

# **ASIAN DEVELOPMENT BANK**

## **REGIONAL TECHNICAL ASSISTANCE TA NO: 5795-REG INSOLVENCY LAW REFORM**

### **SUPPLEMENTARY REPORT ON THAILAND**

Punjaborn Kosolkitiwong  
Dej-Udom & Associates Ltd

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## A. Insolvency Processes

### 1. Please supply numbers and details of cases of:

- (a) corporations whose financial affairs have been or are being handled under the relevant process, framework or agreement governing **informal corporate debt restructuring** [the **numbers** should be from the date that the process, framework or agreement was established to facilitate informal restructuring; **details** of the corporations should relate to size, industry type, debt level];

The Bank of Thailand on September 15, 1999 released figures for the CDRAC debt restructuring process (see section I1). To date, 702 cases have come within the auspices of CRAC, of which in 375 cases, the standard form Debtor/Creditor Agreements have been signed. There are 52 concluded cases where the requisite level of creditor support for the proposed debt restructuring Plan has been reached. The loans under CDRAC's supervision are worth Baht 1.012 trillion. CDRAC has indicated that it expects only about Baht 550 billion of the non-performing loans (NPL) to turn performing again. As of yet, only 20.76% of NPLs in the banking sector have turned performing.

The Bank of Thailand has also issued monthly figures for debt restructuring. The following figures denote amounts of restructured debt in millions of Baht and cite the number of 'cases', which count each non-performing debt item as one case:

	Dec '98	Jan'99	Feb '99	Mar '99	Apr '99	May '99	June '99
Baht (million)	156,865	187,372	215,863	280,936	383,651	430,013	565,998
Cases	9,015	12,004	17,667	30,763	39,114	52,684	75,937

The following figures on debt restructuring for Financial Institutions were also released by the Bank of Thailand:

#### Debt. Restructuring – Categorized by Financial Institutions Under Debt Restructuring

		Dec 98	Jan 99	Feb 99	Mar 99	Apr 99	May 99	June 99
Thai Banks	Baht (million)	491,177	513,363	540,680	598,257	616,273	628,144	836,167
	Cases	5,542	7,951	11,264	13,140	13,691	14,430	18,198
Foreign Banks	Baht (million)	102,248	104,009	102,474	108,422	114,277	112,468	109,110
	Cases	660	679	673	739	736	707	694
Finance & Security Inst.	Baht (million)	96,513	98,946	102,864	83,553	86,279	84,114	85,985
	Cases	1,165	1,172	1,248	1,045	1,188	1,155	1,246
Credit Fonciers	Baht (million)	542	478	498	145	147	141	132
	Cases	38	34	34	11	12	10	8

		Dec 98	Jan 99	Feb 99	Mar 99	Apr 99	May 99	June 99
Total	Baht (million)	690,480	716,796	746,516	790,377	816,976	824,867	1,031,394
	Cases	7,405	9,836	13,219	14,935	15,627	16,302	20,146

#### Debt Restructured

		Dec 98	Jan 99	Feb 99	Mar 99	Apr 99	May 99	June 99
Thai Banks	Baht (million)	137,158	167,094	186,258	246,374	326,804	369,985	499,592
	Cases	7,482	10,005	14,859	27,800	38,165	51,614	74,634
Foreign Banks	Baht (million)	10,857	11,142	17,532	18,657	36,818	37,802	38,938
	Cases	1,173	1,600	2,327	2,382	272	314	341
Finance & Security Inst.	Baht (million)	8,561	8,824	11,735	15,547	19,669	21,863	27,023
	Cases	285	320	398	481	569	645	832
Credit Fonciers	Baht (million)	289	312	338	358	360	363	445
	Cases	75	79	83	100	108	111	130
Total	Baht (million)	156,865	187,372	215,863	280,936	383,651	430,013	565,998
	Cases	9,015	12,004	17,667	30,763	39,114	52,684	75,937

- (b) corporations which have been placed in **formal liquidation** under the relevant insolvency law [**numbers** and **details** should be from January 1999].

From the records kept at the Central Bankruptcy Court, between January and July 1999, there were 24 corporations bankrupted with the Central Bankruptcy Court. There is no record of size and area of the businesses. From the names of the corporations, we can presume that most of such corporations are trading and industrial companies. The smallest amount of debt was Baht 2,685,696. The largest amount of debt was Baht 1,196,122,966.

- (c) corporations whose financial affairs have been or are being handled under the relevant **insolvency law governing reorganisation** [**numbers** and **details** as in (b)].

There are 8 companies that have filed for business reorganization with the Central Bankruptcy Court. There are no records of the size and nature of the business. From the names of the companies, we can presume that most are industrial and manufacturing companies. The smallest amount of debt is Baht 116,938,227. The highest amount of debt is Baht 6,643,624.

