

## DEBT COLLECTION : CASE STUDIES, ALTERNATIVES FOR LEGAL COLLECTION

### 1. Introduction

Goodmorning everybody,

First of all, we would like to thank Amman Union and the Tunisian national credit insurer, Cotunace, for the excellent venue and perfect organization of this event.

We would also like to thank Mr. Besselaar of International Advisers for his excellent review of the possibilities of debt recovery through litigation. Whether we all like it or not, legal procedures remain the most natural way of recovering a debt.

However, we all know that there are certain disadvantages. Having been the Head of the Legal Department for 10 years of East-West Debt, one of the more reputed debt recovering agencies, I think it is fair to say that I experienced them all :

The disadvantages can be summarized as follows :

1. Additional costs involved : you just lost money because you were not paid and the first thing you obtain, is an invoice for the study of the case, followed by invoices for the legal fees and expenses. Even if some cuts in costs are implemented (by way of success fees, contingencies, etc...) a bitter pill to swallow;
2. Difficult venues : most of the time, the first problem that arises, is the one of jurisdiction. Which court is competent to deal with the matter and, even if you obtain you judgment in the end, will you be able to execute it where it needs to be executed (where your debtor holds or has stashed his assets).
3. Long delays : supposing you have overcome hurdle 1 and 2 and you are able to pursue the legal proceedings in a proper venue, the judicial apparatus is not well reputed as far as speed and efficiency is concerned. Debtors have a number of tools, guaranteed rights, to stall proceedings, go into appeal (with even longer delays) and high courts (bring your case to the Italian torpedo).
4. Procedural issues : during legal proceedings, the debtor brings up arguments which are not applicable in pure commercial relations (time barred character, notification issues – especially when not a party to the Hague convention, State Immunity, lack of jurisdiction, etc...)
5. Souring relations : although you might have a claim on a certain debtor and although you want that to be settled, you also might have sympathy for your debtor. It might be a brother muslim country, there might have been calamities in that country provoking financial difficulties, there might be structural problems which you do not want to blame on your debtor. Starting legal proceedings then can :
  - a. Make you feel at unease with yourself;
  - b. Even be impossible from a political point of view;
  - c. Give you a reputation you do not want as the “killer of the poor”;
  - d. Disrupt a relation that was outstanding for the past decades
  - e. And so on

Resuming, litigation definitely has its advantages, it also has disadvantages of which we explained the main ones above. In our experience, litigation and legal procedures is most suitable when the debtor

country has been drifting away from the international commercial scene for some reasons like political embargo, isolation, changed regime. For example, during the nineties and beginning of 2000, this is something what the Republic of Iraq experienced.

The Iraqi banks, Rafidain, Central Bank and Rasheed had huge accounts in Europe which were frozen after the invasion of Kuwait and the outbreak of the first Gulf war. Everybody knew but did not act in the first years for the disadvantages as set out above. Companies like Hoechst, MSD, Pfizer, ... had longlasting relations with their Iraqi clients and only changed attitude in the second part of the nineties. The situation dragged on for too long, the competition between creditors became huge.

We were personally involved in seizing the assets of the Central Bank and Rasheed Bank with Commerzbank and Deutsche Bank (confirming the saying of the seventies "Iraq is the Germany of the Middle East) and were able to recuperate for our creditors an amount surpassing 50 million € or 75 mio USD.

Obviously, the amount attached was not sufficient making few happy and leaving many disappointed, a situation which is still ongoing if we see the initiatives of Kuwait Airways.

Litigation is therefore especially a good possibility when an embargo is imposed, because :

- The monies are frozen and cannot be moved;
- It is well known where they are;
- The political isolation gives a good chance in court,

This is not the case for most debtors and debtor countries. Today the account can be with ING, tomorrow it is with Citibank, the day after that there is no money no more.

Many creditors having chosen the litigation way therefore start with high expectations, obtain an executable judgment, frame that nice official paper with nice stamps and signatures and hang it proudly on the wall of their office, just to find out in the years to come that it did not work out the way they expected and that they are still left unpaid while incurring fees running to the million.

Conclusion : litigation is a good alternative but the last one to be considered when everything else has failed. Moreover, there seems to be always something else to try. The joint venture of BNI ( a company specialized in identifying the debts and the possibilities) and Silcat (focusing on partially legal procedures and commercial solutions) has proven that considering such ways can be rewarding, not only for the creditor but, in the long run, even for the debtor.

Instead of making a publicity campaign as sometimes happens on these types of conferences, whereby you would all fall asleep or considered it time for a tea break and some chit chat in the room next door, we would like to give you a presentation of such possibilities. Not the fact that we offer them is important, the fact that they exist is.

