

ALLEN & OVERY

Restructuring Across Borders

Thailand:

Corporate restructuring and
insolvency procedures | February 2020





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Introduction

There are three principal restructuring and insolvency options available under the Bankruptcy Act (the **Act**):

business rehabilitation;
composition; and
bankruptcy.

The choice of procedure will depend on a number of different factors. If there are reasonable grounds and prospects for rehabilitating the debtor's business, the choice of a court-sanctioned business rehabilitation may provide creditors with the best chance of getting repaid. Realistically, in order to take advantage of this procedure, there needs to be a broad consensus between the majority creditors on the rehabilitation plan and the appointment of the Plan Preparer (as defined below) together with the plan administrator.

If the creditors are secured, they may have the ability to enforce their security outside of a formal bankruptcy or rehabilitation.



Enforcement of security

There are three forms of real security interest recognised under Thai law:

- a pledge (which requires actual (or third party) possession by the pledgee and is possible in relation to movable assets and rights represented by an instrument such as shares);

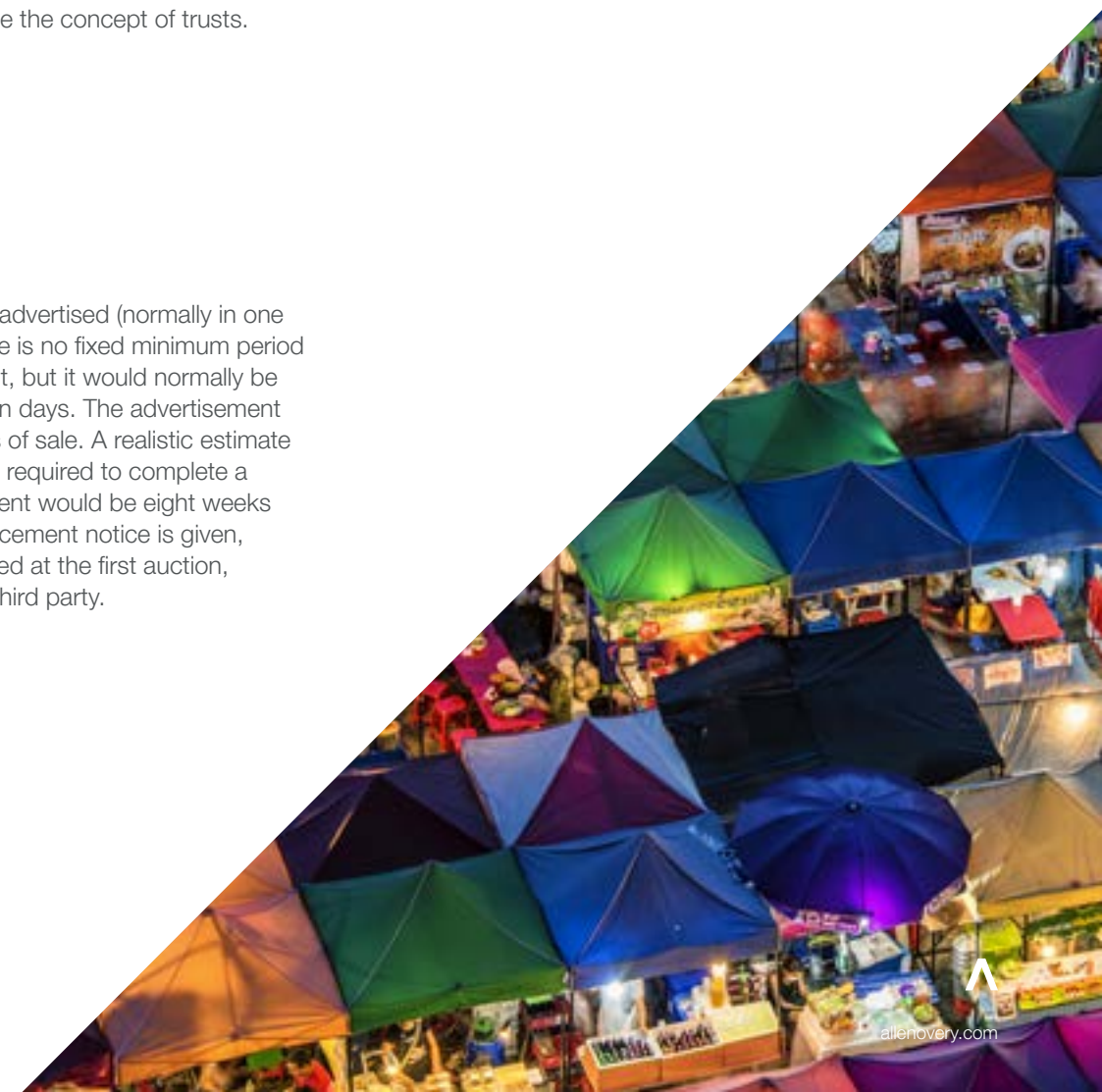
- a mortgage of registered machinery and real property; and
- BSA security created by the entry into a business security agreement under the Business Security Act B.E. 2558 (2015) (the **BSA**).

