

THAI COURT'S APPROACH ON FRAUDULENT ASSET TRANSFERS IN RESTRUCTURING

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Entrepreneurs regularly review and restructure their businesses in response to the ever changing commercial and economic landscape. Reasons for restructuring can range from broad aims such as increasing profitability or reducing costs, to more focussed objectives such as listing a company on the stock market or complying with particular legal requirements.

There are a number of stakeholders involved in any restructuring, banks being one such group, and usually a powerful one at that. A bank will be concerned that they retain their ability to recover any monies owed (e.g. through mortgages, pledges or guarantees) and will often set out strict recommendations and conditions to which businesses must adhere. Failure to comply with a bank's recommendations or conditions could mean that a bank vetoes the restructuring.

But a recent Thai case serves as a warning that management needs to properly consider all stakeholders when undergoing a restructuring. Relying solely on the fact that it followed a bank's recommendation will not be enough to protect a business from falling foul of Thai criminal and civil law, and failure to consider other stakeholders could lead to litigation and serious penalties.

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RECENT CASE

The WFW Bangkok litigation team successfully represented a client in the Thai court who was awarded circa US\$4.5m.

During the course of enforcing the judgment against the debtor to collect the awarded sum, it transpired that the debtor had restructured its business and transferred its assets to a sister company. Particularly pertinent was the fact that the restructuring had been implemented following the receipt of a demand letter from our client. Further investigations suggested that the directors and the shareholders of the debtor and its sister company were the same group of people. Our client's

rights were compromised because, under Thai law, it was unable to enforce the judgment against a sister company. Therefore, our client commenced criminal and civil actions in the Thai courts on the basis that the key motive behind the restructuring was to escape payment of the outstanding judgment debt.

THE CRIMINAL CAUSE OF ACTION

In the criminal case, the proceedings were commenced against the debtor's management under Section 40 of the Act Prescribing Offences related to Registered Partnerships, Limited Partnership, Limited Companies, Associations and Foundations B.E. 2499 (1956) (the "Act"), which provides that:

"Any person who, being responsible for the operation of affairs of a registered partnership, limited partnership or limited company, does any of the following acts knowing that the creditor of such juristic person [...] is in the process of enforcing a debt against such juristic person or is bringing or is likely to bring an action before a Court to claim payment of a debt:

1. diverting, concealing or transferring to any other person the property of such juristic person; or

2. pretending that such juristic person is in debt to another entity, where this is untrue,

shall be, if the act is committed to prevent the creditor from receiving full or partial payment, liable to imprisonment for a term not exceeding three years or to a fine not exceeding sixty thousand Baht or both."

WFW argued that the debtor's management transferred property to the sister company knowing that our client was trying to enforce the judgment debt, and with the clear intention of frustrating such enforcement attempts. It was argued that Section 40 of the Act had accordingly been breached.

THE CIVIL CAUSE OF ACTION

In the civil case, the proceedings were brought under Section 237 of the Thai Civil and Commercial Code (the "CCC"), which provides that:

"The creditor is entitled to claim cancellation by the Court of any juristic act done by the debtor with knowledge that it would prejudice his creditor; but this does not apply if the person enriched by such act did not know, at the time of the act, of the facts which could make it prejudicial to the creditor, provided, however, that in the case of a gratuitous act the knowledge on the part of the debtor alone is sufficient.

The provisions of the foregoing paragraph do not apply to a juristic act whose subject is not a property right."

WFW argued that the asset transfer was made with the knowledge (on the part of both the debtor and sister company) that it would cause prejudice to our client by preventing it from recovering the judgment debt. It followed that the debtor had breached Section 237 of the CCC.

THE DEBTOR'S POSITION

The management of the debtor defended both the criminal and civil actions by arguing that the purpose of making the asset transfer was so that the sister company could apply for listing on the stock market. It noted that the transfers were made under the recommendation from a financial advisor from the bank's affiliate as well as a recommendation of the bank itself. That is, the transfer was not motivated by a desire to prevent our client from receiving full or partial payment, nor was it made to prejudice it in any other way. Rather, the debtor was acting upon direct bank advice to achieve legitimate commercial objectives.

KEY ARGUMENTS

During both the criminal and civil proceedings, the following key arguments were presented to the courts on behalf of our client in an effort to demonstrate the debtor's real motivations:

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1. The transferred assets were integral to the debtor's operations, therefore the debtor could have foreseen that it would need to cease its operations once the assets were transferred to the sister company (and that it would therefore be incapable of paying the debts it owed to our client);
2. The sister company's listing on the stock market would not have had any material benefit to the debtor;
3. The value of the transferred assets is over US\$40m but the payment made by the sister company to the debtor in connection with the transfer was only around US\$10m; and
4. The debtor had not disclosed its yearly balance sheet to the public since the year that the assets were transferred to its sister company, indicating an attempt by the debtor to conceal suspect

THE JUDGMENTS OF THE CRIMINAL AND CIVIL COURTS

The court in the criminal case found that the debtor's management breached Section 40 of the Act by transferring the debtor's property to the sister company with the aim of preventing our client from receiving payment. It therefore imposed prison sentences on the debtor's management.

As for the civil case, the court found that the transfer of assets was fraudulent under Section 237 of the CCC, and therefore ordered the cancellation of the asset transfers. This resulted in the sister company being required to transfer the assets back to the debtor and enabled our client to enforce its judgement against the restored assets.

In other words, both courts refused to entertain the debtor's excuse that the bank had recommended the transfer. The fact it had acted in accordance with bank guidance would not shield it from liability for its failure to take into account the wider stakeholders involved.

CONCLUSION

In an evolving commercial landscape, corporate restructuring can be a useful tool for businesses to re-orientate themselves and adapt to change. However, the Thai court has made it clear that relying on bank guidance to effect asset transfers will not always be sufficient to protect such transfers from subsequent legal challenge.

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