**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OFTHEREPUBLICOFAZERBAIJAN**

*On verification of conformity of decision of the Plenum of the Supreme Court of the Republic of Azerbaijan as of 14 February 2003 to the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of open joint-stock company “Kapital Bank”*

**14 December 2006 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, F.Babayev, B.Garibov, R.Qvaladze (reporter judge), E.Mammadov, I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

representative of applicant M.Aliyev, Head of Legal Department open joint-stock company “Kapital Bank”,

representative of respondent: A.Kalbaliyev, Judge of the Supreme Court of the Republic of Azerbaijan,

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on verification of conformity of decision of the Plenum of the Supreme Court of the Republic of Azerbaijan as of 14 February 2003 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of open joint-stock company “Kapital Bank”.

Having heard the report of Judge R.Gvaladze, speech of the representative of applicant M.Aliyev and representative of respondent A.Kalbaliyev, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

By the decision of local Economic Court No. 1 of the Republic of Azerbaijan as of June 28, 2001 the claim of Production Association “Oil-trunk pipelines” of the State Oil Company of the Republic of Azerbaijan against the lending agency Private Joint-Stock Company “Agrocredit” that is not a bank (hereinafter referred to as the PJSC Agrocredit), and against the Joint Universal Joint-Stock Bank (hereinafter referred to as the BUS Bank) concerning deduction of 612.000.000 manats was rejected.

By the decision of Economic Court of the Republic of Azerbaijan as of September 25, 2001 the judgment of the first instance was cancelled and it was decided to list the claim requirement of the account of the lending agency PJSC “Agrocredit”.

By its decision as of December 27, 2001 the Judicial Board on Cases of Economic Disputes of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCED of the Supreme Court) upheld the judgment of appeal instance.

By the decision of Plenum of the Supreme Court of the Republic of Azerbaijan as of February 14, 2003 the above decision of JBCED of the Supreme Court is changed and decided to hold from the account of BUSBANK (nowadays open joint-stock company “Kapital Bank”) a principal debt of 612.000.000 manats in favor of Production Association “Oil-trunk pipelines”, and reject the claim to the credit organization PJSC “Agrocredit”.

The OJSC “Kapital Bank” specifies in the complaint addressed to the Constitutional Court of the Republic of Azerbaijan that the above decision of plenum of the Supreme Court violated its rights provided by Articles 13 and 29 of the Constitution of the Republic of Azerbaijan.

The complaint is proved by assumption that Plenum of the Supreme Court, violated requirements of the procedural legislation, having considered the case more than in a year after the decision of court of cassation instance, incorrectly interpreted the decree of the Cabinet of Ministers of the Republic of Azerbaijan No. 40s as of February 21, 2000, in the decision without referring to any normative legal act, having defined an authorized contribution to the acting assets, came to a wrong conclusion. The applicant notes that the formation share of Production Association “Oil-trunk pipelines” at a rate of 612.000.000 manat in authorized capital of former Industrially - investment commercial Joint-stock Bank has to be withheld from the account of Agrarian Industrial Bank since, according to the completion certificate as of July 27, 2000, this amount was transferred to this bank.

The applicant also reported that execution of the challenged decision of Plenum of the Supreme Court was suspended on the basis of the letter of the Supreme Court, and he learned about the sending by Economic Court of the decision on execution in June, 2006 after obtaining the court order concerning deduction from OJSC “Kapital Bank” of the sum at a rate of 612.000.000 manat. For the purpose of restoration of rights, he appealed to the Supreme Court with the statement on newly discovered facts, and further with the complaint in the Constitutional Court.

From case papers and documents attached to the constitutional complaint it is obvious that though the legislation did not provide suspension of execution of the decision adopted by Plenum of the Supreme Court by the Supreme Court itself, the Supreme Court addressed with the letter as of May 27, 2003 No. 8m-3/2003 to Department of Judicial Supervisors and Law Enforcement Officers of the Ministry of Justice of the Republic of Azerbaijan with a request of suspension of execution on this case of the decision of Plenum of the Supreme Court of the Republic of Azerbaijan. The copy of the letter was sent also to OJSC “Kapital Bank”.

According to the letter, the above decision of Plenum of the Supreme Court was not executed till June, 2006, and only on June 13, 2006 the Economic Court of the Republic of Azerbaijan issued the court order concerning deduction forcibly at BUSBANK (OJSC “Kapital Bank”) of a constituent share at a rate of 612.000.000 manat.

After that OJSC “Kapital Bank” appealed to the Supreme Court with the statement on newly discovered facts, however by the letter of the Chairman of the Supreme Court of October 31, 2006 it was reported that in connection with discrepancy of arguments of the statement to requirements of the law, and also the admission of the term specified in the legislation consideration of the complaint on Plenum of the Supreme Court is impossible.

As for an essence of the constitutional complaint, Plenum of the Constitutional Court notes the following.

As evident from the facts of the case established by court of appeal instance, the Production Association “Oil-trunk pipelines” of the State Oil Company was one of founders of Industrial investment commercial joint-stock bank and at different times transferred to the Authorized fund of bank the resources at a rate of 612.000.000 manat.

By the order of the Cabinet of Ministers of the Republic of Azerbaijan No. 40s as of February 21, 2000 due to association of capital assets and obligations of Azerbaijan Agrarian Industrial Commercial Joint-Stock, Joint-Stock and Investment & Savings Banks the BUS Bank was created, which 100% of shares belong to the state, according to the point 4 of this order, the Ministry of the State Property, the Ministry of Finance and National Bank were entrusted with organization on the basis of the Agrarian Industrial Bank of the Department on problem debts and obligations of all three banks acting on the basis of the limited license.