## **2. Mix of litigation and pressure/settlement efforts : the cases of Arak and Laos**

We have all experienced it already : debtors can be harsh and difficult to deal with. You have shown understandings, you have tried all amicable ways of negotiating rescheduling agreements etc..., yet your debtor turns a blind eye on you. Moreover, your claim is based on some commercial papers (unpaid invoices, bills of lading and letters of credit, ...) and your debtor creates some doubt over their validity, the applicable interest rates (if any) and so on.

It the end, you have the impression it boils down to the point that you, the unpaid creditor, is the bad guy in this story. You can also end up with impression that your debtor needs a wake up shake.

In such case, a procedure on the merits combined with amicable and less amicable efforts might bring relief. The plain procedure, having your claim confirmed in court, does not involve unpopular measures as money attachments and seizures. You just let an independent person, a judge, decide who is right and to what extent. Mostly, besides the parties, nobody is even aware of the procedures.

Having obtained the final title, it is then time to change the rifle from shoulder and start the outside court recovery proceedings. 2 examples from practice :

### 2.1. Fochi Spa from Italy against Arak Petrochemical Company from Iran

A longstanding dispute, the competent arbitration tribunal finally, after 8 years of proceedings, set the total claim at 65 million €. However, having that paper confirming the right to 65 mio €, still 0 € was recovered. At that point, Fochi was left with 2 choices ;

- Continue the longlasting legal fight trying to attach ARPC monies ;
- Consider other options.

We all know the current situation of Iranian companies, especially when there are linked to the petroleum sector. We all might not agree with what Uncle Sam and the western community in his footsteps do to the country, but the situation is at it is leaving few normally applicable options available.

Therefore, noticing that ARPC was a publicly listed company on the Tehran stock exchange, a combination of amicable talks with a harsh standing point were initiated. Up till that point, the matter had remained an internal affair between 2 parties, each presenting their arguments. The awareness of Fochi, as the creditor, that if the fact that it was awarded an executable arbitral sentence, might have a negative influence on the share rates of the company in the Tehran Stock Exchange, gave the company a tool towards ARPC and after a couple of months of negotiating, a deal was struck.

### 2.2. Erste Bank from Austria against Lao Aviation and the People's Republic of Laos

Lao Aviation leased some aircrafts from Erste Bank (through its specialized subsidiary) but did not pay the last 6 months of the lease. Erste Bank did not want to push initially against a poor country as Laos and negotiations went on for years, yet to no avail. There were always other priorities.

Finally, Erste Bank did go to the contractually agreed high Court of London and obtained its title. This title would have been perfectly executable in Bangkok where Lao Aviation is flying on a daily basis. Negotiations after that judgment failed also until Erste Bank called for a meeting in Bangkok. At that point, Laos realized the risk and paid the full principal amount of the debt back in 3 installments over 6 months.

## **3. Debt conversion**

A broad concept with many possibilities of which the main characteristics are :

- The creditor is paid (partially)
- The debtor has no hard currency obligation anymore which suits him well as he is lacking the hard currency reserves
- It brings the debtor investment and employment, making it possible to turn the negative news of "paying a creditor" into a positive one of "work and investment".

Just to name some of the debt conversion possibilities :

- A fiscal swap : a hard currency claim is swapped into the local currency. The creditor still active in the debt country can use this local currency to pay employees, local contractors, etc... If he is no longer active, he can sell this amount to a third party that still is against a favorable rate;
- Commodity swap : the debtor is lacking hard currency but has a certain commodity in surplus ranging from agricultural products, over land to oil;
- Investment participations : a creditor, despite his claim, might still have a great interest in a certain country. The debtor, despite his inability to pay the hard currency, has an interesting investment project. Using the debt can then be possible to give some preferential treatment to the investor, some lowered stepping in price or favorable working conditions.

Simple in its concept, bringing advantages to all parties concerned (the debtor, the creditor and an eventual involved third party), it is still seen that bringing the concept into operation is hard and has more failures than success stories. The reasons for this contradiction are multiple :

- Fragmentation of the decision makers : when one needs too many politicians to give their blessing, problems start. The Minister of Finance agrees but the Ministry of Economics does not. The creditor agrees but the third party does not (or vice versa of course);
- Short term thinking vs. long term thinking : if the investment or sale of commodity is considered to be happening anyway, it is hard to make people think in the long term. Why giving your oil away against a debt, if you can sell it anyway against dollars or euros?

This is where the combination and the joint venture of BNI and Silcat really proves its added value.

BNI has focused in the past decade on :

- establishing excellent relationships with decision makers in the debtor countries, and;
- identifying the eligible investment projects to apply the principle.

Silcat has focused on :

- aligning itself to key sector world players like Mitsubishi Heavy Industries, dredging companies, etc...
- guaranteeing itself the support of a well rated bank interested in such projects (and its financing).

