

# Summary of the Constitutional Court Ruling No. 8-11/2546

Dated 22<sup>nd</sup> April B.E. 2546 (2003)\*

**Re : Are the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), which added sections 67 bis, section 67 ter and section 67 quarter to the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), and the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), which added section 38 bis, section 38 ter, section 38 quarter, section 38 quinqué, section 38 sex and section 38 septem to the Commercial Banking Act, B.E. 2505 (1962), contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?**

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## 1. Background and summarized facts

The Bangkok South Civil Court referred the objections of defendants in Cases Nos. 6491/2543, 7505/2543, 8713/2543 and 8926/2543, a total of 4 applications, to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

In the first application, Thai Thanakarn Public Company Limited, as plaintiff, filed claims against Thai Steel Galvanize Company Limited, as first defendant, and Mr. Weerachai Aeuwilaijit, as second defendant, at the Bangkok South Civil Court in Civil Case No. 6491/2543 for breaches of loans, promissory notes and guarantees and for a mortgage foreclosure. The plaintiff requested for a court judgment and an enforcement order compelling both defendants to jointly repay the loan amounts and interests, which were calculated up to the date of case filing, as follows: (1) 2,014,817.81 baht plus interest at the rate of 15 percent per annum from the principal sum of 1,414,355.51 baht; (2) 22,507,857.54 baht plus interest at the rate of 15 percent per annum from the principal sum of 15,800,000 baht and; (3) 7,122,243.50 baht plus interest at the rate of 15 percent per annum from the principal sum of 5,000,000 baht. In this regard, interest would accrue as from the day following date of case filing until the complete repayment of the debts by both debtors.

In the second application, Thai Thanakarn Public Company Limited, as plaintiff, filed claims against Mr. Phipat Phunsiri, as first defendant, and Mr. Weerachai Aeuwilaijit, as

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second defendant, at the Bangkok South Civil Court in Civil Case No. 7505/2543 for breaches of contract for discounted sale of bills and guarantees. The plaintiff requested for a court judgment and an enforcement order compelling both defendants to jointly repay the debt of 1,915,049.32 baht plus interests at the rate of 15 percent per annum from the principal sum of 1,337,888.07 baht accruing as from the day following the date of case filing until complete repayment.

In the third application, Thai Thanakarn Public Company Limited, as plaintiff, filed claims against Mr. Weerachai Aeuwilaijit, as first defendant, and Miss Worathan Aeuwilaijit, as second defendant, at the Bangkok South Civil Court in Civil Case No. 8713/2543 for breach of loan contract and mortgage foreclosure. The plaintiff requested for a court judgment and an enforcement order compelling both defendants to jointly repay debts owed to the plaintiff in the sum of 30,143,182.44 baht plus interest at the rate of 15 percent per annum from the principal sum of 20,306,633.18 baht accruing as from day following the date of case filing until the completing of repayment.

In the fourth application, Thai Thanakarn Public Company Limited, as plaintiff, filed claims against Mr. Weerachai Aeuwilaijit as a defendant at the Bangkok South Civil Court in Civil Case No. 8926/2543 for breach of loan and mortgage foreclosure. The plaintiff requested for a court judgment to enforce the defendant to repay the amount of 2,985,055.54 baht plus interest at the rate of 15 percent per annum from the principal sum of 1,958,805.26 baht accruing as from the day following the date of case filing until the completion of repayment.

The defendants in all four applications, as applicants, denied the claims of the plaintiff and defended on the point of law that the provisions of law, including the enactment process of the laws, and the provisions of such law were inconsistent with the Constitution. Applications were submitted to the Bangkok South Civil Court, all of which could be identically summarised as follows:

(1) Was the enactment of the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), contrary to or inconsistent with section 29, section 35, section 48 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)? Was section 67 quarter of the Finance, Securities and Credit Foncier Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), inconsistent with the Constitution?

(2) Were the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), which added section 67 bis, section 67 ter and section 67 quarter to the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), and the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), which added section 38 bis, section 38 ter, section 38 quarter, section 38 quinqué, section 38 sex and section 38 septem to

the Commercial Banking Act, B.E. 2505 (1962), laws which were inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

## **2. Preliminary issue**

The preliminary issue was whether or not the Constitutional Court had the power to accept the four applications for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. The applicant, who was a defendant in all four applications, objected that the Emergency Decree Amending the Finance, Securities and Credit Foncier Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), and the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), were contrary to or inconsistent with the Constitution as regards the Acts as a whole, their provisions and their enactment. As this was a case where the Bangkok South Civil Court had to apply the provisions of law to a case, the Constitutional Court therefore had the power to accept the applications for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Moreover, as the issues in all four applications were identical, the applications were merged and ruled simultaneously.

## **3. The issues considered by the Constitutional Court**

Pursuant to the application, there were four issues which had to be ruled by the Constitutional Court, as follows:

(1) First issue. Was the enactment of the Emergency Decree Amending the Finance, Securities and Credit Foncier Act, B.E. 2522 (1979) (No. 3), B.E. 2540 (1997), contrary to or inconsistent with section 29, section 35, section 48 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) ?

The Constitutional Court held as follows. The right to object to the enactment process of a law in the case of whether an Emergency Decree was in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was the exclusive right of the members of the House of Representatives and Senators according to section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Therefore, the applicant's objection on the enactment process of the law, which requested the Constitutional Court to make a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), did not have to be considered by the Constitutional Court.

(2) Second issue. Was section 67 quarter of the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), B.E. 2540 (1997),

contrary to or inconsistent with the Constitution?

The Constitutional Court held as follows. The applicant had not clearly specified the sections of the Constitution which section 67 quarter of the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), B.E. 2540 (1997), was contrary to or inconsistent with pursuant to section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). As a result, the application was not in accordance with clause 5(2) of the Rules of the Constitutional Court on Constitutional Court Procedure, B.E. 2541 (1998).

