

## **PRE-COMPOSITION STAGE AND REPEATING OF THE APPLICATION FOR COMPOSITION.**

### **The case:**

A company in liquidation appealed to the Supreme Court against the judgement of the Court of Appeal of Naples which had confirmed the decision of the Naples Court regarding the declaration of bankruptcy of the company.

In particular, the Court of Naples had declared the bankruptcy of the company on application submitted by a creditor, after the rejection of two applications for admission to the procedure or arrangement proposed by the debtor company.

The first application, which was submitted as per Art. 161, co. 6 of the Bankruptcy Law, was declared inadmissible in the light of the fruitless expiration of the deadline for filing the plan, proposal and documentation required by law. The second application, instead, brought under Article 161, para. 1 of the Bankruptcy Law and filed before the hearing arranged for the declaration of inadmissibility of the first one, was declared as being unable to proceed with, considering its instrumentality in delaying filing for bankruptcy instead of adjusting the business crisis.

The company then lodged a claim before the Court of Appeal of Naples claiming, on the one hand, that the term for submitting the proposal, plan and legally-required documentation, was non-peremptory; on the other, it claimed that the grounds presented by the Court concerning the admissibility of the second appeal as per Article 161, para. 1 of the Bankruptcy Law presented by the company, could not be based on an alleged abuse of the right by the debtor.

The Court of Appeal dismissed the claim and confirmed the decision of the Court of Naples.

The company proposed, therefore, an appeal to the Supreme Court, alleging that the Court of Appeal has incorrectly applied Article 161 of the Bankruptcy Law, and claiming also that the judges had wrongly interpreted the peremptory nature of the expiry as expressed in the last paragraph of the above rule, as well as the declared speciousness of the second application for composition, in which an abuse of law upheld by the Court of Appeal was found.

### **The Ruling:**

With its ruling No. 6277 filed on 31 March 2016 rejecting the company's appeal, the Supreme Court commented on two important profiles of composition proceedings.

First, the Court stated that, if an arrangement with reserve exists (as per Art. 161, para. 6, of the Bankruptcy Law), then the lawful deadline for the filing the plan, proposal and the documentation is peremptory by character and, by its nature, can lapse. And that, therefore, after the said period expires, the not fully completed application must be declared to be inadmissible.

Second, on taking account of the above mentioned principle, the Supreme Court noted that after that period expires, the debtor is given the option - even pending the hearing set for the declaration of ineligibility or for any examination of bankruptcy petitions - to submit a new application for composition under Art. 161, para. 1 of the Bankruptcy Law, from which, however, it must be inferred that "the proponent's unequivocal will" to give up on the first application, and provided that their application does not lead to a misuse of the composition instrument which, in the Supreme Court's opinion, is taken to occur when, in violation of the general rules of fairness and good faith and the principle of procedural fairness, procedural tools are used to pursue objectives that are different to those endorsed by the rules.