Thai law does not recognise the concept of trusts.

Share pledge

A pledge of unlisted shares may be enforced without the need for court action by the following procedures:

- written notice must be given to the pledgor requiring the pledgor to perform the defaulted obligations within a reasonable timeframe (15-30 days is considered reasonable);
- the notice must state that, if the pledgor does not comply within the specified period, the pledgee will enforce the pledge by selling the shares by public auction;
- at the end of the specified period, a written notice must be given to the pledgor stating the time and place of the auction. There is no requirement to conduct the auction through a professional auctioneer but it is common for this to be done, especially where the pledgee wishes to bid for the shares; and
- the auction is then publicly advertised (normally in one or more newspapers). There is no fixed minimum period for the notice/advertisement, but it would normally be for a period of at least seven days. The advertisement must specify the conditions of sale. A realistic estimate of a practical period of time required to complete a sale of shares on enforcement would be eight weeks from the date the first enforcement notice is given, assuming a sale is transacted at the first auction, either to the lender or to a third party.



Mortgage

On enforcement of a mortgage following a default, the mortgagee must first provide the mortgagor with written notice to perform its obligation within a reasonable period of time (such reasonable period to be not less than 60 days from the date on which the mortgagor receives such notice). If the mortgagor fails to comply with the notice, the mortgagee may then enforce the mortgage in court by requesting the court to seize the mortgaged property and sell it by public auction. It will usually take a minimum of eight months to obtain a judgment debt (if the mortgagor does not contest the litigation process) and a further six to eight months to complete the execution process.

The court process could be as short as one year or as long as five years, depending on the defensive strategy adopted by the mortgagor. In practice, if the value of property is not greater than the loan, debt to asset swaps are not uncommon in mortgage enforcement situations.

The mortgagee may also elect to enforce his security by foreclosure. This is rarely used because the conditions required to be satisfied include that:

- the mortgagor has failed to pay interest for five years;
- the mortgagor has satisfied the court that the value of the mortgaged property is less than the debt due; and
- there are no other registered mortgages or preferential rights existing over the mortgaged property.

Pursuant to the amended mortgage provisions under the Thai Civil and Commercial Code B.E. 2468 (1925) as amended in B.E. 2557 (2014) (**Thai Civil Code**), the mortgagor may request the mortgagee to enforce the mortgage through a public auction without commencing a court proceeding. Under this approach, the mortgagor may submit a written notice to the mortgagee any time after the obligations have become due and payable, provided that there are no other registered mortgages or preferential rights existing over the mortgaged property. The public auction must be carried out within one year from the date on which the mortgagee receives such notice.