Therefore, the Constitutional Court held that this issue did not have to be ruled upon.

(3) Third issue. Was the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), which added section 67 bis, section 67 ter and section 67 quarter to the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

The Constitutional Court held as follows. Section 4 of the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), stated that “the following provisions shall be added as Chapter 5 bis Merger and Transfer of Business, section 67 bis, section 67 ter and section 67 quarter of the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979)”. Section 67 bis essentially stated that the merger of companies did not result in the transfer of licenses of the original companies to the new company. Section 67 ter essentially stated that notice to the debtor under section 306 of the Civil and Commercial Code was not required for the assignment of claim rights in the transfer of business. However, this did not prejudice the debtor’s rights to raise a defence under section 308 paragraph two of the Civil and Commercial Code. Finally, section 67 quarter essentially stated that the merger of a company’s business with another financial institution, or the transfer of business to another financial institution, in the case of a necessary urgency to preserve financial stability and for the benefit of the people, a person is prohibited from initiating insolvency proceedings against such company and financial institution during the merger or transfer process.

Section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), stated that the restriction of such rights and liberties as recognised by the Constitution should not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by the Constitution and only to the extent of necessity and provided that it should not affect the essential substances of such rights and liberties. Section 29 paragraph two stated that such laws must be of general application and must not be intended to apply to any particular case or person; provided that the provision of the Constitution authorising its enactment should also be mentioned therein. Section 29 paragraph three stated that the provisions under paragraph one and paragraph two also applied *mutatis mutandis* to rules or regulations issued by virtue of the provisions of law.

In this connection, section 335(1) stated that in the initial period, the provisions of section 29 paragraph two and paragraph three would not apply to laws in force at the date of the promulgation of the Constitution. Thus, in this case, the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), was in force since 29<sup>th</sup> June B.E. 2540 (1997), prior to the promulgation of this Constitution (11<sup>th</sup> October B.E. 2540 (1997)). Pursuant to section 335(1), the provisions of section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was therefore inapplicable. Moreover, such Emergency Decree had been enacted in order to prescribe measures for promoting the merger and transfer of business by financial institutions so as to rehabilitate the status and engender the stability of the financial institution system as well as protect the interests of the people. The Emergency Decree was also a law which was generally applicable to all financial companies, and not directed at any particular case or person.

Therefore, the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), which added section 67 bis, section 67 ter and section 67 quarter to the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), was neither contrary to nor inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

(4) Fourth issue. Was the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), which added section 38 bis, section 38 ter, section 38 quarter, section 38 quinque, section 38 sex and section 38 septem to the Commercial Banking Act, B.E. 2505 (1962), contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

Section 5 of the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), stated that “the following provisions shall be added as section 38 bis, section 38 ter, section 38 quarter, section 38 quinque, section 38 sex and section 38 septem of the Commercial Banking Act, B.E. 2505 (1962)”. Section 38 bis essentially stated that the merger of commercial banks’ businesses or merger of business with a financial institution did not result in the transfer of the original commercial banks’ licenses to the new commercial bank or financial institution. Section 38 ter essentially stated that notice to the debtor under section 306 of the Civil and Commercial Code was not required in the assignment of claim rights pursuant to the transfer of businesses. However, this did not prejudice the debtors’ right to raise a defence under section 308 paragraph two of the Civil and Commercial Code. Section 38 quarter essentially contained provisions relating to proceedings in connection with the merger of commercial banks or transfer of business to another commercial bank or financial institution. Section 38 quinque essentially prohibited any person from instituting insolvency proceedings against a commercial bank or financial institution in the process of a merger or transfer of business. Section 38 sex essentially stated that, in such a merger or transfer of business, if there was a transfer of assets guaranteed by securities other than a mortgage, pawn or other rights arising from a personal guarantee, such securities shall devolve to the merged or recipient commercial bank or financial institution.

Finally, section 38 septem essentially stated that if there were cases involving the enforcement of claim rights pending in the courts, the merged or recipient commercial bank or financial institution would substitute the relevant parties in such cases and was able to submit new evidence to disprove the documents already submitted, cross-examine witnesses that had already been examined and cross-examine evidence that had already been examined. In the case where the court had already passed a judgment enforcing such a claim right, the commercial bank or financial institution would substitute as a creditor in such judgment.

The Constitutional Court held as follows. The Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), was enacted in order to remedy the problems relating to the status or operations of commercial banks so as to engender stability and strength. Such an Emergency Decree was generally applicable on all commercial banks and was not intended for any particular case or person. The sections of the Constitution authorising its enactment had also been specified in section 3, i.e. “ the following provisions shall be added as section 3 bis of the Commercial Banking Act, B.E. 2505 (1962): ‘Section 3 bis. This Act is a law on the restriction of liberty in dwelling, right in personal property and liberty in engagement of enterprise or occupation, which was enacted by virtue of section 35 paragraph two, section 48 and section 50 paragraph two of the Constitution of the Kingdom of Thailand’ ”. Moreover, the provisions in section 38 bis, section 38 ter, section 38 quarter, section 38 quinque, section 38 sex and section 38 septem which were added to the Commercial Banking Act B.E. 2505 (1962) did not contain any terms that were contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

#### **4. Ruling of the Constitutional Court**

By virtue of the reasons stated above, the Constitutional Court held that the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), which added section 67 bis, section 67 ter and section 67 quarter to the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), and the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), which added section 38 bis, section 38 ter, section 38 quarter, section 38 quinque, section 38 sex and section 38 septem to the Commercial Banking Act, B.E. 2505 (1962), were neither contrary to nor inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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