



# KOCHAM UK Seminar

**: Commercial Debt Recovery**

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a presentation by  
**HILL DICKINSON**



# Commercial Debt Recovery

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1. Financial Disputes
2. Factoring/Invoice Discounting Disputes
3. Commercial/Contractual Disputes
4. Overpayments/Mistaken Payments
5. Vehicle Finance Disputes
6. Enforcement of Court Judgments
7. Insolvency Proceedings
8. Credit Control Procedures
9. Fraud Investigations
10. Cross Border Litigation

## Overview

- Outstanding debt can be extremely detrimental to businesses
- Reducing debt has a significant and positive impact on a company
- Hill Dickinson assist businesses with expertise in debt recovery, litigation, enforcement and insolvency
- We also advise and act on matters where debtor is based outside the jurisdiction of England and Wales

## Time to pay?



First reminder of when payment will fall due

Second reminder that payment has fallen due

Third letter with final deadline for payment

## No response?

### County Court Proceedings

Tailored Letter Before Claim

After 7 days – Issue Proceedings

### Insolvency Proceedings

Undisputed Debt

3 Day Demand

Winding up Proceedings

# Litigation or Insolvency Proceedings

- Litigation or Insolvency?

Litigation produces a court judgment which can be enforced if not paid.

Insolvency has greater risk/reward – payment or liquidation.



# Insolvency Proceedings – Winding Up

- There is no mandatory requirement with a corporate debtor to present a statutory demand requiring payment within 21 days as a prerequisite to a winding up petition.
- Whilst an unsatisfied statutory demand is a ground for presenting a winding up petition, section 123(1)(e) allows a creditor to present a winding up petition on the basis that there is evidence that the company is unable to pay its debts as and when they fall due.
- Achieved by sending a three day payment demand letter by fax or email to the debtor's director(s) and putting them on notice of the potential presentation of a winding up petition.
- We find this focuses the company's attention and reduces the time a creditor has to wait for payment following the issue of a statutory demand.

# Opposing a winding up petition

- Two methods:
  1. Apply for an injunction to restrain presentation of a petition (before it is issued); or
  2. Apply for an injunction to restrain advertisement of a petition in the London Gazette (after it is issued).

# Opposing a winding up petition

**A company can oppose a winding up order if it can show:**

- The debt is genuinely disputed on substantial grounds; or
- There is a genuine cross-claim against the creditor (**Bayoil SA (1998)**)

In **Parmalat Capital Finance v Food Holdings (2008)** - it was held that it is not sufficient for the company to have a "mere honest belief that payment is not due". There must be a genuine and substantial dispute that requires the Court to hear and see all the evidence.

In **Vertex Trading SARL v Infinity Holdings Ltd (2009)** - the High Court allowed a winding up petition to proceed even though the petition debt was genuinely disputed because it appeared that the company was indisputably insolvent. The dispute could be resolved by the Liquidator.

**Foxholes Nursing Home v Accora Limited (2013)** - the Court found that the Creditor's winding up petition was being used to pressure Foxholes into paying the debt despite there being a substantial dispute in relation to Accora's performance of the contract.

The latter decision demonstrates that if there are substantive grounds for disputing the debt, the Court will not allow the use of an insolvency process. However, sufficient evidence must be submitted by the debtor to persuade the Court that there are genuine grounds for disputing the debt. In summary creditors should carefully consider any grounds of dispute before proceeding with insolvency proceedings.

## Litigation & Enforcement

- Is your judgment worth the paper it is written on?
- Enforcement will give you the answer.....



## Enforcement Options

- Attendance by a High Court Enforcement Officer
- Third Party Debt Order
- Insolvency
- Charging Order
- Order to attend Court for Questioning

## Case Study 1

York Services Limited is a UK consultancy practice based in the North of England to whom you supplied invoice services. Its annual accounts show income in the last financial year of £3.4 million. It has gone through a number of pre-pack administrations in the past decade but has previously been taken not previously been a bad payer of your invoices but chose to dispute the debt on the basis that the services you supplied were not exercised with reasonable care and skill. Court proceedings were issued and became acrimonious. A settlement could not be reached and the claim proceeded to trial. You successfully obtained judgment for the full amount of the debt, plus interest and costs. However, it has still not paid the judgment amount and has ignored your correspondence. You believe that the Managing Director is ignoring your letters and refusing to pay as a matter of principle.

**What would be the most appropriate method of enforcement of the judgment?**



## Answer: Third Party Debt Order

- Cash rich service provider – cash in the bank?
  - No real assets other than office equipment of nominal resale value.
  - You have its bank details from its previous payments of undisputed invoices.
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- Alternative option – Winding Up Proceedings but there is a risk that it may simply look to enter yet another pre-pack administration.

