Legal issues: Thailand

Siam Premier *in association with* **Allens Arthur Robinson**

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Prior to the Asian economic crisis, there had been little use of Thailand's Bankruptcy Act which was enacted in 1940 and provided only for bankruptcy (liquidation) proceedings. Following the Asian economic crisis, the level of reported non-performing loans peaked at approximately 47 percent of the total outstanding credit (according to official figures). The government determined that a rehabilitation procedure should be established to promote economic recovery. In April 1998 amendments to the Bankruptcy Act were enacted to introduce a formal rehabilitation procedure. Further amendments were introduced in 1999 to enhance the efficiency of the bankruptcy and rehabilitations procedures. A specialized Bankruptcy Court was also established in April 1999.

Despite these legislative reforms, it was perceived that the pace of restructuring remained slow. Most restructuring negotiations were taking place informally outside the court system and were often progressing slowly. To help facilitate restructuring, a committee known as 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 CDRAC to be applied in informal workouts. The pace of restructuring significantly increased as a result and the official non-performing loan figures have declined.

However, questions exist regarding the quality of some restructuring deals. A common criticism is 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. Some restructuring deals have already failed and are being reworked.

Despite these developments, there have been some successful restructures. These have most commonly occurred where the debtor has been co-operative in the process and where an attempt has been made at operational restructuring as well as realistic financial restructuring with the assistance of independent professional advisers.

1 Describe the nature and the effectiveness of the following processes:

a) Civil unsecured debt collection remedies.

Most civil actions are commenced in the Civil Courts or the Intellectual Property and International Trade Court, which has exclusive jurisdiction, relevantly, over international trade.

Proceedings are conducted on a "installment hearing basis" whereby hearings in a case are scheduled with significant intervals between hearing dates. Even in cases 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 received. The judgment of the court may be appealed. A further appeal to the Supreme Court is possible once a judgment has been obtained. If the debtor does not pay in response to the judgment, the next step is to seek enforcement of the judgment. The plaintiff must assist an execution officer from the Legal Execution Department of the Ministry of Justice 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 asset sales or debts recovered as other judgment creditors can apply to share in the moneys.

b) Secured property enforcement remedies.

The Civil and Commercial Code ("the CCC") recognizes a number of security interests including mortgages, pledges, guarantees and avals which are each discussed below. The CCC also recognizes other forms of security interests, such as warehouse liens and preferential rights.

Mortgages

Land and machinery are the most common types of property over which mortgages may be granted. Machinery mortgages are often cumbersome, as the legislation requires each item of machinery to be registered before a mortgage can be registered over the machinery.

Ordinary civil proceedings in court must be commenced to obtain judgment ordering the enforcement of the mortgage. The mortgagee may ask the court for a judgment ordering the mortgaged property to 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 1-2 years. In the case of land, sales by public auction often do not proceed because the execution officer will not allow the property to be sold unless the bids at the auction are greater than the historical land valuation at the land department. Following the Asian economic crisis, the historical land valuation is often significantly higher than any bidder is prepared to offer in Thailand's presently depressed real estate market.

Pledges

A pledge is a relatively efficient form of security over movable property. Delivery of the pledged property to the pledgee is required. In the case of pledges of shares, the pledge should be noted in the share register of the company. Pledges can be enforced, without having to first 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

Guarantees take the form of suretyship contracts whereby a guarantor agrees to pay a creditor or satisfy a debtor's obligations in the case of the debtor's default. If the guarantor fails to pay, an ordinary civil action must be brought against the guarantor. It is common for directors to provide guarantees of the company's debts, even for public listed companies.

Avals

Payment of a bill of exchange or promissory note may be guaranteed by an aval. The giver of the aval writes the words "Good as Aval" on the bill.

Assignments

Due in part to the inefficiencies in remedies available to creditors under the above security interests, it has become common for debtors to actually assign or transfer property to their creditors, effectively, as security for repayment of their debts. So 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. A draft of the law proposes a form of security over business enterprises.

c) Any special debt collection or secured property remedies available to banking sector creditors.

There are no such special rememdies available to banking sector creditors.

d) Corporate bankruptcy/liquidation processes that are available to corporate debtors and creditors.

Under the bankruptcy procedure, the assets of the bankrupt person or company are liquidated and the proceeds from such liquidation are shared between the creditors. The assets will be insufficient to cover the liabilities of the bankrupt person, and therefore, the creditors will be required to share on a *pro rata* basis.

