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My business partner won't pay up. What should I do?

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An important business partner always pays my invoices late. And then eventually payments cease altogether. There are rumours in the industry that the business partner is about to go bust. What should I do?

There are various ways to collect sums that are owed. This article outlines the measures available, how these should be implemented, and the factors that should be considered in selecting the quickest and most cost-effective approach.

Poor accounts receivable management can have a devastating impact on businesses.

- ❗ **Debt losses can be avoided by identifying the risk of payment default early on.**
- ❗ **It is worth having an action plan and implementing this consistently in the event of non-payment. Concessions should only be granted if they put the creditor in a better position.**
- ❗ **The specific interests involved can influence the choice of collection measure.**

My business partner won't pay up. What should I do?



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Sooner or later all businesses will be confronted with a business partner that does not pay its invoices on time, or defaults altogether. In these circumstances, the issue of whether the business partner is solvent or insolvent will need to be considered. There are various ways to respond to overdue receivables. The specific interests involved will essentially determine what further action should be taken. If the creditor wishes the business relationship to continue, it may be more expedient to reach an amicable settlement with the debtor than take action to enforce the debt.



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Identifying the risk of default early

The key to success in accounts receivable management is spotting the early signs of financial difficulty or inability to pay debts. Initially, there may be rumours buzzing around concerning the business partner. Business partners approaching a crisis are often slow to pay and impose on the goodwill of their creditors. Payment terms may be extended from 30 to 60 or 90 days until eventually an invoice remains unpaid. Promises which are not be kept or an increase in the volume of credit may also signal an inability to pay.

consistently. The creditor needs to demonstrate to the debtor that it intends to follow through on the action plan. In addition, the creditor should only threaten the debtor with measures it is actually intending to take.

The creditor should also avoid «relational conflicts» and keep personal and business matters separate. Friendships must not prevent the recovery of receivables where this would result in the accumulation of debt. This type of situation could put the survival of a business at risk.

Possible debt collection and protective measures

People usually imagine that debt recovery involves debt enforcement proceedings. But enforcement proceedings are not always the best course of action. Creditors going down this route will not be able to recover their money easily or quickly unless they hold a title (see below) to set aside an objection.

The debtor is entitled to raise an objection within 10 days of receiving an order for payment. This will have the effect of suspending proceedings, so that the creditor must take further action to pursue recovery of the debt.

It will be necessary either to set aside the objection by taking civil action for recognition of the claim («*Anerkennungsklage*») or to initiate the procedure for removal of the objection («*Rechtsöffnungsverfahren*»).

Where there are indications of insolvency, an excerpt from the debt enforcement register and a credit report can shed light on the debtor's financial situation.

Determining further action

Once the overall situation has been assessed, it is advisable to draw up an **action plan**. A key consideration is whether or not the business relationship should be maintained. It may be in the creditor's interests to maintain the business relationship despite unpaid bills, for example in the case of long-standing or strategically important business partners. In this type of situation, it may be better to reach an amicable agreement with the debtor rather than start enforcement proceedings. The creditor can review this strategy later if the business relationship turns out to be a loss-making proposition.

Once an action plan has been drawn up, the creditor should implement this



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Six principles of successful accounts receivable management

1. Be vigilant and responsive: it is essential to keep an eye on the financial position of (important) business partners. Any sign of cash flow problems or an inability to pay debts on the part of a business partner should be taken seriously. Once information has been obtained (credit report, excerpt from the debt enforcement register), the situation should be assessed and a decision taken as to further action.
2. Don't delay: too long a wait or an accumulation of accounts receivable can jeopardise the creditor's continued survival.
3. No «relational conflicts»: in business dealings, friends and acquaintances should be treated in the same way as any other business partner.
4. Don't make empty threats: debtor's are often threatened with enforcement action. Failure to take such action in the event of non-payment will undermine credibility and the debtor will no longer be able to take the creditor seriously.
5. Be wary of making concessions: creditors should only make concessions to the debtor if this will put them in a better position, or result in immediate payment of part of the debt.
6. Consider the interests involved: in reviewing potential debt collection measures, creditors need to consider whether or not they want to continue the business relationship with the party concerned.

