

**NORTON ANNUAL SURVEY OF BANKRUPTCY LAW
- THAILAND -**

by

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I. INTRODUCTION

The Thai Bankruptcy Act of 1940 was originally based on the English Bankruptcy Act of 1914. It proved to be lacking in substance and was deficient in several aspects. For example, there was no voluntary bankruptcy, and a debtor could not seek protection through filing for bankruptcy. The 1940 Act only recognized the dissolution of legal status of a natural or juristic entity when it became unable to meet its financial obligations as stipulated by law. A legal process whereby a cash-strapped company with a viable business could be revived was non-existent. Regardless, therefore, of a good prognosis for survival of the business, a debtor company was not given a chance to restructure its business. In addition, the bankruptcy proceedings were notoriously lengthy and most often did not lead to a full realization of the debtor's assets. Creditors were, therefore, inclined to avoid bankruptcy and liquidation, opting instead for negotiating a settlement with debtors.

On March 4, 1998, Thailand's Parliament passed the amendment to the 1940 Bankruptcy Act, which became effective on April 10, 1998. The amendment, which took the form of additional provisions under Section 90 (Chapter 3/1) of the old Bankruptcy Act, allowed for the restructuring or reorganization of a company similar to the United States' Chapter 11 provisions.

On March 17, 1999, the Thai Parliament passed another amendment to the Bankruptcy Act. The 1998 Amendment was passed in haste, leaving several issues unanswered for future legislation. The 1999 Amendment attempted to fill those gaps. The principal issues that the 1999 Amendment was ordained to clarify were: the new monetary thresholds for adjudication of a bankruptcy, plan approval, transactions that could be cancelled, and preferred creditors.

II. THE THAI BANKRUPTCY SYSTEM

A. Bankruptcy Court

The inclusion of reorganization proceedings in the 1998 and 1999 Amendments necessitated specially trained judges with an understanding of the process and appropriate knowledge of business practices. The Parliament as a result was prompted to enact in 1999 the Establishment of Bankruptcy Court and Procedure for Bankruptcy Cases Act. Following such enactment, a specialized court, the Central Bankruptcy Court, was inaugurated on June 18, 1999. The Court has jurisdiction over all bankruptcy cases as well as all civil cases pertaining to bankruptcy cases. Whereas prior to the 1999 Act, any civil court in Thailand could hear bankruptcy cases, all bankruptcy cases are now required to be heard by bankruptcy court judges. Filing of bankruptcy petition with other courts is, therefore, no longer allowed.

The Bankruptcy Courts are divided into the Central Bankruptcy Court and the Regional Bankruptcy Courts. The Central Bankruptcy Court has jurisdiction throughout the Bangkok Metropolitan Area, but all bankruptcy cases which occur outside such jurisdiction may be filed with the Central Bankruptcy Court. However, the Central Bankruptcy Court may, at its own discretion, refuse to try any of such cases. Regional Bankruptcy Courts may be established under an Act which stipulates the jurisdiction and location of such Regional Bankruptcy Court.

B. Judges in the Bankruptcy Court

There is one Chief Judge and one Deputy Chief Judge at the Central Bankruptcy Court and at the Regional Bankruptcy Court. If the Minister of Justice deems that it is necessary in the interests of the government, he may designate more than one Deputy Chief Judge at each Court.

The judges at the Bankruptcy Court are appointed by His Majesty the King of Thailand among the judicial officials under the law governing the regulations of judicial authorities.

The appointees are required to have knowledge and understanding of the matters associated with the bankruptcy law.

C. Bankruptcy Procedure

1. Proceedings in the Court of First Instance

The Bankruptcy Court proceeds with the trial of a case consecutively without adjournment until completion thereof unless there is unavoidable necessity. Thereafter, the Bankruptcy Court makes a judgment or issues an order as soon as possible. In the event that a party fails to appear in Court at any hearing, regardless of whether or not permission is given by the Court, it will be deemed that the party is aware of the court proceedings at that hearing. This proceeding is a substantial departure from the practice current at the time of the enactment of the 1999 Act whereby cases were generally heard on an installment basis at one-month intervals.

Any person or party may petition the Bankruptcy Court to issue an order for taking evidence for disposition immediately if there is any concern that the evidence may be lost or there will be difficulty in accessing them once bankruptcy proceedings commence. Upon receipt of such a petition, the Court will summon the petitioner and the other party or a third party concerned to appear in Court. Deposition may then be taken with the permission of the Court.

The Court may, upon request, order an emergency writ for the attachment or seizure of documents by the Official Receiver. When deemed appropriate, the Court may have other courts or court officials take any part of the evidence for deposition. The deposition of such evidence may take place in or out of the court room.

If the parties or persons involved do not have a domicile or place of business in the jurisdiction of the Bankruptcy Court where the case is tried, the Court shall order the parties or persons involved in the case to appoint a person having domicile in its jurisdiction to be the recipient of pleadings or documents on their behalf within the time specified by the Court.

The delivery of pleadings or documents may also be made by way of posting an announcement at the Court where the case is tried, informing the parties or persons involved to receive the pleadings or documents by this means, which shall take effect after the expiration of a 15-day period from the date of posting the announcement.

The delivery of pleadings or documents to the appointed persons is made in the same manner as the delivery thereof to the parties or as the delivery by other means stipulated in the Civil Procedure Code. The delivery of pleadings or documents to the appointed persons takes effect after the expiration of a seven-day period from the delivery date or 15 days from the date of delivery by other means.

