

PROSPECTIVE BANKRUPTCY IS NOT SUFFICIENT TO DECLARE A COMPANY BANKRUPT.

The Bankruptcy Section of the Court of Milan, with a decree dated 3 October 2019, addressed the issue of whether an insolvency foreseeable in the near future (i.e. the next twelve months) is sufficient to declare a company bankrupt.

The factual background that led the Court to issue such a decree arises from a request of bankruptcy filed by Moby's bondholders.

Bondholders claimed that the company was in a situation of "foreseeable" insolvency and that bankruptcy was expected to occur within one year. The Court rebutted such argument, stating that the company had recently paid the annual installment on its bank loan, had no significant tax and social security liabilities and had ordinarily conducted its activity, while bond repayment was due in 2023. Absent any external signs of current insolvency, the court claimed that the existence of a "prospective bankruptcy" can only be declared in case the insolvency is expected to occur in a very limited time-frame, and that this type of situation can only be addressed by the debtor itself, through a proceeding alternative to bankruptcy, and not by creditors.

Once the New Italian Bankruptcy Code enters entirely into force, in August 2020, a "warning system" will be set up to allow to detect a crisis in its early stages and pressure Directors to address it. With respect to such warning system, the Court of Milan found comfort in the fact that Moby had already set up an efficient internal system, pursuant to the new article 2086 of the Italian Civil Code; a provision that requires companies to establish an accounting and administrative system aimed at detecting a crisis at an early stage and the loss of the company's going concern, in order to allow Directors to make use of the alternative bankruptcy proceedings to address such situations before an irreversible bankruptcy occurs.

In conclusion, Courts are now evaluating the efficiency of the new organization that article 2086 of the Italian Civil Code requires; hence, since such article is already in force, companies are encouraged to adopt a new organization system that addresses the requirements imposed by the new legal provision.