

# **Summary of the Constitutional Court Ruling No. 61/2545**

**Dated 12<sup>th</sup> December B.E. 2545 (2002)\***

**Re : The Civil Court referred the objection of defendants in the case where section 7, section 11, section 16(3), section 23(5), section 25 and section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) 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 Civil Court referred the application of the applicants, who were the first and second defendants in Case No. 991/2543, requesting for a Constitutional Court ruling under section 264 of the Constitution on whether or not section 7, section 11, section 16(3), section 23(5), section 25 and section 30 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 50 of the Constitution.

The facts in the application and supporting documents could be summarised as follows. The Financial Institution Asset Management Corporation, as plaintiff, filed a claim against Mr. Piyabutr Wasuthan, the first defendant, and Miss Weewika Chotiros or Wasuthan, the second defendant, at the Civil Court for breaches of bills and guarantees in Case No. 991/2543. The first defendant was a customer of Ekthana Finance and Securities Public Limited Company (the Company). The first defendant had requested for financial support from the Company in the form of credit evidenced by the issue of promissory notes to the Company. In the offer of such credit, the first defendant would issue a promissory note in the amount of sums received from the Company as evidence of the receipt of such sums and in the promise that he would repay the debts to the Company on the due date of the promissory note or on demand. In this connection, the second defendant guaranteed the first defendant's debts and agreed to be jointly liable with the first defendant. Subsequently, the Minister of Finance issued an order by virtue of the law on finance, securities and credit foncier business terminating the operations of Ekthana Finance and Securities Public Limited Company and directing the Organisation for Reform of the Financial Institution System (ORFIS) to sell the Company's assets and proceed with the repayment of

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the Company's accounting debts pursuant to the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998). In consequence, the plaintiff lawfully received the transfer of assets from Ekthana Finance and Securities Public Limited Company and demanded the repayment of debts from the two defendants on numerous occasions but the defendants did not respond. The plaintiff therefore filed a claim against both defendants in a lawsuit.

The defendants submitted an application to the Civil Court requesting that a reference be made to the Constitutional Court for a ruling. Briefly stated, the powers of the ORFIS under section 7 (1), section 7 (3), section 11, section 16 (3), section 25 and section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) restricted the rights and liberties of a person to engage in an enterprise or an occupation or undertake a fair and free competition, which was prohibited by section 50 of the Constitution. The provisions amounted to the restriction of the rights of shareholders, who were the true owners of the business, in effecting a merger, supervising and managing the company by the appointment of officers, viz a director or a board of directors, to operate the businesses of the company. Section 29 of the Constitution provided that the enactment of laws to restrict the rights and liberties of a person could not be done 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 shall not affect the essential substances of such rights and liberties. Such law which had the force of restricting rights and liberties must also mention the provision in the Constitution authorizing its enactment. However, the Emergency Decree was not enacted in accordance with the Constitution. The Emergency Decree was therefore inconsistent with the Constitution and unenforceable under section 6 of the Constitution.

## **2. Preliminary issue**

Could the Constitutional Court accept the application for consideration under section 264 of the Constitution ?

The Constitutional Court held that, as the application specified the section of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) which was objected to as being contrary to or inconsistent with section 29 and section 50 of the Constitution and such provisions of the Emergency Decree raised by the defendants were provisions of law which the Court was going to apply to a case, and at the time of the application there had not been a ruling of the Constitutional Court relevant to those sections, the case was in accordance with the criteria under section 264 paragraph one of the Constitution. The Constitutional Court could therefore accept the application for consideration under the Constitution.

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

The issues which had to be considered by the Constitutional Court were whether or not section 7, section 11, section 16(3), section 23(5), section 25 and section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were contrary to or inconsistent with section 29 and section 50 of the Constitution.

The Constitutional Court held in Ruling No. 24/2545, dated 4<sup>th</sup> June B.E. 2545 (2002) that section 7, section 16(3), section 23 and section 25 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were neither contrary to nor inconsistent with section 29 and section 50 of the Constitution. It was therefore not necessary to reconsider those issues.

The issues which remained to be considered were whether or not section 11 and section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were contrary to or inconsistent with section 29 and section 50 of the Constitution.

The Constitutional Court held that section 11 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) was a provision on the establishment, constituent and appointment of a committee for the Organisation for Reform of the Financial Institution System and was not a provision on the restriction of rights and liberties of a person under section 29 of the Constitution. There was also no relevance to the liberties or the restriction of liberties to engage in an enterprise or an occupation and to undertake a fair and free competition under section 50 of the Constitution. Section 11 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) therefore did not contain any provision which was contrary to or inconsistent with section 29 and section 50 of the Constitution.

On the other hand, section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) was a provision which restricted the liberty to operate a company, which was a restriction of a person's liberties to engage in an enterprise or an occupation and to undertake a fair and free competition under section 50 paragraph one of the Constitution. Such liberties of a person were recognized by the Constitution. Under section 29 paragraph one of the Constitution, the restriction of such liberties as recognized by the Constitution could not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it should not affect the essential substance of such rights and liberties. Section 50 paragraph two of the Constitution contained a proviso for the restriction of liberties under section 50 paragraph one of the Constitution that the restriction of such liberties could be imposed by virtue of a law specifically enacted for maintaining the security and safety of the State or economy of the country, protecting the public in regard to public utilities, maintaining public orders and good morals, regulating the engagement in

an occupation, consumer protection, town and country planning, preserving natural resources or the environment, public welfare, preventing monopoly, or eliminating unfair competition. In this regard, the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) was a law enacted due to the necessity of having to maintain the security of the national economy. The provision of law was therefore specifically enacted for a purpose determined by section 50 paragraph two of the Constitution. The provision did not affect the essential substance of the liberties of a person to engage in an enterprise or an occupation because the operations of those companies had been terminated by an order of the Minister of Finance and their status or operations could not possibly be remedied or rehabilitated. Moreover, the provision was generally applicable on all companies whose operations had been terminated by orders of the Minister of Finance and could not be continued. Section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) was therefore neither contrary to nor inconsistent with section 29 and section 50 of the Constitution.

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

The Constitutional Court held that section 7, section 11, section 16 (3), section 23 (5), section 25 and section 30 of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) was neither contrary to nor inconsistent with section 29 and section 50 of the Constitution.

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