When deemed appropriate, the Court may order that the pleadings or any documents shall be delivered to the parties or any persons by registered mail with an acknowledged receipt returned to the sender, regardless of whether or not the parties or such persons are domiciled in or out of the Kingdom. In such a case, it shall be deemed that the pleadings or documents delivered by a post official shall have an effect as if they were delivered by a Court Official.

2. Appeal

A judgment or order of the Bankruptcy Court in respect of a business rehabilitation of a debtor, including civil cases associated with such a case, may be appealed to the Supreme Court within one month from the date when the judgment or order is pronounced. The President of the Supreme Court shall establish a section for bankruptcy cases in the Supreme Court to conduct a trial on an appealed bankruptcy case, and a judgment or order shall be issued as soon as possible.

III. LIQUIDATION – ABSOLUTE RECEIVERSHIP

A. Overview

Under Thai law, bankruptcy is an involuntary act whereby the law causes the property of a company/debtor to be distributed among its creditors. It commences when a creditor files for bankruptcy proceedings against individual debtors owing debts of at least Baht 1 million, or corporate debtors owing debts of at least Baht 2 million. The Court, based on the grounds stated by the creditor for bankruptcy action, then issues a receivership order. A trial will then be set to hear the various issues, the outcome of which will depend upon the evidence. Once a receivership order is made against the debtor, said debtor, by effect of the order, will cease control of his assets, which will then be vested on the official receiver.

B. Bankruptcy Process

1. Who can initiate a bankruptcy action and against whom?

As stated above, any creditor owed more than Baht 2 million by a corporate debtor or more than Baht 1 million by an individual debtor may file a bankruptcy action against such debtor. However, the debtor must first be proven insolvent. Under Thai law, a debtor shall be presumed insolvent if any of the following events occurs:

- (1) if the debtor transfers assets or rights in management of his assets to another person for the benefit of all his creditors;
- (2) if the debtor transfers his assets dishonestly or fraudulently;
- (3) if the debtor transfers asset or creates any right over it which may be deemed a preferential transfer if the debtor were a bankrupt;
- (4) if the debtor, in order to avoid paying creditors: (i) leaves Thailand or remains outside Thailand, (ii) removes his assets from the jurisdiction of the Court; or (iii) consents to judgment ordering payment of money which he should not pay;
- (5) if the debtor's assets have been attached under a writ of execution, or there are no more assets capable of being attached;
- (6) if the debtor declares to the Court in any action that he cannot pay his debts;

- (7) if the debtor informs any of his creditors that he cannot pay his debts;
- (8) if the debtor submits to any two or more of his creditors a proposal for composition of his debts;
- (9) if the debtor receives demand letters from his creditors not less than twice, at intervals of not less than 30 days, and the debtor does not pay the debts.

2. *Filing*

When the Court admits a petition in bankruptcy, a copy of the petition is sent to the debtor at least 7 days before the hearing. In the hearing of the bankruptcy action on behalf of the petitioner, the Court will consider the insolvency of the debtor, the amount of debts, and the eligibility of the petitioning creditor. Once these facts are established to the satisfaction of the Court, the Court will order the debtor to be under absolute receivership, otherwise the Court will dismiss the petition.

As long as orders for the absolute receivership of the debtor's assets have not been issued, any creditor may also file a petition to adjudge the debtor a bankrupt. However, once the Court has issued an order for an absolute receivership, the bankruptcy petitions of other creditors against the same debtor will be disposed.

Before the Court orders absolute receivership, the creditor may submit an *ex parte* application as a motion asking for an order of temporary receivership of the debtor's assets. If the Court considers that it is a *prima facie* case, such order shall be issued. In this case, the Court may also require the creditor to give security against loss to the debtor at an amount the Court will consider proper.

The order for receivership directs the receiver to attach seals, accounting ledgers, and documents belonging to the debtor and all assets of the debtor, including those in the possession of third parties. For such purpose, the receiver is empowered to make a forcible entry to any place necessary. Also, the Court may, on application of the receiver, order post and telegraph officials to send to the receiver telegrams, postal mail, letters or other papers addressed to the debtor, for a period not exceeding 6 months from the date that the debtor's assets are put under receivership. The receiver will take over the business and will

manage the assets of the debtor and is thereby empowered to complete any pending business of the debtor, collect or receive money from third parties and to compromise, come to a settlement, or file actions, or defend actions relating to the assets of the debtor.

Bankruptcy actions in the past used to be extremely time-consuming. At present, with the establishment of a specialized Bankruptcy Court, the process has been expedited. It now takes approximately 3 months from the date of filing to the date a court order for receivership is issued. However, the most time-consuming and unpredictable stage of the process, which is the realization and distribution of the assets, still remains unchanged. This stage could easily take many years if the assets are hard to locate and dispose of.

3. Explanation Regarding the Business and the Assets of the Debtor

When the Court orders receivership, the debtor must within 24 hours after he acknowledges such order, take an oath before the receiver and submit an explanation stating whether he is in partnership with any person or not; and if so, the names and addresses of the partnership and of all partners. Then within 7 days after he has acknowledged such order, the debtor must further make an oath before the receiver and submit explanations regarding his business and assets, showing the cause of his insolvency, his liabilities, the data of his creditors, the assets placed as security for creditors and the date of placing such assets as security as well as details of assets which may devolve in the future on the debtor, the assets of the spouse including the assets of third parties which may be in his possession.