2. **Provide details and copies of any published comments, opinions or statements describing how the above processes are working and the level of success or otherwise. There are some statements and comments from both government officials and the private sector describing the processes of bankruptcy and**

**business reorganization and the level of success. Judge Wisit Wisitsora-At is one of those who has commented on the less than entirely enthusiastic response to the business reorganization procedure under the Bankruptcy Act, for the following reasons:**

1. The administration of the company subject to the business reorganization will lose their control or management in the company; therefore, they must consider carefully whether to file for business reorganization.
2. The persons involved in this process (including lawyers, accountants and court officials) were all new to this process. Therefore, a cautious 'wait and see' approach has been adopted to gauge the outcome.
3. Understanding of the process was insufficient, as indicated by the low number of cases where the courts have granted the business to be under the reorganization process. Thus far, there have only been 2 cases where the Court has sanctioned a Plan.

There is a promising trend that those involved with the process understand the process more than before, so the number of cases filed with the court for business reorganization and granted by the Court will increase.

(see also Section I for more detailed comments and findings of this Report)

## **B. Insolvency Reforms**

1. **Provide details of any reforms that have occurred in relation to insolvency law and practice and related areas (such as corporate governance, secured transactions and so forth) since January 1999.**

Two enactments concerning insolvency have come into effect this year. The Establishment of and the Procedure for the Bankruptcy Court, and Amendment to the Bankruptcy Act, (No.5) B.E.2542. The amendments are with respect to both the straight bankruptcy and rehabilitation procedures.

### **Establishment of and Procedure for the Bankruptcy Court:**

1. **The Jurisdiction of the Bankruptcy Court.**

The Bankruptcy Courts have jurisdiction over the bankruptcy cases. Once regional Bankruptcy Courts are inaugurated, no other courts of first instance may accept a case that falls within the jurisdiction. However, any bankruptcy cases arising outside the jurisdiction of the Central Bankruptcy Court may be filed with the Central Bankruptcy Court.

2. **The Procedure of Bankruptcy Cases**

The Bankruptcy Court is required to proceed with the hearing without adjournment until the case is over, save in the case of unavoidable necessity.

Where any party fails to appear on any day appointed whether with or without permission of the court, that party is deemed to acknowledge the proceeding of the hearing on that appointed date.

The court may direct that another court or court officer examine the evidence or part of it on its behalf.

The Bankruptcy Court may call any knowledgeable persons or experts to appear and give opinions for its consideration. Party or interested person in the case may appoint any person domiciled in the jurisdiction of the bankruptcy court to receive pleadings or documents on its behalf, by submitting a request to the competent court. After the approval of the court, such pleadings or documents may be served on the appointed person.

### **3. The Appeal**

Appeals of judgments or orders of the Bankruptcy Court in respect of a business reorganization must be lodged with the Supreme Court within one month from the date the Court renders such judgment or order.

#### **Amendment to the Bankruptcy Act, (No.5) B.E.2542:**

Effective April 22, 1999.

The key issues of the amendment are:

#### **1. Minimum Claim Amounts**

The amount of claim for an unsecured creditor to institute bankruptcy proceedings against the debtor under section 9 of the Bankruptcy Act is raised from Baht 50,000 for an individual person to Baht 1.5 million, and from Baht 500,000 for a juristic person to Baht 2,000,000. Secured creditors may set up a bankruptcy charge only when the Creditor states that if the debtor becomes bankrupt, he is willing to waive the security for the benefits of all creditors, or make an appraisal of the security in the claim which, after deduction of the obligation due to him, is still in the deficit for the debtor who is an ordinary person in the amount not less than Baht 1 million or for debtor who is a juristic person in the amount not less than Baht 2 million.

#### **2. Discharge from Bankruptcy**

A bankrupted individual whose debt was not procured through dishonest means will be discharged from bankruptcy within 3 years from the date the court orders the individual bankrupt.

#### **3. Classification of Creditors**

The amendment to the Bankruptcy Act has classified creditors as follows (Section 90/42bis):

1. Each secured creditor whose debt is not less than 15% of total debts for business reorganization shall be placed in each group.
2. Secured creditors who have not been grouped under (1) shall be set in another group.
3. Unsecured creditors may be placed in many groups. The unsecured creditors who have the same type of claims or benefits are to be placed in the same group.
4. The creditors under Section 130 bis shall be in one group.

Any creditor who believes that the grouping of creditors is not in accordance with these provisions may submit an application to the court within 7 days from the date of knowledge of such grouping. The court may then issue an order for re-grouping. The order of the court is final.

The rights of creditors who are in the same group must be treated equally, unless the creditors who are not treated equally consent in writing.

