

Thailand

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Prior to the Asian financial crisis there was little use of Thailand's Bankruptcy Act, which was enacted in 1940 and provided only for bankruptcy (liquidation) proceedings, a process which to date remains inefficient. With the official figures of the level of reported non-performing loans peaking at almost 50 per cent of total outstanding credit following the Asian financial crisis, in April 1998 amendments to the Bankruptcy Act were enacted to introduce a formal rehabilitation procedure. A specialised court was also established in 1999 to deal with bankruptcy and rehabilitation cases. Since 1998 there have been over 300 rehabilitation cases, although the number of new cases being filed has declined significantly in recent years.

Despite these legislative reforms, the pace of restructuring remained slow. To help facilitate restructuring, the Corporate Debt Restructuring Advisory Committee (CDRAC) was established by the Bank of Thailand and various associations. In March 1999 a number of financial institution creditors agreed to a framework devised by the CDRAC to be applied in informal workouts. The pace of restructuring significantly increased as a result and the official non-performing loan figures declined. There was also an intense period of informal corporate debt restructuring activity under the CDRAC process, although it has now ceased accepting new cases and restructuring activity has decreased.

Other techniques – such as the use of rapid dispositions agencies such as the Financial Sector Restructuring Authority, asset management companies including a national asset management company known as the Thai Asset Management Corporation and specialised mutual funds – have been used to deal with non-performing loans.

The official level of non-performing loans has declined materially. However, there are some questions about the quality of some restructuring deals, with a common criticism being that the so-called 'restructuring' is no more than an unworkable rescheduling of debts without any realistic expectation that the debtor will be able to comply with the rescheduled timetable for repayment, which often involves a large 'balloon' payment of a substantial amount of the principal in the final year of the term. Some restructuring deals have already failed and are being reworked.

A number of companies are undergoing rehabilitation and either are in the process of implementing their court-approved plans or have completed the rehabilitation process and been released from rehabilitation proceedings. The more successful rehabilitation cases have often involved situations where, prior to filing the rehabilitation petition, there has been general agreement between the main creditors and the debtor on the terms of the restructuring. However, there have been instances where tactics such as the filing of claims of questionable merit and the purchasing of debt by parties effectively controlled by the debtor or shareholders have skewed the voting on the approval of plans. The rehabilitation process has become a quasi debtor-in-possession system due to the licensing requirements, practical difficulties and risks in appointing independent planners to manage the

rehabilitation. In some rehabilitations, lengthy and multiple litigation cases have been common.

1. Legal framework and the effectiveness of court process/legal remedies

1.1 Describe the nature and effectiveness of the following:

(a) Debt recovery remedies where the creditor has no security

Most civil actions by unsecured creditors are commenced in the civil courts or the Intellectual Property and International Trade (IPIT) Court, which has exclusive jurisdiction, relevantly, over international trade involving foreign creditors.

In the civil courts, proceedings are conducted on an 'instalment hearing' basis, whereby hearings in a case are scheduled with significant intervals between hearing dates. Even where each party has only two or three witnesses, it is not uncommon for cases to run for two years or more before a judgment is obtained. This judgment may be appealed, and a further appeal to the Supreme Court is also possible. Proceedings in the IPIT Court are generally subject to less delay and appeals are made directly to the Supreme Court

If the debtor does not pay in response to the judgment, the next step is to seek enforcement of the judgment. The plaintiff must help an execution officer to locate and seize assets and receivables of the debtor. The assets are then sold by public auction and the proceeds applied in payment of the debt owed to the plaintiff. However, the plaintiff will not necessarily receive the entire proceeds of assets sold or debts recovered, as other judgment creditors can apply to share in the monies. Enforcement can take many years and there is often little return.

(b) The enforcement of security

Land and machinery are the most common types of property over which mortgages may be granted. Ordinary civil proceedings must be commenced to obtain judgment ordering the enforcement of the mortgage. The mortgagee may ask the court for a judgment ordering that the mortgaged property be seized and sold by public auction, or for the mortgaged property to be foreclosed if interest has been outstanding for five years. The most common enforcement technique for mortgages is to obtain a judgment ordering seizure and sale by public

auction of the mortgaged property. This process normally takes one to two years.