4. Meetings of the Creditors and Creditors' Committee

Upon the Court's order placing the debtor under an absolute receivership, the receiver will call a first meeting of all creditors as soon as possible. This first meeting will consider whether the debtor's proposal for composition should be accepted, or whether the Court should be asked to adjudge the debtor bankrupt.

A subsequent meeting of creditors may be called by the receiver whenever the receiver deems it appropriate or whenever creditors representing more than one-fourth of the debts make a written demand calling for such a meeting.

Creditors who have the right to vote at creditors' meetings are those who have the right to apply for repayments of debts and who have filed such claims prior to the date of the meeting.

At a meeting of creditors, a resolution may be passed appointing a committee of creditors to represent all creditors in matters relating to the management of the debtor's assets. The creditors' committee shall consist of not less than three and not more than seven persons. Resolutions of such committee shall be by majority vote of the persons attending the meeting, and members attending the meeting must number not less than half to form a quorum.

5. Public Examination of the Debtor

After the first meeting of the creditors, the Court examines the debtor publicly to learn about his business and assets, the reason for his insolvency, the conduct of the debtor as to whether he has done or omitted to do any act amounting to an offense under any law relating to bankruptcy, or whether he has behaved improperly in such a manner as to be grounds for the Court to refuse to grant him an unconditional discharge from bankruptcy. While answering these questions, the debtor must take an oath, so that his statements may be used against him later. The date and time of this examination has to be published by the receiver at least 7 days in advance of such examination in at least one daily newspaper. If it appears that a debtor is insane, or is incapable of understanding, or is physically infirm so that it is impossible to conduct the public examination, the Court shall order that the examination will be made in some other manner or in a different place.

6. Composition

(a) Composition prior to Bankruptcy

If both the creditors and the debtor wish to avoid a long, protracted and adversarial bankruptcy action, a composition during bankruptcy may be an alternative. So, whenever the debtor desires to come to a settlement for the satisfaction of his debts by repayment of a

part or in any other manner, he can submit his proposal for the composition in writing to the receiver within 7 days from the date of submission of his explanation of matters relating to his business, etc., or within such period the receiver prescribes. The receiver then calls a meeting of the creditors to consider if such proposal shall be accepted or not. The acceptance will not bind all creditors until the Court passes an order approving the composition. The Court itself shall not be able to consider an application for composition of debts until after the completion of the debtor's public examination. The only exception is where joint debtors apply for a composition even though the Court may not have completed the public examination of all these debtors, because some of the debtors are unable to attend owing to illness, or being outside Thailand. If the receiver then reports that it is unnecessary to examine such debtors, the Court can consider the application if at least one debtor was publicly examined.

In any case, it is forbidden for the Court to approve a composition in which no provision is made for repayment of debts according to the order prescribed by the law relating to the division of the assets of a bankrupt. Neither can the Court approve a composition which is of no benefit to creditors generally, or which gives preferential treatment to some creditors, or which indicates any fact which, if the debtor became bankrupt, would prevent the debtor from being discharged from bankruptcy. In the last case, the Court can approve, if the debtor gives security for repayment of an amount of not less than one-quarter of the total unsecured debt for which the creditors can claim repayment.

The approval for composition must be published within 7 days from the Court's order in the Government Gazette and in at least one daily newspaper. Once the composition is approved by the creditors and the Court, it becomes binding on all creditors. However, a composition does not cause a person, who is jointly liable with the debtor, or who is a guarantor, to be released from his liability.

If the debtor fails to repay his debt as agreed in the composition or if there is likelihood of such repayment to be delayed, or such composition was obtained by fraud, then, on the report of the receiver or on the motion of any creditor, the Court is empowered to terminate the composition and adjudge the debtor as bankrupt.

(b) Composition after Bankruptcy

After the Court's adjudication of bankruptcy, the debtor may (again) submit a proposal for a composition. However, if the debtor's previous composition was unsuccessful, he is not allowed to do so again within 3 months from the date when the last failed. If the Court approves the composition, it is empowered to terminate the bankruptcy and may order the restoration of the power of the debtor to manage his business.

7. Supervision of the Debtor and His Assets and Limitation of His Rights

The debtor whose assets have been placed under receivership must attend all meetings of the creditors and reply to their questions regarding his business. Furthermore, he must do all acts relating to his business and assets as the receiver may reasonably direct, or as may be prescribed in the Bankruptcy Act, or as the Court may order. He shall assist to the utmost of his capacity in the realization and the distribution of his assets among the creditors. In the case that the debtor is about to commit any punishable offense under the Bankruptcy Act, the Court can issue a warrant of arrest of the debtor and can detain him until he gives satisfactory security, but not longer than 6 months.

During the time the debtor is under receivership or adjudged as bankrupt, he has to apply to the receiver to fix a sum of money for expenses for the maintenance of himself and his family. In no case will the debtor be allowed to leave Thailand without written permission of the Court or the receiver. If he is moving house, the debtor has to report his new address within a reasonable time to the receiver.

