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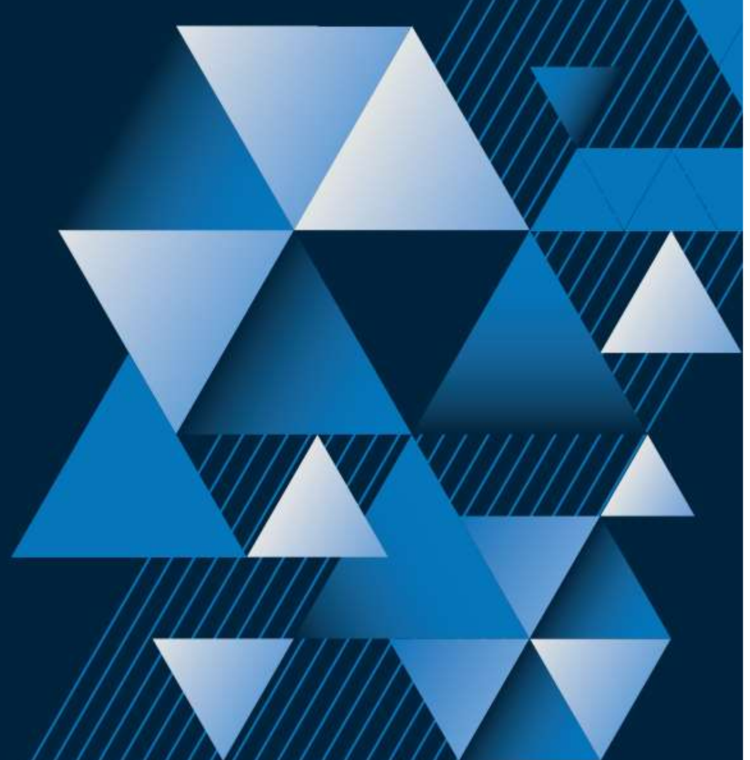
Highlights from Asia Pacific Focus...

- Great (Restructuring) Expectations: Where to Next for Asia?
- New Trends of Korean Insolvency Law
- Vietnam - Key Legal Issues for Foreign Lenders
- Need to Empower Creditors in Japan?
- Between the Lines: Navigating the Gap in Thailand's Business Rehabilitation Process - Potential and Pitfalls
- The Restriction on Loan Principal Haircuts for Indonesian SOE Banks - A Practical Challenge for Loan Portfolio Management
- Debtor-in-Possession Restructurings in Singapore: Moving Towards Timely and Cost-Effective Debt Restructuring Solutions



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BETWEEN THE LINES: NAVIGATING THE GAP IN THAILAND'S BUSINESS REHABILITATION PROCESS – POTENTIAL AND PITFALLS

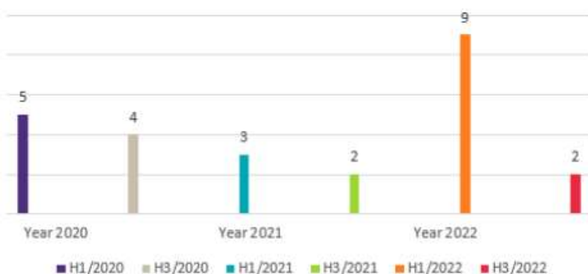
Ian Pascoe and Neetika Mutreja
Grant Thornton
Thailand

"The legislation allows for a streamlined approach, which protects the assets of the business and allows for the distressed business to continue operating during the restructuring period"

Introduced in the aftermath of the 1997-1998 Asian financial crisis, amendments to the Bankruptcy Act, B.E. 2483 (1940) set the stage for corporate rehabilitation proceedings in Thailand. The revised legislation established court-supervised mechanisms designed to steer companies away from the brink of insolvency, offering a structured approach to restructuring liabilities and assets, through the formal appointment of a Plan Preparer and a Plan Administrator (the Restructuring Framework). The legislation allows for a streamlined approach, which protects the assets of the business and allows for the distressed business to continue operating during the restructuring period. However, despite its immense potential as a turnaround tool, the Restructuring Framework remains underutilised.