## Case Study 2

Mitre Contractors Limited is a large construction firm which operates nationally on large scale projects. You provided it with invoice finance/factoring services. Due to tough economic times, cash flow has been a serious problem and you have discovered that the company has been raising fraudulent invoices. Since you raised this issue with it the company has made a number of promises of payment but has failed to make payment. It owed you £50,000. Your patience expired. You issued proceedings against the company and its director who had signed a personal guarantee and obtained a judgment in default for the full amount, plus interest and costs. The director has made himself bankrupt but Mitre Contractors is still seeking to stall matters by promising payment in the future when various contracts have been completed and it has been paid but it has not given a specific date on which it will make payment.

**What would be the most effective method of enforcement of the judgment?**



## Answer: High Court Enforcement

- Cash flow problems – a Third Party Debt Order against its bank account might not result in payment and you do not have details of the contracts it is currently working on so cannot identify whether it has any debts due to it.
- Asset rich – it should have a substantial plant and machinery which can be seized by a High Court Enforcement Officer for sale at auction.
- Relatively cheap method of enforcement – suitable for low value debts .

## Case Study 3

Wainwright Limited is an office cleaning company operating in the South West of England and South Wales with 150 full time and 22 part time staff. It is a family business that has a long tradition in this area of the country. Your company invoices it on a monthly basis, but the last 6 months' invoices totalling £50,000 have not been paid. Its finance director originally tried to dispute the amount of your invoices before conceding and agreeing to make payment. It then failed to do so and blamed the missed payment on a computer glitch.

What is the best method of recovery?



## Answer: Winding Up Petition

- Debt is not disputed so county court proceedings are not necessary.
- It is a family run business trading on its reputation so might fear being made insolvent.
- Winding up can focus minds and produce a speedy recovery.

## Case Study 4

You have a judgment order against JK Accountants Limited for £250,000 but it has suffered financially recently with some high profile departures of partners to a competitor. Cash flow is extremely poor and the practice has no goods against which you can enforce. You know that it has a large number of other creditors with County Court Judgments and might face liquidation in the short term. The practice trades from a city centre office which is subject to a 99 year lease.

**What would be the most effective method of enforcement of the judgment?**



## Answer: Charging Order

- The debtor's leasehold interest in the city centre office can be subject to a charging order and order for sale and will attract interest on the open market as prime office space.
- A liquidation might produce a small dividend for creditors.
- The only real assets are its book debts and which you cannot gain information about.
- Quickly securing the judgment debt against the leasehold interest will avoid you being an unsecured creditor in any future liquidation and give you priority over unsecured creditors.

## Orders to attend Court for Questioning

- Not a method of enforcement
- It is a way of having a personal or corporate debtor against who you have a judgment attend court and answer questions about his/her/its assets, liabilities, income and expenditure.
- Useful tool to:
  1. Exert pressure on a judgment debtor to pay; and/or
  2. Obtain information to assist in identifying the best method of enforcement.

## Security for Debts

- Taking security for debts in the form of a charge over land, property or other assets can often be beneficial:
  1. You will be a secured creditor in any future insolvency
  2. You can allow the debtor time to pay safe in the knowledge that the debt is secured
  3. It can avoid the expense of legal proceedings
  4. It can preserve the business relationship in the future

## The new Debt Recovery Pre-action Protocol

- The Government Consultation has recently concluded
- No decision on the final version is expected for a couple of months
- Proposed protocol :
  1. Relates to debts due from individuals (including sole traders) not companies;
  2. Provides template information sheet and debtor reply forms;
  3. Itemises the information the creditor should provide with its letter before claim;
  4. Proposes a 30 day period for the debtor to reply before proceedings are issued

## The new Debt Recovery Pre-action Protocol

5. Proposes allowing the debtor a further 30 days after completing his/her reply if he/she wants to take legal advice or longer if further time is required by the debtor.
6. Proposes alternative methods of dispute resolution be agreed before court proceedings are issued.
7. Where an agreement cannot be reached it is proposed that the creditor give the debtor 14 days notice before issuing court proceedings

## Enforcement of South Korean Judgments in England & Wales

- No specific enforcement treaty between England and South Korea
- South Korea is a party to the New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards
- In order for South Korean judgments to be enforced in England, the judgment must be:-
  - Final and conclusive in the court which pronounced it
  - For a sum of money, but not for taxes, a fine or other penalty

## How to enforce

- A foreign Judgment from outside the EU can be enforced in England under common law;
- To enforce, a fresh claim would need to be issued;
- It is then normally possible to obtain Summary Judgment on the basis that there is no Defence to the claim as Judgment has already been handed down in another jurisdiction;
- Once the English Court gives Judgment you can then take steps to enforce it in the usual manner.

## Hints & Tips

- Avoid added time and expense and check your contract terms
  - Do you need a choice of jurisdiction & choice of law clause?
- Can you get a European Enforcement Certificate? Check where your debtor trades from – does it also trade within the EU?
- How can you improve your prospects of a recovery - Where are its assets?

## Key contacts

For further information, please contact:



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# Questions?



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