#### **4. Resolution to Approve the Plan**

The resolution approving the plan must be a special resolution passed at:

1. every creditor's meeting of each group of creditors, or
2. at least one group of creditors' meetings and at the time of counting the debts of the creditors who accept the plan in each group of creditor's meeting, the amount of such creditors' debt is not less than 50% of the outstanding debt of creditors who attend the meeting in person or by proxy and pass the resolution on that vote.

#### **5. Other Changes**

- 2.1 The amendment specifies that the conversion of foreign currency denominated debts into Baht is for the sole purpose of calculating votes to be attributed to the various creditors' claims at creditors' meeting.
- 2.2 The discretionary power of the court under Section 90/58 to approve or reject the plan is replaced by objective criteria for approval by the court, including a requirement that upon completion of implementation of the plan, creditors will have received debt repayments not less than the amounts they would have received on liquidation.
- 2.3 The plan administrator has the power to disclaim the debtor's assets or rights under contracts made by the debtor where the terms are more onerous than the benefits receivable by the debtor as prescribed by the plan. This extends the existing provision in the Bankruptcy Act that applies to bankruptcies to apply to rehabilitation proceedings.
- 2.4 Section 94(2) which provides that a creditor may not file a claim in the bankruptcy of the debtor in respect of a debt which the creditor allowed the debtor to create knowing that the debtor was insolvent at the time, is amended to permit a claim to be filed by a creditor in these circumstances provided it is created for the purpose of enabling the debtor's business to continue.
- 2.5 There is a new concept of "related parties" or "insiders" in the legislation in the context of preferential transactions. Under the existing provisions (Section 90/41 and Section 115), transfers or acts done by the debtor during the period of three months prior to or subsequent to an application to adjudicate him as bankrupt, and with the intention to give undue preference to a creditor. The three month period will be extended to one year for acts involving insiders.

Insiders mean the debtor's management, auditors, and shareholders holding in excess of 5 percent. Of the debtor's share capital, spouses, minor children, partnerships and companies related to such persons.

The above changes represent important substantive changes that have by and large received a positive reaction.

#### **2. Provide details of any proposed reforms as above.**

A proposed amendment to the Bankruptcy Act, No.6/2542 was made but is now no longer under consideration.

### C. Corporations

1. **Identify and detail the areas in which it is considered that relevant accounting practice or regulation is weak and could be strengthened [for example, accounting and financial information; projections of income/expenditure; valuation of assets; debtor and creditor control].**

The accounting regulations and the corporate law provide that the director has the duty to keep a proper accounting book at the office. Such a proper accounting book is required to contain (1) the exact amount of income and expenditure, including receipt details of payments, and (2) details of assets and liabilities of the company. However, in practice, most directors do not pay careful attention to these requirements either through neglect or ignorance. Many financial reports do not show the real financial status of companies as they are unprofessionally prepared and audited or the preparation of the financial report does not meet with the accounting standards as prescribed by the accounting law. Although the balance sheet and the financial report of the company have to be approved by the shareholders of the company, in practice the shareholders do not examine whether or not such balance sheet or financial report properly reflects the assets and liabilities of the company. Therefore, there is no real control by the shareholders of the company.

2. **Identify and detail areas of weakness in corporate governance by reference to such factors as director's duties and their performance; financial management and responsibility; the interests of shareholders and creditors. If possible, provide specific examples of cases in which examples of such weaknesses have been found to exist.**

The standards and duties for corporate governance by directors, financial management and the interests of shareholders and creditors are all prescribed by statute. With respect to directors, the statutory standards and duties are comparable to many Western countries, but enforcement is lax. Shareholders have the right to bring actions against directors and/or the company, but such action is seldom performed. Creditors are hampered by the slowness of some enforcement procedures. Share pledges require sale of pledged shares by public auction.

3. **Identify and detail areas of concern regarding political, government or commercial links with corporations, by reference to such factors as "cronyism", "patronage" and corruption.**

There is scarcely any real attempt to disguise links between politics, government, and the large corporate conglomerates (with both legal and illegal business interests). The corporates 'bank roll' political parties who in turn literally buy the allegiance of many voters. When in office, the financial support afforded the political parties will be duly 're-paid' through the award of government contracts, concessions, approvals and generally preferential treatment. The relationship is one of patronage, the exercise of which is in breach of various laws; in this sense, one can view it as corruption. Another perspective is that it is the modern application of traditional Thai methods and values of governance that are still more influential than the law, which to some extent reflects foreign values and international expectations rather than domestic realities. Further changes to the law will, alone, do little to change practice. Urbanization, education and social change are more important factors. Great expectations have been placed on the latest Constitution (enacted 11 October, 1997), and admittedly, its positive effect is evident. So while the importance and strength of the interlinked patronage relationships is lessening, the links between politics, government, and the large corporate conglomerates are still strong and can be expected to remain so in the foreseeable future.