Depending on the type of title held, the **removal of an objection** may be provisional or final («*provisorische or definitive Rechtsöffnung*»). Final removal means that the objection is set aside, allowing the creditor to continue debt enforcement proceedings by filing an application to this effect. Orders for final removal of an objection constitute, inter alia, enforceable judicial decisions (Article 80 of the Swiss Debt Enforcement and Bankruptcy Act «DEBA»). A title to have the objection set aside on a provisional basis (Article 82 DEBA) would include an acknowledgement of debt duly signed by the debtor, such as an agreement in writing. The sum owed must be clearly stated in the agreement, e.g. in a contract of sale, the purchase price must be specified. All grounds of defence (e.g. repayments or limitation of actions) are permitted under the procedure to set aside objections on a provisional basis. Once an order for the provisional removal of an objection has been granted, the debtor may prevent the creditor from continuing the proceedings by filing an action for discharge from indebtedness («*Aberkennungsklage*»).

Where there is evidence that the business partner has suspended payments, the creditor may apply to the competent court for an **adjudication of bankruptcy without preliminary proceedings** (Article 190 DEBA). The Act does not require all payments to have ceased. The debtor is deemed to be insolvent if it is unable to settle claims that are undisputed and outstanding, systematically files an objection or has ceased to pay even small amounts. Failure to pay liabilities under public law, such as social security contributions and taxes, is also an indication that payments have been suspended. Creditors can access this information by obtaining an excerpt from the debt enforcement register. If the debtor has asked the creditor if it is willing to enter into a private composition agreement, this would also be a clear signal that the debtor is no longer able to satisfy all its creditors. The insolvency

must not be merely temporary, but have subsisted for some considerable period of time. The creditor must adduce evidence of the suspension of payments.

The advantage of such applications is that if the debtor believes that its business can survive, it will do its utmost to raise funds and make payments to avoid an adjudication of bankruptcy. If the creditor fails to do this, bankruptcy proceedings may be commenced without the creditor first having to go through the entire debt enforcement process or taking any civil action.

Attachment is another mechanism worth considering in the context of debt collection. An **attachment order** is not a method of enforcement as such, but merely a protective measure. It prohibits the debtor, subject to the penalties prescribed by law, from disposing of the attached assets. The purpose of the order is to prevent the debtor from dissipating assets. Creditors may apply for attachment orders unilaterally without the debtor being heard. There are three conditions for obtaining an attachment order: there must be a claim against the debtor, one of the grounds for seeking attachment must exist, and there must be assets belonging to the debtor (Article 271 DEBA).

An order for «offshore attachment» is also of practical relevance. Such a measure may be granted on the grounds that the debtor is not resident, or does not have its registered office, in Switzerland and the claim has a sufficient link with Switzerland (e.g. Switzerland has been agreed as the place of jurisdiction). A final, enforceable title to set aside an objection in debt enforcement proceedings also constitutes sufficient grounds for granting an attachment order. An authorisation for attachment, i.e. the grant of an attachment order, does not bring the proceedings to a close. The onus is on the creditor to continue the proceedings, i.e. it must «enforce» the attachment order by bringing an action or initiating debt enforcement proceedings within 10

«The first to recognise the imminent insolvency of a business partner will be the last to lose out!»

days. If the creditor fails to do this, the attachment order prohibiting the disposal of assets will lapse.

The mechanism of the **builder's lien** can also be used to secure the claims of tradesmen and building contractors, which is frequently encountered in practice. For a builder's lien to apply, the tradesman or building contractor for the property must have supplied labour and materials, or labour alone (Article 837(1)(3) of the Swiss Civil Code «SCC»). A builder's lien must be registered no later than four months after the work has been completed (Article 839(2) SCC). As in the case of attachment orders, builder's liens must be enforced.

Sales of receivables and settlements

Instead of the collection and protective measures outlined above, it is also possible to sell receivables to a debt collection

agency. A sale of receivables may be appropriate if the creditor needs swift access to money and is unwilling to assume the risks associated with collection.

Creditors who have an interest in maintaining the business relationship or decide against debt collection measures on other grounds may agree a **repayment plan or percentage-based settlement** with the debtor. It is important to ensure that the agreement concerned constitutes a provisional title to set aside an objection, allowing debt enforcement proceedings to be continued in case of a payment default under the settlement. An immediate part payment should also be required on conclusion of the agreement.

Conclusion and practical recommendations

The right debt collection measure should be determined following an assessment of the overall situation. Debt enforcement proceedings will only be productive if there is an enforceable title to set aside an objection. It is advisable to verify in advance if there is a valid title to set aside an objection. Where there is specific evidence that the debtor has suspended payments, the creditor also has

the option to file for an adjudication in bankruptcy without preliminary debt enforcement proceedings. Depending on the circumstances involved, an attachment order is a useful means of securing assets and taking the debtor by surprise. We would be happy to help you in determining the most appropriate debt collection measure in your situation and to guide you through your chosen procedure.