

# Summary of the Constitutional Court Ruling No. 40/2548

Dated 5<sup>th</sup> April B.E. 2548 (2005)\*

**Re: The Central Intellectual Property and International Trade Court referred the objection of a defendant (Mr. Prachai Leawpairat and others) to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not section 90/27 paragraph two and section 90/60 paragraph two of the Bankruptcy Act B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4) B.E. 2541 (1998), were contrary to or inconsistent with section 4, section 29 paragraph one, section 30 paragraph one and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).**

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## 1. Background and summarized facts

International Finance Corporation, plaintiff, filed a lawsuit against Mr. Prachai Leawpairat, the first defendant, and Leawpairat Enterprise Company Limited, second defendant, at the Central Intellectual Property and International Trade Court claiming breach of guarantee contract. In summary, Thai Petrochemical Industry Public Company Limited, a debtor, entered into a loan contract with the plaintiff in order to raise capital for investment in a project involving the construction of petrochemical products and petroleum production facilities. The total amount of loan was 460,000,000 US dollars. The first and second defendants entered into contracts jointly and severally guaranteeing the repayment of such debt. In due course, the Central Bankruptcy Court gave judgment for the business reorganization of the debtor and an approval of the reorganization plan pursuant to which the debtor repaid a portion of the debt in installments to the creditor. Repayments halted when the debtor sent a letter requesting for an indefinite postponement of repayment for the remaining balance. The plaintiff did not consent to such request and made demands for repayment from the first and second defendants as guarantors. Both defendants took no action. As a result, the plaintiff filed this lawsuit.

Both defendants filed defences and denied the plaintiff's claims. The defendants also filed an objection that section 90/27 paragraph two and section 90/60 paragraph two were contrary to or inconsistent with section 4, section 29 paragraph one, section 30 paragraph one

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and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

## **2. Preliminary issue**

The Constitutional Court had undertaken a preliminary consideration of the application and found that the Central Intellectual Property and International Trade Court was going to apply the provisions of law objected by the applicant as being contrary to or inconsistent with the Constitution to the case. The court thus referred such opinion to the Constitutional Court for a ruling. This case was therefore in accordance with section 264 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which the Constitutional Court could accept for consideration.

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

The issues in the application which had to be considered by the Constitutional Court were whether or not section 90/27 paragraph two and section 90/60 paragraph two of the Bankruptcy Act B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4) B.E. 2541 (1998), were contrary to or inconsistent with section 4, section 29 paragraph one, section 30 paragraph one and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 4 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was a provision on human dignity, a value of humanity inherent in every person protected by the Constitution. Section 29 paragraph one of the Constitution provided the principle for protection of rights and liberties whereby the rights and liberties of a person recognized under the Constitution could not be restricted. An exception was provided for the restriction of rights and liberties by virtue of provisions of law specifically enacted for the purposes provided by the Constitution and to the extent of necessity so long as the essential substances of the rights and liberties were not affected. Section 30 paragraph one of the Constitution provided the principle of equality whereby all persons were equal under the law and enjoy equal legal protection. Section 48 paragraph one of the Constitution recognized the rights of a person in property, whereby any restriction thereof must be in accordance with provisions of law. On the other hand, section 90/27 paragraph two and section 90/60 paragraph two of the Bankruptcy Act B.E. 2483 (1940) provided for the rights and liabilities of a joint debtor, partner of a debtor, guarantor or person acting as guarantor for the debtor. In any case, the issue in this application referred only to the guarantor. Upon a consideration of section 90/27 paragraph two which gave a guarantor the right to file for debt repayment in the business reorganization for sums which he/she might subsequently be made liable to provided that the creditor had not already exercised the right to seek full debt repayment. As for section 90/60 paragraph two, which provided that a court order approving a plan did not alter the liabilities of a guarantor for debts existing prior to the date of plan