A pledge is a relatively efficient form of security over movable property. Delivery of the pledged property to the pledgee is required, and in the case of pledges of shares the pledge should be noted in the share register of the company. Pledges can be enforced by public auction of the pledged property. Pledges can be enforced, without first having to obtain a court order, by public auction of the pledged property conducted by the pledgee's appointed auctioneer. Pledges, particularly over shares, are easily and quickly enforced.

Guarantees take the form of suretyship contracts whereby a guarantor agrees to pay a creditor or satisfy a debtor's obligations in case of the debtor's default. If the guarantor fails to pay, an ordinary civil action must be brought against the guarantor. Directors commonly provide guarantees of the company's debts, even for public listed companies. The enforcement of guarantees is generally not particularly successful, as asset tracing can be difficult.

Payment of a bill of exchange or promissory note may be guaranteed by an aval. Warehouse liens and other preferential rights are also possible.

Due in part to the inefficiencies in remedies available to creditors under the above security interests, it has become common for debtors actually to assign or transfer property to their creditors, effectively as security for repayment of the debts. As long as the assignment becomes unconditional in all respects before the debtor is placed into rehabilitation or bankruptcy, the creditor can deal with the property as its own.

A new secured transactions law has been proposed, although it has been dormant for many years. A draft of the law proposes a form of security over business enterprises.

(c) Corporate bankruptcy/liquidation processes

The bankruptcy of a company is achieved either through a special resolution of the company's shareholders to dissolve the company or through the commencement of bankruptcy proceedings by one or more creditors. In order to place a debtor into bankruptcy it is necessary to establish several matters, including that:

- the debtor is insolvent; and
- the petitioner's debt is not less than Bt1 million for individuals and Bt2 million for corporate debtors.

Where the petitioner is a secured creditor, it must satisfy the additional criteria and must state in its petition that it will either surrender or value its security.

As part of the dissolution process, the liquidators (usually one or more of the company directors) must prepare a balance sheet (and a profit and loss statement, if the debtor is a public company), which is then audited.

The courts apply the balance-sheet test of insolvency (ie, whether assets exceed liabilities). A number of presumptions of insolvency are set out in the Bankruptcy Act which assist the petitioning creditor in proving insolvency. There is a presumption of insolvency if, among other things, the petitioning creditor serves two notices of demand on the debtor at intervals of not less than 30 days requiring payment of amounts owed and the debtor fails to pay the debt. To rebut these presumptions, the debtor must present credible evidence of solvency.

If satisfied, the court will issue a final receiving order over the assets of the debtor and appoint the official receiver, whose duties are to administer and manage the business affairs and assets of the debtor.

Often, liquidators negotiate and compromise claims with creditors to ensure that the company remains solvent and may be liquidated without going through the procedure under the Bankruptcy Act.

Bankruptcy proceedings are handled by the Central Bankruptcy Court and administered by an official receiver under that court's supervision. The process of liquidating a debtor's assets and distributing the proceeds to creditors can be slow, and proceedings may take many years to finalise.

(d) Formal corporate rescue processes

In April 1998 Thailand introduced a formal corporate rescue procedure by inserting Chapter 3/1 into the Bankruptcy Act dealing with business reorganisations. The procedure is commonly referred to as 'rehabilitation'. Debtors, creditors or specific government agencies may petition the court for the rehabilitation of a corporate debtor if they can show that:

- the debtor is insolvent;
- the debtor has aggregate debts exceeding Bt10 million; and
- there are reasonable prospects of a successful rehabilitation.