8. Discharge from Bankruptcy

The debtor may submit an application by way of a motion to the Court asking for an order of discharge from bankruptcy. In fixing the date of hearing of this application, time must be allowed to the receiver to inform the bankrupt and all creditors in advance of not less than 14 and to publish the same in at least one daily newspaper. In such hearing, the Court will examine and consider the explanations of the debtor, receiver, the creditor, and its own records of the public examination. The discharge will be granted if the debt is fully paid on

the day of the discharge. The Court is prohibited from ordering the discharge from bankruptcy if it is found that the bankrupt is a dishonest person. This will be presumed, for example, if the bankrupt carries on business, knowing he is unable to pay his debts, or if he has given preference to any creditor. An order for discharge is published in the Government Gazette and at least one daily newspaper. The fact that a court has given order of discharge from bankruptcy shall not release from liability a person who is partner with the bankrupt, or is jointly liable with the bankrupt, or who guarantees, or is in the position of a guarantor of the bankrupt.

In any event, a bankrupt who has been discharged from bankruptcy still has the duty to assist in the realization and distribution of his assets which are with the receiver as the receiver may require. If he does not so assist, the Court may again withdraw the discharge from bankruptcy.

D. Proceedings in the Case of the Debtor's Death

In the event that the debtor dies and if it appears that if the debtor had been alive, the creditors could have filed a bankruptcy suit against him, the creditors may petition the Court for management of the estate of the debtor in accordance with the Act. This action must be filed in Court within one year after the debtor's death. In such action, the creditors must ask that the heirs, or administrator of the estate, or the controller of assets, join and defend the action on behalf of the deceased debtor. The representative of the deceased debtor has the duty to submit the explanations as the debtor would have if he was still alive. If the debtor dies during the trial, or at the time when the Court adjudged him a bankrupt, the proceedings shall continue as in the proceedings of a deceased debtor.

E. Proceedings in the Case where the Debtor is an Ordinary Partnership, a Limited Partnership, a Limited Company, or any other Juristic Person

Where the debtor is a juristic person, aside from creditors being able to file a bankruptcy action shown above, the liquidator of such juristic person may also submit a petition to the Court asking that such person be adjudged a bankrupt if it appears that the contribution of shares has been fully paid up and the assets are insufficient to cover the debts. The Court

then issues an order placing the juristic person immediately under absolute receivership, and the meeting of creditors shall appoint one creditor to have the rights and duties as that of a petitioning creditor. He as well as the receiver may file a motion for the adjudication of bankruptcy of persons who are found to be unlimited partners in such juristic person, without filing a new action. The Court may then order a temporary receivership of the assets of such person. The petitioning creditor may be required to give security against loss in such amount as the Court may deem proper. If it appears later that the person was or is not an unlimited partner, the Court will terminate the receivership and if such person filed a motion to the Court, the Court has the power to order that the petitioning creditor who asked for the receivership pay compensation to such person in a sum as the Court may consider proper, or it may order that the receiver make such payment out of the assets of the juristic person.

III. BUSINESS REORGANIZATION

A. Overview

The proceedings for business reorganization are governed by Chapter 3/1 of the Act. The procedures under Chapter 3/1 start with the filing of a petition for restructuring by either the debtor or the creditor or creditors owed more than Baht 10 million, or a relevant government authority. When the Court approves the application for restructuring, it gives the debtor protection by declaring an automatic stay which restricts the ability of creditors to take action against the company to recover any sums owing to them. The stay prevents any form of legal process being commenced or continued against the company. The stay also prevents creditors from filing dissolution or bankruptcy petitions. After the Court's approval of the application, the creditors are next required to select a plan preparer to draft a rehabilitation plan. The creditors' choice of plan preparer must be approved by the Court. Within one month from the Court's appointment of the plan preparer, all creditors must submit their claims. The plan preparer is then obligated to draft the plan, which must be submitted to the creditors within 3 months. The creditors must approve the plan through a special resolution passed by the creditors who are grouped into various categories. Once approved by the creditors, it is submitted to the Court for its final approval. From the time the Court accepts

the plan, it becomes binding on all creditors. The plan is then implemented within a five-year time frame from the Court's approval, with two one-year extensions allowed. Within this time frame, if the Court deems that the plan is not successful, it may order its termination and/or put the company under absolute receivership, leading to bankruptcy proceedings.

B. Filing of Petition Business Reorganization

1. Who can initiate a business reorganization action and against whom?

The debtor, or the creditor or creditors owed more than Baht 10 million, or a relevant government authority, may file a petition for reorganization of the debtor's business regardless of whether or not a lawsuit for bankruptcy has been filed against the debtor. However, it must be established that the debtor is insolvent and that there is reasonable ground and prospect to reorganize its business.

Filing for a petition for reorganization will not be allowed in the event that: (i) the Court has ordered the debtor to be under absolute receivership; or (ii) the Court or the registrar has ordered a dissolution or revocation of the registration of juristic person of the debtor, or a registration of dissolution of such juristic person is made, or the juristic person must be dissolved for other reasons.

2. Specifics of the Petition and Fees

The petition for business reorganization must clearly set out: (i) the insolvency of the debtor; (2) list and address of all creditors whom the debtor is indebted alone or altogether for an amount of not less than Baht 10 million; (3) reasonable ground and prospect to rehabilitate the business; (4) name and qualifications of the plan preparer; and (5) a letter of consent of the plan preparer. If a creditor is the petitioner, it shall annex the data of other known creditors; if the debtor is the petitioner, it shall annex the list of all of its existing assets and debts, including data of the creditors.