approval by court order, it was held that such provision recognized the existing rights of a creditor over the debtor and guarantors as well as the rights of a guarantor over the debtor under the Civil and Commercial Code. In other words, a guarantor was under an obligation to repay debts to the creditor on the debtor's behalf in the event of the latter's failure to make repayment. Also, in the event of a default in repayment by the debtor, the creditor was entitled to demand repayment from the guarantor. As regards the guarantor, other than any arguments available as a guarantor against the creditor, the guarantor could also raise any arguments available to the debtor against the creditor. Once a guarantor had repaid debts to the creditor on behalf of the debtor, he/she had the right to seek indemnity from the debtor with respect to the loan amount and interests as well as for any losses or damages resulting from such guarantee.

Section 90/27 paragraph one of the Bankruptcy Act B.E. 2483 (1940) provided for the right of a creditor to seek debt repayment in the business reorganization if the debt was accrued prior to the business reorganization court order date despite such debt being not yet due or a conditional debt. Section 90/27 paragraph two conferred a guarantor with the right to submit an application for debt repayment in the business reorganization with respect to sums which he/she might be subsequently made liable to. The submission of an application for debt repayment must be made within one month as from the publication of the order appointing the plan organizer as provided by law. Under the provisions of such law, even though the court had already issued an order to reorganize the business of the debtor, the guarantor remained liable to the creditor under the guarantee contract. The guarantor's rights were protected by the right to file a debt repayment application for the amount which might be subsequently claimed by the creditor and repaid on the debtor's behalf. Nonetheless, the law significantly conferred the creditor with a right to file for debt repayment since a guarantor's right to indemnification would only arise once the guarantor had repaid the creditor on the debtor's behalf. Therefore, if the creditor had already exercised the right to file for full repayment of debt, the law prohibited the guarantor from exercising the right to file for debt repayment, which would prejudice the rights of the creditor. The provisions of such law granted equal protection to the proprietary rights of the creditor and guarantor and did not constitute a restriction of a person's rights in property, nor was the human dignity of persons diminished in any way. Thus, section 90/27 paragraph two of the Bankruptcy Act B.E. 2483 (1940) was neither contrary to nor inconsistent with section 4, section 29 paragraph one, section 30 paragraph one and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Section 90/60 paragraph two of the Bankruptcy Act B.E. 2483 (1940) was a consequence of the formulation of a business reorganization plan, being an essential process in the debtor's business reorganization. The plan organizer would undertake an analysis of the circumstances, the problems of the business and make recommendations to resolve those problems by formulating a business reorganization plan. Once the business reorganization plan was approved by the meeting of creditors and endorsed by the court, it would be implemented to the resolution of business problems so as to revive the business in recession to its original

state. The rationale behind section 90/60 paragraph two, which provided that a court order approving the plan did not alter the liabilities of a guarantor which existed prior to the date of such court order, was that a business reorganization plan was an exclusive matter for the debtor. The purpose of the plan was to resolve the insolvency and financial problems. Success in the administration of a business reorganization plan was not a certainty. In the event of a failure and the absolute receivership of the debtor's assets, the creditor was obliged to conduct bankruptcy procedures. In this regard, the creditor bore the risk of receiving partial repayment or the sum agreed in the business reorganization plan. Therefore, the guarantor was not released of the liabilities since at the time of executing the guarantee contract, the guarantor committed to repay the creditor in the event of the debtor's failure to repay such debt. The provisions of such law granted equal protection to the rights of persons in property and did not constitute a restriction of a person's rights in property, nor was the human dignity of persons diminished in any way. Thus, section 90/60 paragraph two of the Bankruptcy Act B.E. 2483 (1940) was neither contrary to nor inconsistent with section 4, section 29 paragraph one, section 30 paragraph one and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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

The Constitutional Court held that section 90/27 paragraph two and section 90/60 paragraph two of the Bankruptcy Act B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4) B.E. 2541 (1998), was neither contrary to nor inconsistent with section 4, section 29 paragraph one, section 30 paragraph one and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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