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Newsletter | Business Rehabilitation

BUSINESS REHABILITATION SPOTLIGHT SERIES EPISODE #2 The Power of the Automatic Stay

In the first article of our Business Rehabilitation Spotlight Series, we provided an overview of the anatomy of a typical business rehabilitation in Thailand where we focused on the key considerations for Thai and Foreign Creditors. In this episode, we will highlight one of the key features in a rehabilitation proceeding that comes into immediate effect when the rehabilitation petition is accepted by the Court and continues until the rehabilitation case ends.

Automatic Stay

The automatic stay, which is an automatic injunction, halts certain actions from being taken by the creditor to the Court against the insolvent debtor and its assets once the rehabilitation petition is accepted by the court. Section 90/12 of Thai's Bankruptcy Act B.E. 2483 (A.D.1940) (the "**Bankruptcy Act**") constitutes the automatic stay, forbidding creditors or other related persons from taking certain actions against debtors during the automatic stay period. To illustrate, the stay generally blocks any enforcement of court judgments or obligations, while maintaining only public utilities such as electricity and water for the operation of the debtor's ordinary business. Although this may sound precarious to the creditors, the stay also restricts the debtor's ability on utilizing its assets unless certain conditions are met as a way to provide certain degree of guarantee to creditors.

The meticulous legal effects of the automatic stay are what constitutes its main strength. Since the automatic stay allows the debtor to continue its business operations, the debtor can maintain its commercial liquidity; thereby increasing the chances of repayment of debts which, in turn, benefits all creditors.

One of the significant purposes for the automatic stay is to protect debtors' assets from dilution, such as prohibiting creditors from

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executing their legal rights against debtors' assets. Moreover, it restrains any processes that will affect debtors' assets and undermines fair and duly rehabilitation process during the entire period of the rehabilitation proceeding. For example, no civil action shall be instituted against the debtor in connection with the debtor's property and no dispute in which the debtor may be liable or suffer loss shall be referred to arbitration for a decision.

Debtor's Restrictions During the Automatic Stay

On the other hand, Section 90/12 (9) of the Bankruptcy Act depicts the actions which debtors cannot take in their businesses, i.e. making any disposal, distribution or transfer, granting a lease, making repayment of any debts, create debts or performing any actions having the effect of creating any encumbrance over the debtor's property during the automatic stay period. The section also includes exceptions, which allows the debtor to take actions that are necessary for the continuation of the debtor's normal business operation. This means that debtors can continue to conduct any business operations, which are considered normal business operations without prior permission from the Court. However, if debtors wish to take any actions apart from the normal business operation, debtors must file an application before conducting such actions with the Court and the Court accepts the petition for an order amending, varying or cancelling the restriction of the rights under Section 90/12, either by claiming that such restriction is not necessary for the business rehabilitation or the restriction fails to afford sufficient protection to the rights of secured creditors according to Section 90/13 of the Bankruptcy Act, otherwise, such action shall be deemed void. The prohibition according to this Section also applies to the plan preparers and plan administrators.

In order to determine what falls under the scope of the exception in Section 90/12 (9), here are some interesting Supreme Court judgment interpreting the ordinary course of the debtor's business:

1. The Supreme Court Judgment No. 12709/2555

The court ruled that the lawsuit on claiming property to be returned to the debtor is part of the debtor's management of the ordinary course of business and debtor's property in order to complete the rehabilitation of the debtor's business. It is not considered as an act that creates a burden on the debtor's property. The plan administrator has the power to file a lawsuit without seeking permission from the Central Bankruptcy Court. The lawsuit must be

a lawsuit on behalf of the debtor, not on behalf of the plan administrator.

2. The Supreme Court Judgment No. 7236/2545

In this case, the debtor's committee found certain mistakes in the financial report prepared by the audit firm of the debtor, which caused damages to the debtor of approximately THB 10,000 million. Therefore, the plan preparer filed a tort claim against the audit firm. According to the judgment, the act of the plan preparer in filing the tort claim against the audit firm is not necessary for the continuation of the normal business operation, but, instead, it created a burden to the debtor's asset if the debtor lose the case.

3. The Supreme Court Judgment No. 19798/2557

In this case, the plan administrator has sold the debtor's land and buildings less than the normal market price. Based on the judgment, the Supreme Court ruled that such act is expressly prohibited under Section 90/12 (9) and therefore become invalid due to:

- i) the land and buildings that the plan administrator has sold are properties that are necessary for the debtor to develop and make a profit in the rehabilitation;
- ii) the business rehabilitation plan of the debtor does not authorize the plan administrator to sell the said assets to third parties; and
- iii) the sale of land and buildings is not the ordinary course of the debtor's business.

In conclusion, while the automatic stay provisions protect the debtor against certain actions from creditors and other third parties, debtor can continue to operate the business and potentially overturn the business condition back into profitability and not risk going bankrupt, allowing the debtor to repay creditors' debts.