To place a debtor into bankruptcy it is necessary to establish, among other matters, that the debtor is insolvent and that the petitioner's debt is not less than Baht 1,000,000 for individuals and Baht 2,000,000 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.

The courts apply a balance sheet test of insolvency (i.e. whether assets exceed liabilities). A number of presumptions of insolvency are set out in the Bankruptcy Act that assist the petitioning creditor to prove insolvency. To rebut these presumptions the debtor must introduce credible evidence of solvency.

If satisfied, the court will issue a final receiving order over the assets of the debtor and will appoint the official receiver, whose duties are to administer and manage the business affairs and assets of the debtor. All creditors, including the petitioner, are then required to file a claim with the official receiver for the settlement of the debts owed to them.

e) Formal corporate rescue processes that are available to corporate debtors and creditors.

In April 1998 Thailand introduced a formal corporate rescue procedure by inserting Chapter 3/1 into the Bankruptcy Act dealing with business reorganizations. 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, has aggregate debts exceeding Baht 10 million and that there are reasonable prospects of a successful rehabilitation.

Insolvency is considered on the same basis as in the bankruptcy proceedings and can often be hotly contested when an aggressive petition is filed by creditors without the debtor's consent. The decision of the Central Bankruptcy Court in the rehabilitation case 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 fact. 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 a plan for creditor approval. This process normally takes 3-5 months. Creditors vote on the plan and then it is 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 has since its introduction become increasingly more popular and now represents a significant alternative remedy available to creditors and debtors.

f) Informal corporate rescue processes.

In 1998 a framework of principles known as the Bangkok Framework was formulated to provide guidelines for stakeholders in informal debt restructuring negotiations. CDRAC was then established by a number of trade, banking and finance company associations in conjunction with the Central Bank of Thailand ("the BOT") to help facilitate corporate debt restructurings. In March 1999 CDRAC issued a Debtor-Creditor Agreement and an Inter-Creditor Agreement that 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 who signed up to the terms for all debtors that subsequently sign a Debtor Accession agreeing to be bound by the Debtor-Creditor Agreement. CDRAC targets debtors and asks them to sign a Debtor Accession. If the debtor refuses, the participating creditors are bound to seek to place the debtor into bankruptcy, rehabilitation or take legal proceedings against the debtor.

The agreements establish a process to disclose information, prepare and approve a restructuring plan, mediate debtor-creditor disputes and arbitrate inter-creditor disputes. The agreements were unconditionally binding until 31 December 2000. Now, creditors may elect not to be bound by the agreements by giving 30 days notice in writing.

Creditors who breach the agreement face penalties and fines imposed by the BOT. Few fines have, in fact, been imposed to date.

The CDRAC process begins with a first meeting of creditors to prepare a workout schedule and appoint a "Lead Institution" that helps to co-ordinate the process. A steering committee of creditors may be appointed and, if so, the Lead Institution is the chairman of the steering committee.

The process has, in practice, been very time compliance focused with often inadequate attention paid to the quality or feasibility of restructuring deals.

g) Any other corporate insolvency, or insolvency-related, processes that are available under special legislation.

There are no other insolvency related processes under special legislation.

2 What is the effect upon debt enforcement and secured property enforcement processes of:

a) An adjudication of corporate bankruptcy/liquidation?

The official receiver is joined in all proceedings relating to the debtor's property. The court may make orders as appropriate including for the termination of those proceedings. However, pending a final bankruptcy order, a creditor may bring a civil action for repayment.

The final order for control freezes further claims by creditors to the courts. From the date of the final order, claims may be made under the Bankruptcy Act only.

Orders to enforce judgments are suspended unless completed before the bankruptcy order. Enforcement of these orders is deemed to be complete once the period provided for other creditors to apply for a share of assets under the civil law has expired. These provisions do not affect the rights of secured creditors to enforce their securities.

Secured creditors need not file claims for repayment in the bankruptcy. The secured creditor can stand outside the bankruptcy and simply enforce its security. Alternatively, a secured creditor 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, and if so, it may claim for the difference between the sale price obtained by the receiver and its debt. Alternatively, the secured creditor may have its security valued and claim for the difference between its debt and the appraised value. The official receiver may redeem the property at such valuation.

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 securities 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. Secured creditors do not forfeit their security during the rehabilitation and maintain priority rights to their security.

