

APPEALING PROOF OF DEBT REJECTIONS: THE CREDITOR'S GUIDE TO CONTESTING LIQUIDATOR'S DECISION

Introduction

When a company goes into liquidation, the appointed liquidator takes on the crucial task to manage the assets of the wound-up company, investigate the affairs of the company, gather and realise the assets of the company, if necessary, sell off the company's assets, distribute the proceeds, and settle outstanding debts of the company. In this capacity, the liquidator also represents all creditors, balancing their competing claims while protecting their collective interests. However, for creditors to be entitled to recover their outstanding debts owed by the wound-up company, a Proof of Debt ("POD") must be submitted pursuant to the procedure under the Companies (Winding-Up) Rules 1972 ("WUPR"). It is essential to understand the rights and role of a creditor during liquidation and the legal avenues available if a POD is rejected.

What is a Proof of Debt?

A POD is a document submitted by a creditor that quantifies the amount owed by the company. It typically includes supporting documentation to validate the claim, such as invoices, contracts, court orders or bank statements. The liquidator assesses these documents to determine whether to accept or reject the claim by the creditor.

Procedure to Submit Proof of Debt

Where the procedure for POD is concerned, it is provided under Rules 78 to 100 of the WUPR. The process for submitting a POD under WUPR is structured to ensure that creditors can substantiate their claims effectively. The procedure are as follows:

(a) Creditors must first gather all relevant evidence to support their claim. According to Rule 79 of WUPR, creditors must submit an affidavit that verifies the debt. This affidavit should detail the particulars of the debt and refer to supporting documents such as statements of account or court orders that can substantiate the claim.[1]

(b) The affidavit must then be filed by the creditor or by a person acting on behalf of the

creditor, pursuant to Rule 80 of WUPR. If the affidavit is made by a person so authorized, it must include information about that person's qualifications and means of his knowledge.[2] To submit the POD, the affidavit in this context refers to the submission of Form 55 to the liquidator as stated in Rule 81 of WUPR which must be affirmed before a Commissioner of Oath.[3]

(c) Pursuant to Rule 91 of WUPR, the liquidator will set a date (which shall be not less than twenty-one (21) days from the date of the notice), by which creditors must prove their debts or claims. The liquidator must notify creditors through an advertisement in the Gazette in Form 94 and relevant newspapers as well as provide written notice in Form 57 or Form 58 to all the creditors who claim to be a creditor of the company, subject to the knowledge of the Liquidator.[4]

(d) After receiving the POD, the liquidator is required by Rule 92 of WUPR to examine the POD. The liquidator must either admit or reject the POD in whole or in part after examination.

(e) If the liquidator rejects a POD, the liquidator must state its grounds of rejection in writing in Form 59[5] to the creditors. If further evidence is required, they can request additional documentation from the creditors.

Can creditors appeal if their Proof of Debt is rejected?

In cases where a liquidator rejects a POD, creditors have the right to appeal to the court to reverse or vary that decision pursuant to Rule 93 of WUPR. Under this rule, the creditor must give notice of their application to appeal against a decision rejecting a proof before the expiration of twenty-one (21) days from the date of service of the notice of rejection from the liquidator. The court may extend the time but in the absence of any extension, a notice of application for the appeal must be submitted within 21 days.

Further, pursuant to Rule 97 of WUPR, the liquidator would have to file a memorandum of his disallowance of the POD within three (3) days of receiving notice of the creditor's appeal.

The Federal Court case of **Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2023] 3 MLJ 627** emphasised the requirement for the liquidator to comply with mandatory procedures under the WUPR when handling proofs of debt filed by the creditors of a company in liquidation.

(a) Background Facts

The 1st Respondent was appointed as the subcontractor to carry out mechanical and engineering ("**M&E**") works in a construction project in Vietnam. The 1st Respondent in turn, subcontracted its work to the Appellant. When the construction project was suddenly terminated, the architects in charge of the project in November 2000 certified, among other things, the final amount the main contractor had to pay to the 1st Respondent for the M&E works. When the main contractor failed to pay the certified amount, the 1st Respondent sued the guarantor, Gammon Construction Ltd ("**Gammon**") who had guaranteed the main contractor's due performance of the M&E subcontract, for the sum of USD995,879.39.

The 1st Respondent was subsequently wound up and the 2nd and 3rd Respondents (collectively referred to as "**Liquidators**") were appointed as the 1st Respondent's liquidators.

