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THE PARTICULAR NATURE OF THE DAMAGE. THE CIRCUMSTANCE CAN BE APPLIED TO MORE THAN ONE BANKRUPTCY EVENT

The Court of cassation, with the sentence n.36816/2016, returns on the applicability of the mitigating circumstance of the particular nature of the damage whereof the art.219 of bankruptcy act regarding the hypothesis of the plurality of events of bankruptcy.

di **Mariarosaria Giongati**
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Direttore responsabile
Raffaele Giaquinto

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Can the mitigating circumstance of the minor nature of the damage, be recognized to the entrepreneur who committed more bankruptcy acts? Yes.

To say that, is the Italian Court of cassation, with a sentence that adds another level to the discipline of the relations among different crimes of bankruptcy provided by the bankruptcy law.

As it is known, the bankruptcy can be fraudulent (art.216) or simple (art.217).

Also, the fraudulent bankruptcy can be divided into patrimonial, on documents or preferential and all of these typologies can be realized through ontological different behaviours.

For instance, the patrimonial bankruptcy can happen due to distraction, concealment, dissembling, destruction, squandering of goods or the non-existent exposure of liabilities in order to bring prejudice to creditors, from the bankrupt entrepreneur.

The simple bankruptcy too, may happen because of different behaviours, as, for example, supporting personal or familiar excessive expenses or squandering the heritage with question of pure luck or imprudent use of it.

But, what happens if the entrepreneur commits more than one bankruptcy act? We can find the answer in the second comma of the art.219, according to which if the guilty committed more acts among those provided on each of the article denoted, the penalties established by the above-mentioned articles, increase.

The circumstance present in the art.219, though, can be considered an aggravating circumstance to be applied to an only crime? Formally yes, essentially no.

The Joint Divisions of the 2011 made clear that, although the art.219 talks about “aggravating circumstances”, the described one, is a specific discipline of “bankruptcy continuation”, that breaks a general discipline of the continuation of which of the art.81 c.c.

Each event keeps an autonomy, collecting as separate crime, but subjected to the “constant” evaluation with the others, through a rule (whereof the art.219 of bankruptcy act) aimed to avoid Draconic sanctioned answers when these acts are led again to bankruptcy.

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Made clear of that, it has to be underlined as this type of "continuation" diverges in regards to the art.81 c.c. not only because of the sanctions, but also because of the fact that, being formally considered an aggravating circumstance, it is subjected to the balance of which at the art.69 c.c., as affirmed by a consolidated law.

Therefore, if the "aggravating circumstance" can contribute with the extenuating circumstance of the special nature, it cannot be affirmed, as the territorial Court does, that the same does not match and because of the fact that have been committed more bankruptcy acts, it does not exclude the minor nature of the damage.

The Court clarifies that "in matter of fraudulent bankruptcy, the judgement regarding the particular nature of the event has to be put in relation to the global decrease [...] that the bankrupt's behaviour provoked to the active mass that would have be available for the division where there was not illicit".

Similarly, in matter of the bankruptcy on document, "the presuppositions for the recognizable circumstance in the matter have to be estimated in relation to the damage caused by the creditor mass owing to the incidence that the behaviours integrating the crime had the possibility to exercise the dismissive actions and the other action put to protect the interests of the creditors".

The extenuating of which, to the third comma, does not regard the comprehensive behaviour, but to the damage caused by the creditors, damage that can also be average.