Owners of assets material to the business operations of the debtor (for example, 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.

c) The initiation of an informal corporate rescue process?

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. However, there is no binding standstill imposed under the CDRAC process. Separate standstill agreements may be agreed and often an informal standstill takes place during negotiations.

Creditors have agreed in the Debtor-Creditor Agreement to temporarily suspend the requirement for the debtor to pay default interest from the date the debtor signs the Debtor Accession.

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

There is no such special legislation that applies under these circumstances.

3 What is the effect on the management of a corporation of:

a) 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 not have any further powers unless the receiver instructs them 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.

b) 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. Management must provide information to the planner and can be examined before the court.

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 debtor's shareholders will regain their full legal rights as shareholders.

c) The initiation of an informal corporate rescue process?

While a company is undergoing a restructuring under the CDRAC process, the existing management of the company retains control of the company and shareholder rights are not affected.

However, under the Debtor-Creditor Agreement the debtor agrees not to incur any expenses or dispose of assets outside the ordinary course of its business. A number of other restrictions are imposed under this agreement.

Management is required to provide information to creditors subject to confidentiality obligations.

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

There is no such special legislation that applies under these circumstances.

4 Who is responsible for "case management" control and administration of:

a) A corporate bankruptcy/liquidation?

The official receiver and the Bankruptcy Court administer the bankruptcy. The bankruptcy process is viewed as an inefficient process as it can often take numerous years for the official receiver to liquidate the debtor's property and make distributions to creditors.

b) A formal rescue?

In rehabilitation the planner is responsible for the preparation of the plan and the management of the company. Once creditors and the court approve a plan, a plan administrator is appointed to administer the plan.

The official receiver, via the Business Reorganisation Office, a department of the Legal Execution Department of the Ministry of Justice, undertakes a case management role in all rehabilitations. It is also responsible for assessing claims of creditors, convening meetings of creditors, holding examinations and has a number of other functions during the rehabilitation.

c) An informal rescue?

While a company is subject to the CDRAC process, the existing management remains in control of the company. The company is subject to the restrictions described in Section 3c above.

A committee of CDRAC monitors the progress of the restructuring and considers requests for extensions of deadlines and amendments to the workout schedule for the restructuring. Representatives from CDRAC attend some creditor meetings.

In practice, the Lead Institution together with financial and legal advisers case manage the restructuring.

d) A case of corporate insolvency under any special legislation?

There is no such special legislation that applies under these circumstances.

5 Who has the responsibility for the preparation of the plan of rescue under:

a) A formal rescue?

From the date that its appointment is announced in the Government Gazette, the planner has three months to prepare a plan and present copies to the official receiver and the creditors. With court approval this period may be extended twice for up to one month each time.

Once the plan has been submitted, the official receiver must call a meeting of all creditors to consider approval of the plan. Revisions to the plan may be made and a new planner appointed if the planner does not agree to amendments approved by creditors holding a majority of the debt.

If the creditors' meeting fails to approve a plan, the court may do either of the following:

- Revoke the order granting approval to the rehabilitation, in which case control of the company will be handed back to the previous management.
- If a bankruptcy petition was filed prior to the rehabilitation, place the debtor into bankruptcy.

b) An informal rescue?

Under the CDRAC process, the debtor must formulate the restructuring plan and submit the workout schedule within the specified time frame. This should be done within three months of the first meeting of creditors, extendable for up to two months with the consent of CDRAC.

In practice, the debtor often consults with the legal and financial advisers and creditors to prepare a plan acceptable to all. Often the advisers are instructed to draft the plan. Lengthy negotiations between creditors in relation to inter-creditor issues and between a steering committee of creditors and the debtor take place prior to the submission of the plan by the debtor.

Creditors may propose amendments to the plan and a meeting is held to vote on the plan. If the plan does not receive the requisite level of creditor approval, dissenting creditors may submit an alternative plan. In practice, the debtor will often revise the plan to take into consideration requests from creditors to which the debtor is prepared to agree. A second meeting is held where creditors vote on the debtor's revised plan and submit any alternative plan.

6 How are the different classes of creditors treated in relation to:

a) A corporate bankruptcy/liquidation?

The debtor may propose a composition of the debtor's debts in writing to the official receiver. A special resolution (meaning a resolution by a majority of creditors whose debts equal at least 75 percent of the total debts of creditors present and voting) is required to approve the composition together with approval of the court.