To enforce a mortgage or seek foreclosure, the mortgagee will be liable for the following official costs and expenses (excluding legal fees):

- a court fee of 1% of the amount of the claim (or, in the case of appeal, 1% of the judgment amount as determined by the lower court). The maximum fee payable is THB100,000 for each claim not exceeding THB50,000,000. An additional court fee of 0.1% must be paid for the portion of a claim that exceeds THB50,000,000. This court fee is payable at the time of filing the claim and is payable to all three courts, ie the Court of First Instance, the Court of Appeal and the Supreme Court; and
- a public auction fee of 3% of the sale price and related administrative cost of approximately THB2,500.



Assignments

Although assignments do not constitute a type of security recognised by Thai law (for the purposes of the Thai Civil Code and the Act), it is not unusual for contractual rights to be assigned.

Assignments can be made either on an absolute basis (where there is an immediate transfer of the relevant receivables and/or other rights) or on a conditional basis (where the assignment is triggered by specific events which may include, for example, the filing of a bankruptcy petition against the assignor).

There are no specific enforcement procedures for the “enforcement” of a conditional assignment other than the service of a notice of assignment on the underlying obligors. If notice is served (rather than consent obtained), the underlying obligors can continue to rely on set-off rights and defences against payment that may have accrued against the assignor prior to receipt of notice.

If the filing of a bankruptcy petition is specified as one of the events triggering assignment, the assignee must file a claim for repayment in the assignor’s bankruptcy.

BSA security

By way of background, the BSA was passed by the National Legislative Assembly and was enacted in November 2015. The BSA introduces a new type of security under Thai law created by the entry into a business security agreement between the security taker and the security provider, under which the security provider agrees to provide certain assets as security for an underlying debt, without the delivery of those assets to the security taker.

Assets that can be collateralised under the BSA include a business, a right of claim (receivables), movable property used in the security provider’s business (eg machinery, inventory and raw materials), immovable assets (if the security provider operates a real estate business), intellectual property and perennials.

The security taker may enforce BSA security either by way of foreclosure (ie taking ownership of the asset) or by a sale of the relevant assets through a public auction. However, if a security is created over a business, the enforcement process must be carried out by a security enforcer. There are also specific steps and procedural requirements relating to the various types of assets which must be compiled with when enforcing security over that class of asset.



Business rehabilitation

The business rehabilitation procedure is a corporate rescue procedure governed by the Act.

A creditor, the debtor and, in certain circumstances, the Bank of Thailand and certain governmental or quasi governmental authorities shall be entitled to file an application for a business rehabilitation order where the debtor is insolvent or is unable to repay its debts and has indebtedness owing to one or more creditors (including the petitioner) in an amount not less than THB10,000,000. The petitioner must be able to demonstrate that there are reasonable grounds and prospects for rehabilitating the debtor's business.

Promptly after receiving a petition for rehabilitation which meets the requirements set out under the Act, the court will issue an order accepting the petition. After issuing such order, the court will proceed with the initial inquiry (described below) on an urgent basis. The court will publish the order, together with the date and time of the initial inquiry, twice in at least one widely circulated daily newspaper. Each publication must not be more than seven days apart. A copy of the petition will also be sent by the court to all known creditors.

The purpose of the initial inquiry is for the court to determine whether: (a) the debtor is insolvent or is unable to repay its debts and has indebtedness owing to one or more creditors in an amount of not less than THB10,000,000; (b) there are reasonable grounds for rehabilitating the business; and (c) the petition was filed in good faith.

If the court determines that the above criteria are satisfied, it will accept the petition and issue an order for the business rehabilitation of the debtor. If the court finds otherwise, it will dismiss the petition.

A court order accepting the rehabilitation petition will result in an automatic stay against enforcement of all debts of the debtor. Throughout the period from the date on which the court accepts the petition to the end of the period for implementing the rehabilitation plan or until the court revokes the business rehabilitation order, no person may file a civil complaint against the debtor which may attach to the debtor's assets. A creditor is also prohibited from enforcing a judgment against the debtor's assets. Further, a creditor who is entitled by law to enforce payment of a debt is also prohibited from seizing or selling the debtor's assets.