Meanwhile, creditors need to be prudent and exercise cautionary steps and should appoint of counsel to represent them in Court in the overall course of the rehabilitation process.

Please contact our Bankruptcy and Rehabilitation team should you have any specific questions regarding your rights as a creditor or debtor in any ongoing or future rehabilitation proceedings in Thailand.

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Dispute Resolution: Restructuring and Insolvency Practice Group

Our latest engagement

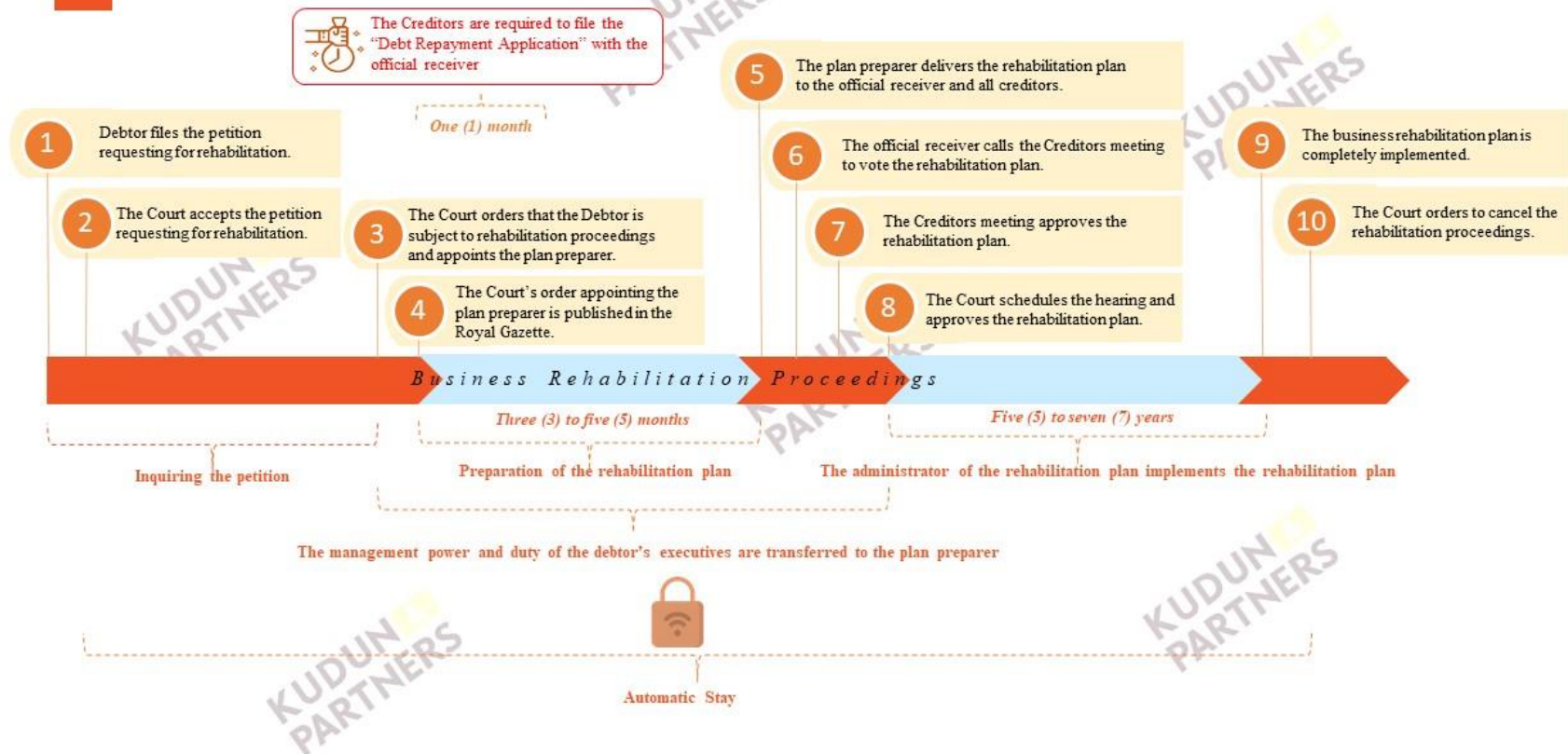
Kudun and Partners has been officially appointed to represent a total of 87 savings co-operatives in their capacity as creditors of Thai Airways International Public Company Limited in Thailand's largest-ever business rehabilitation proceeding to date, with debts estimated to be in excess of THB 352.49 billion (approximately USD 11.34 billion).

Together, the co-operatives represent the largest group of creditors of Thai Airways, holding an aggregate debt of THB 45.65 billion or approximately 65% of the airline's debenture debts and 13% of the airline's total debt.

Our firm is also representing several other notable creditors of Thai Airways, including AEC Securities PCL., Country Group Securities PCL., Srisawad Finance PCL. (BFIT), and Volvo Group (Thailand) Co., Ltd.

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