**4. Identify and detail areas of concern regarding the size and power of corporations, corporate groups or conglomerates.**

The corporate conglomerates still have very significant power over the “making and breaking” of governments. The patronage mentality means that government is largely a process of securing personal advantage for politicians and their benefactors, as opposed to governance for the overall good of the nation. There are positive signs, however, that the new Constitution of 1997 and the need for austerity since the economic recession of mid-1997, are creating more transparent, fairer, and less ‘corrupt’ government.

**5. Is it practical and might it be of benefit to introduce legal guidelines on director duties and responsibilities and to provide sanctions or penalties for breach or non-observance of such duties? If so, outline the areas to be covered and the nature of any sanctions.**

Beyond the already existing legal duties and obligations, it is probably not practical or of benefit to introduce additional guidelines on directors. The main issue is one of enforcement.

**6. Would directors of corporations benefit from education and training on such areas such as financial management and responsibility, negotiation of a financial restructure, informal work out techniques? If so, detail the areas and the type of program.**

Directors would more than likely benefit from training, although the benefit would be almost entirely for directors whose infractions arise from ignorance, not wilful neglect or misconduct, which is more of a problem. A form of licensing could be established to ensure directors meet with certain criteria; however, such ideas are not currently being considered by the legislature.

#### **D. Banks/Finance Providers**

**1. Identify and detail the areas in which it is considered that the lending practices of domestic banks are weak and might be improved or strengthened.**

The weaknesses of lending practices of domestic banks are:

**1. Lack of Transparency**

There has been very little inter-bank sharing of information in Thailand. Valuable credit and customer information has not been shared both between banks and made available for select disclosure to other entities. The most damaging mistake of the Bank of Thailand was the concealment of facts about the true state of its foreign exchange holdings; there is a long tradition of such an approach.

**2. Technology**

Thai banks lag behind the region in technological development. A visit to some branches is like stepping into a time-warp. The protected, xenophobic attitude to foreign participation in the banking sector has created a technology-averse non-competitive banking sector.

### **3. Heavy Reliance on Administrative Guidance**

Operationally, there is very little delegation of responsibility within banks. Subordinates will perform tasks, but approvals by middle and often upper management will be required. Culturally, there is a reluctance to question authority. When there is an instruction or guidance from the executive of the bank to do something, even if it is not according to the regulatory standards or law, bank officers will comply.

### **4. Lenient Disclosure Rules**

Both the rules and compliance with them have been lax, in particular the latter. There are cases where banks have reported secured loans as performing even if no interest had been paid for a year.

### **5. Deficiencies in Regulatory Standards**

Bankers routinely funneled easy money to favored companies with the little regard for the creditworthiness of projects. Basic security and credit procedures were not in place, or ignored. Large amounts of unsecured funds have been advanced to politicians and their supporters.

### **6. Regulatory Uncertainty**

The government and regulators turned a blind eye to growing evidence that excessive lending was causing a property bubble, contributing to a dangerous level of bad debt. The banks had lent large amounts to corrupt politicians, provoking accusations of a stitch-up between the institutions and its supervisors.

### **7. Risk Management**

This issue is a mixture of hubris and inexperience. Bankers failed to examine the financial risks they were undertaking. The current predicament is a result of risky lending—particularly for property development and auto-financing—against inadequate collateral.

The above weaknesses could be strengthened as follows:

#### **1. Increased Transparency**

The Bank of Thailand has taken steps to ensure that Thai banks will establish credit committee to approve loans, and loans will be listed as non-performing when borrowers miss payments for three months. Other areas under their review include:

- Accrual of interest
- Classification criteria
- Provisioning requirements
- Collateral Valuation
- Loan Restructuring
- Loan Portfolio

#### **2. Privatization and Deregulation**

#### **3. Opportunities for Foreign Investors**

There is now the possibility for financial companies to merge with foreign banks. Thailand has come up with a temporary solution to the issue of foreign control over its banks:

It will allow majority foreign ownership for 10 years. ABN Amro has so invested in Bank of Asia, and DBS in Thai Danu Bank.

**2. Identify and detail areas of concern regarding the involvement of banks with corporations (for example, through equity holdings, long term relationships, government association)**

**2.1 Equity Holding**

It is a common practice for some banks may swap or convert their debts to equity in debtor's corporations if they consider it beneficial to the banks. Also, the taking of shares in corporate debtors as collateral is a long established practice, particularly for Bangkok Bank. In the event of insolvency, this situation can create something of a conflict of interest for banks, which are both creditors and shareholders.