The automatic stay also prohibits a secured creditor from enforcing its security within one year from the date on which the court issues an order accepting the petition, unless the approval of the court is obtained. However, after the aforementioned period which is extendable for a maximum period of one more year, a secured creditor is entitled to enforce its security without prior court approval. Enforcement within these two years is possible if the court approves the enforcement.

A creditor whose rights are affected by the stay on actions may apply to the court for an order to amend the limitation on its rights if that limitation is either: (a) unnecessary for the rehabilitation; or (b) the creditor is a secured creditor whose rights are insufficiently protected¹.

¹ The Act provides that if there has been either a repayment of debt or the provision of additional security to the secured creditor, in each case in an amount equal to any decrease of the value of a secured asset where the decrease in value is caused by the limitation on the rights of the secured creditor, then that repayment or additional security will be considered by the court to be sufficient protection of the rights of the secured creditor.

At the same time as the court issues the business rehabilitation order, it will normally appoint a person to be responsible for continuing the business (until the court approves the rehabilitation plan) and prepare the rehabilitation plan (the **Plan Preparer**). The Plan Preparer is normally a person proposed by the petitioner, unless the court objects to such person or the debtor and/or other creditors object and nominate another person as the Plan Preparer. Any disagreement or objection is to be resolved by a vote of creditors whose claims constitute two-thirds of the total claims of the voting creditors.

The Plan Preparer must prepare and submit a business rehabilitation plan to the official receiver within three months of the date of publication of the Plan Preparer's appointment in the *Government Gazette*².

A rehabilitation plan must be approved by the creditors and the court. A resolution passed by the creditors to approve a rehabilitation plan must be:

- a resolution passed by a majority of each and every class of creditors³ whose debts are equal to or more than two-thirds of the total debts of creditors present at the creditors' meeting in person or by proxy and who voted on that resolution; or
- a resolution passed by a majority of at least one class of creditors whose debts are equal to or more than two-thirds of the total debts of creditors present at the creditors' meeting in person or by proxy and who voted on that resolution, provided that the total debt of all creditors who approved the plan is at least 50% of the total debt of creditors who attended the meeting in person or by proxy and voted on such resolution.

Following the creditors' approval, the official receiver will report to the court and the court will convene a hearing to consider the plan. If the court is satisfied that the rehabilitation plan contains all required information, is fair to all creditors within the same class and that the creditors will receive distributions in an amount not less than the amounts which would be paid in a bankruptcy, it will issue an order approving the rehabilitation plan. The rehabilitation plan will then be implemented by the plan administrator.

A creditor or financial institution may provide the debtor with financial assistance while the debtor is in financial difficulties. A creditor or financial institution extending further loans to the debtor in accordance with the rehabilitation plan will have priority over other creditors in terms of repayment of its debt to the extent of the new monies provided.

The debtor and its creditors will have up to five years (extendable for another two years) to resolve the debtor's financial difficulties pursuant to the rehabilitation plan. Where the rehabilitation is successful, the debtor will be able to continue its business operations and be released from all claims. If the rehabilitation is unsuccessful, the debtor may or may not be declared bankrupt at the discretion of the court.

² This period can be extended by the court for up to a further period of two months.

³ The rehabilitation plan must classify the creditors into separate classes and must treat creditors within the same class equally. The classes are: (a) secured creditors with debt equal to or more than 15% of the total debts claimable in the rehabilitation; (b) the remaining secured creditors; (c) unsecured creditors (who may be divided into separate classes in accordance with the type of claim they hold); and (d) subordinated creditors.



Composition

An alternative method of corporate rescue is the composition procedure, which arises out of the bankruptcy process (as discussed below) and provides for an arrangement to be entered into between the debtor and its creditors to restructure its debt obligations.

