party had knowledge that it would prejudice the debtor's creditors.

When there appears to have been a transfer of assets or any other act that the debtor has committed or allowed to be committed within the three-month period prior to or after the filing of the bankruptcy or reorganization petition, with the intent to place any creditor in an advantageous position over other creditors, the Planner, Administrator or official receiver may file an application with the court requesting the nullification of that transfer or act.

In addition, within two months from the date that the Administrator is informed of the court's approval of the reorganization or rehabilitation plan, the Administrator has the right to refuse to accept rights under a contract where the obligations exceed the benefits to be received, provided that those rights were included as part of the reorganization or rehabilitation plan approved by the creditors' meeting and the court.

# 2. Is it possible to obtain a moratorium before insolvency?

Yes, a creditor may seek a temporary receivership order, through an *ex parte* injunction, to freeze the debtor's assets or set up a bankruptcy action against the debtor. If the court finds the debtor to be insolvent, it makes an order that places the debtor in absolute receivership, by which the debtor is suspended from any action related to its assets and any legal challenge in relation to the debtor's assets is put on hold.

# 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Transactions in which a creditor allows a debtor to create additional debts even though the creditor knew at the time (e.g., because the debtor had not been servicing the relevant debt for several years) that the debtor was insolvent (i.e., assets are less than debts) can be set aside. A creditor that allows the additional debts to be created will be barred from filing a claim to recover the amount of those additional debts.

The additional debt does not include debts permitted to be created so that the debtor can continue its ordinary business operations.

# 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

Security can be enforced upon the breach of the underlying obligations that the security secures, subject to contractual terms and conditions. The enforcement requirements differ depending on the type of security and they are set out below.

**Valid security interests under Thai law**

**Pledge**

A pledge can be enforced out of court. To enforce a pledge, a written demand notice must be given to the debtor requiring it to perform the obligations and all accessory acts within a reasonable time (as stated in the notice). If the debtor fails to comply with the notice within the prescribed period, the pledgee is entitled to sell the pledged property but it must be sold by public auction.

**Mortgage**

A mortgage can be enforced by a court order to either foreclose or sell the mortgaged property by public auction.

To enforce a mortgage, a written demand notice must be given to the debtor by the creditor requiring the debtor to perform the obligations and pay for all related charges within a reasonable time (as stated in the demand notice, which in any case must not be less than 60 days from the receipt of the creditor's written demand notice). In the case of a third-party mortgagor, the creditor is also required to serve a demand written notice on that third-party mortgagor within 15 days after the date of its demand notice to the debtor. If the creditor fails to serve the required written demand notice within the 15-day period, the third-party mortgagor is relieved from any liability for all interest, compensation and accessorial charges arising after that prescribed period.

**Business security**

A business security created under the Business Security Act can be enforced once an enforcement event (as specified in the business security agreement and the registration record) occurs. The enforcement in relation to specific assets and entire businesses are subject to different procedures.

In relation to specific assets, the creditor can choose one of the following:

Foreclosure

Sale of the secured assets by public auction by serving an enforcement notice on the security provider

Once the notice is served, the security provider is prohibited from disposing of the secured assets or causing the value of the secured assets to decrease and it is required to surrender them to the secured creditor that will then be entitled to take possession of the secured assets. No court proceedings are required except where the security provider refuses to surrender the secured assets to the secured creditor.

In relation to an entire business, enforcement must proceed through a duly licensed security receiver authorized to enforce the security. The parties appoint the security receiver by serving an enforcement notice on the security receiver. The security receiver will be responsible for the investigation in relation to whether an enforcement event has occurred. Once the security receiver determines that an enforcement event has occurred, the managerial power and shareholders' rights over the business (except rights to dividends) will be transferred to the security receiver. The security provider is required to deliver the entire business, related documents and related rights and liabilities to the security receiver within seven days after the receipt of the enforcement order from the security receiver. The security receiver is in charge of managing the business until it is sold, selling the business and allocating the sale proceeds.

**Other security interests**

**Guarantee**

To enforce a guarantee, upon a default by the debtor, the creditor must serve a written demand notice on the guarantor within 60 days of the default. The creditor may not demand that the guarantor perform its obligation before the written demand notice reaches the guarantor. If the creditor fails to serve a written demand notice within the 60-day period, the guarantor is relieved from any liability in relation to all interest, compensation and related charges arising after the prescribed period.

