

“Know-How Paper”

Collecting due payments from customers in Ukraine: An impossible task?

Trading in goods imported and distributed throughout the territory of Ukraine remains a risky business – especially if pre-payment is not agreed upon with the Ukrainian customer.

What may a foreign company undertake to receive its due payment when they have delivered goods to Ukrainian customers and the customer is not paying as agreed? A straightforward answer would be: very, very little...!

Nonetheless, the Ukrainian legal system does not remain indifferent to such situations and provides several alternatives that companies may resort to.

- (a) **Negotiations** – try to resolve unsettled obligations through direct negotiations with the customer. Although not always realistic or opportune, a settlement through negotiations avoids high judicial costs, lengthy proceedings, often unpredictable court rulings, while safeguarding future business relations.
- (b) **Pre-judicial settlement** – out-of-court procedure may only be resorted to when both parties to the dispute are subjects of commercial activity. Current legislation provides that parties must start pre-judicial settlement proceedings when they have foreseen so in their commercial contract – in all other cases, this procedure is voluntary. During pre-judicial settlement proceedings, law firms often act as mediators. Pre-judicial settlement proceedings usually last approximately one month, although they may last up to two months, while costs may vary depending on the involvement or not of expert mediators such as law firms.
- (c) **Court proceedings** – if negotiations or pre-judicial settlement efforts have failed or have not taken place, the seller may appeal to the court. Where the non-fulfilment of payment by the customer originated on the basis of a commercial contract, the seller must appeal to commercial courts; on the other hand, if the concluded contract is not a commercial contract, the seller must appeal to civil courts.

Ukrainian procedural legislation provides for imperative proceedings (only in civil courts) and claims proceedings (both in commercial and civil courts).

Imperative proceedings may only be initiated if the dispute arose on the basis of a written (non-commercial) contract. In imperative proceedings, the applicant must submit all relevant information in written form; judicial decisions are adopted within 3 days from the creditor's appeal, without requiring court sittings or the appearance of either the creditor (seller) or the debtor (customer). The debtor has a right to appeal to decisions taken in imperative proceedings within three days, in which case the appeal procedure will be handled in claim proceedings. Noteworthy is also that costs of imperative proceedings are 50% lower than of claim proceedings.

In *claims proceedings*, a decision on the admission of the case is to be taken within 10 days after the application by the creditor, whereas a judicial ruling is ought to be issued within two months after the application, although in practice said term may be considerably prolonged. The cost of claim proceedings is 1% of the sum of the debt,

considering however that said costs may not exceed 270 € and 4000 € in civil and commercial courts respectively.

In case of non-compliance with the court ruling, the creditor may appeal to the State Executive Service for the execution of the debt. Upon submitting an application to the State Executive Service, said application will be examined within 3 days. Upon acceptance of the application by the State Executive Service, the debtor will be granted a 7-day term for voluntary payment of his debt, after the expiry of which compulsory execution of the debt will be initiated (through the alienation of the debtor's property via public auction, sequestering of bank accounts and salary, etc...).

However, as court proceedings are very lengthy, decisions biased and costly, and Ukrainian customers are very reluctant to participate in out-of-court dispute resolution, preventive measures are highly recommendable when trading in Ukraine.

Therefore:

1. Avoid delivering goods without **pre-payment** (or at least a considerable advance payment)!
2. Always make a **written contract!**
3. Provide strong **contractual guarantees** against the non-payment for delivered goods in the contract! Such contractual guarantees may take the form of for instance forfeits, bank warranties, mortgage clauses or monetary deposits.
4. **Notarize the contract!**¹
5. Provide a **compulsory arbitration clause** in the contract! Especially foreign companies may be able to convince their Ukrainian customer-partners to conclude arbitration clauses (notwithstanding the considerable additional costs related thereto), in which case disputes on non-execution of payments may be resolved by for instance the International Court of Arbitration, the European Court of arbitration or any national arbitration court or alternative dispute resolution chamber.
6. Provide for **contractual penalties!** Although the enforceability of contractual penalties by Ukrainian courts remains weak and uncertain, they have a strong dissuasive character and, if enforced, may not be contested by the debtor (customer).

As recovering your money after delivery of goods and services remains highly doubtful and uncertain (even highly unlikely), avoid deliveries prior to payment or include strong contractual guarantees in the agreement. If deliveries will nonetheless be undertaken prior to payment, exploit the possibilities provided by legislation to appeal directly to the State Executive Service for compulsory execution of the due payment. Thus, primordially: Safeguard yourself against situations in which you will have to claim money from customers after deliveries have taken place!

This document was prepared by the law firm PETERKA & PARTNERS LLC in close cooperation with the Royal Danish Embassy in Ukraine. For further information or questions, please contact Mr. Alexander Poels, LL.M., Director of PETERKA & PARTNERS LLC, at poels@peterkapartners.com or +380 44 581 11 20. For further information and references, please consult the website www.peterkapartners.com.

¹ In the event of non-payment by the customer after delivery of goods, the seller may request the notary public for an "executive inscription" to the contract on condition that he submits a document confirming the "indisputable debt of the customer" and the delay in the contract's execution (such as for instance the debtor's acceptance of his debt). If the contract attests of such "executive inscription", the seller may directly appeal to the abovementioned State Executive Service for the execution of the debt. However, uncertainties persist to the evidence needed for the establishment of "indisputable debt" and therefore this procedure is not used on a widespread basis yet.