Following the issuance of an absolute receivership order, the debtor may submit a composition proposal as an alternative to liquidation. At the creditors' meeting immediately following such submission, the creditors have the option of: (a) passing a special resolution to agree the proposal; or (b) proposing that the court declare the debtor bankrupt.

If the creditors do not approve the proposed composition, the court will normally declare the debtor bankrupt and the bankruptcy process will proceed as described below.

If the creditors approve the composition plan by special resolution, the next step is for the court to consider the proposal. The court will consider the plan in the light of any objections received from creditors and a report prepared by the official receiver. If a composition plan does not make provision for repayment of debt according to the order prescribed by law or does not benefit creditors generally, the court will not approve a composition plan.

If both the court and the creditors approve a composition plan, the official receiver will publish the court order approving the plan in the *Government Gazette* and any bankruptcy proceedings against the debtor will be suspended.

If the debtor fails to implement the composition plan within the stipulated time period or if the composition plan was granted based on fraudulent grounds, the official receiver or any creditor may apply to court to terminate the composition and adjudge the debtor bankrupt. The debtor may only seek a further composition after a period of at least six months from the date on which the court terminated the previous composition.

Bankruptcy

The bankruptcy procedure is governed by the Act. A creditor or group of creditors can petition for the bankruptcy of a debtor, provided that:

- the debtor is insolvent;
- the aggregate indebtedness of the debtor exceeds THB2,000,000; and
- the aggregate indebtedness can be expressed as a sum certain in money.

However, a debtor cannot itself file a voluntary petition for bankruptcy.

The Act provides that a debtor will be presumed to be insolvent under certain circumstances, including:

- where the debtor transfers or delivers its assets dishonestly or fraudulently;
- where the debtor transfers or creates any right over an asset which would be deemed a preference if the debtor were, in fact, bankrupt;
- where the debtor fails to satisfy an outstanding debt following the service of two notices of demand at least 30 days apart; or
- where the debtor:
 - moves assets out of the jurisdiction; or
 - consents to a judgment ordering the payment of a debt even though there are grounds for not paying,

in each case, for the purpose of delaying or avoiding payment of a debt owed to its creditors.

At the hearing of the bankruptcy petition, the debtor may present evidence to rebut the presumption of insolvency. The Act does not contain a specific accounting definition of insolvency. In practice, a Thai court will apply a combination of a balance sheet test and a cash flow test to establish whether or not a debtor is insolvent. If the court is satisfied that there are sufficient grounds to order bankruptcy, it will make an order for absolute receivership, otherwise the court will dismiss the petition.

In addition to the requirements set out above, a secured creditor petitioning for bankruptcy must show to the court that the outstanding debt owed to it exceeds the realisable value of the secured assets, or that it has chosen to abandon the secured assets for the benefit of all creditors.

During the bankruptcy procedure, a secured creditor may:

- enforce its security separately without filing a proof of claim in the bankruptcy proceedings; or
- file a proof of claim in the bankruptcy proceedings if:
 - it agrees to surrender its secured assets for the benefit of all creditors, in which case the creditor may file a claim for the full amount of the debt;
 - it has enforced its security outside the bankruptcy proceedings, in which case the creditor can then file a proof of claim for any deficiency;
 - it has instructed the official receiver to sell its secured assets by auction, in which case the creditor can then file a proof of claim for any deficiency; or

- it has appraised the value of its secured assets, in which case the creditor can then file a proof of claim for any deficiency.⁴

A petitioning creditor may also make an ex-parte application to the court for a temporary receivership order. The court will inquire into whether there are sufficient grounds for making such an order, for example, if the debtor has carried out or is very likely to carry out fraudulent or preferential transactions.

The official receiver may apply by motion to join all civil actions that are pending against the debtor at the time when a temporary receivership order is made.

Once the court issues a receivership order (whether temporary or absolute), the debtor is prohibited from performing any act relating to its assets or business unless carried out in accordance with the order or the approval of the court, the official receiver or a creditors' meeting.

