

## **ABSTRACT**

**Thesis Title** : Provisional Protective Measures before Judgment in Bankruptcy Proceedings

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**Degree Sought** : Master of Laws

**Academic Year** : 2000

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A bankruptcy proceeding is usually speedy, however it may consume a substantial period of time when the debtor takes some actions which cause his property to lose value or when the debtor attempts to evade various writs of execution. Therefore, most creditors in bankruptcy proceedings usually request provisional protective measures to prevent the debtor from disposing of his property or causing any damage to it, so that the property shall accrue as much value as possible when it is ultimately distributed to creditors after the winding up of the case.

The Bankruptcy Act B.E. 2483 provides for the following provisionally protective measures:

1. A restriction of the rights of the debtor according to Section 17 through incarceration of the debtor and examination of the debtor's property.
2. Section 17 protective measures of the debtor's property through temporary receivership or Section 90 protection through receivership of the partnership.

3. Section 18 protective measure through the withdrawal of temporary protective measures or Section 29 temporary protection through the provision of legal remedy related to damages arising from the wrongful action of a creditor.

After having reviewed the Bankruptcy Act B.E. 2483, specifically the temporary protective measures in bankruptcy proceedings which were modeled on the 1914 Bankruptcy Act of England proceeding according to the repealed 1986 Insolvency Rules, it was revealed that Thailand's current measures have not been amended for a long period of time. This has resulted in the creation of several problems, such as the restriction of the rights of the debtor. Specifically, in cases in which the debtor's property is subject to examination, the debtor's business reputation may be indirectly tarnished. In addition, in a case in which the debtor is temporarily incarcerated, the debtor may lose freedom to operate his business. These measures are actually coercive rather than protective measures undertaken against the debtor which fail to provide flexible security. Regarding protection of the debtor's property, in the past, the official receiver would normally manage the property of the debtor by disposing, settling or undertaking any acts to complete the pending business of the debtor. Most of the official receivers are legally capable, but do not have any knowledge of the business of the debtor. The possibility of the debtor being adjudicated a bankrupt can be foreseen from the time the debtor is placed under temporary receivership due to its severe enforcement just as if the debtor were placed under absolute receivership. Sometimes the temporary receivership order is applied widely, inflexibly and discriminatorily despite the fact the debtor has not yet been adjudicated bankrupt. After being placed under temporary receivership, the business and property suffer loss, deteriorate and finally become bankrupt.

In addition, the protective measures fail to rapidly prevent damage because of a lack of rules which fail to produce any benefit to the debtor. Ascertaining damages is a slow process, sometimes damages are incurred over a period of time. Certain damages cannot be compensated, such as those relation to business goodwill and trademark protection.

The author is of the opinion that Thailand should utilize a more satisfactory and upated system of temporary protective measures, providing clear rules, both in terms of law and practice. To this end, the author suggests undertaing a comparative study of pre-adjudication provisional measures in the Civil Procedure Code and the application of the special manager under the 1914 Bankruptcy Act and Insolvency Rules of 1986, with the automatic stay utilized in American Bankruptcy law, as well as the resultant order accepting an application for reorganization under the Bankruptcy Act B.E. 2483 Section 90/12, which relates to the restriction of rights of the debtor, enabling the debtor an option in providing security or other guarantees. The Thai system should be further improved by adding new measures, which force the debtor to give his cooperation, in order to facilitate the process of property examination.

In regards to protection of the debtor's property, Section 18 should require the participation of more interested parties. In addition, a hearing should be simultaneously processed under Section 29, in order to intantly fix damages for the debtor, including the setting of a specific amount of security before the creditor can apply for enforcement of protective measures. Furthermore, a longer time frame should be provided for the debtor to demand that the creditor pay damages, clearer rules should be provided and the court should be empowered to use its discretion in making an

order within its jurisdiction stipulating any conditions it deems fit. Such conditions include the partial seizure of property or authorizing the debtor to carry on business under the supervision of the official receiver. In addition, in the event the court issues an order to apply a temporary protective measure, an automatic stay measure or special manager should be employed to apply such a measure to the normal business operation of the debtor. Such amendments to the protective measures would be mutually beneficial to the concerned parties and the official receiver and would most certainly fulfill the underlying objectives of the protective measure system.