Insolvency is considered on the same basis as in bankruptcy proceedings and is often hotly contested where an aggressive petition is filed by creditors without the debtor's consent. The decision of the Central Bankruptcy Court in the rehabilitation of Thai Petrochemicals Industry in March 2000 was widely misreported as indicating a shift to a cash-flow test of insolvency. Rather, the judgment appears to be an indication that the Central Bankruptcy Court will apply the balance-sheet test sensibly by valuing assets on a discounted cash-flow basis if credible valuation evidence is submitted to the court. The court has indicated that each case will be considered on its own facts. Subsequent judgments in other cases have seen the court accept evidence submitted by the debtor to prove that its assets exceed its liabilities, and therefore the court has determined that the company is not insolvent.

If the court orders rehabilitation of the debtor, a planner is appointed. The planner must prepare and submit the plan for creditor approval. This process normally takes three to five months. Creditors vote on the plan, which is then submitted to the court for approval. The term of the plan must not be more than five years, although the court can extend this period to a maximum of seven years.

The rehabilitation procedure is reasonably efficient, although there are loopholes and opportunities for those seeking merely delay. Uncertainties in the law can also result in lengthy litigation cases and unfair results.

(e) Informal corporate rescue processes

A corporate debtor will often agree the terms of a restructuring with its principal secured and unsecured creditors and then enter into separate arrangements with other unsecured creditors, such as trade creditors. These processes are conducted informally.

In 1998 a framework of principles known as the Bangkok Framework was formulated to provide guidelines for stakeholders in informal debt restructuring negotiations. The CDRAC was then established. In March 1999 the CDRAC issued a Debtor-Creditor Agreement and an Inter-creditor Agreement which were signed by a number of local and foreign financial institutions. These agreements are binding contracts that commit the signatories to follow a set framework to expedite debt restructurings. The agreements bind the creditors which signed up to the terms for all debtors that subsequently sign a debtor accession agreeing to be

bound by the Debtor-Creditor Agreement. The committee targeted debtors and asked them to sign a debtor accession. If the debtor refused, the participating creditors were bound to seek to place the debtor into bankruptcy or rehabilitation, or take legal proceedings against the debtor. However, these agreements have now expired and have not been renewed. The CDRAC is no longer accepting new cases.

1.2 What are the formal processes to effect a liquidation of the company's assets?

See section 1.1.

1.3 What is the effect on debt collection and the enforcement of security of:

(a) An adjudication of corporate bankruptcy/liquidation?

Once an absolute receivership order is made, creditors can no longer institute civil or bankruptcy proceedings against the company and must claim amounts owed through the formal claim filing process.

Secured creditors need not file claims for repayment in the bankruptcy. A secured creditor can stand outside the bankruptcy and simply enforce its security. Alternatively, it may choose to participate in the bankruptcy and may file a claim for repayment for the full amount of its debt if it surrenders its security. The secured creditor may also ask the official receiver to liquidate its security or redeem it at a valued price.

(b) The commencement of a formal corporate rescue process?

During rehabilitation, the debtor is provided with many protections intended to implement a standstill on enforcement actions. Any applications for its liquidation, dissolution or bankruptcy, civil complaints or arbitration applications that could affect its assets and enforcement actions by judgment creditors against its assets cannot proceed during this period.

No secured creditor may enforce its security unless the court orders otherwise. The court may grant permission for such enforcement if the creditor can show that the security it holds is not necessary for a successful rehabilitation of the debtor, or that the secured creditor is not sufficiently protected during the rehabilitation.

Owners of assets material to the business operations of the debtor (eg, leased equipment) may not repossess the assets without court permission.

The debtor cannot transfer assets or incur debts except in the ordinary course of business without court approval. Amounts owed by the company up to the day prior to the date of the court order for rehabilitation must be claimed through the formal claim filing process. The company (then under the control of the planner) cannot make payments in respect of these pre-rehabilitation amounts. Payments will be made pursuant to the creditor-approved and court-sanctioned rehabilitation plan.

(c) The initiation of an informal corporate rescue process?

The initiation of an informal corporate rescue does not prevent the collection of debts through the court process or the enforcement of security. While it is possible to implement a standstill agreement to contractually bind creditors in relation to these matters, such agreements are not common in Thailand.