The Central Bankruptcy Court (the Court), supervises and governs the Thai business reorganisation process under the Restructuring Framework. The framework allows for distressed businesses (the Debtor) to submit a petition for business reorganisation, and, under the protection of an automatic stay, appoint a Plan Preparer to formulate and propose a reorganisation plan to restructure the Debtor's liabilities, to be put to a vote of the creditors. The reorganisation plan must be voted through by the majority of creditors and endorsed by the Court. The Restructuring Framework also provides for cramdown and clawback provisions. Generally, it is a well drafted legislation, in line with the norms and standards of international restructuring provisions.

However, the number of companies which have used and benefitted from this framework is limited, as can be seen from the graph below. The data has been obtained from the public database which provides limited information until 2022.



There has been a recognition of the need to amend the legislation to increase the applicability and usage of the framework. Most recently, this has manifested in a draft amendment to change provisions specifically targeted at Small and Medium-sized Enterprises (SMEs), as well as the introduction of pre-packaged plans.

Key prospective changes:

- **Qualifying debt threshold for Non-SMEs rehabilitation** - Increase of the debt amount threshold to qualify for rehabilitation from THB 10 million (approximately USD 280,000) to THB 50 million (c. USD 1,500,000). Companies that do not reach this threshold can avail the provisions specifically designed for SMEs.
- **SMEs registration requirement** - The requirement that only SMEs registered with the Office of SMEs Promotion or other government organisations will be removed.
- **Submission of prepackaged** - Under the current legislation, the debtor is required to submit a prepackaged rehabilitation plan which demonstrates that all creditors has already approved the plan upon submission to the Court. This will no longer be a requirement, but rather, optional.
- **Acceleration in rehabilitation process** - A pre-packaged plan, whether for SMEs or ordinary enterprises, will allow for accelerated approval process by the Court.

While it is positive to see further reforms being introduced to expand the reach of the insolvency framework, their remain significant practical hurdles that impair the efficacy of the framework. From our experience, we outline five:

Expediency

Timing stands as one of the primary impediments to the effective deployment of Thailand's rehabilitation framework. Although the Bankruptcy Act is explicit in its mandate for promptness, with Section 90/9 emphasizing that the court should treat the inquiry with urgency, the reality often unfolds differently.

Section 90/11 further underscores this emphasis on timely action, stipulating that the court's inquiry into the petition should be continuous, "free from any temporal interruption and without adjournment until the completion of the inquiry." The clear objective here is to prevent prolonged periods of uncertainty that can exacerbate a business's financial troubles and reduce confidence among creditors, stakeholders, and employees.

However, in practice, it can take up to three months for even the preliminary hearing. Subsequent hearings can stretch the process to an extended timeframe of 12-18 months before a business reorganisation order is officially issued. The legislation then grants up to 5 months (3 months with additional 2 extensions of 1 month) for the preparation of the plan, which must then be approved by a creditor meeting and then endorsed by the court. This adds an additional 7-8 months to the timeline, meaning it can be 2 years since the initial petition before the implementation of the Reorganisation Plan can commence. This compares poorly with other jurisdictions, where the turnaround time is a matter of weeks, not years.

This protracted timeline poses a slew of challenges. For the distressed business, each delay can further erode its financial status, jeopardizing chances of a successful recovery. Meanwhile, creditors who have a vested interest in the recovery of their debt, are left hanging in uncertainty, unable to take action due to the moratorium granted in the process. For the Bankruptcy Act's rehabilitation provisions to be truly effective, there needs to be a realignment between its prescribed timelines and the actual speed of court proceedings.

While this is partially addressed by the draft amendment introducing pre-packaged plans, expediency needs to be addressed across the board. The prolonged process has eroded confidence in the rehabilitation mechanism itself, making businesses (and creditors) hesitant to utilize this tool.

