

Wine Law

Effective debt collection for wineries



Wine Lawyer

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Mark Hamilton, of Grope Hamilton Lawyers, provides specialist national legal services to the Australian wine industry. Hamilton has contributed to the Grapegrower & Winemaker magazine in the past and returns with a regular ‘wine law’ advice column. Hamilton’s articles will cover everything from grape contracts to trademark protection for wine

brands, but his first offers practical information for wineries about debt collection. Given the state of the wine industry over the last 15 years, effective debt collection policies for wineries is fundamental.

THE MOST EFFECTIVE debt collection strategy is to act promptly. Do not let the receivables ledger grow. When the signs of decline are apparent, watch all accounts receivables and act quickly to address the problem. Strategies may include speeding up billing (don’t wait until the end of the month, send invoices out now), hire lawyers earlier or enforce retention of title rights through registered “Personal Monies Security Interests” (which you must have) when accounts get beyond acceptable terms.

Be pro-active, and be persistent. Make sure that the person responsible for debt collection in your office is suitable and experienced – there is no point in having somebody with a ‘soft touch’ contacting your customers attempting to recover payment of your receivables. The person you would select as your credit control officer will probably not be the person you would select as your chief sales person. Having an appropriate person collecting your debts can nip problems in the bud and lessen the number of debts which have to go to legal recovery.

Maintaining cashflow is vital to any business but is particularly important in a capital intensive industry such as the wine industry. This reality was amplified by the prolonged growth which many under-capitalised wine companies experienced during the pre-Global Financial Crisis export drive.

With export driven growth comes overseas debt exposure to distributors, often for considerable sums of money. Whereas

in the “old days”, exporters were paid upon bill of lading, it is now common for Australia wine companies, other than when dealing with, in particular, China, to give their overseas distributors 60, 90 or even 120 days credit to enable the wine to arrive at its destination and be marketed.

DEBT INSURANCE

Debt insurance is an option which must be part of the overheads associated with your export business. In terms of overseas distribution contracts, it is vital that effective retention of title clauses be included. It is obviously difficult and expensive to arrange for your wine products to be recovered from the distributor in a foreign country, however, this is far preferable to not recovering the stock at all, or having a right to do so. Stock could then be kept in the relevant country pending transfer to a new distributor.

Every attempt should be made, when negotiating distribution agreements, to have a governing law and jurisdiction clause which provides that the laws of Australia apply to the contract and that jurisdiction is vested in the Courts of Australia. This enables you to commence proceedings a superior court in your state.

This is because it is obviously difficult and potentially expensive to have to institute debt recovery proceedings in a foreign jurisdiction. It is much easier for you to instruct local ▶

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lawyers and much cheaper to pay legal costs at Australian rates.

By virtue of the distribution contract providing that the laws of your jurisdiction, and the courts of your jurisdiction, will apply to disputes under the distribution agreement (including recovery of your stock), you will have a passing acquaintance, at least, with the laws and courts in your “backyard”, but may have little or no knowledge of the law or court process in your export markets.

AUSTRALIAN DOMESTIC SALES

Once the period for payment of an account has expired, you will have to decide whether to adopt a “softly-softly” approach or whether to threaten recovery proceedings if the amount owing is not paid within a specified period.

In terms of domestic sales, these will generally be retail sales to members of the public through mail order, cellar door or even via the Internet, sales to your Australian wholesale distributors or to retailers.

Debt recovery in Australia

INTERNAL RECOVERY ATTEMPTS

The earlier contact is made with a debtor to collect the debt without threatening legal action, the better, as this allows you to ultimately threaten recovery proceedings and to proceed, if necessary, before too much time has passed since the account was rendered.

In this way, you will have adopted a customer orientated approach by acting reasonably and by attempting to recover the debt without initially threatening legal proceedings.

REFERRING MATTERS FOR LEGAL ACTION

If your demand is not met then you should immediately instruct lawyers to take recovery proceedings. Subsequent steps in the debt recovery process should be taken as soon as the relevant time limit allows, so that the debtor is left under no misapprehension as to your determination to promptly recover the debt.

Your debt recovery procedures will lack credibility with your debtors if there are significant pauses in the process and particularly if you do not follow through with immediate action in the terms threatened. Acceptance of your determination to promptly recover the debt, and the inevitability of the process, is more likely to cause the debtor to pay up earlier.

It is also normally a good strategy to refer all contact with the debtor to your solicitor once legal proceedings have been instituted. Say that the matter is out of your hands and that they should speak to your solicitor about the matter.

Referring contact to the solicitor should ensure that any pay-out figure provided to the debtor will include your full entitlement including maximising recovery of the legal costs which you have incurred. The client is often the victim of direct contact with the debtor by virtue of the client agreeing to accept the original debt and failing to recover interest and legal costs. It is ironically not uncommon for the clients who continue to deal direct with debtors, in these circumstances, to later on be concerned about the cost of recovery.

In terms of cost efficient debt recovery, it is vital to adopt a consistent policy for recovery of all debts. By far the most cost effective and timely approach is to act promptly, hand the entire debt collection matter over to your solicitors and to have standing instructions with them that you will settle for nothing less than the full amount of the claim, interest entitlement and legal costs unless there are unusual or compelling circumstances which dictate a departure from that policy. Do not chop and change your approach.

Debt collection is going to cost you money. However, if you set out with the objective of recovering interest and legal costs

on delinquent debts and only reluctantly accept less than 100% recovery, then you will minimise the amount of non-recoverable costs which you incur overall each year. If you keep having direct contact with debtors and “letting them off” the interest and legal costs for no good reason, then your result will be materially different.