No automatic stay is imposed on creditors by the CDRAC process. The Bangkok Framework (which is non-binding) envisages that creditors will not enforce their claims during restructuring negotiations. Separate standstill agreements may be agreed and often an informal standstill takes place during negotiations.

(d) The initiation of an insolvency or insolvency-related process under any special legislation?

The Thai Asset Management Corporation Act provides for the acquisition of non-performing loans held by Thai financial institutions and asset management corporations by the government-owned Thai Asset Management Corporation. The Thai Asset Management Corporation may, in certain circumstances, restructure a debtor's business. During the implementation period for a Thai Asset Management Corporation business restructuring, a stay on proceedings and other enforcement actions similar to those under rehabilitation proceedings applies to the debtor. This precludes creditors from obtaining a civil judgment or bankruptcy or rehabilitation order against a debtor, although it appears to be possible (and may be necessary) to initiate civil proceedings to protect against the expiry of a limitation period. A creditor is permitted to file a claim for debt

repayment with the Thai Asset Management Corporation-appointed plan administrator. The method of dealing with creditors' claims is not specified in the Thai Asset Management Corporation Act.

1.4 Are insolvency procedures involving a corporation incorporated in your jurisdiction recognised if they are started in another jurisdiction?

No. Insolvency proceedings must be commenced in Thailand.

1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential personal liability for continuing to trade? In practice, are any such provisions actually enforced?

The Bankruptcy Act does not specifically penalise directors and officers who allow a company to trade while insolvent. Directors may be liable under either the Civil and Commercial Code (for limited companies) or the Public Limited Companies Act (for public limited companies), where the company's financial difficulties arise due to breaches of the directors' duties. Certain criminal sanctions apply to breaches of specific provisions of Thai law and where there is fraudulent intent on the part of the directors. In practice, civil and criminal actions against directors are uncommon.

2. What are the advantages and disadvantages of triggering a formal procedure?

Whether the following are viewed as advantages or disadvantages will in some cases depend on whether they are looked at from the debtor's or creditors' perspective.

Advantages:

- The debtor is sheltered from actions that may adversely affect its business. Due to the stay the debtor can therefore carry on normal business operations.
- The formal rehabilitation process allows all creditors to be bound by the rehabilitation plan. Under an informal process, the principal difficulty is often the inability to bind all creditors to a plan.
- Under the formal rehabilitation process, a cramdown can be achieved. Approval of a restructuring plan requires a special resolution at a meeting of any one class of creditors and

approval by creditors holding at least 50 per cent of all claims allowed to vote on the plan. A special resolution is a resolution passed by a majority in number holding 75 per cent in value of the claims represented and voting at the meeting. Once the court approves the rehabilitation plan, the plan is then binding on all creditors that were entitled to file applications for debt repayment and other creditors that are entitled to receive payment under the rehabilitation provisions.

- All debt is bound, including contingent liabilities. When a company enters into restructuring negotiations, the full extent of its liabilities may not be reflected in its balance sheet, particularly its contingent liabilities. Under the formal rehabilitation process, the claims procedure crystallises all creditors' claims, including contingent liabilities. If a claim is not filed within the one-month deadline, the creditor may lose its rights to the repayment of debt.
- Under the rehabilitation provisions, there is a clearly defined timetable for the agreement of creditor claims, the preparation of a plan and its approval by the creditors and the court. A plan will normally be prepared and voted on by the creditors within five to eight months of the date of filing of a rehabilitation petition.
- There are a number of tax benefits in relation to restructurings under the provisions of the Bankruptcy Act. These benefits have been temporarily extended to restructurings under the CDRAC process completed on or before December 31 2005. It is uncertain whether this deadline will be extended further. The current tax benefits include exemptions from corporate income tax, value added tax, special business tax and a reduction in immovable property transfer fees.