By investing our efforts on key markets as Electricity and heavy equipment, we are able to offer governments and state companies of debtor states interesting possibilities to have negotiations over a debt reconversion brought to a good end and to persuade them to accept the solution. In order to give you a good insight, let me address two concrete examples :

### 3.1. The Kingdom of Morocco and its French bilateral debt (Pierre et Vacances)

The Moroccan Kingdom has a substantial bilateral debt to France outside the scope of the Paris Club amounting to 65,790 million euros. We approached Pierre & Vacances, a French group specialized in tourism investment and operation of holiday reasorts as we saw that Morocco was keen on further improving its tourism infrastructure.

To this effect, Morocco voted a law facilitating the change of agricultural land into development land, especially in the coastal region and the surroundings of the imperial cities (Fez, Marrackech, Meknes).

Through the facilitation of BNI, a tripartite agreement was signed between the Moroccan Kingdom, the French Republic and Pierre & Vacances. The main elements of this agreement were :

- The drafted touristic project of Pierre & Vacances was found to be eligible in accordance with the Moroccan land transformation law;

- The debt was brought back to 75% of its principal amount and was sold to BNI. Pierre & Vacances paid this amount in hard currency to BNI who forwarded the purchase price to the French Treasury;
- Pierre & Vacances established a mixed company of Moroccan origin together with a Moroccan Corporate Bank;
- 85% of the total debt amount is deposited in local Moroccan Dirhams into an account belonging to Morocco Pierre & Vacances, another 10% will be granted by way of fiscal advantages and advantages in nature. The remaining 5% is kept as retention money until the project is fully operational;
- Works are currently ongoing in the “Palmerie of Marrakech”.

This example clearly shows the advantages for all parties involved :

- The French Republic recovered 75% of its debt;
- Morocco got rid of a debt, obtained a new touristic project and gave work to several hundreds of construction employees without having to touch its foreign currency reserves;
- Pierre & Vacances has a new site in a much desired environment, and obtained local currency to pay the land to the local farmers and its employees at a discount of 25%.

A straightforward success story of a fiscal local currency swap. Obviously, it is a question of finding the right eligible debt, the right eligible investment and the right investment partner.

### 3.2. The People’s Republic of Bangladesh and the Kingdom of Thailand (Mitsubishi)

The Republic of Bangladesh had a large debt to the national credit insurer of Thailand for unpaid rice deliveries, totaling over 100 mio USD. In the beginning of the year 2000, Bangladesh also bought 2 steam turbines with Mitsubishi of 350 MW for an amount of 250 million USD. Due to the lack of available funds, these turbines were never implemented in an electricity complex as the cost would have run up to around another 450 million USD.

Thailand is also experiencing a tropical climate and is in constant need, especially taking into account its continuously growing industry sector, for incremental electrical power.

Silcat presented the following idea. The turbines have been lying in the port of Chittagong for the past 10 years. Even if vacuum packed, having 0 running hours, the equipment needs a complete overhaul. The weight of a 350 MW turbine is so high that gravity always creates some deflections in the rotors and blades that need to be rectified before being operational. Bangladesh lacks the funds to do the overhaul, left alone to operate the turbines.

Thailand is in need of additional electricity and could use a new 750 MW power plant (2 x 350 MW + 50 MW by recuperation of the heat in a combined cycle – closed circuit plant). The turbines were shipped to a Mitsubishi Maintenance Partners workshop and revised, sold to the Thai government for 50 million USD + the rice debt and erected in Thailand by Mitsubishi.

Again, a situation that was positive for the 3 involved parties :

- Bangladesh : lost its debt and even made money from equipment it was not able to use and that reached the status of scrap metal without any major overhaul it was unable to pay for;
- Thailand : acquired a 750 MW power plant for a normal price of 700 mio USD at a price of 500 mio USD;
- Mitsubishi : got a major contract for which it was paid the normal applicable price.

Conclusion : The above given examples are quite different in nature and scope. They show that a debt reconversion is a very case by case thing that needs intensive study and a creative mindset and spirit. However, there are a number of advantages :

- All parties are happy;
- No costs involved other but the time of functionaries;
- Silcat/BNI has no expenses but travelling and time and can work for the larger part on a no cure, no pay basis;
- The disadvantages of litigation are avoided, especially as far as political tension and reputation is concerned.

With this comparative overview, he have tried to show you that, although litigation is sometimes necessary as a last resort option, alternatives do exist. Moreover, they are not time bound. As such, an advice that we can give is not to wait with your claims. Outsource them after a specific period of time (e.g. 2 years) and focus in first instance on alternative debt collection. Only in case that fails, and depending on the applicable time limitation on your claim, you can still start litigation then.

Thank you for your attention and of course, we are available to give some further insight and reactions in person to you when desired.

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