

Summary of Constitutional Court Ruling No. 9/2552

Dated 6th May B.E. 2552 (2009)*

Re: The Civil Court referred the objection of defendants (Sanwa Inter Food Company Limited, as first defendant, and Mr. Bun-ek Chokwattana, as second defendant) to the Constitutional Court for a ruling in the case of whether or not section 26 in conjunction with section 28 and section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), were contrary to or inconsistent with section 27, section 29, section 30, section 218 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

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1. Summary of background and facts

The Office of the Judiciary submitted the objection of defendants (Sanwa Inter Food Company Limited, as first defendant, and Mr. Bun-ek Chokwattana, as second defendant) in Civil Case No. Ngor 311/2543 (2000) of the Civil Court 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 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 27, section 29, section 30, section 218 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and whether or not section 26 in conjunction with section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The facts could be summarized as follows.

The Industrial Finance Corporation of Thailand, a juristic person, being a financial institution established under the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as plaintiff, filed an action against Sanwa Inter Food Company Limited, the first

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defendant, Mr. Bun-ek Chokwattana, the second defendant, and Mr. Jakrakij Srimaneekulroj, the third defendant, in the Civil Court on 23rd May B.E. 2543 (2000), as Case No. Ngor 311/2543 (2000). The charges or wrongdoings alleged were for defaults on agreements for loan, guarantee, mortgage and pledge. All three defendants submitted replies in defence. During the trial, the court issued an order to dispose the case with respect to the third defendant, and scheduled a hearing of the judgment on 22nd October B.E. 2547 (2004). During the proceedings, Thai Military Bank Public Limited filed a motion dated 18th October B.E. 2547 (2004) to subrogate the plaintiff's rights as a party in the case. The first and second defendant submitted a statement dated 24th December B.E. 2547 (2004) objecting to the subrogation of the plaintiff's rights as a party, and requested that the Court dismiss the application for subrogation filed by Thai Military Bank Public Limited and to proceed with the trial as provided by law.

The first and second defendants filed motions dated 12th May B.E. 2548 (2005) requesting the Civil Court to refer an opinion to the Constitutional Court for a ruling, in summary as follows. The provision in section 34 of the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), which stated that "upon the completion of the merger or transfer of businesses of the Corporation, the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended, shall be repealed...", constituted a restriction of rights and liberties of a person recognized by section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). In addition, the enactment of an Emergency Decree was exclusively applicable to the Industrial Finance Corporation of Thailand, not being an enactment for general application. The enactments were therefore made without regard to the principles on enactment of an Emergency Decree, and an avoidance of the Constitution in regard to the scrutiny of Emergency Decree enactment which were powers of the legislative assembly as provided under section 218 and section 219 of the Constitution.

Moreover, section 26 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), provided that "financial institution" meant a financial institution under the law on commercial banks, whereas prior to the enactment of this Emergency Decree, the Corporation did not have the status of a financial institution under the Commercial Banks Act B.E. 2505 (1962). However, subsequent to the enactment of this Emergency Decree, the Corporation became a financial institution under the law on commercial banks pursuant to section 26. Upon consideration of the steps and procedures for merger, it was found that all the steps and procedures under the Commercial Banks Act B.E. 2505 (1962), and all the amendments, which provided for the merger of commercial banks or merger with another financial institution, or the transfer of a commercial bank's businesses to another financial institution, applied, despite the fact that the Corporation had not yet acquired the status of a financial institution under the Commercial Banks Act B.E. 2505 (1962) and the amendments. Even though section 28 provided for the *mutatis mutandis* application of the Commercial Banks Act B.E. 2505 (1962),

as amended by the Emergency Decree Amending the Commercial Banks Act B.E. 2505 (1962) (No. 4), B.E. 2541 (1998), it was provided further in section 34 that upon the completion of the Corporation's businesses, the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), and the amendments thereof, would be repealed. The enactment of section 26 was therefore contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) since such Emergency Decree was specifically enacted for application to the case of the Corporation's merger, regardless of the fact that in the merger or transfer of the Corporation's business with Thai Military Bank there was another financial institution, or commercial bank, which also merged with Thai Military Bank, namely DBS Thai Dhanu Bank Public Limited. Subsequent to the merger with Thai Military Bank, DBS Thai Dhanu Bank did not relinquish its juristic person status as in the case of the Corporation.

Both defendants therefore requested for a Constitutional Court ruling on (1) whether or not section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 27, section 29, section 30, section 218 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and (2) whether or not section 26 in conjunction with section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The Civil Court found that there had not been a ruling of the Constitutional Court with respect to such provisions. A temporary stay of proceedings was therefore imposed and the objection transmitted through official channels to the Constitutional Court for further ruling.