When petitioning for a business reorganization, the petitioner has to pay the Court's fee of Baht 1,000 and deposit with the Court security money for the expenses, for which the

petitioner shall be responsible, in the amount of Baht 50,000 at the time of filing such petition. In the case that the petitioner refuses to deposit the security and the Court has not yet ordered for reorganization, it will be deemed that the petitioner has abandoned his petition. In the case of the creditors or a relevant government authority, as the case may be, being the petitioner, the plan preparer shall make reimbursement of the said expenses out of the assets of the debtor to the petitioner without delay after the Court has ordered for business reorganization. The petitioner may not withdraw his petition unless the Court grants him approval therefor. No approval will be granted if the Court already ordered for reorganization. If the Court approves the withdrawal of the petition, an announcement must be made in at least one widely circulated newspaper not less than 7 days in advance, in order to inform the creditors and the debtor.

3. Automatic stay

When the Court approves the application for reorganization, it gives the debtor protection by declaring an automatic stay, which restricts the ability of creditors to take action against the company to recover any sums owing to them. The stay prevents any form of legal process being commenced or continued against the debtor. The stay also prevents creditors from filing dissolution or bankruptcy petitions. Once the automatic stay commences, it means a severe limitation for the secured creditor on the enforcement of its securities. Basically, a secured creditor cannot file an action in a civil case against a debtor in respect of the debtor's assets without the Court's approval. If there has already been a judgment, the execution of such judgment over the assets of the debtor cannot also be carried out without the Court's dispensation. In order to apply for an amendment or annulment of the limitation, the secured creditor will have to prove that the stay or limitation is not necessary for the business reorganization, or does not sufficiently protect the rights of secured creditors. On the other hand, this protection shall be deemed sufficient if there has been a repayment of debt to secured creditors in the amount equal to the amount of decrease in the value of the assets used as security, or there has been a giving of security to secured creditors so as to compensate the original security in the amount equal to the decrease in the value of assets used as security or any other procedure to which secured creditors have consented or which the Court sees will allow the secured creditor to receive repayment of their debts at the value of the assets used as security at the time the petition for business

reorganization is submitted, including interest and contractual benefits, when the procedures to be implemented are terminated.

C. Plan Preparer, Plan Administrator and Receiver

1. Plan Preparer

When the Court approves the application for reorganization, a plan preparer has to be appointed to work out a plan for reorganization of the business.

The plan preparer does not need to have any special qualifications. It is envisaged that this matter will be subject to regulations that may be promulgated in the future. The plan preparer may be a company or a committee, and since there is no such area of professional practice in Thailand as a specialist insolvency practitioner as in other jurisdictions, the plan preparer can practically be any person, company or committee nominated by the debtor or creditor and approved by the Court. A system of licensing plan preparers is apparently being considered.

The plan preparer has the two-fold function of continuing the business and preparing a plan. His roles under the amended Act are very broad and powerful. Once appointed by the Court, the powers and duties of the debtor's directors in managing the business as well as all the legal rights of the debtor's shareholders (except the right to receive dividends) are all vested in the plan preparer. In this way, the plan preparer is given a wide range of administrative powers to enable him to take over the business effectively.

Primarily, the party requesting reorganization has the prerogative in appointing the plan preparer. If there are no objections from the debtor or creditor, the Court, if it has the opinion that the person is suitable to be the plan preparer, appoints the person nominated by the petitioner. However, if there are objections from either the debtor or creditor, the debtor then gets the prerogative to nominate the plan preparer. If the debtor does not do so, a meeting of the creditors will be called by the receiver. The receiver will then publish an advertisement fixing the day, time and place of the meeting of the creditors for the purpose

of electing the plan preparer not less than 7 days in advance of the meeting in one daily newspaper. He will also notify the debtor and all known creditors.

In nominating a plan preparer to the meeting of the creditors, a letter of consent from the nominated person has to be supplied first. However, if the debtor has proposed a plan preparer whom the creditors object to, it would require creditors owed two-thirds of the debt to override the debtor's choice and replace him with their own nominee. Such voting creditor has to be a creditor, who may request repayment of his debt for business reorganization

In order of priority, the parties that have the right to appoint a plan preparer are: first, the petitioner; second, the debtor; then third, the creditor. It can be seen that the creditor does not have absolute power in choosing the plan preparer, albeit this is not of much concern to large creditors who can unilaterally control the procedures for nominating the plan preparer. However, it poses a problem for small creditors, who have a smaller voice or none at all.

In the case the Court ordered business reorganization but not yet appointed a plan preparer, all legal rights of the debtor's shareholders shall be suspended except the right to receive dividend. Said rights shall be vested in the interim executive or the receiver, as the case may be, until a plan preparer is appointed.

2. The Plan Administrator

The plan administrator is principally vested with the duties of managing the business and assets of the debtor according to the business reorganization plan. His appointment, tenure, qualifications and compensation are specifically contained in the plan. His duties commence upon the Court's order approving the plan. He may propose a revision of the plan and/or an extension of the plan implementation period. Such extension may be made only two times at no more than one year each. If, however, it is clear that the plan has almost been fulfilled, the plan administrator may request an extension as long as necessary. The plan administrator, pursuant to the plan, may request the Court to permit the amendment or the establishment of

new Articles of Association or Memorandum of Association of the debtor. The law requires him to report regularly to the receiver and the Court with regard to the implementation of the plan. Specifically, he has to let the Court know of his views as to whether the reorganization of the business has been completed or not.