Creditors are not divided into classes for voting or other purposes. Other than in relation to compositions, creditor voting does not play a significant role in the bankruptcy process.

b) A formal rescue?

In rehabilitation creditors are divided into classes by the planner and are specified as such in the plan. The classes are as follows:

- Each secured creditor holding secured debt of not less than 15 percent of the debtor's total debts shall each be classed as a group.
- Other secured creditors.
- Unsecured creditors may be classified into several groups where their claims are similar.
- Subordinated creditors.

Creditors in the same class must be treated equally unless they consent otherwise.

A rehabilitation plan must be approved by a special resolution (see above) of all classes of creditors or at least one class of creditors, provided that creditors (in any class) holding at least 50 percent of the total debts of creditors present and voting voted to approve the plan. However, some creditors are deemed to have voted for the plan, such as creditors who are to be paid in full within 15 days and subordinated creditors.

For voting purposes, foreign currency debts are converted into Baht.

If creditors approve the plan, the court will consider whether or not the plan satisfies a number of requirements, such as whether it provides for a better return to creditors than they would receive in bankruptcy.

c) An informal rescue?

At the first and second meetings of creditors under the CDRAC process, approval of the plan requires a special resolution (75 percent in value and more than 50 percent in number of participating creditors). Once approved, the plan is binding on all participating creditors.

However, if at the second meeting a special resolution is not passed but at least 50 percent in value and in number of creditors approve of the proposed plan, the plan is submitted to the Executive Decision Panel of CDRAC for arbitration to resolve any inter-creditor issues.

If, at the second meeting less than 50 percent in number and value of creditors vote for the proposed plan, creditors are compelled to commence the bankruptcy, rehabilitation or other legal proceedings against the debtor.

There is no system for classifying creditors into classes.

d) A case of corporate insolvency under any special legislation?

No such special legislation applies under these circumstances.

7 What is the position of both unsecured and secured creditors who vote against, do not agree with, or do not consent to, a plan of rescue in relation to:

a) A formal rescue?

At the court hearing at which the court considers whether to approve the plan, creditors who did not vote to approve the plan may raise objections to the plan. If after considering the objections, the court approves the plan, it binds all creditors.

b) An informal rescue?

Any creditor whose debt is greater than Baht 1 Billion may elect not to be bound by a decision of the Executive Decision Panel to approve a plan and could then take any action available to it.

In all other cases, once a plan is approved in the CDRAC process, all participating creditors are bound by it and must implement the plan, including, if necessary, by filing a rehabilitation petition and seeking to have a plan approved under the rehabilitation procedure.

c) A case of corporate insolvency under any special legislation?

No such special legislation applies under these circumstances.

8 In relation to the need for an insolvent corporation to have urgent working capital funding, what difficulties are encountered in the provision of such funding in relation to:

Under the Bankruptcy Act, a creditor cannot file a claim for repayment if the creditor allowed the debtor to create the debt at a time when the creditor knew that the debtor was insolvent. However, an exception has been introduced to allow the creditor to claim if the creditor allowed the debt to be created so that the debtor could continue its operations. This exception was introduced in 1999 and removed a significant disincentive to creditors in providing working capital to distressed debtors.

In practice, it remains difficult for many debtors in financial difficulty to obtain working capital.

a) A formal rescue?

Once in rehabilitation, the company and the planner cannot incur debts except where it is essential to enable the debtor to carry on business as normal, unless otherwise ordered by the court. Due to the imprecise nature of the concepts involved here, a prudent planner will seek court approval before obtaining any new working capital.

The law does provide that any creditor who provides finance to the planner or plan administrator need not submit a claim for repayment in the rehabilitation to be entitled to repayment. The law also provides a priority to debts incurred by the planner and plan administrator if the debtor is placed into bankruptcy following the rehabilitation.

b) An informal rescue?

There is no priority extended to creditors who provide working capital or other facilities in a CDRAC restructuring or any other out-of-court restructuring.

c) A case of corporate insolvency under any special legislation?

There is no such special legislation that applies under these circumstances.

9 Briefly describe the relevant provisions relating to the setting aside of antecedent and fraudulent transactions in relation to:

a) A corporate banktuptcy/liquidation.