STREAMLINE INSTRUCTIONS FOR LAWYERS

To streamline your debt collection procedure, and to ensure timeliness and minimalised costs, it is a good idea to have a pro-forma instruction sheet from your solicitors which you can fill in, and to which you can attach the basic documents relating to the debt, and send to your solicitor. This communicates all necessary information to your solicitor in a cost efficient manner, as it avoids the need for lengthy telephone conversations or meetings.

It also allows a solicitor to minimise the cost to you as the instruction sheet should be designed to establish all information necessary for the preparation of a formal letter of demand (if you wish that sent as a precursor to a summons) or a summons to be prepared as a clerical task in a legal office.

FORMAL RECOVERY PROCESS

The solicitor will include an amount in a letter of demand, sent upon receiving instructions, and writing the letter of demand as part of the total amount which a debtor must pay within the (probably) seven day period to avoid legal proceedings being instituted.

If the demand is not met, then the summons issued would include a statement of claim setting out the amount owing, the interest you are entitled to, and the amount of legal fees and filing which are permitted under the court-determined scale of costs and fees.

In the event that proceedings are instituted then these will generally be issued (as an example, in South Australia) in either the Magistrates' Court (or Local Court equivalent) for debts up to \$100,000.00, and in the District Court for claims in excess of that amount. It would be rarely necessary for proceedings in the relevant State Supreme Court.

In the great majority of straight forward collection matters, the claim is not disputed (or even if some form of “delaying” defence is filed), the matter does not usually proceed to trial.

The summons provides a time limit for the defendant to enter an appearance or defence, depending upon the procedures in the particular court involved. If the defendant does not enter a defence within the required time, then you will be entitled to sign judgment for the amount of the debt, interest and legal costs incurred to date and to obtain a certificate of judgment as a preparatory step to taking enforcement proceedings against the debtor.

In the event that the debtor has filed a defence which raises a genuine dispute in relation to the debt, then the matter has become “contentious” and will proceed as with any other disputed civil claim. Whilst there may be no dispute about the debt itself, the debtor may be claiming the right to set off some damages claim which they raise by way of a counterclaim to the summons. For example, a claim based upon some alleged breach by you of the distribution agreement or arrangement.

POST JUDGMENT RECOVERY STEPS

Assuming that the claim has not been defended and you have obtained judgment, there are various enforcement options open to you. These include:

- Obtaining a Charging Order and Warrant of Sale over any real property of the judgment debtor;
- Applying to the Sheriff to attend the debtor's premises and seize goods to the value of the debt. This is potentially effective

in motivating payment because of the ‘embarrassment factor’ involved. The goods seized must be the property of the debtor and cannot be encumbered in any other way. Any goods seized are sold at auction and the monies paid to you after payment of the Sheriff's costs;

- Bankruptcy Proceedings against an individual debtor. Action may be taken to have a personal debtor declared bankrupt. Individuals who cannot pay their debts upon demand (i.e. they are insolvent) can be declared bankrupt provided that the minimum debt including interest and costs is \$5,000.00. A bankruptcy notice is served upon the individual debtor setting out the amount owing, attaching a copy of the judgment debt and advising the debtor that unless the amount owing is paid within 21 days of service, they will be deemed to have committed “an act of bankruptcy” and that a creditors petition will be filed in the Federal Court or, if possible, the Federal Magistrates' Court seeking a bankruptcy order;
- In terms of enforcing a debt against the company, you must proceed to wind up the company on the basis that it cannot pay its debts as and when they fall due (i.e. that it is trading as an insolvent company). Again, the minimum amount of the debt must be \$2,000.00. The first step is to serve a statutory demand upon the company setting out details of the debt and demanding payment within 21 days. Upon receipt, the company has 21 days from the service of the demand to either pay the debt in full or commence proceedings in the relevant state Supreme Court to dispute the debt; and
- If the debt is not paid in full, or to your satisfaction, and the company does not commence proceedings in the relevant state Supreme Court disputing the debt, the Court will order the winding up of the company and the appointment of a liquidator to liquidate its assets for the benefit of its creditors.

REASONS FOR ACTING NOW

As a matter of policy, you should work on the ‘squeaky door’ principle and the assumption that the debtor has severe cashflow problems. This assumption will impress upon you the urgency of recovering the debt on the basis of the ‘early bird’ principle. Apart from the fact that you haven't been paid, you will probably not have actual knowledge of the liquidity position of the debtor. Some businesses simply choose to delay payment.

THE ‘GOLDEN RULE’ OF DEBT COLLECTION

Remember the golden rule: the customer who does not pay you is not worth having so there is no good reason not to take a firm but courteous approach to recovering your debts.

For God's sake, stop supply!

For the same reason, it is imperative to stop supply to a delinquent debtor. This is another compelling reason why early debt recovery steps are necessary in case your marketing people are continuing to sell more wine products to a customer who is already in breach of your terms of trade. Internal communication of the debtor's list to marketing and sales people is vital.

Debt recovery is not your business. Instruct lawyers early in the process and benefit. Go and sell some more wine to someone who will pay.

Mark Hamilton of Grope Hamilton Lawyers provides specialist national legal services to the Australian wine industry. He has a lifetime of wine sector experience through his involvement with Hamilton's Ewell Vineyards. He can be contacted on (08) 8231 00898 or 0412 842 359 or by email at mhamilton@gropehamiltonlawyers.com.au. For more information, visit www.gropehamiltonlawyers.com.au.

