

RHIZA & RICHARD

GUIDE TO DEBT RECOVERY

Introduction

The Covid-19 pandemic may impact a company's revenue through cessations in production, delivery of goods or services to the market or significant drops in demand and delays in customers paying outstanding invoices.

Disruption of revenue may strain a company's cash holdings or forces it to dip into its reserve. Apart from reviewing lending requirements, many are looking to credit control and debt recovery as a tool to improve liquidity.

Traditionally viewed as playing a supporting role, credit control and management departments now form the de facto front line of a company. Their functions are critical to the lifeline of businesses. Their policies, if focused and well executed, may move companies into the black.

As companies scramble to improve liquidity, a tougher and more focused policy in collecting your debts is required.

What is Debt Recovery?

Debt recovery is a systematic process of collecting your debts when they are due. A debt arises from a breach of a promise to pay, whether for goods delivered or services rendered.

"Failing to prepare is preparing to fail"

Successful debt recovery starts with planning and preparation. The debt recovery process is essentially a litigation process. The steps to

take and pitfalls to avoid are similar. They are critical to the success of your litigation and should start as soon as there are signs that things may get ugly.

Your preparation should encompass the following.

1. Preserve your evidence.

Winning your case depends largely on the evidence that you have. Hence, preserve the contract where your client had promised to pay, the documents showing deliveries of goods or services that had been carried out as well as the reminders for payments that you sent.

2. Limit Your Communication

Limit your communication with the client. Keeping in mind, most of what you write may eventually surface during litigation and be used against you. This would also apply to verbal communication or messages over the phone.

3. *"Sorry Seems to Be the Hardest Word"*

Sometimes, to diffuse tension, one may react naturally by apologizing. But Elton John is right this time. "Sorry", "my mistake" or "my fault" should be the last words you want to say. You do not need them to be misinterpreted.

When a client complains without offering any evidence, for example, that the retaining wall you built yesterday had collapsed because of poor construction, do not allow the complexity of the complaint to overwhelm your ability to act professionally. Instead of apologizing, check if

your Contractors All Risk policy is in place.

4. Communicate with Your Lawyer

It is never too soon to contact your lawyer when you sense a dispute is brewing. Early communication with your lawyer to plan and strategize is the determining factor in a successful litigation.

Methods of Debt Recovery

1. “See you in Court”

The most common way to recover debts is by filing an action in the Court. If the case is straightforward and the debtor has no genuine defence, you may be able to obtain a summary judgment against the debtor. A summary judgment is when the court decides on the case by considering the documents without hearing witnesses in court. If the dispute is complex, witnesses would need to be called.

2. Arbitration

Sometimes, the parties to a contract may have agreed to an alternative dispute resolution such as arbitration. In such cases, the contracting parties can no longer resort to the courts. Arbitration proceedings are common in construction and commercial disputes as the process is private and confidential. The process is substantively similar except it generally takes a longer time and is more expensive.

Section 38 of the Arbitration Act 2005 allows the High Court to recognise an arbitration award as binding and be enforced by entry as a judgment in terms of the award.

3. Adjudication

For construction industry, adjudication proceedings are introduced by the Construction Industry Payment and Adjudication Act 2012. It is a process allowing contractors to recover payments for work done if there is a construction contract in writing.

It is a speedy process. Under section 28, once the adjudication decision is out, the contractor may apply to the High Court for an order to enforce the adjudication decision as if it is a judgment of the High Court.

The Execution Process

In the present context, a judgment is a decree from the Court ordering your debtor to pay you. However, what if the judgment debtor refuses to abide by it? You, as the judgment creditor, will need to “execute” on your judgment. These are commonly referred to by litigants as execution proceedings.

1. Winding Up

If the debtor is a company, winding up proceedings are normally taken out. The winding up of a company is the process where the company’s assets are collected and sold in order to pay its debts. The company is formally dissolved and it ceases to exist once a winding up order is made.

A winding up petition can be presented against the debtor company for a debt above RM10,000-00 if the company is unable to pay its debts.

2. Writ of Seizure and Sale

A Writ of Seizure and Sale allows the judgment creditor to seize and sell the judgment debtor’s movable property, i.e. stocks, office equipment etc., to satisfy the judgment.

3. Judgment Debtor Summons

A Judgment Debtor Summons enable the judgment creditor to summon the judgment debtor or if the judgment debtor is a company, its directors to the Court to enquire where are the judgment debtor’s properties so that further execution proceedings could be taken out on these properties.

4. Garnishee Proceedings

Garnishee proceedings enable the judgment

creditor to apply to the Court for any other identified person who is indebted to the judgment debtor, known as the garnishee to pay the judgment creditor. In effect, garnishee proceedings enable the judgment creditor to freeze the judgment debtor's bank account and have the monies therein paid over.

5. Bankruptcy

If the judgment debtor is an individual, bankruptcy proceedings could be taken out if the debt exceeds RM50,000-00. This procedure aims to vest the affairs of the judgment debtor in the hands of the Malaysian Insolvency Department who aims to realise the assets of the judgment debtor to pay off its debts.

6. Prohibition Order

This procedure allows the judgment creditor to seek an order from the Court to sell the judgment debtor's immovable properties, such as lands houses etc., to satisfy the judgment. Of course, if these properties are charged to financial institutions, they will have priority over the monies realised, whilst the judgment creditor would be entitled to the balance.

Conclusion

Bad debts occur when the environment is tough for businesses. However, they could be minimised by having a debt recovery plan in place. If a company does not have an adequate plan in place, it's not too late to implement one.

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