If the creditor is entitled to demand that the guarantor perform the obligations of the debtor after the default by the debtor, the guarantor can choose to do one of the following:

Perform that obligation in its entirety

Exercise its right to perform only the specific portion of the debtor's obligations for which the guarantor is liable under the terms and conditions of the obligations agreed between the debtor and the creditor prior to the default

In these circumstances, the guarantor will be exempted from paying interest at the default interest rate. If no payment is made within the period specified in the demand notice, the creditor may file a lawsuit in court.

**Assignment**

To enforce an assignment of rights, the relevant parties may give a demand notice to the counterparty stating their intention to enforce their rights under the assigned agreement. If there is no payment within the specified period under the demand notice, the creditor may file a lawsuit in court.

# 5. Do any limitation periods apply in relation to bringing an action to enforce security?

The limitation period for bringing an action under a loan is ten years from the date when the relevant claims can be enforced. The barring of claims because of an elapsed limitation period or time prescription does not prevent a mortgagee or a pledgee from being entitled to enforce its security in relation to the secured assets. However, enforcement in relation to the outstanding interest is only permitted for the amount outstanding in the five years preceding the enforcement proceedings.

# 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

Secured assets must only be liquidated on enforcement by public auction.

# 7. Are there any particular legal or practical difficulties or delays in enforcing security?

A mortgage can only be enforced by a court order and the secured assets must be sold by public auction. The judicial process can take a considerable amount of time before a final judgment is obtained. Sometimes, no bidders may participate in the auction and this may further prolong the enforcement process.

In our experience, the enforcement of business security under the Business Security Act is still unprecedented.

# 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

There are no specific requirements that apply to foreign entities in relation to the enforcement of security in Thailand. However, foreign entities should be aware that there are issues in relation to the recognition and enforcement of foreign court judgments. Thai law does not specifically provide for the direct enforcement or recognition of foreign court judgments in Thailand. Moreover, Thailand is not a party to any treaty or agreement by which the judgment of a foreign court is entitled to be recognized and enforced in Thailand. Therefore, new judicial proceedings based on the merits of the case must be initiated in Thailand. However, foreign court judgments and documentary evidence generated during any foreign litigation process, including settlement negotiations, may be admissible as evidence in new court proceedings initiated in Thailand.

# 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

The advantages of arbitration over litigation are as follows:

 An arbitral award is likely to be obtained in a shorter time than court judgments because a court judgment is likely to be subject to subsequent appeal proceedings before two superior courts before it becomes final.

An arbitral award is final and binding on the parties in the arbitration proceedings. Under the Arbitration Act B.E. 2545 (2002) ("**Arbitration Act**"), neither party can appeal against the merits of the arbitral award, whether to the arbitral tribunal or the courts in an action for the enforcement of the arbitral award.

Thai courts generally recognize and enforce arbitration awards whether they are made in Thailand or elsewhere. However, the courts are more likely to enforce foreign arbitration awards if the parties involved are entitled to rely on the terms of relevant international conventions to which Thailand is a party. At present, Thailand is a member state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also known as the New York Convention 1958), and the Convention on the Execution of Foreign Arbitral Awards 1927 (also known as the Geneva Convention 1927). Therefore, an arbitral award made in a member state under either of these conventions will be recognized and enforced by Thai courts. Nevertheless, as discussed in the answer to question 8 of this section, Thai law does not specifically provide for the direct enforcement or recognition of foreign court judgments in Thailand.

In litigation proceedings before the courts of Thailand, the trial and all documentary submissions and pleadings must be conducted in Thai. However, in arbitration proceedings, although the seat of arbitration may be in Thailand, parties can agree to have the arbitration conducted in another acceptable language.

It is also possible under Thai law to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit.

# 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

We are not aware of any precedent judgment or decision in relation to this type of asymmetrical jurisdiction clause. In principle, Thai law does not prohibit the agreement for the submission by any person to the jurisdiction of a foreign court, but an agreement of this type does not prevent Thai courts from having jurisdiction over the case if, by virtue of the Civil Procedure Code of Thailand, it has jurisdiction over the case. It is likely that Thai courts would exercise their jurisdiction over any case within their power regardless of any contractual restriction.

In relation to the choice between litigation and arbitration, under the Arbitration Act, when the agreement to arbitrate exists and it is valid, the parties are prohibited from filing a lawsuit before any court and they are bound to refer the dispute to arbitration. If any party files a lawsuit before any court in breach of the arbitration agreement, the other party may ask the court to stay the litigation proceedings so that the case can be referred to arbitration. Unless this arbitration agreement is void or unenforceable, Thai courts will usually give effect to it and will stay the litigation proceedings.

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