

The facts are as follows: an insolvency creditor challenged the decision of the administrator in bankruptcy of a company about not recognizing its credit. The credit derived from a guarantee granted to secure a promissory note from a company belonging to the group of the insolvent company.

The guarantee was signed by the Chairman of the Board of Directors of the company. It is noteworthy that the Chairman was empowered to bind the company, providing always that he exercise such power jointly with another member of the Board. However, the guarantee was signed by the Chairman without the signature of the other member of the board and without the Board consent to sign the guarantee. The company, as well as the other counsellor, was aware of this situation.

Therefore, the Chairman signed the guarantee without being empowered for such purpose. The bankruptcy administrators thus rejected the credit and, accordingly, the insolvency judge and the Court of Appeal also dismissed the claim.

The judgment of the Court of Appeal took into account the previous doctrine of the Supreme Court recognizing the validity of the guarantee granted by the Director of the company that did not respect the limitations of representation established by the company, providing always that the Director act within the ordinary course of the usual business of the company. However, the Court concluded that such doctrine should not be applicable in this specific case because the Chairman was not the Director and because the issuance of guarantees cannot be regarded as an act of ordinary business of the company.

In contrast, the Supreme Court upheld the appeal, taking into account its doctrine of apparent authority. This occurs when a person acts in such a way on behalf of another that causes the third party with whom it negotiates to believe the authority exists. It requires, in turn, that the subsequent conduct of the represented person corroborates such belief. The doctrinal outcome for the Supreme Court is that those that reach an agreement in good faith with an apparent representative should be maintained in the contract.

The requirements under this doctrine are that the third party shall act in good faith, and that such good faith is based not merely on circumstantial evidence but on an objective situation. The third party must also avoid negligence when faced with the objective situation.

Considering the above, the judgment examined the particular circumstances of the case. The fact that the guarantor and guaranteed companies belong to the same group of companies favoured the appearance of empowerment. This appearance determined that the third party could not be damaged by the lack of power of attorney. Finally, the Court considered relevant the subsequent acts of the Board of Directors of the guarantor which failed to manifest anything against the guarantee nor did it object when they tried to enforce the promissory note.

The main difference of this judgment is that it clearly governs the requirements for the application of the apparent authority, against the criterion of the Court of Appeal, and it does not require that the acts of the apparent grantor fall within the ordinary course of business.

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