A creditor who is not filing for bankruptcy will be unaffected by another creditor filing for bankruptcy or by the debtor being placed under a temporary receivership order and may, until an absolute receivership order is issued, sue directly for debts and petition for the debtor's bankruptcy.

⁴ If the official receiver disagrees with the valuation prepared by the secured creditor, the official receiver and the secured creditor may agree on a method by which to sell the asset and the secured creditor may claim for any shortfall. If the official receiver and the secured creditor cannot agree on a method, the asset may be sold by public auction, in which the secured creditor and the official receiver may bid and the net proceeds of sale will be deemed the amount of the secured creditor's claim that has been extinguished.

In addition, the official receiver alone will take over the business of the debtor (managing and disposing of the assets, carrying out any necessary acts to complete any pending business of the debtor, receiving money or assets which the debtor is entitled to receive). The official receiver is an officer of the court, over whom the creditors have little control. All unsecured creditors must file a claim in the bankruptcy proceedings to recover their debts (even if they are judgment creditors).⁵

The claim must show details and evidence of the outstanding debt and must be filed within two months of the date of the absolute receivership order. For foreign creditors, the claim, evidence of debt and any relevant power of attorney must be authenticated and notarised by a notary public as a precondition to filing the debt claim.

A petitioning creditor must comply with certain requirements. For example, it has a duty to assist the official receiver in calling in and disposing of the debtor's assets (but will only be entitled to a *pro rata* share of distributable assets). Further, it is initially responsible for all court fees and expenses in the bankruptcy proceedings and may have to provide security for costs (but will be reimbursed at the conclusion of the proceedings, provided sufficient funds exist).

A creditor may set off its claim against a claim of the debtor provided that the creditor's claim arose prior to the date of the temporary or absolute receivership order, whichever happens earlier. This is regardless of whether the assets underlying the obligations are different (ie monetary obligations may be set off against obligations to transfer other assets such as shares or real property) or the obligation is conditional or not yet due for payment. However, in practice, it may be difficult to appraise the value of non-monetary obligations for set-off purposes.

Proceeds of liquidation are paid in the following order:

- expenses of the official receiver in managing the debtor's assets;
- official fees incurred in collecting the debtor's assets;
- fees of the petitioning creditor;
- taxes due for payment in the six months prior to the receivership order and certain employee payments; and
- any other debts.

Under Section 94(2) of the Act, any debt that the creditor allows to be created with the knowledge that the debtor is insolvent may not be claimable in bankruptcy proceedings, except for debts created by those creditors extending funds for the debtor's business viability.

On average, bankruptcy proceedings may take between 6-10 years to complete. Essentially, all assets and liabilities will be frozen for this period and often no party will benefit.

⁵ Secured creditors are not obliged to file claims but may elect to do so.



Cross-border issues

Thailand has not adopted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency.

