

# Summary of the Constitutional Court Ruling No. 26-34/2545

Dated 4<sup>th</sup> June B.E. 2545 (2002)\*

**Re : The Bangkok South Civil Court and the Civil Court referred the objections of the defendants to the Constitutional Court in cases where section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), were contrary to or inconsistent with 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 and the Civil Court submitted the following applications of defendants, a total of nine applications, requesting that the Constitutional Court rule on whether section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No.2), B.E. 2541 (1998), were contrary to or inconsistent with the Constitution.

The Bangkok South Civil Court submitted the following applications of defendants, a total of five applicants, containing objections that the enactment of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998) were contrary to or inconsistent with section 29 and section 48 of the Constitution and that section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998) were contrary to or inconsistent with section 26 and section 48 of the Constitution:

(1) Case No. 7017/2543 Bangkok Capital Mutual Fund as plaintiff against Mr. Virachai Aeuvilajit as defendant;

(2) Case No. 10023/2543 Gamma Capital Mutual Fund as plaintiff against Mrs. Apiraporn Paibul as first defendant and Mr. Virachai Aeuvilajit as second defendant;

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(3) Case No. 9121/2543 Gamma Capital Mutual Fund as plaintiff against Mr. Likit Hongladarom as first defendant, Mr. Pornchai Jetipak as second defendant, Mr. Virachai Aeuvilaijit as third defendant and Mr. Chaipong Thammapij as fourth defendant, in which case the third defendant was the applicant;

(4) Case No. 11342/2543 Gamma Capital Mutual Fund as plaintiff against East Geo-Systems Company Limited as first defendant and Civil Engineering Company Limited as second defendant, in which case the second defendant was the applicant; and

(5) Case No. 11620/2543 Gamma Capital Mutual Fund as plaintiff against Mr. Supoj Thamprapas-assadorn as defendant.

The Civil Court submitted the following objections of the defendants, as applicants in a total of four applications, objecting that the enactment of both Emergency Decrees on Reform of the Financial Institution system and the provisions in certain sections of both Emergency Decrees on Reform of the Financial Institution System were contrary to or inconsistent with the Constitution:

(1) Case No. 8125/2543 Bangkok Capital Mutual Fund as plaintiff against Power-P Public Company Limited as first defendant, Mr. Virachai Aeuvilaijit as second defendant and Mr. Saneu Trakulsuk as third defendant, in which case the first defendant was the applicant;

(2) Case No. 8986/2543 Gamma Capital Mutual Fund as plaintiff against Thai Technique Construction Company Limited as first defendant, Civil Engineering Company Limited as second defendant, Mr. Chaiwal Assavasirisuk as third defendant and Mr. Suthep Kreukkritaya as fourth defendant, in which case the second defendant was the applicant;

(3) Case No. 8995/2543 Gamma Capital Mutual Fund as plaintiff against E. T. M. Cons. (1995) Company Limited as first defendant, Civil Engineering Company Limited as second defendant, Mr. Chaiwal Assavasirisuk as third defendant, Mrs. Ngamnit Phayungkijjombat as fourth defendant and Mr. Prasert Udom-mangkorn as fifth defendant, in which case the second and third defendants were the applicants; and

(4) Case No. 11294/2543 Gamma Capital Mutual Fund as plaintiff against Phrom Maharachpandinthong Company Limited as first defendant, Civil Engineering Company Limited as second defendant, Mr. Chaiwal Assavasirisuk as third defendant and Mr. Woravit Verabowornpong as fourth defendant, in which case the third defendant was the applicant.

All the nine applications submitted by the Bangkok South Civil Court and the Civil Court to the Constitutional Court for consideration contained similar facts. In summary, the plaintiffs were buyers of assets in the form of business credit, including claim rights, of finance companies and finance and securities companies which were the original creditors of

the defendants whose operations had been suspended by an order of the Minister of Finance. The purchases were made from the Organization for the Reform of the Financial Institution System (ORFIS), which acted as the administrator for the sale of property for the repayment of debts in such finance companies or finance and securities companies. The ORFIS obtained their powers from the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998). Subsequently, the plaintiffs sent letters to the defendants notifying of the assignment of claim rights in the debts from such finance companies or finance and securities companies and demanded repayment of the debts by the debtors. However, the defendants did not repay. The plaintiffs therefore filed lawsuits against the defendants for debt repayment.

