

Kluwer Arbitration Blog

The Interplay of Insolvency Law and Arbitration in Thailand

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The economic downturn in [Thailand](#) has resulted in increased pressure on Thai debtors. Several banks have forecasted Thailand's gross domestic product (GDP) to [contract 8.1 percent in 2020](#) due to a more severe than expected COVID-19 pandemic and the containment measures implemented by governments in many countries including Thailand.

Creditors who are party to an arbitration agreement with a Thai debtor will need to consider the financial status of the Thai debtor and determine whether to pursue their claims by way of arbitration or insolvency proceedings in the local courts – or whether both options can be pursued in parallel – to maximise their chances of recovery.

Insolvency Proceedings in Thailand

Thailand's [Bankruptcy Act](#) allows a creditor to initiate a bankruptcy action when the debtor is (a) insolvent; (b) indebted to one or several plaintiffs for a total of at least THB 1 million (if the debtor is a natural person) or THB 2 million (if the debtor is a juristic person); or (c) unable to meet current or future payment obligations.¹⁾

Where the debtor is a juristic person (e.g. a company), the insolvency petition seeks the debtor's liquidation—that is, to bring its business to an end and distribute its assets to the relevant claimants. Because the debtor's assets will be distributed among all creditors, the creditor who files the insolvency petition is deemed to be acting not only on its behalf, but on behalf of the other creditors as well.

Interaction Between Arbitration and Insolvency Proceedings

Unlike the creditor who files an insolvency petition in court, a claimant in arbitration seeks to protect and secure only its own interests.

Arbitration and local insolvency proceedings are [not mutually exclusive](#). However, when a creditor has moved ahead with arbitral proceedings (whether in Thailand or otherwise), after which an insolvency petition is filed against the Thai debtor locally, a number of questions are raised:

- Must the creditor who commenced arbitration stop the arbitral proceedings and join the insolvency proceedings or business rehabilitation process?
- Should the creditor submit a debt repayment application in the insolvency process while the arbitral proceedings are ongoing?
- Would the arbitral award be enforceable during the debtor's business rehabilitation process?

To answer these questions, and explain the proper application of insolvency legislation in the context of arbitration, I discuss two judgments of the Thai Supreme Court below.

PTT PLC. v. Nacap Asia Pacific Thailand Co., Ltd.

In *PTT PLC. v. Nacap Asia Pacific Thailand Co., Ltd.* (case no. 7082-70832558), Nacap Asia Pacific Thailand Co. Ltd (“**Nacap**”) was placed in official receivership while PTT PLC (“**PTT**”) was pursuing arbitration against Nacap outside Thailand. PTT submitted a debt repayment application but also requested the official receiver to delay examination of PTT's debt repayment application until the arbitration award had been granted.

In its ruling, the Supreme Court stated that section 12 of the [Arbitration Act](#) stipulates that an arbitration agreement and the appointment of an arbitral tribunal remain valid even if one of the parties is under official receivership. However, the Supreme Court ruled that there is no exception to the requirement that a creditor has to submit a debt repayment application in the insolvency process; rather, the official receiver has a duty under section 105 of the Bankruptcy Act to call any creditor, debtor, or other person for interviews or to order them to turn over documents evidencing the debt. The Supreme Court therefore did not accept PTT's argument that the ongoing arbitration prevented examination of its debt. In its view, the official receiver had a statutory duty to examine the debts and report them to the court, and there was no need to delay the examination until the arbitral proceedings were concluded since the examination would not cause any disadvantage to PTT as a creditor.

This ruling means that the usual time limits for the submission of debt repayment applications would apply to all creditors, including those who have a pending arbitration against the debtor at the time the debtor is placed into official receivership:²⁾

- Local creditors must submit their debt repayment application to the official receiver within two months from the date of dissemination of the court order for the debtor to be placed into official receivership.
- Foreign creditors living outside Thailand will be given an additional two months (i.e. a total of four months) to submit their debt repayment application.

It is important for creditors to note the above timelines – the failure to submit a debt repayment application within the prescribed period will prevent a creditor from sharing in the distribution of the debtor's assets and from voting at the creditors' meeting.

TPI Polene PLC. v. HC Trading International Inc.

In *TPI Polene PLC. v. HC Trading International Inc.* (case no. 13535-135362556), TPI Polene

PLC (“**TPI Polene**“) was in business rehabilitation when the company entered into an agreement for the sale and purchase of goods with HC Trading International Inc (“**HC Trading**“). A dispute arose over the agreement, and since there was an arbitration clause, HC Trading (the creditor) pursued an arbitration against TPI Polene (the debtor) in Singapore. Although the creditor knew that the debtor’s business was under rehabilitation, the creditor failed to petition the court for approval to proceed with the arbitration.

The Supreme Court ruled that section 90/12 (4) of the Bankruptcy Act³⁾ stipulates that any court or arbitration proceedings must be suspended during business rehabilitation, unless the court orders otherwise. This means that a creditor cannot pursue other court or arbitration proceedings unless the court which has oversight of the business rehabilitation case agrees. Section 90/12 also states that any court judgment or arbitration award that is obtained contrary to that requirement, i.e. pursuant to court or arbitration proceedings that were continued without the approval of the court, will not be enforceable.

The Supreme Court noted that while the foreign arbitral award could not be revoked, the enforcement of the award against the debtor in Thailand must comply with the business rehabilitation sections in the Bankruptcy Act to be fair to all creditors. Since HC Trading failed to obtain the court’s permission to proceed with arbitration during the debtor’s business rehabilitation, enforcement of the arbitral award against the debtor’s assets would be contrary to public policy. Hence, the Supreme Court refused to enforce the award under sections 43 and 44 of the Arbitration Act.⁴⁾

This case highlights that during the process of business rehabilitation, the commencement or continuation of arbitral proceedings needs to be permitted by the court in the business rehabilitation case if the creditor plans to enforce the arbitral award against the debtor’s assets in Thailand. Thus, Thailand’s insolvency legislation should be taken into account and complied with when a creditor proceeds with such an arbitral case, even if outside Thailand.

Conclusion

In times of economic downturn such as the present, the interaction between insolvency law and arbitration proceedings is crucial to note, particularly for creditors pursuing arbitration proceedings against financially troubled debtors that have assets in Thailand. Local insolvency law—including business rehabilitation regulations—merit the creditor’s close attention, especially the law on the submission of debt repayment applications, petitions to commence or continue arbitration proceedings, and the enforcement of arbitral awards in the Thai Bankruptcy Court. Focusing solely on the arbitration would be a big mistake, as the creditor may overlook the important role of local insolvency law and its impact on the creditor’s prospects of recovery against the debtor.


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References

?1 Bankruptcy Act, Section 9.

?2 Bankruptcy Act, Section 91.

?3 The law on business rehabilitation is also contained in the Bankruptcy Act. The Bankruptcy Court has jurisdiction over both business rehabilitation and bankruptcy matters in Thailand.

Section 43 of Thailand's Arbitration Act states that the court can refuse to enforce the arbitral
?4 award under six different conditions. Section 44 states that an arbitral award that is contrary to Thailand's public policy is not enforceable.

This entry was posted on Sunday, October 11th, 2020 at 7:00 am and is filed under [Arbitration](#), [Enforcement](#), [Insolvency](#), [Thailand](#)

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