3. The Receiver

The receiver is a government official. Under the amended Bankruptcy Act, he takes on a more expanded role. He acts in an administrative capacity, being responsible for calling meetings and receiving claims for payment. Such meetings include the creditors' meeting for selecting the plan preparer and creditors' meeting to consider the plan. Before the formal appointment of the plan preparer, the receiver is also vested with the duty to take over the business of the debtor. During the plan implementation, the receiver is entrusted with the duty of supervising the actions of the plan administrator, who can be removed by the Court at the receiver's recommendation. Generally, where the plan preparer or plan administrator for any reason does not exist, his rights and duties are taken over by the receiver.

C. Explanation on the Business and Assets of the Debtor

Within 7 days after learning of the appointment of the plan preparer, the debtor shall submit an explanation regarding his assets. The plan preparer may extend such time with reasonable grounds. If the debtor fails to submit such explanation, the plan preparer has the authority to hire others to help as necessary, with the costs to be deducted from the debtor's assets. The explanation must clearly disclose all activities the debtor is engaged, the assets, liabilities and obligations the debtor has with third parties; the assets used as collateral in favor of creditors; the assets of third parties which are in debtor's possession; whether the debtor is a shareholder in any other company or a partner in any other partnership; the names, occupations and complete addresses of all creditors; the names, occupations and complete addresses of persons indebted to the debtor; details regarding assets that will pass to the debtor in the future and any other additional data which the plan preparer deems appropriate. Upon a motion by the plan preparer or receiver, the Court has the power to compel those persons who admit that they are indebted to the debtor or who admit that they have assets of the debtor in their possession, to pay the debt or to turn over those assets.

When it appears that the debtor has the right to demand repayment or delivery of assets to himself and this person does not admit it, the plan preparer shall notify the receiver who shall start an investigation which might lead to the Court seizing such asset.

D. Claim for Repayment

The law stipulates that all applications for repayment must be done within one month from the time the Court's appointment of the plan preparer is published. All creditors, secured, unsecured or judgment creditors, must file according to the same procedures. If a creditor eligible for repayment does not apply within this period, he forfeits his right to receive payment, unless the plan provides otherwise, or the Court cancels the business reorganization order. The debts for which repayment can be claimed will be only those that occurred before the Court issued the reorganization order, regardless of whether or not the debt has matured or is conditional. For debts that were created between the time that the Court issued the order to reorganize business and the appointment of the plan preparer, the creditors have the rights according to the time periods stipulated in the plan without having to apply for repayment of debt for business reorganization. These creditors must, however, send a letter to the plan preparer asking him to issue a letter for their claim prior to the meeting held to discuss the plan. As for the actual repayment of debts, the receiver has the authority to authorize payments. However, debts that can be repaid must be those that have not been opposed by the plan preparer, the other creditors, or the debtor. If any person opposes an application filed, the receiver shall investigate the matter and issue approval, partial approval or dismissal of such application. Any objections to the orders issued by the receiver may be filed with the Court within 14 days after learning of the issued order.

For foreign creditors, of particular concern is the currency of payment. If the debt applied for is in foreign currency, the amount must be converted into Thai currency. The computation shall be based on the exchange rate on the day the Court issued the order to reorganize business. In these times of fluctuating exchange rates, one can envision the huge amount of gains or losses that can be made just because of this particular rule.

New creditors, or those injecting fresh funds into the company for its reorganization, are allowed to have the right to repayment in accordance with the plan. This procedure is one

of the major changes in the old bankruptcy law. Under the 1940 Act, a new creditor lent money at his own risk. This was because the 1940 Act prohibited the repayment of a debt created when the creditor had known that the debtor was insolvent at the time. This particular provision of the 1940 Act was one of the pivotal issues which made business restructuring virtually not feasible. The 1998 and 1999 Amendments addressed this issue by allowing the new creditor to have the right to repayment in accordance with the plan. However, unlike other jurisdictions where new creditors enjoy “super priority”, the Thai legislation does not automatically entitle these new creditors to have priority over all other creditors. Their entitlement to repayment arises with their sending of a letter to the plan preparer seeking his confirmation of their claim. If the plan preparer confirms the claim, the new creditor is paid according to the time period in the plan. If the plan preparer disapproves or if the creditor fails to send the letter, the new creditor must apply for repayment to the receiver, just like all other types of creditors, within 14 days from the date of the creditors’ meeting to approve the plan or the date of receipt by creditor of the letter delivering his claim.

E. Annuling a Juristic Act already Executed

The plan preparer or receiver may ask the Court to cancel a fraudulent act pursuant to the Civil and Commercial Code by filing a motion. If the juristic act which is subject to this motion arose within the period of one year before the date of filing of the petition and thereafter, or it is a gratuitous act, or is an act where the debtor has received compensation in an amount less than appropriate, it shall be presumed that it is an act which the debtor and the person who was enriched thereby had the knowledge that it would prejudice third creditors. If it appears that there was a transfer of assets committed within 3 months before the petition or thereafter, with the intent to put a creditor in an advantageous position, the Court has the power to order the cancellation of such act. If the person taking advantage is an insider of the debtor, cancellation can be done if the act was done one year before the petition and thereafter.

