

GUIDANCE NOTE

Recovering a Trade Debt

February 2012

Most, if not all, businesses will need to pursue an unpaid invoice at some time. This checklist highlights the advantages and disadvantages of the main options available to your business when trying to recover a fairly modest trade debt.

1. Court proceedings

There are a number of points you should consider before starting court proceedings:

- Conduct a cost/benefit analysis before initiating proceedings. Make sure you factor in the cost of enforcement.
- Be cautious about starting proceedings if you do not intend to see them through. You will almost certainly be liable for the other party's costs if you discontinue your claim.
- Be careful about threatening to start formal recovery proceedings if you do not intend to do so. The other party may call your bluff.
- Remember that your recovery of costs will depend on:
 - when the matter is concluded (whether before or after proceedings have been commenced);
 - the financial value of the claim and consequently the track the claim is allocated; and
 - how the claim is concluded (whether by agreement or at trial).

2. Insolvency proceedings

Your business may be able to recover a debt from a company by either:

- Threatening compulsory liquidation (also known as winding up) by the court.
- Serving a statutory demand.

However, you should be wary of threatening to start formal recovery proceedings if you do not intend to do so. The other party may call your bluff.

3. What is a winding-up petition?

- The threat of starting winding-up proceedings can put considerable pressure on a company to pay an outstanding debt promptly and the basic procedure is relatively inexpensive. However, these proceedings should generally be regarded as a last resort.
- The court requires a creditor to behave reasonably before starting winding-up proceedings and, in particular, to write to the company with details of the debt and demanding payment.
- It is an abuse of process to issue a winding-up petition if a debt is genuinely disputed.

4. What is a statutory demand?

A statutory demand is a written notice in a prescribed form demanding payment of a debt owed by a company to one of its creditors. There are a number of advantages of serving a statutory demand:

- Preparing and serving a statutory demand is quick and inexpensive.
- The process does not involve the court.
- If a creditor serves a statutory demand, they are not obliged subsequently to commence winding-up proceedings.

5. Reaching a settlement

It almost always makes sense to consider informal methods of recovering a debt (for example, using negotiation or mediation) as they can provide the quickest and simplest solutions. You should also think about the disadvantages associated with litigation. For example:

- Litigation can be disproportionately expensive to the sums being argued about.
- The outcome of litigation is uncertain.
- The court is only able to offer a limited range of remedies.
- The parties often destroy any prospect of resuming a commercial relationship.

6. Negotiation

Negotiation is a dialogue intended to resolve a dispute and produce agreement on a future course of action. One way in which a trade debt might be recovered is by opening a negotiation with the debtor. This can be done verbally (through a telephone call) or in writing (for example, by e-mail).

7. Mediation

Mediation is a flexible, voluntary and confidential form of dispute resolution in which a neutral third party assists parties to work towards a negotiated settlement of their dispute. The parties retain control of the decision whether or not to settle and on what terms.

8. The without prejudice rule

Parties usually negotiate on a without prejudice basis. This rule generally prevents statements made in a genuine attempt to settle an existing dispute (whether made in writing or orally) from being put before the court as evidence of admissions against the interest of the party which made them.

9. Doing nothing

Your business can always simply write off the sum that you are owed. Before taking this step, you should consider the:

- Size of the debt.
- Likely cost of recovering the debt.
- Importance of the current relationship between the parties.
- Likelihood of maintaining an ongoing commercial relationship between the parties.

The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues

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