2. Preliminary Issue

The preliminary issue was whether or not the Constitutional Court had the power to admit this application for consideration.

After consideration of the application, the Constitutional Court ordered the admission of the application for proceedings pursuant to clause 12 of the Rules of the Constitutional Court on Constitutional Court Procedures B.E. 2546 (2003), and for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

This case was pending trial in the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2540 when subsequently the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) was promulgated on 1st October B.E. 2549 (2006) wherein section 35 paragraph one provided that all matters provided by law as the powers of the Constitutional Court, or a problem arising on whether or not a law was inconsistent with the

Constitution, would become the powers of the Constitutional Tribunal, and paragraph four provided that all cases or matters pending proceedings in the Constitutional Court on 19th September B.E. 2549 (2006) would be transferred to the powers and responsibilities of the Constitutional Tribunal. Thereafter, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated to replace the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), wherein section 300 paragraph one, paragraph three and paragraph four provided that the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) became the Constitutional Court, and that the provisions of section 35 paragraph two, paragraph three and paragraph four of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) would continue to apply until the enactment of an Organic Act on Constitutional Court Procedures. All cases or matters pending proceedings in the Constitutional Tribunal would be continued by the Constitutional Court, and upon the appointment of Constitutional Court Judges under this Constitution, all cases and matters pending proceedings were transferred to the powers and duties of the newly appointed Constitutional Court. The Constitutional Court therefore had the power to try and adjudicate this application.

After consideration, the Constitutional Court found that while this application was pending trial in the Constitutional Court, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated. The review of the constitutionality of provisions of law had to take into consideration whether or not such provisions of law were contrary to or inconsistent with the Constitution in force at the time of the Constitutional Court ruling. However, as the provisions of section 27, section 29, section 30, section 218 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), raised in the applicants' objections that provisions of law were contrary to or inconsistent with, embodied identical principles to section 27, section 29, section 30, section 184 and section 185 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), this application was therefore ruled pursuant to the provisions of section 27, section 29, section 30, section 184 and section 185 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

3. Issues considered by the Constitutional Court

A preliminary issue which had to be ruled upon was whether or not the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), and the amendments thereof, were laws applicable by the Civil Court to the case, and thus referable to the Constitutional Court for a constitutionality ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found as follows. Even though section 34 paragraph one of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), provided that the Industrial Finance Corporation of Thailand Act

B.E. 2502 (1959), and the amendments thereof, would be repealed upon the completion of the merger or transfer of the Corporation's businesses, there was still a condition that the merger or transfer of businesses had to be carried out lawfully without any objection or opposition. In the event of an objection or opposition and the case reached the court, there had to be a final decision of the court that such business merger or transfer process was lawfully conducted in order for the repeal of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959) and the amendments thereof to become effective. Moreover, in the Court's consideration of the objection or opposition, the Court had to take into account the relevant provisions of law when making a decision, being the provisions of law applicable by the Court to this case. Therefore, even though it was evident from the Notification of the Ministry of Finance Re: Report of IFCT Business Transfer Completion, thus implying that the process of transfer of the Corporation's businesses under the business merger and transfer project between Thai Military Bank Public Limited and the Corporation was completed as of 26th November B.E. 2547 (2004), as there was an objection on the legality of such business merger or transfer, the process was not concluded until a final judgment of the Court. Hence, the Civil Court was therefore capable of applying the relevant provisions of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree on the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), in order to make a decision on such issue. As the provisions of law were applicable by the Civil Court to the case, they could be submitted to the Constitutional Court for a constitutionality ruling.

As regards the defendants' objection on whether or not section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 184 and section 185 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court found that this was a case where the defendant objected to the process for enactment of an Emergency Decree which section 185 of the Constitution did not give the applicants (defendants) any such a right to raise an objection on the enactment of an Emergency Decree. In the case of the Emergency Decree Amending the Industrial Finance Corporation Act B.E. 2502 (1959), B.E. 2547 (2004), it also appeared that the National Assembly had already given its approval of the Emergency Decree, which came into force as an Act, without any member of the House of Representatives or Senator exercising the right to seek a Constitutional Court ruling on its constitutionality. Thus, there was no further issue which required a ruling on the enactment process of such Emergency Decree. The Constitutional Court therefore was not required to give a ruling on the defendants' objection in regard to whether or not section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 184 and section 185 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Hence, the issues which had to be ruled upon by the Constitutional Court were as follows.