Disadvantages:

- From the date of the rehabilitation order, the powers of the board of directors are suspended and responsibility for managing the debtor's affairs and safeguarding its assets passes to the planner, and then to the plan administrator once the plan has been approved by the court.
- Where an independent financial adviser is appointed as the planner and/or plan administrator, transaction costs – particularly professional financial advisory fees and legal fees – can be high, while such costs are not normally as high if the debtor (or a related

party) is appointed as the planner and/or plan administrator.

- The rehabilitation process may be delayed by creditors or shareholders that wish to disrupt the process, often to the detriment of the debtor's business. These delays also increase the cost of the process.

3. What are the practical options for out-of-court restructuring?

Out-of-court restructuring is available either under the CDRAC process, which is now largely completed, or within the framework of an informal voluntary restructuring. Informal voluntary restructuring requires the debtor's and creditors' cooperation in negotiating the plan and executing the required legal documentation. In most medium and large-scale restructuring cases, a consensus between the debtor and creditors is difficult to achieve. Negotiations may be difficult to conclude where creditors have varying security rights and inter-creditor issues are commonly difficult to resolve.

The increasing role of specialised distressed debt hedge funds has changed the dynamics in many informal restructurings of late. These funds can inject new monies into distressed businesses and often engage in substantial debt purchasing which can remove many of the inter-creditor issues in a restructuring. They are also focused on medium-term turnarounds of companies rather than short-term profits from taking hold-out positions, which characterised many of the 'vulture' funds seen a few years ago.

4. What is the effect on the management of a company of:

4.1 An adjudication of corporate bankruptcy/liquidation?

In bankruptcy, the official receiver takes control of the debtor's business and assets and the existing management will have no further powers unless the receiver instructs it to perform some work. The debtor and its management must provide information on oath to the official receiver and explain the cause of the debtor's insolvency. The debtor and management are also publicly examined in court.

4.2 The commencement of a formal corporate rescue process?

Upon the appointment of a planner, the assets and business operations of the debtor are placed under the control of the planner. Similarly, once a planner has been appointed all shareholders' rights, other than the right to receive dividends, are vested in the planner. Once a plan has been approved by creditors and the court, the administration of the plan will be overseen by a plan administrator who assumes all of the management powers over the debtor's business operations and assets that were previously held by the planner. Upon successful completion of the rehabilitation plan, the debtor will regain the authority to manage its business operations and assets and the shareholders will regain their full legal rights as shareholders. Management must provide information to the planner and can be examined before the court.

4.3 The initiation of an informal corporate rescue process?

The company's existing management is not normally affected by the initiation of an informal corporate rescue process. While the creditors could agree a change in management, it is not particularly common in informal rescues in Thailand. More commonly, an independent financial adviser is appointed to provide cash-flow monitoring services and periodically report to the creditors' steering committee.

4.4 The initiation of an insolvency or insolvency-related process under any special legislation?

Under the Thai Asset Management Corporation Act, once the Thai Asset Management Corporation's Executive Committee appoints the plan administrator for a business restructuring, the existing management's powers cease and the plan administrator is vested with full managerial authority. Company executives remain in office during the plan administration period, but have no power to bind the company or carry out any act on its behalf, and are not entitled to remuneration. The Thai Asset Management Corporation can appoint the company's existing management as the plan administrator (supervised by a plan supervisor), provided the debtor has cooperated with the Thai Asset Management Corporation and its executives have not acted in bad faith.

5. Roles of key players involved in the restructuring and insolvency process

5.1 Who is responsible for the ‘case management’ control and administration of a corporate bankruptcy/liquidation, a formal rescue or an informal rescue?

The official receiver and the Bankruptcy Court administer the bankruptcy.

In rehabilitation, the official receiver, via the Business Reorganisation Office, undertakes a case management role in all rehabilitations. It is also responsible for assessing the claims of creditors, convening creditors’ meetings and holding examinations, and has a number of other functions during the rehabilitation. Once creditors and the court approve a plan, a plan administrator is appointed to administer the plan.