Clarity on precedence of laws

The overlapping purviews and conflicting primacy of various legislations present additional hurdles for business navigating the rehabilitation process in Thailand. This is exacerbated by the delayed enforcement timeline mentioned above, meaning that companies have to deal with the conflicting provisions for a longer period of time.

An example of this can be seen from the moratorium period provided in the legislation, which impedes the Debtor from making any creditor payments until the rehabilitation plan is approved. However, the labour law dictates that salaries and severance amounts must be paid in a timely manner. Failure to comply with the labour law, particularly in the case of severance payments, can lead to criminal sanctions for the Debtor, the directors of the Debtor and potentially by definition the Plan Preparer.

Another example is the intersection of bankruptcy and corporate laws. The bankruptcy legislation stipulates that the rights of shareholders are suspended during the business reorganisation period. However, corporate law mandates shareholder approval for the Debtor's annual financial statements in order to file with the competent authority within a stipulated timeframe post the fiscal year's close.

Such discrepancies underscore the need for a comprehensive review of the legislative landscape, to ensure harmonization between the various legislative obligations.

Group holdings

The current Bankruptcy Act falls short in addressing the complexities associated with Company Groups. Instead of offering a holistic rehabilitation mechanism for an interconnected group of companies, it strictly focuses on individual entities. This is problematic since insolvency in one member of a company group can send ripples through the entire structure, inevitably impacting the holding company.

In addition, section 90/60 specifically states that "The Court's order approving the plan does not have any effect of varying liabilities of persons who are the debtor's partners or bear joint liability together with the debtor or stand surety for [the Debtor]." In reality, banks often require guarantees from affiliate companies when granting a loan, regardless of creditworthiness of the affiliate company. Therefore, a restructuring of the principal debtor, without a corresponding restructuring of the guarantee amount simply serves to shift the insolvency from one entity to the other, instead of resolving it.

Lack of sources of guidance

It is a challenge to obtain any guidelines or rulings in the public domain by the related authorities. Preliminary rulings help the stakeholders e.g. the debtor or the creditors to have better understanding of their positions and have a clear picture about their next steps or any required actions to be taken in order to preserve and secure their legitimate rights under the Act. Lack of clarity can also lead to increase the time for the authorities to consider any cases pertaining to business rehabilitations that might benefit from previous similar judgments or rulings. Also, by nature of legislative drafting, some provisions of the Act leave quite broad room for interpretation. Therefore, it often requires a number of petitions to be filed with the Court during the reorganization process, seeking for approvals to ensure that the actions or decisions of the Plan Preparer have been made in line with the provisions of the Act.

Independent appointments

Finally, the legislation allows for the management itself to appoint themselves as the Plan Preparer, and steer the Company through the reorganisation process. Creditors are often wary of supporting a reorganisation process which is management-led, as the process may end up as a self-serving endeavour. A revision requiring the appointment of an independent and autonomous plan provider will engender greater credence and add legitimacy to the process, leading to wider adoption.

Conclusion

In light of these observations, it's clear that while Thailand's insolvency framework has made commendable strides since its inception, there remains room for refinement. Addressing the identified gaps, especially those pertaining to timeline expediency, legal clarity, and the need for impartiality, is critical.

Firstly, reforming the legal framework to streamline and expedite the restructuring process could bolster business confidence and insolvency resolution. Greater clarity in legal provisions, alongside broader awareness in insolvency matters, can help mitigate uncertainty and potential gridlock in the court system.

Finally, nurturing a culture that perceives restructuring as a viable strategic tool, rather than a last resort is pivotal. This shift requires collaborative efforts from policymakers, financiers, corporate stakeholders, and practitioners.

By embracing these changes, Thailand has the potential to develop a more resilient and responsive corporate restructuring landscape, capable of withstanding future economic shocks and maintaining its trajectory towards sustainable economic growth.