All the defendants who were the nine applicants submitted pleadings and similarly objected to the court in relation to the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) that such law was contrary to or inconsistent with the Constitution. Briefly stated, the ORFIS did not have the capacity of a seller and did not have the power to administer the sale of assets, credit and other claim rights of the finance company and finance and securities company whose operations had been suspended because the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), which contained provisions on the establishment and the prescription of powers and duties of the ORFIS, were emergency decrees which were contrary to or inconsistent with the Constitution for the following reasons:

(a) The Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), published in the Government Gazette on 24<sup>th</sup> October B.E. 2540 (1997), was a law on the restriction of rights in property of persons under section 48 of the Constitution. However, such law did not refer to the provision of the Constitution which allowed the enactment of laws which restricted the rights of persons. Moreover, although the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), which came into force on 23<sup>rd</sup> May B.E. 2541 (1998) referred to section 48 of the Constitution, such a reference did not render enforceable the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) which was inconsistent with the Constitution. Both Emergency Decrees were contrary to or inconsistent with section 29 paragraph one and paragraph two of the Constitution read in conjunction with section 48 of the Constitution and was therefore unenforceable under section 6 of the Constitution.

(b) Section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), which added provisions to the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), namely, section 30 bis, section 30 ter and section 30 quarter, provided for the exercise of powers by the ORFIS but did not take into account the rights of a person in property which was protected by the Civil and Commercial Code. This was particularly true in relation to the assignment of claim rights and the sale by

open market, which was inconsistent with section 26 in conjunction with section 48 paragraph one of the Constitution. The defendants therefore requested the Bangkok South Civil Court and the Civil Court to stay its trial and adjudication of the cases and refer the matter to the Constitutional Court for a ruling under section 264 of the Constitution.

## **2. Preliminary issue**

Can the Constitutional Court accept these applications for consideration under section 264 of the Constitution?

The Constitutional Court held that as the applications specified the sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) which were objected as being contrary to or inconsistent with section 26 and section 48 of the Constitution, and that such sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) claimed by the defendants were provisions of law which the courts had to apply to a case and there had not yet been a ruling of the Constitutional Court in relation to such sections, the case satisfied the criteria laid down by section 264 paragraph one of the Constitution. The Constitutional Court therefore accepted this application for consideration.

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

The following two issues were considered by the Constitutional Court:

The first issue was whether or not the enactment of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998) were contrary to or inconsistent with section 29 and section 48 of the Constitution.

The Constitutional Court held that, even though in all nine applications, the applicants requested that the Constitutional Court makes a ruling under section 264, a section which provided for the Constitutional Court to make a ruling in the case where parties to a case or the court claimed that a provision of law as applicable to the case was contrary to or inconsistent with the Constitution, the applicants' objections were related to the unconstitutionality of the legislative procedure, and not that the provisions of law were contrary to or inconsistent with the Constitution. Therefore, on this issue, the applicant did not have the right to apply to the Constitutional Court for a ruling under section 264.

The second issue was whether section 30 bis, section 30 ter and section 30 quarter, as amended by the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), were contrary to or inconsistent with section 26 and section 48 of the Constitution.

On this issue, a ruling had been made by the Constitutional Court that section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), were neither contrary to nor inconsistent with section 26 and section 48 of the Constitution in Ruling No. 24/2545, dated 4<sup>th</sup> June B.E. 2545 (2002). Therefore, this issue needed not be reconsidered.

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

The Constitutional Court held on the first issue in the application that the case was not in accordance with section 264 of the Constitution; hence, the applicant did not have the right to apply for a Constitutional Court ruling. On the second issue, the Constitutional Court had made a ruling in Ruling No. 24/2545; therefore the issue needed not be reconsidered.

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