In bankruptcy, antecedent transactions, such as preferences entered into within the three months (one year for insiders of the debtor, i.e. related parties) and fraudulent transactions entered into within one year before the application for adjudication of bankruptcy can be cancelled by the official receiver. These types of actions have been rare to date.

b) A formal rescue.

In rehabilitation a planner, plan administrator or the official receiver may ask the court to set aside a fraudulent transaction as per above, including any preferences. The time periods are the same as in bankruptcy.

In an informal rescue, while the CDRAC agreements do specify that the debtor shall not make preferential payments to creditors, there is no power afforded to set aside such payments aside from the general CCC provisions under which fraudulent transactions and preferences can be attacked.

CDRAC creditors are required to act in good faith in accordance with the provisions of the agreements. In theory, sanctions from the Bank of Thailand and fines could be levied if it could be said that in receiving or procuring a preferential payment from a debtor the creditor was not acting in good faith.

c) A case of corporate insolvency under any special legislation.
No such special legislation applies under these circumstances.

10 Are there any provisions of law that might operate to invalidate a secured property transaction in relation to:

a) A corporate bankruptcy/liquidation?
b) A formal rescue?
c) A case of corporate insolvency under any special legislation?
The provisions discussed in Section 9 above apply to secured property transactions.

11 Describe the difficulties that are encountered in endeavoring to administer cases of corporate bankruptcy/liquidation and formal corporate rescue that involve property and business interests located in more than one jurisdiction.

A number of problems can be encountered in administrating bankruptcy and rehabilitation cases that involve property or business interests located outside Thailand. Foreign judgments will not be enforced by a Thai Court but may, at the discretion of the Thai Court, be admitted as evidence. However, foreign arbitration awards are recognized. Foreign law will be recognized as the governing law of an agreement only to the extent that the foreign law is proved to the satisfaction of the Thai Court and is not contrary to the public order and good morals of Thailand.

Bankruptcy proceedings apply only to assets of the debtor in Thailand whereas foreign bankruptcy proceedings have no effect on assets within Thailand. In bankruptcy proceedings, foreign creditors can only claim for repayment of their debts if they prove that Thai creditors would be similarly entitled to claim in bankruptcy actions in the foreigner's country. They must also agree to deliver any asset or distribution they have received in any foreign bankruptcy to be added to the debtor's estate in Thailand.

There has been some discussion of adoption of the UNCITRAL Model Law on cross border insolvency.

Siam Premier in association with Allens Arthur Robinson

Contact: Lampros Vassiliou, Partner, Head of Corporate Insolvency & Reorganization

25th Floor Thai Wah Tower II
21/147-50 South Sathorn Road
Bangkok 10120
Thailand

Phone: +662 679 1333
Fax: +662 679 1314
E-mail: lampros@siamlaw.co.th

Financial issues: Thailand

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1 Is the restructuring/insolvency legislation generally:

a) Understood?

The current insolvency/restructuring legislation in Thailand, the Bankruptcy Act B.E 2483 (AD 1940) as amended by Bankruptcy Act (No5) B.E 2542 (AD 1999), ("the Act"), has only been operative since mid-1998. The revised legislation introduced fundamental changes, including new concepts such as the "planner". Formalized insolvency proceedings were rare in the pre-crisis economic environment and the introduction of the revised restructuring legislation was not widely understood initially. Creditors now have a better understanding of the general concepts, however, the practical application of these concepts has yet to be universally understood.

Rehabilitation provisions of the Act are heavily weighted in favor of creditors, leaving shareholders technically excluded from the process. Shareholders cannot veto a rehabilitation plan that has been approved by creditors and the court.

The legislation is drafted widely and as a consequence, the initial rulings by the Bankruptcy Court Judiciary were not always consistent. This is understandable when considering the previous lack of experience with this aspect of the law. The Ministry of Justice ("MOJ") and the Business Reorganization Office ("BRO") have organized training for the judiciary in the issues facing restructuring companies. Training covers such matters as asset valuation techniques, understanding how corporate feasibility studies are performed and their purpose, learning more about the process of corporate and debt restructuring, and the economic environment that has given rise to the need for restructuring.

The legislation is still not widely understood or acknowledged by other courts (such as the Labor and Civil Courts) and governmental authorities. Experience has shown that there is a gap between the legislation provisions and the required amendment to internal procedures of these organizations.

b) Being followed and/or available opportunities being taken up?

The use of the Rehabilitation process is gaining in acceptance with a total of130 rehabiliation orders granted and a further 19 applications pending as at the end of December 2000.

