Global Restructuring and Insolvency Guide - Thailand

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Bankruptcy**

Not all types of assets can be secured. Only financial institutions can take security over inventories and accounts receivable.

**Liquidation**

Not all types of assets can be secured. Only financial institutions can take security over inventories and accounts receivable.

**Business reorganization**

Not all types of assets can be secured. Only financial institutions can take security over inventories and accounts receivable.

## What is the nature of the insolvency process?

**Bankruptcy**

Both personal and corporate bankruptcy proceedings can only be commenced by a creditor, not a debtor. No provisions allow voluntary bankruptcy under Thai law. Successful verification of the debtor's insolvency by the creditor leads to a court order of absolute receivership. The creditor can also seek a temporary receivership order in order to freeze the debtor's assets or require the debtor to provide security. The process is under judicial supervision, i.e., the Bankruptcy Court and the Official Receiver of the Legal Execution Department.

**Liquidation**

After a shareholders' resolution initiates the dissolution of a company, the company's active status will be deemed to continue for the purpose of liquidation. If it appears to the liquidator that the total assets of the company are insufficient to cover all debts, the liquidator will need to immediately file a petition to the court requesting the company to be declared bankrupt. In this case, the proceedings will be in line with the bankruptcy proceedings.

**Business reorganization**

Both debtors and creditors can commence business reorganization proceedings by filing a petition to the Bankruptcy Court. Once all criteria under the Bankruptcy Law are satisfied, the court will grant the business reorganization order and appoint the planner. The whole process will be under the supervision of the Bankruptcy Court and the Official Receiver of the Legal Execution Department.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Bankruptcy**

The creditor must prove that (1) the debtor is insolvent (where the total debt is greater than the total assets); (2) the debtor, who is a juristic person, is indebted to one or several creditors who filed the complaint about not less than THB 2 million; and (3) the debt in (2) can be determined as a definite amount, irrespective of whether they are due for payment immediately or at a future date. The court will also consider whether there is any reason why the debtor should not be adjudged bankrupt.

**Liquidation**

After the capital is settled with the debt, the company's total assets must be insufficient to cover all the debt.

**Business reorganization**

The criteria for instituting a reorganization proceeding include that (1) the debtor is insolvent, or the debtor cannot settle its debt that is due and payable; (2) the debtor is indebted to one or several creditors at a definite amount of debts of not less than THB 10 million, irrespective of whether they are due for payment immediately or at a future date; and (3) there are justifiable grounds and methods to reorganize the debtor's business.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No.

## Is restructuring of both secured and unsecured claims possible?

**Bankruptcy**

Yes.

**Liquidation**

Not applicable, as the purpose of this regime is to dissolve the company.

**Business reorganization**

Yes.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Bankruptcy**

No. The assets are distributed under a waterfall mechanism with certain priority claims. All unsecured creditors with no priority claim will receive repayment on a pro rata basis.

The shareholders may be classified by the company's articles of association. However, the shareholders will normally not receive anything during the bankruptcy process unless it appears that the total proceeds from the realization of the assets are greater than the total claims in the bankruptcy proceedings.

**Liquidation**

No, for the case of creditors' claim.

The shareholders may be classified by the company's articles of association.

**Business reorganization**

Yes. The creditors' claims can be classified under the business reorganization plan. Under the Bankruptcy Act, the classification can be made as follows:

(1) Each secured creditor with secured debt of not less than 50% of the total debts will be treated as one class.

(2) Secured creditors not classified in (1) will be treated as one class.

(3) Unsecured creditors can be classified into several classes. In the same class, the nature of claims must be essentially identical or similar.

Under the plan, the claims of shareholders may be classified into separate classes and receive different treatment from other classes, subject to fairness and good faith.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Bankruptcy**

Shareholder approval is not required to commence the case.

**Liquidation**

Yes, for dissolution only.

**Business reorganization**

Shareholder approval is not required to commence the case unless the company's articles of association provide otherwise in case the company itself commences the case.

If the shareholders have a claim against the debtor, they are entitled to vote in their capacity as creditors, not as the shareholders.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Bankruptcy**

Yes, only in case the debtor proposes a debt composition.