In informal rescues, there is no independent person responsible for the control and administration of the rescue. Typically, the independent financial adviser (if one is appointed) would, in conjunction with the company, deal with any administrative steps involved in the rescue.

5.2 Who is responsible for the ‘case management’ control and administration of a case of corporate insolvency under any special legislation?

The Thai Asset Management Corporation – and in some cases the original lending institution or the debtor – is generally responsible for administrative aspects of cases under its jurisdiction.

5.3 Who is responsible for preparing the restructuring plan in a formal or informal rescue?

In rehabilitation proceedings, the planner is responsible for preparation of the plan, which must be submitted to the official receiver within three months of the announcement of the planner’s appointment in the *Government Gazette*. The court may grant two extensions of one month each.

In an informal rescue, it is typically the financial adviser, appointed either by the debtor or by the creditors’ steering committee, who prepares the plan.

5.4 Who is responsible for preparing the restructuring plan in a case of corporate insolvency under any special legislation?

In the case of a business restructuring under the Thai Asset Management Corporation Act, the Thai Asset Management Corporation’s Executive Committee will appoint the planner who prepares the plan.

6. What financial information is available to creditors in a corporate bankruptcy/liquidation, a formal rescue and an informal rescue?

All limited companies must file audited financial statements with the Ministry of Commerce each year within 120 days of the company’s financial year-end. Listed companies must also file quarterly financial statements with the Stock Exchange of Thailand, which must be reviewed by the company’s auditor prior to submission. These accounts are available for review by all creditors.

In a formal liquidation, the company must prepare a statement of affairs outlining the company’s assets and liabilities within seven days of an absolute receivership order. If the debtor is unable to provide such information, the official receiver does so on behalf of the debtor.

In a formal rehabilitation, the debtor must prepare financial information as at the date on which the court accepts the rehabilitation petition and submit such information to the planner within seven days of his appointment. The key financial information to be submitted to the planner includes:

- the debtor’s assets, liabilities and other obligations;
- assets used as collateral in favour of creditors;
- assets of third parties which are in its possession; and
- details of all of its creditors and debtors.

The plan must include details of the debtor’s assets, liabilities and other binding obligations as at the date of the rehabilitation order, as well as details of all creditors segregated into various classes.

The plan need not include detailed historical profit and loss accounts or financial projections, although the planner commonly provides this information to the major creditors. The planner will normally include financial projections when requested to do so by the creditors.

The plan and its related implementation documents usually include provisions for the

debtor to deliver to the major creditors regular financial information, such as:

- business plans;
- annual budgets (including profit and cash-flow forecasts) broken down by month;
- monthly and/or quarterly management accounts;
- audited financial statements; and
- other *ad hoc* information requested by the major creditors.

There is no requirement for the provision of financial information to creditors in an informal rescue. However, as the debtor is seeking voluntary concessions from some or all of the creditors, key creditors will typically demand extensive financial information prior to reaching any agreement on concessions. Information usually requested includes audited and management accounts, financial projections and asset valuations performed by independent appraisers.

The Thai Asset Management Corporation Act is silent on the provision of financial information to creditors, although the debtor may be required to provide its accounts to the plan administrator. In practice, the Thai Asset Management Corporation often requires the debtor to provide financial projections.

7. Financial issues

7.1 What are the main areas from which funding is generally utilised by companies undertaking either formal or informal restructuring?

In many restructuring cases, it is relatively difficult for debtors to gain access to new debt or equity funding to assist in expansion of capacity or for debt refinancing. Relevant factors for this include:

- the inability or reluctance of existing shareholders to contribute new equity;
- the reluctance of existing shareholders, who are also often management, to accept new investors into the business for fear of loss of management control;
- the perception that equity fundraising would be done at or near the bottom of the market;
- the lack of unpledged assets available to offer as security for new borrowing; and
- the reluctance of existing creditors to advance new funds, given the risk perceptions and a lack of clarity in the law in relation to super-priority lending.