As a result of the relatively few applications made to use the Rehabilitation process in the early period following the introduction of the new law and the speed of restructuring generally, the Bank of Thailand established the Corporate Debt Restructuring Advisory Committee ("CDRAC") to oversee a framework which provides a timetable and str ucture for informal restructuring. Under this process creditors party to the agreement (financial institutions subject to the supervision of the Bank of Thailand) are required to institute formal insolvency proceedings at the conclusion of an unsuccessful CDRAC informal process.

Creditors in enforcing their rights against a debtor have not generally applied the legislation in an adversarial context to date. Recent appointments in respect to Thai Petrochemical Industries and Thai Amarit Brewery are exceptions to this trend, which is likely to continue as creditors become more familiar and comfortable with the process.

As noted above, in the event of an unsuccessful outcome following the conclusion of the CDRAC process, the use of the bankruptcy provisions is required by the CDRAC through an obligation of creditor signatories to institute formal insolvency proceedings. However, in practice, creditors have not rigorously pursued the enforcement provisions contained within the process guidelines.

c) Being enforced by relevant authorities?

Enforcement of the Act occurs through the Bankruptcy Court, which is a public and transparent process. Applications to the court are instigated by creditors or the debtor. Increasingly this avenue is being used.

The commitment to the process is evident in the quality of judges appointed to the Bankruptcy Court and the level of training provided to them. The court held a seminar following the first year of its operations for the purpose of reviewing its performance and developing ongoing enhancement to its operations. In addition, a project to strengthen the Business Reorganization Office is planned for this year.

2 Broadly speaking, in practice, does the insolvency/restructuring legislation tend to lead to:

a) Early recognition and action on financial difficulties experienced by a corporation?

The legislation is not generally being applied within the early stages of financial difficulties. It is being applied as a "last resort" under the CDRAC process or within the final stages of a restructuring to cram down on creditors or provide certainty as to liabilities going forward. This is due to a number of factors, including the following:

- The extent of the economic crisis in Thailand, resulting in resources being prioritized to the most distressed situations.
- A lack of provisions within the legislation requiring debtors/directors to proactively take any action if they become aware of insolvency (for example no director personal liability for failure to remit employee tax deductions, as is the case under Australian law).
- The requirement for debtors to admit insolvency at the outset of the process.
- Concern at the exclusion of shareholders from the process after it has commenced, unless there is prior debtor/creditor agreement as to the role of the company/shareholders in formulating the plan.
- The application of the CDRAC process in which debtors are centrally selected for restructuring using a top down approach based on level of debt.
- The provisions of the Act dictate a balance sheet, rather than a cash flow, test of insolvency, resulting in a greater burden in proving insolvency. This may act as a deterrent to creditors in making a contested application and increases the leverage of the debtor. The outcome of the TPI case earlier this year in which a contested application was successful was widely viewed as being pivotal to the future application of the legislation.

As a result of the above issues, planner appointments have tended to occur at the conclusion of a restructuring negotiation, with either a "prepackaged" agreed plan or a high-level understanding of how the plan will be developed. Perceived benefits of using the planner process at this stage are to "lock in" dissenting minority creditors (which may not be possible in an informal restructuring) and to give protection from existing "unidentified" claims. The latter point is particularly important from the perspective of potential new investors.

A number of planner appointments have involved the debtor taking a role in the planner appointment as either sole planner or jointly with creditor/independent representatives. This has resulted in greater debtor acceptance of the process, but only after they are made aware of the scope of their ongoing involvement.

The use of the planner process in the implementation of restructuring provisions reduces practical difficulties in certain processes such as capital reductions and debt/equity conversions, as compared to seeking to implement these actions in an informal restructuring. However, the legislation is being applied at the end of the process.

b) Restructuring alternatives as opposed to liquidation, and if not, why not?

Rehabilitation through the planner process is broadly viewed across all stakeholder groups as a more positive alternative to bankruptcy within Thailand.

This is substantially due to the stigma attached to liquidation. We have seen a number of instances of non-viable companies where restructuring efforts have been pursued in circumstances where liquidation may have been more appropriate.

Other factors that make liquidation an unattractive option are as follows:

- In some instances there is no real break-up value for a business, nor a prospect of sale as a going concern, therefore continued operation by existing stakeholders is seen as the only option.
- Liquidation requires creditors to write off, rather than provide for, a bad debt.

