

The Supreme Court rules in a recent decision over different bankruptcy incidents. The first relates to a work contract to supply materials in which a penalty clause for late work is established, and the ability to execute the works under the guarantee provided in the contract if the contractor may not execute them. Having a delay in delivery of the work and having entrusted to another company the repair works, the owner claimed the payment of the amounts and compensation with the guarantee held.

The First and Second Instance decisions declared that the payment was due but compensation did not proceed pursuant to article 58 of the bankruptcy Act. However, the Supreme Court considered that compensation applied because Article 58 would not be applicable when the compensation occurred as a result of the liquidation of the same contractual relationship and, therefore, the owner of the work could apply those amounts withheld to pay the compensation for delay.

The second incident requested the termination of payment made to one of the Directors of the bankrupt company before the company was declared in insolvency. The Supreme Court confirmed the decision of first and second instance, because improper remuneration of a Director could not be considered as an ordinary act of the company performed in normal conditions. It is also considered improper because the remuneration of directors is subject to the achievement of benefits and, in this case, it was agreed even though there had been no profits.

Finally, the third bankruptcy incident requested, on the one hand, the cancellation of the meeting held in suspect period, in which the payment of dividends was agreed, and, on the other hand, the agreed dividends prior to this period but satisfied afterwards.

The Court of First Instance, which decision was subsequently confirmed by the Provincial Court, terminated the agreement because the company had significant losses, so the payment of dividends was not justified. With regards to the payment of dividends that the company agreed to in the meeting out of such period, the agreement could not be subject to termination as it was indeed for the payments made afterwards.

The Supreme Court confirmed the previous decisions and concluded that, with regards to the first case, damages should be considered in the "irregular" distribution agreement as the company gathered significant losses and confirmed the cancellation of such meeting because the undoubted asset sacrifice representing the attribution of this right of the shareholders was unwarranted as a result of the aforementioned "irregularity".

In the second case, it also confirmed the termination of payments made during the suspect period as the recipients of the payments were people related to the insolvent company and, therefore, there was a presumption of prejudice in their actions. It was also because of the nature of the credits as well as the fact that when those were satisfied, the company had significant losses that made the payment unjustified, even if those payments were due. The judgment concluded that the termination only affected the payment, thus the receiver of the money paid was obligated to make the repayment with interest but without losing its right to credit, which, as it was previous to the insolvency proceedings would be considered included within the bankruptcy proceedings. The termination of payment did not entail the repayment of the contributions of shareholders because there was not a reciprocal relationship between them.

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