**2.2 Political Involvement**

Banks may have strong associations with particular corporations that are in turn politically connected. Often banks and in particular financial institutions have financed politicians' pet projects and allies, with authorisation for the finance usually coming from the highest levels but in breach of their own internal procedures and regulations. The recipient corporation may be insolvent and no collateral is taken.

**2.3 Long-Term Relationship**

The long term relationship of a bank with any corporation may impact on the lending practices of the bank in a less than impartial and inappropriate manner.

**3. Would officers/employees of bank/finance institutions benefit from education and training on such areas as lending practices, formal insolvency practices, informal work out techniques and practices? If so, detail the areas and the type of program.**

Yes. The courses would ideally cover all areas of how officers/employees should perform their work, but in particular, lending practices (credit risk assessment, collateral), operational efficiency and customer service should be focused on.

**E. Property Law**

**1. To what extent might the law relating to ownership, mortgages and the creation of other security interests in land and other property be improved/reformed to enable secured transactions to be transacted more efficiently?**

According to the existing suretyship law in relation to mortgages, only real property or certain categories of registerable property (i.e. ships or vessels of six tons and over, steam launches or motor boats of five tons and over, floating houses, beasts of burden and industrial machines) may be mortgaged. The current law fails to cater for the importance of intellectual property. Some businesses may hold copyrights and valuable tradenames but lack real assets, so cannot obtain finance because of lack of real collateral, despite great prospects. In addition, to avoid the complication of required delivery of property as in pledge law and to enable the owner to use and exercise its intellectual property rights in its course of business, a clear legal framework is required to enable the mortgaging of intellectual property. In this regard, the intellectual property holder's rights and the foreclosure sanctions should be

strategically balanced. The registration systems by relevant existing bodies will need to be upgraded to cope with the mortgaging of intellectual property.

**2. Are there particular commercial or other practices (as distinct from formal laws) associated with the laws relating to property and secured transactions which impede or restrict the latter?**

Some of the bureaucracy associated with the registration has decreased in the past 10 years, part of which has been eased by technology. However, in some cases the land registrar plays a protective role in relation to foreigners or those who have a relationship with foreigners. In cases where foreigners are either permitted to own real property under the Board of Investment Act or the Condominium Act, it is required that evidence of remittance of money from foreign country issued by the Bank of Thailand is supplied upon the registration since the law requires that the funds are not from a domestic source. Therefore, foreign investors who intend to establish a new entity or a joint-venture out of locally accrued earnings, are forced to transmit their money out and then back into the country. For many years it had been a policy of the Department of Land not to register ownership of Thai women who were legally married to a foreigner. This was recently repealed by the Constitution that prohibits discrimination on property rights. Enforcement of securities via the court can be subject to delays because of the high case load and the ability of defendants to use delay tactics in court.

#### **F. Secured Transactions**

**1. What are the major impediments to the enforcement of security rights over property?**

The major impediment to the enforcement of security rights over property is the delay in judicial process of enforcement. A secured creditor is not entitled to automatically enforce the secured property even though the debtor is in default of payment, unless there is a judgment. As the court has many cases, it takes time to obtain judgment. This problem is recognized by the courts and the Ministry of Justice is in process of drafting a foreclosure law and also amending the existing law relating to mortgages and pledges.

**2. How might these impediments be best overcome?**

See 1 above.

**3. Is there a fair balance between the enforcement of secured property rights and the restraint on those rights under relevant insolvency law? If not, in which areas is there an imbalance and outline what improvements might be made.**

No. The balance is too heavily weighted in favour of the borrower. See above.

## G. Insolvency Law

1. **What are the major substantive defects in the corporate insolvency law viewed from the respective positions of:**
  - (a) **banks/financial providers**
  - (b) **secured creditors**
  - (c) **unsecured creditors**
  - (d) **employees**
  - (e) **corporations**
  - (f) **directors**
  - (g) **shareholders?**

### (a) **Banks/Financial Providers**

The reason for promulgating Bankruptcy Act (No. 4) B.E. 2541, which introduced the reorganization process (Article 90) is because it was deemed that certain articles of the Bankruptcy Act B.E. 2483 were not suitable for the current economic and social condition. Particularly in the case where a corporate debtor (including a bank) faces a temporary financial liquidity problem and should receive financial aid from any person wishing to give such financial aid to the debtor to provide opportunity to rehabilitate the debtor's business operation. Article 94(2) of the Bankruptcy Act, however, provided that a creditor who allowed the debtor to incur debt knowing full well that the said debtor is insolvent shall not be entitled to receive payment of debt in a bankruptcy case which resulted in that no financial institutions or private enterprises agreed to grant financial aid to a debtor facing temporary financial liquidity problem. The debtor therefore became a bankrupt person albeit its business operations were in a condition to be rehabilitated if the debtor were to receive financial aid. It was therefore deemed appropriate to prescribe provisions to protect the granting of financial aid to a debtor facing temporary financial difficulties to allow the debtor to rehabilitate its business operations.

