

Collection Profile South Africa

Collecting in South Africa

- Due to financial constraints, most companies pay up to 90 days compared with the average 30 and 60 day terms and conditions which are industry driven. In some cases, small to medium enterprises are taking as long as 120 to 180 days to settle debts.
- South Africa has a court system plagued by inadequate systems, backlogs and general inertia by the clerks that serve within it. This makes the whole process tedious and frustrating for the creditor and their attorney. Unfortunately, this is very often used to the defaulter's advantage to drag matters out for as long as possible.
- All insolvent estates are administered under the control of the Master of the High Court. The liquidation procedures in South Africa are protracted and tedious and they rarely yield any worthwhile dividends. The cost, on the other hand, is relatively low unless an attorney has been involved in the collection prior to the liquidation.

Collection complexity



Complexity relating to

Notable Severe
→

	Notable	Severe
Payments	\$ \$ \$	\$
Court proceedings	⚖ ⚖ ⚖	⚖
Insolvency proceedings	↘ ↘ ↘	↘



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Days Sales Outstanding (DSO): The average terms and conditions in South Africa are between 30 and 60 days and are industry driven.

General information

Availability of financial information

Companies have an obligation to keep all financial statements or related information and records secure. The Companies Act, Act 71 of 2008, clearly sets out who can access this financial information. One also has to keep the PAIA Act (the Promotion of Access to Information Act, Act 2 of 2000) in mind. Legally, they are not obliged to share this information unless ordered to do so by the courts.

For example, where a Company cannot pay the debt and a judgment is obtained leading to the issuance of a Warrant for Execution to attach any property (assets) and if the assets are not sufficient to cover the debt, the creditor is entitled to demand a copy of the most recent annual financial statement. This will need to be made available to the creditor within 5 business days from receipt of the request.

A listed company, however, publishes financials yearly.

Main corporate structures

- Sole Trader/Proprietor: One person owns the business and the law makes no distinction between that person and the business that they are operating. The assets and debts of the person are also assets and debts of the business. Sole traders must refer to their business as 'Name t/a (trading as) business name'.
- Partnership: A business that is owned by between two and 20 partners. As with a sole trader, there are no distinctions between the assets and debts of the individuals and those of the business. It is advisable to have legal agreements in place that establish profit sharing, asset management and actions in the event of a partner wishing to leave.
- Close Corporation /23: A business model allowing up to ten individuals to start a business with limited liability. The assets and debts of the business belong to the Close Corporation rather than to the Members. The suffix 'CC' must be written after the business

name on official documentation. If this is omitted, the law does not see the assets and debts of the business as separate from those of the Members.

- Company: A business model consisting of over ten people, constrained by the laws of the Companies Act. It comprises the owners (or shareholders) and the directors (managers of the organization) and its assets and debt belong solely to the company. The name of the company must always be followed by the suffix 'Pty (Ltd)' and the names of the directors and the registration number must always be included on the company letterhead. The last two digits (/00) of the registration number denotes the 'type/form' the company takes.

Companies can take many forms including:

- State owned company /30
- Private company /07
- Public company /06
- Personal liability company /08
- Non-profit company /21
- External profit company /10
- External non-profit company /21

Regulatory environment

South Africa has a court system plagued by inadequate systems, backlogs and general inertia by the clerks that serve within it. This makes the whole process tedious and frustrating for the creditor and their attorney. Unfortunately this is very often used to the defaulter's advantage to drag matters out for as long as possible.

- Legal practitioners: Advocates can appear in any court, while attorneys / lawyers may be heard in all of the country's lower courts and can apply for the right of appearance in the superior courts.
- Supreme Court of Appeal: Has jurisdiction to hear and determine an appeal against any decision of a high court.
- High Courts: These courts hear matters that are of such a serious nature that the lower courts would not be competent to make an appropriate judgment or to impose a penalty.

- Circuit local divisions: Periodically conduct hearings at remote areas outside the seat of the High Court.
- Regional Courts: The regional courts adjudicate civil disputes.
- Magistrate's Courts: These courts form an important part of the judicial system as it is where ordinary "consumers" (the party to whom the credit facility was granted to - a legal person or a company) come into contact with the justice system daily. This is with a view to widen access to justice as more people will be able to access the Magistrate's Courts, where it is cheaper and faster to obtain legal recourse compared to the High Courts. The aim is to strengthen the independence of the judiciary

- legal person or a company) setting out any changes being made to interest charges.

Debt collection costs

The Act specifies that the collection costs the credit provider incurs when attempting to collect an overdue debt from the consumer cannot exceed the court tariff. In some cases, the court will rule against the creditor (+/-70%), allowing the debtor leniency, stating that costs and interest will be carried by each party. Furthermore, if no contractual agreement exists, collection costs can only be applied if done through an attorney.

Getting Paid

Days Sales Outstanding (DSO)

With the state of the economy at present, domestic debtors are battling with cash availability. This makes it difficult even for large companies to meet the payment terms agreed to on their original credit application forms.

The average terms and conditions in South Africa are between 30 and 60 days and are industry driven. However, due to the financial constraints, the trend in the last few years has most paying up to 90 days. In some cases, the small to medium enterprises are taking as long as 120 to 180 days to settle debts.