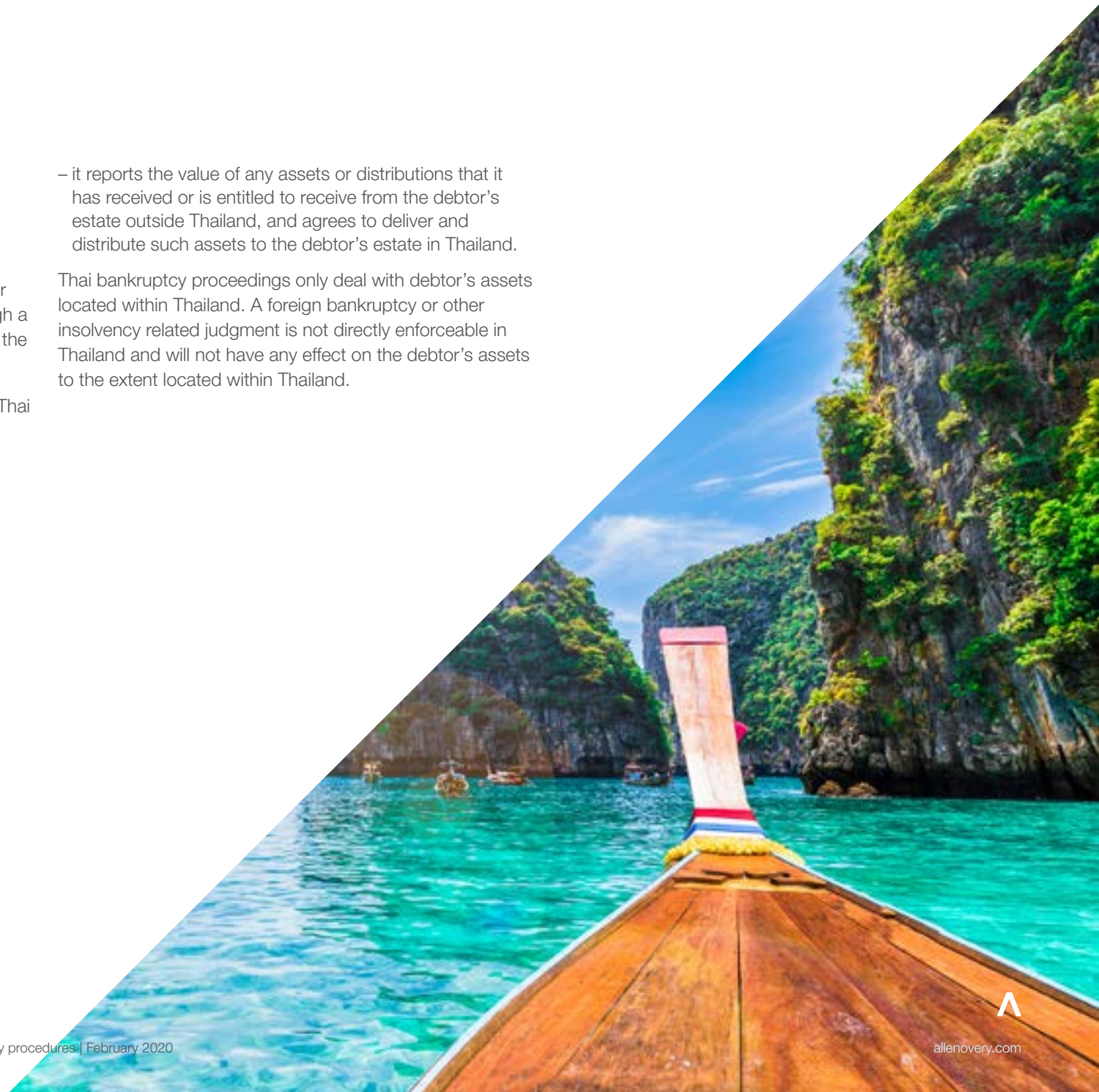
The Thai bankruptcy court only has jurisdiction to initiate a winding-up or rehabilitation proceeding in respect of companies domiciled in Thailand (ie the company may or may not be incorporated in Thailand) or operating through a representative in Thailand one year before or at the time the bankruptcy petition is filed.

A foreign creditor may only claim in the bankruptcy of a Thai company if:

- creditors in Thailand are similarly entitled to claim for payment of debts in bankruptcy actions under the laws of the country in which the foreign creditor is a national; and

- it reports the value of any assets or distributions that it has received or is entitled to receive from the debtor's estate outside Thailand, and agrees to deliver and distribute such assets to the debtor's estate in Thailand.

Thai bankruptcy proceedings only deal with debtor's assets located within Thailand. A foreign bankruptcy or other insolvency related judgment is not directly enforceable in Thailand and will not have any effect on the debtor's assets to the extent located within Thailand.



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If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.



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Further information

Developed by Allen & Overy's market-leading Restructuring group, Restructuring Across Borders is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please click [here](#).



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