

# Summary of Constitutional Court Ruling

No. 38-39/2547

Dated 8<sup>th</sup> April B.E. 2547 (2004)\*

**Re:** The Central Bankruptcy Court referred the objections of debtors in Bankruptcy Case Nos. L. 895/2544 and L. 1422/2544 requesting for a Constitutional Court ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case where section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were contrary to or inconsistent with section 6, section 27, section 28, section 29, section 30 and section 57 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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## 1. Background and summarized facts

The Central Bankruptcy Court referred the objections of debtors in bankruptcy cases, a total of two applications, requesting for a Constitutional Court ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

**First application.** Max Asset Management Corporation Limited, the plaintiff creditor, filed a petition against Thai Iso-Wall Company Limited, the first debtor, and Kosa Holding Company Limited, the second debtor, and Mr. Chai Kosawisut, the third debtor, at the Central Bankruptcy Court requesting for a court order of absolute receivership of all three debtors' assets and a judgment declaring all three debtors as bankrupts pursuant to a default on debts owed to the plaintiff creditor in the amount of 28,915,399.07 baht.

**Second application.** Max Asset Management Corporation Limited, the plaintiff creditor, filed a petition against Rotoplast Company Limited, the first debtor, Mr. Chai Kosawisut, the second debtor and Mr. Ekalak Buathong, the third debtor, at the Central Bankruptcy Court requesting for a court order of absolute receivership of the debtors' assets as well as a judgment declaring the debtors as bankrupts pursuant to a case where such debtors defaulted on debts owed to the plaintiff creditor in the amount of 45,260,386.20 baht in Bankruptcy Case No. L. 895/2544.

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The debtors in both petitions, as applicants, filed motions to the Central Bankruptcy Court, which were essentially identical and could be summarized as follows. The applicants objected that the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which provided for the assignment of debts without having to give notice to the debtors, were provisions of law that restricted the pre-existing rights of debtors as debtors protected under the Constitution and section 306 of the Civil and Commercial Code. They asserted that those provisions were enacted and came into force subsequent to the emergence of this cause of action. Thus, they were provisions of law which applied particularly to the debtors in this case, and did not apply to people generally. Such provisions were considered to be laws which were inconsistent with section 6, section 27, section 28, section 29, section 30 and section 57 of the Constitution and thereby subject to section 264 and section 271 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 both applications for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held that in both applications, the applicants objected that the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No.4) B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were provisions of law which were inconsistent with section 306 of the Civil and Commercial Code and section 6, section 27, section 28, section 29, section 30 and section 57 of the Constitution. These were cases where the Central Bankruptcy Court had to apply such provisions of law to the cases. Therefore, the Constitutional Court had the power to accept both applications for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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

There were three issues which had to be considered by the Constitutional Court.

The **first issue** was whether or not section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were contrary to or inconsistent with section 306 of the Civil and Commercial Code.

The Constitutional Court held that section 264 in conjunction with section 6 of the Constitution conferred jurisdiction on the Constitutional Court to make a ruling in cases of

objections on whether or not a provision of law was contrary to or inconsistent with the Constitution. It did not confer any jurisdictional power on the Constitutional Court to make a ruling in cases of objections on whether or not a provision of law was contrary to or inconsistent with laws in the same hierarchy. Therefore, the Constitutional Court did not have to make a ruling on this issue.

The **second issue** was whether or not section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), was contrary to or inconsistent with section 6, section 27, section 28, section 29, section 30 and section 57 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The **third issue** was whether or not section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was contrary to or inconsistent with section 6, section 27, section 28, section 29, section 30 and section 57 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 6 of the Constitution was a provision in Chapter 1 on general provisions which stated that the Constitution as the supreme law of the State without any provision recognizing rights and liberties or conferring any powers to persons or organs. It was therefore not possible to rely on such provision or raise an objection that any provision of any law was contrary to or inconsistent with section 6 of the Constitution. Section 27 of the Constitution was a provision in Chapter 3 on rights and liberties of the Thai people. It was a provision which laid down the general principle of recognizing the rights and liberties of the Thai people as provided in various sections of this Constitution. Section 27 did not contain any provision which specifically recognized any particular right or liberty. It was therefore not possible to rely on such section or raise an objection that any provision of any law was contrary to or inconsistent with section 27 of the Constitution. As for section 28 of the Constitution, the provisions laid down the principle of allowing a person to invoke human dignity or exercise his rights and liberties to the extent that it did not violate the rights and liberties of other people or contrary to the Constitution or good morals. In addition, there was a concession for persons whose rights and liberties recognized by the Constitution were violated to invoke the provisions of the Constitution to bring a lawsuit or to defend himself or herself in court. However, there was no provision which specifically provided for such matter. Thus, it was not possible to rely on such provision or raise an objection that any provision of any law was contrary to or inconsistent with section 28 of the Constitution. On this point, the Constitutional Court had also already decided in Ruling Nos. 9/2545 and 40/2545 that section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were neither contrary to nor inconsistent with section 29 and section 30 of the Constitution. Therefore, the second and third issues on whether or not section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the

Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were contrary to or inconsistent with section 6, section 27, section 28, section 29 and section 30 of the Constitution did not have to be considered by the Constitutional Court.

The questions under the second and third issues which remained to be considered by the Constitutional Court were whether or not section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were contrary to or inconsistent with section 57 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 57 of the Constitution laid down the principle on the protection of a person's right as a consumer. The rules and procedures of such protection would be in accordance with provisions of law. However, at the time of this ruling, such law had not yet been enacted. The only relevant legal provision was the Consumer Protection Act, B.E. 2522 (1979), which had been in force before the promulgation of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Even though such law was subsequently amended by the Consumer Protection Act (No. 2), B.E. 2541 (1998), there was still no provision on the establishment of an independent organization consisting of representatives of consumers for giving opinions on the enactment and issuance of laws, rules and regulations and on the determination of various measures for consumer protection. In this case, section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), provided for the transfer of businesses of a commercial bank in the case a merger between commercial banks or a merger with other financial institutions where the approval of the Minister of Finance was required. Such transfer of claim rights associated with the transfer of business could be affected without having to give notice of the transfer to the debtors under section 306 of the Civil and Commercial Code. However, this did not prejudice the right of the debtor to raise a defence under section 308 paragraph two of the Civil and Commercial Code. It was apparent that section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), was not relevant to and did not prejudice a person's right as a consumer under section 57 of the Constitution.

Section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), provided for the transfer of assets which were claim rights from a financial institution to an asset management corporation in the case where an asset management corporation assigned the original creditor as a collecting agent to collect debt repayments. Such a transfer of claim rights was deemed lawful without having to give notice of the transfer to the debtor under section 306 of the Civil and Commercial Code. This did not, however, prejudice the debtor's rights to raise a defence under section 308 paragraph two of the Civil and Commercial Code. It was apparent that section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), did not in any way have the effect of restricting

the rights of a debtor. Therefore, there was no impact on the rights of a person as a consumer under section 57 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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

The Constitutional Court held that section 38 ter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 9 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were neither contrary to nor inconsistent with section 57 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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