G. The Plan

1. Specifics of the Plan

At a minimum the plan must contain: (i) the reasons for reorganizing the business; (2) details concerning the assets, liabilities and other binding obligations of the debtor at the time the Court orders business reorganization; (3) principles and methods of business reorganization; (4) redemption of collateral in the case where there are secured creditors and liabilities of a guarantor; (5) ways to solve the problems if there is a temporary lack of liquidity while implementing the plan; (6) action to be taken in cases in which a claim or debt is assigned; (7) the name, qualification and letter of consent of the plan administrator and compensation; (8) the appointment of the plan administrator and his release from this position; (9) time period for implementing the plan, which must not exceed 5 years; and (10) the refusal of assets of the debtor or contractual rights, in the case where the assets of the debtor or contractual rights have obligations which exceed the benefits to be derived therefrom.

2. Creditors Meeting for Approval of the Plan

The plan preparer, after having been officially appointed by the Court and announced in the Government Gazette, then proceeds with the drafting of the plan. This task must be completed within three months, with two possible extensions of one month each. The plan is then sent to all related parties. After receiving the plan, the receiver will call a meeting of the creditors in order to discuss whether to accept the plan or how to revise it. A creditor, the debtor, or the plan preparer may request for the revision of the plan by submitting an application to the receiver at least three days in advance before the day of the meeting.

The resolution approving the plan must be a special resolution passed by the creditors according to their classifications as explained below.

3. Groups of Creditors

The creditors are classified as follows:

- (1) Secured creditors having secured debts of not less than 15% of the total debts;
- (2) Other secured creditors not included above;

- (3) Unsecured creditors;
- (4) Preferred creditors (i.e. creditors under Sec. 130 bis).

For the approval of the plan, each group of creditors enjoys equal rights. The plan must have been approved by a special resolution of a meeting of either:

- (a) each group of creditors, or
- (b) a group of creditors (other than those described in Sec. 90/46 bis below) owed at least 50% of the total debt (Sec. 90/46).

These voting rules also apply to revisions to the plan; removal of plan administrator; and appointment of creditors' committee for implementation of the plan.

There are three types of creditors that are excluded from the aforementioned classification and are deemed to have accepted the plan. These are:

- (1) Creditors to be repaid in full within 15 days of the plan, such that the debtors will be deemed to have never been in default;
- (2) Creditors who will receive payment under existing contracts;
- (3) Subordinated creditors (Sec. 130 bis).

4. Proceedings after the Court Accepts the Business Reorganization Plan

Once the Court accepts a plan, it becomes binding on all creditors. The plan administrator is principally vested with the duties of managing the business and assets of the debtor according to the business reorganization plan. His appointment, tenure, qualifications and compensation are specifically contained in the plan. The plan is then implemented within a five-year time frame from the Court's approval, with two one-year extensions allowed. If, however, it is clear that the plan has almost been fulfilled, the plan administrator may request an extension as long as necessary. Pursuant to the plan, the plan administrator may request the Court to permit the amendment or the establishment of new Articles of Association or Memorandum of Association of the debtor. The law requires him to report regularly to the receiver and the Court with regard to the implementation of the plan.

Specifically, he has to let the Court know of his views as to whether the reorganization of the business has been completed or not.

5. Plan Implementation--Creditors' Committee

The creditors during this time may pass a resolution to appoint a committee of creditors to monitor plan implementation. The committee of creditors must be composed of at least three but not more than seven members. They must be from among the creditors or people assigned by the creditors to act on their behalf. No one creditor may have more than one representative.

The plan preparer will then prepare a report of plan implementation and submit the same to the receiver every three months as required by the receiver. In the event that the plan administrator fails to act in accordance with the plan, carries out his duties dishonestly, causes damage to the creditors or debtor, or there are other reasons that he should not continue serving as plan administrator, the Court may order upon a motion of the debtor's executive or the committee of creditors or the report of the receiver, the removal of the plan administrator from his position or issue any other order which seems appropriate. The receiver will then call a meeting of the creditors in order to pass a resolution to select a new plan administrator as soon as possible.

F. Termination/Absolute Receivership

If the Court does not approve the plan or decides to terminate the business reorganization and decides not to place the debtor company under receivership, but instead merely terminates the restructuring plan, the company is restored to its former state. This means that the rights and liabilities of the former shareholders and directors are reinstated. In such circumstances, the stay is lifted, reinstating all rights and liabilities of the former shareholders and directors. Secured creditors may then decide to foreclose on the debtor's assets.

In the event that the Court orders absolute receivership, the day that the Court accepts the petition for consideration shall be deemed as the day that it is requested that the debtor be

adjudicated bankrupt. The creditors must first apply for repayment with the receiver within two months following the date of publication of absolute receivership. For creditors residing outside Thailand, this is extended for another two months.

G. Appeal

An interlocutory order or a court order giving a decision regarding business reorganization cannot be appealed except for the following orders: (i) an order dismissing a petition, (ii) an order allowing or disallowing a creditor to receive payment in reorganization either in whole or in part, (iii) an order to place a debtor under absolute receivership, and (iv) any order that the Chief Judge of the Court of First Instance or the Chief Judge of Region having jurisdiction deems appropriate in the interests of justice and the judge permits a filing of written appeal.

IV. MANAGEMENT OF DEBTOR'S ASSETS

A. Making Claims for Repayment of Debts

Any creditor filing a claim in bankruptcy must file his claim with the receiver within two months following the date of publication of the order of the absolute receivership. If the creditor comes from abroad, the receiver may extend this period by another two months. Where the receiver joins in a pending action on behalf of the debtor, the creditor can be entitled to file a claim in the same period, but to be calculated from the date of the final judgment for such action.

