

Court of Appeal rules on loss of credit capacity in bankruptcy

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On 25 April 2018 the Court of Appeal ruled on the loss of credit capacity in the context of bankruptcy. The case involved a company that intended to resist a creditor's application for bankruptcy on the basis that it had not lost its credit capacity, as it could prove that the funds needed to settle its debt were available in its lawyer's third-party account. Therefore, the court had to verify whether there was a loss of credit capacity, which is necessary to declare bankruptcy.

The court stated that a loss of credit capacity must exist at the time of the judgment, regardless of the situation at the time of the bankruptcy application.

The court further ruled that the debtor's lawyer's confirmation that sufficient funds were available in his third-party account to settle the company's debts (regardless of the origins of the funds) sufficiently proved that the debtor had not lost its credit capacity.

Finally, the court rejected the creditor's argument that the availability of funds in an account, let alone a third-party account, did not guarantee the use of those funds to pay off the creditor.

This decision is notable due to its favourable impact on debtors. This was the first time that the availability of company funds, against which bankruptcy proceedings had been applied, in a third-party account was seen as a sufficient reason to avoid the loss of credit capacity. Thus, the court has finally clarified the notion of the loss of credit capacity referred to in Article 437 of the Code of Commerce in a way that is restrictive and favourable for debtors.

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