The new bankruptcy law designated that the Bank of Thailand is entitled to file a motion for rehabilitation if the debtor is a commercial bank or financial company.

### (b) **Secured Creditors**

Realisation of secured property is slow and requires a court order.

Under Section 90/12 of the Bankruptcy Act, a moratorium or automatic stay will come into effect from the time a petition is accepted for reorganization. This will prevent secured creditors from pursuing their debts, enforcing their civil judgement or filing a straight bankruptcy petition against the debtor. The only option is to participate in the reorganization proceeding.

### (c) **Unsecured Creditors**

Unsecured creditors share the problems of slow court proceedings with secured creditors, but also face subordination to secured creditors. Enforcement practices are hampered by the unavailability of complete information concerning a debtor's financial position.

Under Article 90 of the Bankruptcy Act, unsecured creditors are divided into several groups. The rights of creditors who are in the same group must be treated equally, unless the creditors who are not treated equally consent in writing. Additional finance given to a company under the plan enjoys a priority right over existing unsecured debts—the opposite effect of Article 94(2).

**(d) Employees**

The existing legislation can generally be regarded as favourable for employees. They are possessed of a preferential right under Section 253 of the Civil and Commercial Code. Consideration of the effects of a proposed Plan under a reorganization petition on employment should be indicated. This adds a new dimension to the bankruptcy law.

**(e) Corporations**

Section 90 of the Bankruptcy Act has not attracted many cases. More reorganizations have been through the Bank of Thailand initiated CDRAC procedure, which does not enjoy the benefits of the moratorium/automatic stay under Section 90, but has the benefit of speed, the coercive powers of the Bank of Thailand and a mechanism to ensure that creditors agree amongst themselves—one of the biggest problems with reorganizations. There also appears to be some stigma attached to filing an application under the Bankruptcy Act. There is a perception that doing so will adversely affect the perception of the company, and its share value. However, most corporations have conducted their reorganizations independently. The corporate preference in Thailand is still to avoid the courts and government assisted approaches.

**(f) Directors**

A director's authority upon plan acceptance will depend upon the Plan, but for most directors their role will be suspended.

**(g) Shareholders**

Under Article 90, the interests of shareholders seems to be very much limited. All the powers relating to the decision-making on the future of the company shifts to creditors. This includes the powers to decide to reduce and increase the capital. Conversion of debts into equity is also allowed.

But with the concept of appointing someone as a planner, the law has to balance the interest of the shareholders and creditors reasonably.

**2. What are the major practical defects in the application of the insolvency law viewed from the respective positions of:**

- (a) corporations**
- (b) creditors?**

**(a) Corporations**

Reorganization is provided for companies both private and public.

The new law stipulates "automatic stay", which has a very wide scope and comes into effect at the beginning of the process (i.e. upon acceptance of the petition by the court).

During the stay but before the reorganization order is issued, the existing management can still have the control of the company subject to the limitation that it can only conduct the ordinary business of the company. To do something further than the ordinary course of business, the management needs leave of the court.

In addition, under section 90, the rights of shareholders are very limited. The power relating to the decision-making on the future of the company shifts to creditors. This includes

the power to decide to reduce and increase the capital and conversion of debt to equity (securitization).

**(b) Creditors**

Upon filing the petition (reorganization process), the moratorium or automatic stay under section 90/12 will come into effect and will prevent secured and unsecured creditors from pursuing their claims, enforcement of civil judgements and the filing of “straight” bankruptcy proceedings against the debtor. The only option left to creditors to advance their claims is to participate in the reorganization proceeding.

The reorganization order must be put to a vote by creditors within 3 months of the appointment order and be approved by a special resolution of creditors representing 75% of the claimable debt. Only the creditors who have filed their proof of claim with the official receiver of the business reorganization within one month from the date of the publication of the appointment of the Planner have the right to vote.

A Bill has recently been proposed by the Ministry of Justice to adopt the principles of classification of creditors and voting by classes. This will enable the Planner and the court to divide creditors into classes and the voting will represent the real needs of each class better. It may also make arriving at a special resolution more difficult.

**H. Judicial System**

- 1. Has there been any discernable improvement or change in the operation of the judicial system in relation to the conduct of:**
  - (a) debt collection/recovery processes;**
  - (b) enforcement processes in respect of secured property rights;**
  - (c) recovery or enforcement processes in respect of leased property;**
  - (d) formal corporate insolvency processes?**

There has been no discernable improvement or change in the operation of the judicial system except in respect of the formal corporate insolvency process under Article 90 of the Bankruptcy Act, which has attracted very few cases considering the number of insolvent companies and in comparison with the CDRAC procedure (see and independent restructurings).

