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Arrivederci! Delaware Bankruptcy Court Sends U.S. Vendor Packing ... to Italy

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In the Chapter 15 proceeding of Energy Coal S.p.A., the Delaware Bankruptcy Court required a U.S. creditor to recover its claim in Italy.

Because there is no uniform global insolvency law, and each world country has its own insolvency law, The United Nations Commission on International Trade Law (UNCITRAL) developed the UNCITRAL Model Law on Cross-Border Insolvency (1997) to facilitate cooperation and uniform outcome in cross-border insolvencies. 43 countries have adopted the model law, and the U.S.'s version is Chapter 15, which is an ancillary proceeding to the "foreign main" proceeding, in this case in Italy. Founded on principles of comity, the U.S. courts assist the foreign insolvency court in cross-border insolvencies. A key benefit of Chapter 15 to foreign debtors is use of the "automatic stay" which enjoins creditor action against U.S. assets. Another important benefit is the foreign debtor's ability to obtain discovery and assert claims against U.S. companies.

MacEachern Energy LLC ("U.S. Vendor") was a vendor owed 2.2 million euros by Energy Coal S.p.A. ("Energy Coal"), an Italian company doing business in the U.S. U.S. Vendor also owed money to Energy Coal, creating a right of setoff of mutual debts. In April, 2015, Energy Coal filed for insolvency protection in Italy, under Italian Insolvency Law, the Concordato Preventivo. In October, 2015, Energy Coal also filed Chapter 15 in the U.S. to obtain the U.S. "automatic stay" to enjoin U.S. creditors from pursuing its U.S. assets.

In the Italian proceeding, 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 the injunction preventing it from recovering 100% from Energy Coal in the U.S., and the effective elimination of its setoff rights. Energy Coal could recover 100% of its claims from U.S. Vendor, while U.S. Vendor would receive 7% or less on its claims. In support of its objection, U.S. Vendor cited its contract with Energy Coal which provided Florida law and venue 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 proceeding, meaning 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 is 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 the Delaware Court acknowledged the loss of U.S. Vendor's setoff 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 setoff of its entire claim as a defense.

We hope you found this useful and informative. Please contact us if you have any questions about this or any other matter.

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