U.S. creditors to pursue its U.S. assets.

In the Italian proceedings, Energy Coal submitted a restructuring plan for approval by the court in September, 2016. The Italian plan provided that unsecured creditors would receive 7% or less as a dividend. In the Chapter 15 case, Energy Coal moved to have its Italian plan enforced in the U.S., by order of the Delaware Bankruptcy Court. Specifically, the claims of U.S. creditors were subject to the Italian plan, and creditors were enjoined from seeking judgments in the U.S.

U.S. Vendor objected to the Italian plan, particularly against the injunction preventing it from recovering 100% from Energy Coal in the U.S. and the effective elimination of its set off rights. Energy Coal could recover 100% of its claims from U.S. Vendor, while U.S. Vendor would have received 7% or less on its claims. In support of its objection, U.S. Vendor cited its contract with Energy Coal, which provided for the Florida law and venue to be applied to any contract disputes.

In light of U.S. Vendor's objection, Energy Coal agreed that U.S. Vendor could reduce its claims to a judgment in Florida courts. However, Energy Coal's position remained that any judgment would be subject to the Italian plan and could only be paid pursuant to the Italian proceedings, meaning that U.S. Vendor must litigate in Italy.

The Delaware Bankruptcy Court ruled that comity and the need for cooperation and assistance in cross-border insolvencies outweighed the parties' contractual choice of law and choice of forum provisions. U.S. Vendor was thus left to litigate in Italy regarding the enforcement of its judgment and distribution on its claim. A piece of good news for U.S. Vendor is that the Delaware Court acknowledged the loss of U.S. Vendor's set off rights and hinted that if Energy Coal sought recovery of claims owed by U.S. Vendor, the Court would allow U.S. Vendor to assert set off of its entire claim as a defense. ■

> **THE U.S. COURTS ASSIST THE FOREIGN INSOLVENCY COURT IN CROSS-BORDER INSOLVENCIES**

Italy:
NPL and insolvency proceedings

Recently, the attention of the financial–economic world has focused on non-performance loans, (hereafter NPL).

The term "NPL" stands for bank loans emerging from mortgages, loans and funding, difficult to recover due to a worsening of the economic and financial situation of the debtor, no longer able to perform all or part of his/her contractual obligations.

Within the macro-category of the NPL, the Bank of Italy, in application of the EU Regulation 227/2015, has foreseen a new and precise classification of the NPL, in particular:

- Non-performing loans that are the debt exposures of subjects in an insolvency situation or situations alike. In this case, it is not necessary that the status of "non-solvency" be judicially established;
- Probable defaults or exposures - other than those classified as non-performing - for which the Bank, without recourse to actions such as the enforcement of guarantees, evaluates unlikely that the debtor regularly performs his/her obligations;
- Expired past due and/or overdrawn exposures or exhibitions that have expired or exceed the credit limits for more than 90 days and are above a materiality threshold.

The issue related to NPLs suffered by the Italian banks is largely the result of the recession that hit the Italian economy in recent years and especially the long time needed for the judicial recovery of the credit.

In the context of non-performance loans, procedures aimed at recovering the repayment of those loans play a fundamental role . On the one hand, there are the procedures regulated by the Civil Code - which have to be excluded from this brief analysis – and on the other, the insolvency procedures.

With regard to the latter, unfortunately, their duration is too long; in fact, the information provided by the Bank of Italy shows that recovery takes place within approximately the first five years.

The element of slowness of recovery characterises not only the "liquidation" procedures such as bankruptcy and the composition with creditors which have a liquidation purpose, but also the restructuring procedures provided in the Italian law.

In fact, in most cases, these proceedings are still ongoing four years after they commenced.

Furthermore, it is useful to consider the restructuring procedures that are transformed into liquidation procedures.

With regard to individual recovery procedures, the composition with creditors deserves a particular attention. In fact, despite several amendments to insolvency law aimed at pointing out the restructuring purpose[2], these proceedings are still being used nowadays for liquidation purposes. It is important to highlight, however, that according to the analysis conducted by the Bank of Italy, the number of recoveries obtained through the composition with creditors is higher than those obtained through other procedures.

In this context, in order to avoid that the presence of non-performance loans in the balance sheet, adversely affecting the granting of credit, the recent reforms related to the bankruptcy law will hopefully reduce the time needed for the recovery and increase the positive outcome of insolvency proceedings.

At the European level, however, one should be aware of the directives of the EBA (European Banking Authority) aimed at reducing non-performing loans by exhorting the operational and governance bases for effective recovery, which shall be implemented by January 2019. ■

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