- 2. What reforms, if any, have been made to improve the operation of the judicial system in relation to the above 4 areas?**

A Central Bankruptcy Court has been established. This is a positive move, as “specialist” judges and court officers can better implement the legislation, and the proceedings should proceed more rapidly.

- 3. Are there any identifiable proposals for reforms in these areas?**

There is a proposed amendment to the Civil Procedure Code related to debt recovery and enforcement. The foreclosure laws are the subject of review, as is the reorganization process under the Bankruptcy Act.

**4. What are the main problems or difficulties regarding the operation and application of the corporate insolvency law through the court system?**

There are no significant problems or difficulties regarding the operation and application of the corporate insolvency law through the court system since the Central Bankruptcy Court has been established, but as it has only been in existence a few months, it is perhaps too early to comment.

**5. What practical improvements might be made to overcome these problems/difficulties?**

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### **I. Informal Work Out Techniques**

**1. Provide detailed examples of some cases of successful informal work outs and also cases of genuine attempts at informal workouts which have not been successful.**

There are three broad options a corporation has in Thailand for debt restructuring: reorganization under Article 90 of the Bankruptcy Act, restructuring under the CDRAC procedure, and independent work-outs. They can be classified as formal, quasi-formal and informal respectively. The formal Article 90 procedure has been outlined and focused upon elsewhere in this report. CDRAC (Corporate Debt Restructuring Advisory Committee): The Bank of Thailand, in recognition that the process of corporate debt restructuring is an integral part of the restructuring of the non-performing loans, and hence the overall financial system, established its own framework for debt restructuring. In cooperation with 5 other associations, namely the Board of Trade, Federation of Thai Industries (representing debtor companies) and the Thai Bankers' Association, Association of Finance Companies and the Foreign Banks' Association (representing the creditor groups) set up CDRAC. On 3 August 1998, these associations signed on to a Framework for Corporate Debt Restructuring—the so-called Bangkok Approach, modeled along the London Approach.

CDRAC only involves financial creditors. There are two standard form contracts: Inter-Creditor and Debtor-Creditor. Copies are attached hereto. The agreements are designed for the more complex restructurings. Some 46.6% of debtors under CDRAC's guidance have not signed the agreements and are or have negotiated simpler debt restructuring agreements.

Informal, independent workouts vary considerably in their approach and procedures.

**2. In practice, are such technique/s operating efficiently and successfully?**

In some respects, it is too early to properly answer this question given the dearth of insolvency cases prior to the July 1997 economic crisis, and the comparatively recent introduction of Article 90 and CDRAC procedures.

However, the clear majority of corporate entities in Thailand have chosen the informal, independent workouts, particularly over proceedings under Article 90 of the Bankruptcy Act, but also even when compared with the cases under the CDRAC process.

In order to assess the success of informal workouts, some consideration of this issue should first be made in respect of the formal workout procedure under Article 90 of the Bankruptcy Act.

While much media and government attention has been focused on the introduction of the reorganization process under Article 90 of the Bankruptcy Act, the tiny number of cases that it has attracted means that it has in practice been largely insignificant and ineffectual in terms of its primary goal of rehabilitating a debtor's business operation.

Reasons for this lackluster response have already been raised under Section I(2). In addition, other factors include the stigma attached to cases filed under the Bankruptcy Act (for whatever reason), a generally non-litigious approach to dispute resolution, but perhaps most importantly, the perception that no court proceedings will be conducted expeditiously.

Nevertheless, it is somewhat surprising that these factors were not counterbalanced to a greater extent by the 'blanket' debt moratorium that is enjoyed by a debtor only under Article 90 proceedings, and [until the recent Amendment to the Bankruptcy Act (No.5) also extended protection to creditors providing capital to insolvent companies in informal workouts also—see Section L(1)5.4], the legal protection afforded creditors who provide funds when the debtor has liquidity problems only if there were Article 90 proceedings. In other words, until Amendment No.5 came into effect in April of this year, creditors providing funds to insolvent companies involved in informal workouts were not permitted by law to file a claim in respect of such funds in the event of subsequent 'straight' bankruptcy proceedings against the insolvent company. Now that the law does afford protection to creditors providing funds in both informal and formal workouts, there is one reason less to institute proceedings under Article 90.

In terms of numbers relative to Article 90 proceedings, CDRAC is a success [see Section A.1(a)]. However, 52 cases where there has been an agreed upon and signed plan only represents 7.4% of the total under its control. It also remains to be seen whether the agreed upon Plans are adhered to. In addition, CDRAC is not a 'total' debt restructuring process—it only covers financial creditors. Also, only since the Amendment to the Bankruptcy Act (No.5) was the prejudice against creditors injecting additional funds removed (see above).