According to point 4 of the order of the Cabinet of Ministers No. 40s as of February 21, 2000, the order No. 65s as of April 1, 2001 accepted the coordinated offers of the Ministry of Finance, the Ministry of the State Property and National Bank on functioning of Agrarian industrial joint stock bank with preservation organizationally of a legal form as Credit Organization JSC Agrocredit, and its Charter passed the state registration.

Production Association “Oil-trunk pipelines”, having appealed to court with the statement of claim, asked to hold for the credit organization JSC Agrocredit and BUSBANK 612.000.000 manat listed to them in the Authorized capital of the Joint industrial and investment joint stock bank.

Courts resolved dispute in the above order.

Courts appeal, and cassation instances, referring to point 4 of the decree of the Cabinet of Ministers No. 40s as of February 21, 2000, recognized a constituent share at a rate of 612.000.000 manat, paid at different times by the Production Association “Oil-trunk pipelines” to Industrial investment bank, “distressed debt” and came to a conclusion concerning the clearing off of this sum by the credit organization JSC Agrocredit.

Plenum of the Supreme Court, not being based on any normative legal act, came to such conclusion that as the concept “distressed debt” has to be understood not as a debt of banks, but debts to banks, and also in a type of that return of an authorized share is regulated by the chapter “Natural persons”, but not by the chapter “Debt” of the Civil Code of the Republic of Azerbaijan, the requirement of a share cannot be considered as a debt. Because the share belonging to Production Association “Oil-trunk pipelines” belongs to the operating assets, this sum has to be withheld from BUSBANK and transferred to Association.

Plenum of the Constitutional Court considers that the conclusion to which Plenum of the Supreme Court came, does not correspond to requirements of the legislation and the facts of the case established by courts.

Plenum of the Constitutional Court for the purpose of clarification of issue concerning belonging of an authorized share to the acting or non-acting assets and liabilities involved in matter in quality of the expert of the representative of legal department of JSC International Bank of Azerbaijan.

In the conclusion of the expert it was specified that in practice under acting with assets and liabilities are understood the means which are actually in a turn, including 150% of the state domestic loans of the Ministry of Finance of the Republic of Azerbaijan, goods materials which are in a warehouse, correspondent accounts, new main assets (the building, furniture and the equipment, the computer and communication, vehicles), the salary of workers, taxes transferred into the local budget, transfers in the state and local funds.

Non-acting assets and liabilities are understood as calculations with Head department, revaluation of actions, aging of fixed assets (the building, furniture and the equipment, the computer and communication, vehicles), the credit of National Bank, percentage debts on means of banks, actions, funds of revaluation of fixed assets, profit (losses) of last years, a loss of financial year.

From the circumstances of a civil case established by court of appeal instance it is evident that constituent shares because are recognized as liabilities, brought in the act concerning transfer of not acting assets and liabilities made on July 27, 2000 and transferred to Agrarian Industrial Bank, and the acting assets and liabilities are transferred to BUSBANK. At the same time, this sum was specified also regarding liabilities of the corresponding column in the balance of BUSBANK made for July, 2000.

It should be noted, that in Article 122 of the Civil Code of the Republic of Azerbaijan acting till September 1, 2000, entering of authorized capital into liabilities of balance of the enterprise also accurately found the reflection.

Besides, according to “The plan of calculations for a banking system of the Republic of Azerbaijan and instructions concerning its application” (the 50th class – the Authorized capital, the 501st group – the Authorized capital of the credit organization, the 5011th – the column “liabilities” common shares), the Board of National Bank of the Republic of Azerbaijan approved by the decision as of June 9, 2001 (protocol No. 22), shares (constituent shares) were specified not in an asset of balances of banks, but in a liabilities.

Considering the above, Plenum of the Constitutional Court considers that Plenum of the Supreme Court at a legal assessment of the facts of the case established by courts incorrectly interpreted point 4 of the decree of the Cabinet of Ministers No. 40s as of February 21, 2000 and, without having applied due to application of Article 122 of the previous Civil Code and "The plan of calculations to a banking system of the Republic of Azerbaijan and the instruction concerning its application" (the 50th class – the Authorized capital, the 501st group – the Authorized capital of the credit organization, the 5011th – the column “liabilities” common shares), the Board of National Bank approved by the decision as of June 9, 2001, came to a wrong conclusion. The specified circumstances led to violation of the right for legal protection affirmed in Article 60.1 of the Constitution. For this reason Plenum of the Constitutional Court considers that the decision of Plenum of the Supreme Court challenged by the applicant as of February 14, 2003 has to be recognized as null and void in connection with discrepancy with Article 60.1 of the Constitution, and the civil case has to be reconsidered in order and terms established by the civil procedure legislation.

Plenum of the Constitutional Court considers necessary to note that possibility of cancellation at any moment of the final judgment which entered into force and settled possibility of the appeal contradicts to the rule of law and the principles of legal certainty.

Being guided by parts V, IX and X of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize the decision of Plenum of the Supreme Court of the Republic of Azerbaijan as of February14, 2003 on civil case of Production Association “Oil-trunk pipelines” of the State Oil Company against lending agency Private Joint-Stock Company “Agrocredit” that is not a bank, and to the Joint Universal Joint-Stock Bank concerning deduction of 612.000.000 manats as null and void in connection with its discrepancy with the Article 60.1 of the Constitution. To reconsider the case in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.