The Appellant lodged a POD dated 28 March 2011 with the Liquidators to claim the sum of USD997,750.70 which includes the outstanding sum of USD995,879.39 due under the subcontract.

Some years later, Gammon settled its suit with the 1st Respondent by paying USD1,215,000 pursuant to a Consent Judgment to the 1st Respondent. Following that payment, the liquidators informed the Appellant that it would be paid a dividend of USD179,075.81 on its POD as the rest of its claimed amount would be deducted to settle a procurement fee of USD445,660.90 (that the Appellant had contracted to pay the 1st Respondent under their subcontract) while a further USD371,142.66 would be deducted to settle interest on the late payment of the procurement fee. Contending that the liquidators were not entitled to make the said deductions on their own, the Appellant sued the 1st Respondent/the liquidators for the full sum set out in the POD in December 2017.

The High Court allowed the Appellant's claim and found that the Appellant is entitled to the sum as claimed in the POD. The Court of Appeal however, reversed the decision and held that the deductions made by the liquidators were proper and valid and that, in any event, the Appellant's POD claim was time-barred as it was based on the November 2000 architect's certificate of payment. Hence, the appeal at the Federal Court.

(b) Salient Issue

Whether the Limitation Act 1953 applies to a POD that has been accepted and not formally rejected by a liquidator?

(c) Decision of Federal Court

The Federal Court decided in favour of the Appellant and held that the Appellant's claim was not time-barred as the Limitation Act 1953 does not apply to a POD that is accepted and not formally rejected by the liquidator.

The Federal Court further emphasised that the liquidator must meticulously examine the POD lodged by the creditor. After having examined the claim together with supporting documents, the liquidator must decide whether to accept or to reject the POD. If he decides to reject, he is legally required under the WUPR to state in writing to the creditor whose claim he has rejected, the grounds for the rejection. Under Rule 92 of WUPR, the Liquidator is required to issue a notice of rejection as prescribed in Form 59.

However, the Liquidators did not comply with the procedures provided under the Rules and instead took steps outside the purview of the law. The Liquidators notified the Appellant they had admitted the POD to the extent of USD179,075.81 but subject to certain deductions, and issued the notice of dividend. The sum of USD179,075.81 was not rejected but deducted. If the intention of the liquidators was to reject the said sum as claimed in the POD then they must specifically state so in the form as prescribed under Rule 92 of WUPR. Thus, such admission amounts to an acknowledgment that if the

Limitation Act applies, it provides for a fresh accrual of action in which case, the claim is not time-barred.

(d) Takeaway

Although the question for determination by the Federal Court is not directly on the compliance of the procedures under the WUPR but whether limitation applies to the POD admitted, the Federal Court did emphasise on the liquidator's statutory duty to adhere to procedures under the WUPR. The WUPR provides clear protocols for accepting or rejecting PODs, and liquidators are legally bound to comply with these mandatory procedures. Once a POD has been accepted and not formally rejected, liquidators cannot later change their decision and invoke a defence of limitation. If a liquidator intends to reject a POD based on limitation, they must clearly and explicitly state this in the formal notice of rejection. In this case, the liquidators' failure to do so suggested that their reliance on limitation was an afterthought.

Conclusion

To conclude, the right to appeal POD rejections is a vital aspect of the liquidation process which safeguards creditors' ability to recover debts. Understanding the legal procedures and rights to challenge a liquidator's decision is essential for creditors to ensure fair treatment and to further verify that the liquidator has complied with statutory obligations.

-
1. Malaysian Department of Insolvency, '8. What is proof of debt?' (Official Portal of Malaysian Department of Insolvency) <<https://www.mdi.gov.my/index.php/home/faqs/104-liquidation-faq/1682-8-what-is-proof-of-debt>> accessed 4 November 2024.
 2. Companies (Winding-Up) Rules 1972, r 80.
 3. Companies (Winding-Up) Rules 1972, r 83.
 4. Companies (Winding-Up) Rules 1972, r 91.
 5. Companies (Winding-Up) Rules 1972, r 92.

Written by:



Nik Amalia Suraya Nik Muhammad Saifuddin
Associate
nikamalia@azmilaw.com



Lim Yu Fang
Trainee Solicitor
limyufang@azmilaw.com

Corporate Communications

Azmi & Associates

25 December 2024