Under many plans, unpledged assets are provided to existing financial creditors as security for old debt, creating difficulties in accessing new long-term debt financing, as there may be no assets available to offer as security. Also, even after a debt restructuring, the debtor's balance sheet will often carry an excessive amount of debt as creditors seek to minimise any permanent debt write-off or debt-to-equity conversion. In this environment, it is therefore not surprising that existing creditors are reluctant to advance new funds.

Where existing creditors advance new funds to companies undergoing restructuring, it is typically short-term lending to provide additional working capital in order to avoid an immediate cash crisis and enable the debtor to continue its business.

There have been a number of cases where equity has been injected from new shareholders or investors such as hedge funds.

Many plans contain future requirements placed on the debtor either to raise new equity or to refinance part or all of the outstanding debt. It is therefore likely that the final resolution of many formal and informal rehabilitation plans will be achieved by increased activity in both the equity raising and refinancing markets, or by breach of the plan and second restructuring.

7.2 In what order are creditors paid in a corporate bankruptcy/liquidation?

In a corporate bankruptcy, creditors are paid in the following order:

- expenses of the official receiver in managing the company's assets;
- official fees incurred in collecting the company's assets;
- fees of the petitioning creditor and counsel's fees as the court or the official receiver may decide;
- taxes due for payment in the six months prior to the receivership order and wages, overtime pay, holiday pay and severance payments which employees are entitled to receive for the period of four months prior to the receivership order, subject to a maximum of Bt100,000 per employee; and
- any other debts.

Where the funds available for distribution to creditors are insufficient to pay the debts of any category, the debts are paid on a *pro rata* basis.

Secured creditors may have recourse to their security and are not required to file claims in the

bankruptcy proceedings, although subject to certain conditions they may file claims in the bankruptcy proceedings.

7.3 Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?

Under rehabilitation proceedings, the planner, plan administrator or official receiver may request the court to set aside:

- a fraudulent act under Section 237 of the Civil and Commercial Code. If the act occurred in the year prior to filing of the rehabilitation petition or thereafter, was gratuitous or occurred at less than appropriate value, it will be presumed to be prejudicial to creditors; or
- a transfer of an asset or other act by the debtor in the three months prior to filing of the rehabilitation petition or thereafter, with the intention to provide a preference to any creditor. The relevant time period is extended to one year for acts involving insiders, as defined in the Bankruptcy Act.

The plan administrator also has the power, within two months of being informed of his appointment, to disclaim assets of the debtor or rights under contracts made by the debtor where the terms are more onerous than the benefits received by the debtor as prescribed by the plan.

In bankruptcy proceedings, the official receiver has similar powers to those set out in the bullet points above. The official receiver also has the right to disclaim assets of the debtor and rights under contracts; however, the relevant period is three months from the date on which the official receiver learns of the contractual terms.

Outside of formal rehabilitation and bankruptcy proceedings, a creditor may take action under Section 237 of the Civil and Commercial Code to set aside any act done by a debtor with the knowledge that it would prejudice creditors. Knowledge on the part of the person enriched by the debtor's act is also necessary, unless the act involved no consideration. Cancellation of the preferential act cannot affect the right of a third party acquired in good faith, unless the right is acquired for no consideration.

7.4 What is the position of both unsecured and secured creditors that vote against, do not agree with or do not consent to either a formal or an informal rescue plan?

Under the Bankruptcy Act, secured and unsecured creditors have the same voting rights, although they are normally classified into different classes for voting purposes. Where a creditor votes against a plan that has been approved by the requisite number of creditors, that creditor may object to the court at the time the court considers whether to approve the plan. If the objection is unsuccessful and the court approves the plan, the plan is then binding on all creditors that were entitled to file applications for debt repayment and other creditors that are entitled to receive payment under the rehabilitation provisions.

In an informal rescue, dissenting creditors are not bound by the terms of a plan approved by the other creditors and are entitled to enforce any security rights or commence civil proceedings against the debtor to recover amounts owed. The debtor and its creditors may agree on a compromise to avoid legal proceedings.