The use of the rehabilitation process is likely to be significantly less time consuming and more straightforward than individual creditors pursuing foreclosure options over pledged assets, which is another option open to individual creditors.

3 What are the main practical difficulties being encountered in:

a) The preparation of restructuring plans?

The following practical difficulties have been encountered in preparing restructuring plans:

- Dealing with individual creditor requirements to find alternative treatments for amounts that should be written off.
- The creditors' desire for incorporating a substantial level of detail in a plan prior to acceptance, rather than agreeing to a plan that is then implemented under broad parameters. The consequence of this is a requirement for detailed work prior to knowing if the plan is accepted.
- The creditors' reluctance to accept the commercial realities of losses.
- Both creditors and other stakeholders concentrating on the financial aspects of a plan, rather than the incorporating into the plan essential non-financial areas, such as accounting systems and corporate governance.

b) The implementation of restructuring plans?

Practical difficulties have been encountered in implementing restructuring plans. Getting regulatory authorities to recognize the restructuring plan has proved difficult. This is problematic because in a number of instances these authorities do not yet have internal systems in place to deal with the provisions of the Act. Difficulty lies in the task of managing "deal creep" and a tendency towards two negotiations, i.e. in agreeing the plan and then the subsequent execution of the related formal transaction documentation.

4 To what extent are companies that are going through any formal or informal restructuring merely adjusting their debt/equity structure, rather than genuinely restructuring their business operations?

There is a widely held view within the financial community in Thailand that the majority of completed restructurings are, in fact, largely rescheduling arrangements (often with grace periods or concessional arrangements on interest/principal repayments) with little genuine financial or operational restructuring taking place. This is supported to some extent by evidence of the return to non-performing loan ("NPL") status of some restructured loans.

The following circumstances contribute to the above trend:

- The reluctance of financial creditors to accept up front principal write-offs.
- The focus of Thai financial creditors on short-term reduction in NPL numbers, due to the positive impact of this on capital adequacy requirements.
- The reluctance of shareholders for up front equity dilution (potential dilution, down the track, as a consequence of future under performance is more acceptable).
- The tendency for management/shareholders to view financial and operational issues as independent issues and a reluctance from the financial creditors to force these issues.
- The tendency for management/shareholders to view all aspects of their business as core, resulting in a reluctance towards divestment or other business restructuring alternatives.

The exception to the above trend has occurred where the restructuring involves the introduction of a new strategic investor taking a majority or substantial equity position. Leverage has existed in these situations to force business or operational changes as a condition of the new investment.

5 What are the main areas from which funding is generally being utilized by companies which undertake either formal or informal restructuring?

As noted above, the majority of restructurings completed to date have not included, to any significant extent, new funding either by way of equity or debt. An exception is the restructurings that are effectively asset sale transactions involving the near or total dilution of existing shareholder interests, for example the case of Alphatec.

A number of restructurings have been undertaken on a "cashless basis", involving the rescheduling of debt repayment obligations to match forecast future cash flows. A number of these have been based on projections that assume an early return to pre-crisis economic conditions.

In addition, a number of completed cases have included an equity element – either an obligation to obtain new capital within a specified time frame or actual/contingent debt/equity swaps. Contingent future debt/equity swap options are often based around an inability to meet financial projections incorporated within the restructuring plan.

Where new capital from new investors has been introduced, it has often involved near or total dilution of existing shareholder interests, or at a minimum, substantial reductions in control by the existing shareholder groups.

Raising funds from the capital markets has not been a viable alternative in the restructuring experience in Thailand to date. Companies in the process of restructuring are increasingly looking at the domestic bond market as an option for refinancing foreign debt.

The following factors contribute to the relative absence of new money within restructurings:

- The reluctance/inability of existing shareholders to contribute new equity.
- The focus of domestic banks on reducing NPLs – a risk adverse approach to putting new money into a restructuring case (inability to lend money to a NPL).
- Foreign ownership restrictions/desire for foreign investors to have control conflicting with existing shareholders who wish to maintain control (dilution issue per above).

PricewaterhouseCoopers

Contacts: Charles Ostick, Partner

Bangkok City Tower, 15th Floor
179/74-80 South Sathorn Road
Bangkok 10120
Thailand

Phone: +66 2 286 9999
Fax: +66 2 286 4440
E-mail: Charles.Ostick@th.pwcglobal.com