**Liquidation**

No.

**Business reorganization**

Yes.

# Commencing the Process

## Who can commence?

**Bankruptcy**

Only creditors. There are no provisions allowing voluntary bankruptcy under Thai law.

**Liquidation**

Shareholders of a debtor through a shareholders' resolution

**Business reorganization**

Both creditors and debtors.

## Is shareholder's consent required to commence proceeding?

**Bankruptcy**

No.

**Liquidation**

Yes.

**Business reorganization**

Not in general, except only in cases that the articles of association of a debtor specify otherwise.

## Is there an ability to consolidate group estates?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No.

## Is there any court involvement?

**Bankruptcy**

Yes.

**Liquidation**

It depends on whether the debtor's total assets can satisfy all debts. If yes, there will be no court involvement. If no, a liquidator has to apply for bankruptcy with the Bankruptcy Court.

**Business reorganization**

Yes.

## Who manages the debtor?

**Bankruptcy**

Once the Bankruptcy Court grants the absolute receivership order, the Official Receiver will take control and manage the debtor's assets and business.

**Liquidation**

The liquidator can be a director unless stipulated otherwise by the company's articles of association.

**Business reorganization**

Once the Bankruptcy Court grants the business reorganization order and appoints the planner, the planner has managerial power to operate the debtor's business. The planner can be (i) a licensed planner, (ii) the debtor, or (iii) a current director of the debtor.

After the business reorganization plan is approved, the plan administrator takes control of and operates the debtor's business and implements the plan.

## What is level of disclosure of process to voting creditors?

**Bankruptcy**

The bankruptcy process will be announced to the public only after an absolute receivership order is issued. The official receiver is required to publish the absolute receivership order in the Royal Gazette and in one newspaper publication to urge all creditors to submit an application for debt repayment. The official receiver will notify all creditors, who submitted an application for debt repayment, of all the creditors' meetings in advance.

**Liquidation**

Not applicable.

**Business reorganization**

The business reorganization process will be announced to the public through a newspaper publication once the Bankruptcy Court accepts the petition for further consideration. Moreover, the Bankruptcy Court will also send a notice informing of such petition to all creditors known to the debtor. If the Bankruptcy Court grants the business reorganization order, the official receiver will publish such order in the Royal Gazette and a newspaper publication, and will also send a notice to all creditors to urge them to file an application for debt repayment. The official receiver will notify all creditors, who submitted an application for debt repayment, of all the creditors' meetings and court hearings in advance.

Once the business reorganization is implemented by the plan administrator, the plan administrator must file the quarterly report on the plan implementation to the Official Receiver.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Bankruptcy**

Certain government authorities are excluded. If they are in financial difficulty, the Ministry of Finance has to determine an approach to resolve said problem.

**Liquidation**

Liquidation only applies to a juristic person established under commercial laws.

**Business reorganization**

Certain government authorities are excluded. If they are in financial difficulty, the Ministry of Finance has to determine an approach to resolve said problem.

## How long does it generally take for a creditor to commence the procedure?

**Bankruptcy**

Six to twelve months from the date of filing for obtaining the absolute receivership order depending on the court's schedule and the debtor's defense

**Liquidation**

Three to twelve months after the shareholders' resolution to dissolve a debtor, depending on the assets realization and the complications of the obligation owed to the creditors

**Business reorganization**

Six to twelve months from the date of filing for obtaining the business reorganization order depending on the court's schedule and the objection to the petition for the debtor's business reorganization, for which a trial may be required.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No, except where the debtor itself is appointed as the planner, the incumbent management would still control the business and prepare the business reorganization plan under the supervision of the Official Receiver and the Bankruptcy Court.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Bankruptcy**

There is no stay or moratorium regime during the trial period, whereby the court will consider whether the absolute receivership order should be issued.

**Liquidation**

No.

**Business reorganization**

The automatic stay will be in effect immediately when the court accepts the business reorganization petition for further consideration. The automatic stay will remain until the business reorganization process comes to an end by the court's order. The automatic stay applies only in Thai jurisdiction.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

If the debt is incurred by the planner, the plan administrator, or the Official Receiver, such debt will have priority over other unsecured creditors. However, such priority will not affect the right of a secured creditor to first receive the repayment of debt from the proceeds generated from the disposal of its secured assets.

