

Debt Recovery in Malaysia Letter of Demand and the Available Court Proceedings

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1. Introduction

We have seen many businesses strive to navigate through the financial constraint due to the COVID-19 pandemic. One of the factors that affects companies' cashflow is the outstanding payment due from another party (debtor). Collecting receivables would be troublesome and parties would



eventually resort to legal recourse. In this situation, it is important for debt collectors to understand how the legal debt recovery process works in Malaysia in order to enforce their rights.

2. Initiating the debt collection - Letter of Demand (“LOD”)

The most common way to initiate the debt recovery process is by serving a letter of demand for the outstanding sum. This method, albeit not mandatory, has proved the cost and time effectiveness as parties are at liberty to negotiate and mutually reach to a settlement without having to go to court.

However, it must be differentiated between a normal LOD and a “statutory” LOD. The contents may be similar however the intention differs. Statutory LOD is served by virtue of Section 466 of the Companies Act 2016 and it is necessary to have the notice served to the debtor with the view to file a winding-up process. We will elaborate this point at section 3 below.

What is LOD?

Generally, Letter of Demand or also known as Notice of Demand is a document issued to formally request for money owed by the debtor and legal action will be taken should the debtor fail to comply with it.

LOD is not necessarily to be issued by a lawyer. A debt collector may issue the LOD himself but it is prudent to have a lawyer to review or draft the LOD before issuance of the same. Apart from ensuring the correct terms and intention of the letter is properly worded, a lawyer will also ensure the following points are addressed for an effective LOD.

Points to consider for an effective LOD

- Identify the rights to claim the money owed based on the contract or the compensation that is due.
- The basis of claims is not in contradiction to any repayment terms agreed by the parties in the contract.
- The time to be given for debtor to submit the payment and the legal action that might be taken as a result of failure to make payment within the stipulated timeline.
- The appropriate address and debtor's status based on the CCM or insolvency searches¹.

3. Subsequent civil action – enforcement of judgment

Should a LOD be unsuccessful and the outstanding sum remains unpaid, the debt creditor may proceed to institute a civil action in court. In the event the debt creditor is successful in its civil action, the courts will provide a judgment where the debt creditor as to follow the terms of the judgment, which is usually the payment of the sum owed. However, there are instances where the debtor refuses, ignores or is not willing to adhere to the judgment. A creditor can then compel the debtor by using modes of enforcing a judgment. There are various methods in enforcing judgments available for debt recovery in Malaysia. Let's look at the most common modes in a case study below:

Company A owed Company B a cumulative sum of RM5,000,000.00 for IT maintenance services rendered by Company B for year 2020. Despite several reminders Company A continue to neglect the payment with unrecorded justification that they are suffering financial difficulties due to COVID-19 pandemic and unable to meet the invoiced payment.

¹ CCM search is done at Company Commissions Malaysia and Insolvency search is done at Malaysian Insolvency Department

After receiving the LOD from Company B's lawyer, Company A continue to disregard the outstanding payment and caused Company B to be in a financial distress due the said unpaid invoices. Company A was sued by Company B and the court has decided in favour of Company B. Company B was then awarded with a judgment for the sum of RM5,000,000.00 against Company A. However, Company A has been ignoring this judgment and Company B has yet obtained any payment from the said judgment.

The lawyer representing Company B is advising the available legal proceedings for Company B's consideration to execute the legal action in court. Below is the explanation of each mode of execution available for Company B:

(a) Judgment Debtor Summon (JDS)

Company B may file a Notice of Application² supported by an affidavit to court. The court, upon satisfied with the grounds of claim will issue the JDS against Company A with an objective to compel Company A to appear in court and provide their justification of the payment default. The objective is to give an opportunity to Company A to pay the debt by instalments commensurate to his means.

In the event Company A fails to appear before the court within the stipulated time, the court may arrest Company A to be brought to court to be examined or the court may issue and ex-parte order against him.

Upon examination or the ex-parte order (in the case of non-appearance) is made, the court may order Company A to pay the outstanding sum either in lump sum or by instalments. Company A must comply with the order and failure to comply will amount to contempt of court.