Informal, independent workouts have proven most popular, despite clear problems that may arise. Without unanimity amongst creditors, there is nothing to stop 'renegade' creditors from pursuing and enforcing their claims. This may include straight bankruptcy proceedings. Enforcement of an independent restructuring agreement is also an issue. Most agreements will a non-waiver provision for the benefit of creditors, whose original claims may still be accepted should court proceedings be initiated. Unlike CDRAC and Article 90 proceedings, there will usually be no definite framework, timeframe or mechanism for reaching agreement. Unless there is a strong lead taken by one or more key creditors and/or advisors, informal workouts may flounder. From the creditor's perspective, a failed independent workout means they will probably be looking at one of the other alternatives or straight bankruptcy proceedings. Therefore, it will have taken longer to recover the debt. In spite of the foregoing, most debt is being restructured in this manner.

**3. What are the major problems in the application of these technique/s?**

See above

**4. Is it considered that training and education in the operation of these technique/s would be valuable and, if so, in what areas and the whom should the training be directed?**

Training and education is especially important in these areas, as they are new to Thailand. The government has recognized this. Training of Bankruptcy Court judges and of

official receivers and related officers of the law, financial system and the understanding in the economy regarding this matter.

## **J. Insolvency Administration System**

### **1. Comment on the extent of development, expertise and efficiency regarding both public and private sector administration of formal cases of:**

- (a) corporate liquidation; and**
- (b) corporate reorganization**

#### **(a) Corporate Liquidation**

The corporate liquidation is exercised by the appointed liquidator. The liquidator's power is stipulated in accordance with Section 1259 of the Civil & Commercial Code. There has been no amendment to the such law, even though the Bankruptcy Act has been amended several times. In practice there are few cases filed with the Court by the liquidator on such ground. There is also no specific qualification for liquidators under the corporate law. Anybody can be a liquidator if he or she is appointed by the shareholders of the company at an extraordinary meeting of shareholders to dissolve the company, or if he or she is appointed by the Court. Therefore, liquidators have no special expertise.

#### **(b) Corporate Reorganization**

As the reorganization law has just been implemented, not many cases have been filed with the Court. No comments can properly be made at this stage. From the records available at the Bankruptcy and Civil Courts, Planners for corporate reorganization have come from the major accounting firms. Such firms are probably best equipped for the role.

### **2. Is it considered that education and training in these areas would be valuable and, if so, in what areas?**

Education and training in substantive insolvency law and procedure would be valuable. The judges who deal with insolvency cases and business reorganization cases should also be trained in business matters, not purely legal so that they can understand the cases well.

### **3. Is it considered desirable to introduce more formal structures of both public and private sector administration of insolvency cases?**

Yes, so that cases can go more smoothly.

## **K. Information & Statistics**

### **1. Is it desirable to establish systems to gather information concerning:**

- Incidence and results of formal insolvency cases under the insolvency law**
- Incidence and results of informal insolvency cases under the insolvency law**
- Statistics of value of assets and liabilities**
- Causes of financial failure, main area/s of business?**

The Legal Execution Department, the Ministry of Justice of Thailand has now established a system to gather information concerning statistics of incidence and results of formal insolvency cases. Computer searches can be made of individual or juristic persons to see if bankruptcy, interim receivership or absolute receivership orders have been made. The search results can be obtained within 5 minutes. However, there is no system to gather the information concerning the statistics of value of assets and liabilities, or causes of financial failure or main areas of business. This information would be of great benefit.

**2. If so, how best might such systems be established?**

The Execution Office is the logical place to start introducing the compilation and dissemination of a broader array of information.

**L. General Insolvency Information and Developments**

**1. Provide details of any other relevant information or developments since January 1999 in regard to such issues as the effect of insolvency law policies on areas such as employment, fiscal/revenue debts, detection and recovery of corporate fraud, domestic and foreign investment and etc.**

Although economic growth is now occurring (estimated 3-5% for 1999), unemployment is at .....% and NPLs stood at 46% of total outstanding credit at the end of June. It appears that while the economic recession has already troughed, the clean-up in its aftermath will take years.

**2. Is there any evidence of a change in attitudes (such as social/commercial stigma, aversion to strict legal processes, fear of loss of control) toward the use of: (a) formal insolvency processes; and (b) Informal insolvency processes in respect of corporations in financial difficulty or insolvent corporations? If possible, provide details of any specific cases which might reflect evidence of change.**

In our own assessment and judging from the statistics, we can find no evidence of a discernable change in attitudes towards the insolvency processes.