## Can procedure be used to implement a debt-to-equity swap?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

Yes, in accordance with the terms and conditions under the business reorganization plan approved by the Bankruptcy Court.

## Are third party releases available?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No.

## Are the proceedings recognised abroad?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No.

## Has the UNCITRAL Model Law been adopted?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No.

## Can a debtor continue to carry on business during insolvency proceedings?

**Bankruptcy**

Once the absolute receivership order is issued, all business operations will cease. Exceptions will be made for any activity that is necessary to continue because of its nature for a smoother close-down. In such exceptional case, the Official Receiver, upon the approval of the creditors at the creditors' meeting, can continue such activity for the purpose of a smoother close-down or cessation.

**Liquidation**

No. The company is already dissolved, so there will be no business operation. The company is deemed to still be in existence only for the purpose of liquidation, not for usual operations.

**Business reorganization**

The debtor can operate its business as long as it is a normal business operation. The business will be operated by a temporary administrator, a planner, or a plan administrator, depending on the stage of the case.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Bankruptcy**

The Bankruptcy Act criminalizes incurring of debt before an absolute receivership order is issued that does not have reasonable ground to justify that it would be able to repay such debt.

**Liquidation**

No.

**Business reorganization**

No.

## What is the order of priority of claims?

**Bankruptcy**

Secured creditors will receive repayment of not less than the value of its security and will have a right to receive the proceeds from the realization of secured assets (if any) before other creditors.

For unsecured claims, the following sequence will be applied for the distribution of assets among creditors:

(1) Expenses incurred in the administration of the deceased debtor's estate

(2) Expenses incurred by the Official Receiver in the management of the debtor's property

(3) Expenses from the deceased debtor's funeral according to their financial status

(4) Fees for the collection of property

(5) Fees incurred by the plaintiff (the creditor) and lawyers' fees as determined by the court or the Official Receiver

(6) Taxes and duties due within six months prior to the absolute receivership order and money that employees are entitled to receive prior to the receivership order in return for the service performed for the employer (the debtor) in accordance with section 257 of the Civil and Commercial Code and the law on labor protection

(7) Other debts

All unsecured claims are settled on a pro-rata basis.

**Liquidation**

The liquidator should settle all debts in full. Otherwise, the liquidation process will turn into a bankruptcy process.

**Business reorganization**

Secured creditors will receive repayment of not less than the value of its security and will have a right to receive the proceeds from the realization of secured assets (if any).

Unsecured creditors will be repaid under the terms and conditions of the business reorganization plan, and the priority scheme under the bankruptcy will also apply.

## Do pension liabilities have any priority over other unsecured claims?

**Bankruptcy**

No.

**Liquidation**

No.

**Business reorganization**

No.

## Is it possible to challenge prior transactions?

**Bankruptcy**

Yes. Previous transactions can be challenged, as follows*:*

(i) **Preferential Transaction**: Any transaction undertaken within three months before the filing of the business reorganization petition can be revoked if they place a creditor in a more advantageous position than other creditors (or so-called "preferential transaction"). The period of three months can be extended to one year if a creditor receiving such preferential treatment is connected to the debtor, e.g., a director or a shareholder of the debtor.

(ii) **Fraudulent Transaction**: Any transaction that the debtor undertakes with the knowledge that such an act will prejudice its creditors. This will not apply if the person enriched by such transaction was not aware of the fact that, at the time the transaction took place, the transaction provided was prejudicial to the creditors. However, in the case of a gratuitous transaction, the knowledge on the part of the debtor alone is sufficient. The revocation must be filed with the court within one year after the preferential transaction is known to the planner/plan administrator and, in any event, no later than ten years from the date of the transaction.

(iii) **Executory Contract**: Within two months from the date of the court's order approving a reorganization plan, a plan administrator is entitled to refuse any rights under any transaction that would create more burden than a benefit for the debtor in pursuant to the plan.

**Liquidation**

No.

**Business reorganization**

It is the same as described in bankruptcy proceedings.

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