(b) Garnishee Proceeding

Alternatively, Company B may, by an ex-parte application of Garnishee Proceeding³ supported by an affidavit garnish money that Company A is supposed to receive from a third party ("garnishee"). For instance, where Company A is the main contractor for the

² Order 48 of Rules of Court 2012

³ Order 49 of Rules of Court 2012

IT maintenance for the End Customer, Company B may garnish the outstanding sum directly from the End Customer.

The court will issue the Garnishee Order to the said garnishee to attend court and show cause against the order. If the garnishee does not attend the court, the order will be made absolute and garnishee will be subject to pay the amount as ordered by the court. If garnishee attends the court, the court can either decide the matter summarily or fix the matter for a further hearing.

(c) Writ of Seizure and Sale

Another option to execute the debt recovery is from the sale of movable or immovable property owned by Company A. Company B may apply for this proceeding by issuing a Writ of Sale and Seizure⁴ prescribed under the law.

When the order is endorsed by the court, the movable property will be seized by virtue of the said order. As for immovable property, the court will issue an order to prohibit Company A from dealing (transferring, leasing or charging) with the property.

The properties in question will be auctioned and the proceeds will be paid to Company B to satisfy the outstanding sum.

(d) Winding-up OR Bankruptcy Proceeding

- Winding-up

Should Company A fail to comply with the JDS (as described earlier) or the failure to comply with a judgment against it in general, a winding-up process may be executed as a subsequent process. Winding-up or liquidation may be commenced on the ground that a company is “unable to pay its debt”⁵. The threshold to commence this process is when Company A is unable to pay its debts more than RM10,000.00⁶. Alternatively, Company B may proceed with a petition for winding-up immediately without the need of a statutory LOD, depending on the outcome of the JDS.

⁴ Order 45 Rule 12(1) of Rules of Court 2012

⁵ Section 465(e) and 466 Companies Act 20

⁶ In light of COVID-19, the law has increased the threshold from RM10k to RM50k to ease the companies' burdens and reduce the winding-up of companies during pandemic.

For the purpose of this process, a statutory LOD as mentioned at the earlier section of this newsletter, is necessary to support the winding-up application by Company B pursuant to Section 466 of the Companies Act 2016. Company B, must issue the statutory LOD giving 21 days for Company A to pay the outstanding sum, failure of which will indicate Company A's inability to pay its debt hence a winding-up proceeding shall follow suit.

Once the winding-up order is obtained from court, the assets of Company A will be subject to liquidation and the proceeds from the sale of the assets will be distributed to all creditors including Company B, in accordance with the list of priority.

- Bankruptcy

This proceeding is only relevant when the debtor is an individual having debts of more than RM50,000.00⁷. Once the Bankruptcy proceeding is endorsed by the court, such person will be adjudged bankrupt and his assets will be subject to distribution to all creditors to pay off his debts based on the priority of the creditor's claim.

4. Non-compliance to the court order

The above-mentioned court proceedings will result in judgments being enforced against the debtors. The court may order certain acts including payment of the outstanding sum within the time scheduled by court which shall be complied by the debtors. Failure to commit to the court order will amount to contempt of court and the aggravated party may apply to initiate the committal proceeding⁸. If convicted for the committal proceeding, the penalty involves fine, imprisonment or both.

5. Limitation of time

It is imperative to note whether the debt creditor has the locus standi to pursue the claim if the default has occurred after quite some time. In any matters relating to contracts dispute, the time limitation for commencing legal action is generally 6 years from the date on which the cause of action accrued i.e. the date the money is due/defaulted for payment. However, once a judgment has been obtained against the debtor and the debtor still fails or refuse to pay in

⁷ Section 5 of the Insolvency Act

⁸ Order 52 of Rules of Court 2012

accordance with the judgment or the court order, the judgment will be enforceable within 12 years from the date of the said judgment⁹.

6. Conclusion

Based on the above, there are several modes available to recover debts in Malaysia which begins with the issuance of a Letter of Demand. However, the most suitable and specific mode will subject to the certain factors including but not limited to the nature and the type of debt or the current situation of the parties. In light of this, we assist our clients in assessing their claims to recover the debts with the effective drafting of Letter of Demand as well as the appropriate modes to be taken in court. If you have any questions about our services, please do not hesitate to contact us.

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⁹ Section 6 of Limitation Act 1953



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