The first issue was whether or not section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 27, section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found as follows. Section 31 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), provided that the provisions in Chapter XXII Company Merger of the Public Companies Act B.E. 2535 (1992) applied *mutatis mutandis* to the business merger and transfer of the Corporation. Therefore, upon the completion of the transfer of the Corporation's business under the business merger and transfer scheme between Thai Military Bank Public Limited and the Corporation pursuant to section 34, it followed that the juristic person status of the Corporation established under such Act terminated by virtue of law. Moreover, upon the transfer of assets, debts, rights, obligations and responsibilities, no benefit was to be obtained from the further application of Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), and the amendments thereof, and there was no case for the re-application of the provisions of this Act to the business merger and transfer of the Corporation. Thus, there was reasonable cause for the repeal of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), and the amendments thereof, pursuant to the time precondition for the termination of such law.

Section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was deemed as a provision of law which was generally applicable to the merger or transfer of the Corporation's business, and the provision was enacted to the extent of necessity in the interest of fairness for all parties concerned on an equal basis. The provision did not restrict the rights and liberties of the relevant persons, whether they may be shareholders, creditors or debtors, did not constitute an unfair discrimination and did not affect the essential substance of the rights and liberties recognized by the Constitution. Furthermore, the provision was not intended for application to a particular case or person in such a manner that such person received unequal treatment or unequal protection. The provision was therefore neither contrary to nor inconsistent with section 27, section 29 and section 30 of the Constitution.

The second issue was whether or not section 26 in conjunction with section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was contrary to or inconsistent with section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found as follows. Section 26 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), provided that “commercial bank” meant a commercial bank under the law on commercial banks, and “financial institution” meant a financial institution under the law on commercial banks. The question on whether or not the scope of application of such provisions, or the extent of restriction of rights and liberties, exceeded necessity or affected the essential substances of the rights and liberties, depended essentially on the substance of the provisions in each section where such defined term applied. In this regard, it was discernable that section 26 was a provision on the definition of the words commercial bank and financial institution which could merge with the Corporation or transferred businesses to the Corporation under section 27 of the same Act. It did not mean that the Industrial Finance Corporation of Thailand was a financial institution as claimed by the applicants since the Corporation was already specifically defined under section 3 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959).

Section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), on the other hand, provided for the *mutatis mutandis* application of the rules and procedures pertaining to the merger of commercial banks or merger with a financial institution, or the transfer of businesses of a commercial bank to another commercial bank or financial institution as provided under section 38 bis, section 38 quarter, section 38 quinqué, section 38 sex and section 38 septem of the Commercial Banks Act B.E. 2505 (1962) to the merger or transfer of the Corporation’s business, as the case may be. In addition, section 31, in conjunction with section 146 paragraph two and section 153 of the Public Companies Act B.E. 2535 (1992) also provided that upon the completion of merger or transfer of business, the commercial bank or financial institution merged or recipient of business transfer would receive all the assets, liabilities, rights, obligations and responsibilities existing in the Corporation, and if after the business merger or transfer, there was an opposing shareholder, the Corporation should arrange for a buyer of the shares held by such shareholder.

After consideration, it was found that in the merger or transfer of business, the law did not require the Corporation to merge with or transfer business to a commercial bank or financial institution immediately, nor did it provide for the merger with or transfer of business to any particular commercial bank or financial institution as asserted by the defendants. The actual merger or transfer of businesses was dependent upon the independent decision of the shareholders’ meeting of both the Corporation and the commercial bank or financial institution on whether or not to undertake the merger or transfer of business in accordance with the conditions determined by the mutual agreement of both parties. Also, in such merger or transfer of businesses, the law provided for the rights and obligations of the Corporation and the commercial bank or financial institution that had merged or received the transfer of businesses and related persons, clearly and continuously. In other words, the original rights and obligations of related persons would be maintained. And if a party found that his/her rights had been prejudiced or found that another party failed to perform his/her

obligation, there would be a right to file an action in court for a decision in order to fairly safeguard such person's rights.

Even though section 26 in conjunction with section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), restricted certain rights of a person pertaining to the merger or transfer of businesses of the Industrial Finance Corporation of Thailand, the provisions were generally applicable to the extent that was necessary in fairness to all related parties on an equal basis, without affecting the essential substances of the rights and liberties. The provisions were not intended to apply to any particular case or person in such a way that would result in unequal treatment or unequal protection in the merger or transfer of businesses of the Industrial Finance Corporation of Thailand. The provisions also did not constitute an unfair discrimination against a person on the grounds of differences in persons. Hence, section 26 in conjunction with section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was therefore neither contrary to nor inconsistent with section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

4. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court held that section 34 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was neither contrary to nor inconsistent with section 27, section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and that section 26 in conjunction with section 28 of the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), as amended by the Emergency Decree Amending the Industrial Finance Corporation of Thailand Act B.E. 2502 (1959), B.E. 2547 (2004), was neither contrary to nor inconsistent with section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