7.5 What actions can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?

In rehabilitation proceedings, the creditors may, in certain circumstances, replace either the planner or the plan administrator. A replacement planner or plan administrator is normally appointed by the court following a resolution passed at a creditors' meeting in accordance with the voting requirements under the Bankruptcy Act.

A creditor may also file an appeal against an official receiver's order in relation to the debt owed to that creditor. Appeals against court orders made in relation to the rehabilitation proceedings are also possible.

In relation to bankruptcy proceedings, creditors (as well as the debtor and third parties) that suffer loss as a result of a decision of the official receiver may file a motion to the court for a review of that decision.

8 .General

8.1 Can the insolvency regime be described as systematic and efficient for:

(a) The liquidation of businesses incapable of being restructured?

No – both the voluntary and involuntary liquidation procedures are typically lengthy and inefficient.

(b) The restructuring of debt?

The rehabilitation process is fairly systematic but often inefficient due to delays caused by objections and other tactics used by both debtors and creditors.

8.2 What are the biggest legal and non-legal impediments to the systematic and efficient liquidation of business and restructuring of debt?

The liquidation process is hampered by inefficient identification and sale of assets and in the maximisation of recovery, as well as delays in the distribution of proceeds.

The restructuring process is hampered by:

- late entry into the process;
- insufficient information provided to creditors;
- a lack of new funding;
- uncertainties as to the scope and meaning of the law;
- lengthy court battles; and
- improper debt claims.

8.3 Has the insolvency regime been reformed in the last two years?

There have been no substantial changes to the rehabilitation legislation, except for the removal of certain conditions for appeal to judgments and reform of criminal offences.

Discussion has been ongoing for a number of years about a substantial reform of the Bankruptcy Act, with varying views on the approach suggested for amendment.

8.4 Are there any other legal or non-legal changes in the last two years that have impacted on the operation of the insolvency law regime?

A number of high-profile legal challenges and court decisions have clarified aspects of the law or

exposed deficiencies in it. These will shape the operation of the law in practice going forward. These cases have involved:

- the appeal process;
- the role of the debtor's executives;
- the constitutional validity of the rehabilitation law;
- the pre-emption rights of shareholders;
- the implementation of debt-for-equity swaps;
- the roles and duties of the planner; and
- the difficulties in the termination of rehabilitation plans.

The government also appointed a national legal development committee to review the existing law and consider whether it should be amended. Proposals that have been made include the separation of commercial law from the civil law, the reform of the IPIT Court, and the reform of the bankruptcy law and the law governing the misuse of cheques.

8.5 Is statistical information on insolvency cases and corporate insolvency published? If so, how? Is it easy and freely accessible?

Statistical information on rehabilitation cases is posted on www.led.go.th and is freely accessible. The information published is general information on each case, such as:

- the name of the debtor;
- the date of entry into rehabilitation;
- the result of the creditors' meeting; and
- the date on which the court approved the plan or the rehabilitation was cancelled.

Monthly statistical information regarding court orders for receivership against the debtor is also available at www.led.go.th and www.bckk.or.th. Access is free. Details of cases which have undergone rehabilitation and receivership are also published by royal decree. The information is generally provided in the Thai language.

8.6 What is the most urgent reform required to facilitate the systematic and efficient handling of corporate insolvency cases (formal and informal)?

The following recommendations are framed in terms of what is considered realistic and feasible within the existing environment:

- an efficient and effective secured transaction law and enforcement system;
- an efficient and effective liquidation system for

unviable businesses, including improvement of the process for realising assets and distributing proceeds;

- a reformed rehabilitation process containing greater protections for creditors;
- clarification of numerous uncertainties in the scope and meaning of the rehabilitation law;
- protection for independent planners and a workable system for management of rehabilitation cases;
- reform of the court system, including the rotation system for judges, particularly in the Bankruptcy Court, and the efficiency and predictability of courts, particularly the civil courts;
- a binding framework for out-of-court workouts similar to that which existed under the CDRAC agreements; and
- greater protection for new money lenders.