An unsecured creditor may file a claim if the cause of indebtedness arose before the receivership, even if such debt may not be due yet. A secured creditor naturally has rights over the asset which is security afforded to him by the debtor prior to the order of receivership and, therefore, need not file for repayment if the security fits his claims. If a secured creditor applied for repayment without declaring himself as secured, he must return the asset given as security to the receiver, and his rights over such asset shall cease, except when the creditor proves to the Court that such omission arose through oversight.

If a creditor who is entitled to claim for repayment of his debt is indebted to the debtor when the Court orders receivership, even if the grounds for indebtedness are not the same, or are subject to conditions or to terms as to time, such debts may be set off against each other, unless the creditor's right of claim against the debtor accrued after the order of receivership of the asset.

Foreign creditors who are domiciled outside of Thailand can claim repayment of debts in the bankruptcy action upon their compliance of the following conditions:

- (1) They must prove that creditors in Thailand are similarly entitled to claim for payment of debts in bankruptcy actions under the laws and before the courts of the countries of which they are nationals;
- (2) They must report the amount of the asset or distribution that they have received or are entitled to receive from the same debtor's estate located outside of Thailand, if any. If so, they must agree to deliver the asset or distribution from the debtor's said estate to be added to the debtor's estate in Thailand.

Foreign creditors may be represented by their power of attorney during the course of the bankruptcy action. They may, at times, be called to appear in court to testify or as a witness.

B. Effect of Bankruptcy in regard to Business Already Completed

The receiver may ask the Court to cancel a fraudulent act pursuant to the Civil and Commercial Code by filing a motion. If the juristic act which is subject to this motion arose within the period of one year before the date of filing of the petition and thereafter, or it is a gratuitous act, or is an act where the debtor has received compensation in an amount less than appropriate, it shall be presumed that it is an act which the debtor and the person who was enriched thereby had the knowledge that it would prejudice third creditors. If it appears that there was a transfer of assets committed within three months before the petition or thereafter, with the intent to put a creditor in an advantageous position, the Court has the power to order the cancellation of such act. If the person taking advantage is an

insider of the debtor, the cancellation can be done if the act was done one year before the petition and thereafter.

C. Collection and Disposal of Asset

The Court or the receiver is empowered to issue a summons to any person who is suspected to have assets of the debtor in his possession or who is believed to be indebted to the debtor or is considered to be capable of giving information about the assets. If such person intentionally defies the summons, the Court is empowered to issue a warrant for the arrest of such person and to detain him until he complies with the order of the Court or receiver. When it appears that the debtor is entitled to claim assets from another person, the receiver will inform such person in writing to repay his debts. The receiver will further inform such person that if the liability is disclaimed, he shall show cause for such disclaimer within 14 days from the receipt of such notice. Otherwise, it shall be deemed that such person is indebted to the bankrupt estate in the amount stated in the notice, absolutely. If such person disclaims within the time prescribed, the receiver will conduct an investigation.

If the condition of the business indicated reasonable grounds for continuing the operations, upon approval of the creditor's meeting, the receiver may himself operate such business or may appoint any other person, in order to wind it up.

Assets realized by the receiver on the debtor's bankruptcy may be sold by the receiver in any manner which is most convenient and beneficial. Sales other than public auctions must be approved by the creditor's committee.

D. Division of Assets

Assets in excess of that reserved for fees and expenses must be distributed by the receiver among the creditors without delay. Assets with which debts may be paid are all assets belonging to the debtor except for personal and necessary effects that the debtor and his spouse and his minor children reasonably require in accordance with their condition in life and livestock, seeds, instruments and items for use in the debtor's occupation of a total value not exceeding Baht 100,000.

In distributing the assets among creditors, the expenses and debts will be paid in the following order: expenses of administration of a deceased debtor's estate, expenses of the receiver in managing the debtor's business, funeral expenses of a deceased debtor, fees in collecting assets, fees of the petitioning creditor and counsel's fee as the Court or the receiver may prescribe, taxes which have become due for payment within 6 months prior to the order for receivership of the assets, and wages that employees have the right to receive prior to the order for receivership for work performed for the debtor pursuant to the law concerning labor protection, as well as other debts. If the money is insufficient to pay the debt in any series in full, the creditors in such series shall be paid *pari passu*. On the other hand, if all debts, fees and expenses under the Bankruptcy Act had been paid in full, any assets remaining shall be returned to the bankrupt.

E. Closing of the Action

When the receiver has made final distribution of the assets of the debtor, or has ceased to take action under the composition, or when the bankrupt has no distributable assets, the receiver reports to the Court and asks the Court for closing the action. When the Court has considered the report and the accounts of the receiver, together with the objections by the creditors, the Court may or may not close the action. If the Court issues an order refusing the closure upon filing of a motion by a creditor or interested person, the Court may order that the receiver be responsible for any act or omission performed in contravention of his duty. An order for closure releases the receiver from all liabilities up to the date of such order.

F. Termination of Bankruptcy Action

Upon the application of an interested person or receiver, the Court is empowered to terminate the bankruptcy action if the receiver is unable to proceed for the benefit of the creditors, because the petitioning creditor does not exist or did not pay the fees or the debtor should not be adjudged a bankrupt; or the debts have been paid in full or at least the amount of the debts has been deposited with the Court, or the receiver made his final distribution and during the following 10-year period, the receiver has not been able to

collect any further asset of the bankrupt person and no creditor has asked the receiver to arrange for the collection of any asset of the bankrupt person.