Late payment interest

Despite a credit agreement to the contrary, the in duplum rule states once a consumer is in default, debt interest may never exceed the outstanding capital balance owed at the time of default. The interest rate applicable can be debited at any time after the day to which it applies. At least five business days written notice must be given to the "consumer" (the party to whom the credit facility was granted to

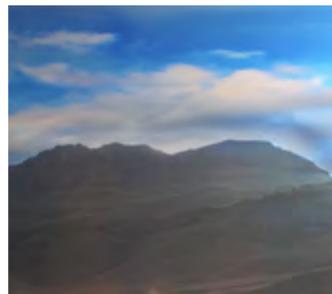
Ownership protection

Although title retention clauses are conceptually very simple, they have become increasingly widely drafted, which has resulted in the courts striking down the clauses. Problems arise where the goods sold are mixed with other goods of a similar nature, so that they are no longer identifiable. In many jurisdictions such an onward sale passes goods title to the subsequent purchaser, and the original seller loses title.

The main purpose of RoT clauses are to ensure that where goods are supplied on credit, if the buyer goes into bankruptcy, the seller can repossess the goods as long as they have not been sold or reworked into other products.

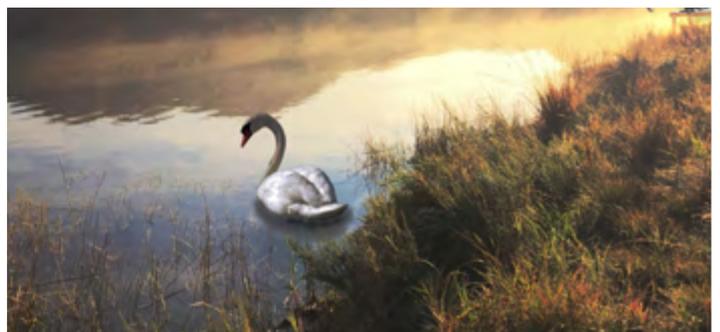
Payments

Electronic Funds Transfer, or EFT, allows the sending of payments electronically and are especially advantageous because the payee receives payment faster than with a paper check, and there is no risk of a check getting lost in the mail. Checks are rarely used if ever in South Africa as most creditors refuse to accept them. Checks can have a stop payment issued against them and the only recourse would be a long legal process of obtaining default judgement (approximately 1 year).



Late payment interest:

Once a consumer is in default, debt interest may never exceed the outstanding capital balance owed at the time of default.



Collecting overdues

Amicable action

Negotiating

Negotiations in South Africa have to be carried out within the parameters of the National Credit Act (NCA) Section 34 (2005) which are to:

- promote responsible credit granting,
- prohibit reckless credit granting,
- provide for debt re-organization in cases of over-indebtedness,
- regulate credit information,
- provide for registration of credit bureau, credit providers and debt counselling services,
- establish national norms and standards relating to consumer credit, and
- promote a consistent enforcement framework relating to consumer credit.

Once the collector has received a claim, they are obliged to stay within the framework as set out in the NCA.

The first letter of demand (LOD) gets sent, quoting section 129 giving the debtor the option to contact a lawyer / attorney / debt counselor or the creditor within a 10 business day period to arrange payment. This letter must be sent via registered mail.

If the debtor persistently defaults or does not respond during the amicable phase, a final demand letter is sent (this can be done electronically) stating the account will be handed over to an attorney within five days

Legal action

Ordinary proceedings

The summons is the document that officially starts a lawsuit. The defendant must be given notice of the claim by having a copy of the summons or notice of motion served on it by the sheriff (a statutory officer empowered by legislation to affect service of court processes).

After service of the summons, the defendant can serve notice to defend. If a notice to defend is not served within the time limit of 10 business days, the claimant can immediately apply to the registrar of the High Court (registrar) for default judgment. If a notice to defend is served but the defendant fails to deliver a plea, the claimant can apply for default judgment.

If a plea is delivered, the defendant can include a counterclaim with it (also known as a claim in reconvention). It must be a claim against the claimant but does not need to be limited to the subject matter of the claimant's claim. If the defendant raises new issues in the plea, the claimant is allowed to reply through a replication. Each party is entitled to further pleadings or replications but a reply is only necessary where the other party raises new issues not previously dealt with.

After close of pleadings, either party can apply for a trial date to be allocated by the registrar. Prior to the trial the parties exchange replies to and requests for further particulars. This is intended to assist the parties to understand each other's pleaded issues and to shorten the hearing.

Before the hearing, the parties must also complete a number of pre-trial procedures, the most important of which is the exchange of relevant documents between the parties (discovery). Additionally, the parties must hold a pre-trial conference at least six weeks before the hearing of the matter, at which they must discuss certain issues with the aim of shortening the hearing. Minutes of the pre-trial conference must be filed with the registrar at least five weeks before the hearing.

If, at any stage, a party does not comply with the High Court Rules, that party's claim or defense may be dismissed.

Necessary documents

As in all cases, whether handing over a claim to Euler Hermes, an attorney or a liquidator, the more documentation supplied the better. However, mandatory documents are: statement of account, invoices, delivery notes / shipping documents, and credit application / order forms. Other documentation would include any correspondence between other third parties, the debtor, the creditor and Euler Hermes.

Time limitations

The Statute of Limitation is three years in South Africa. Once this time period has elapsed the debtor can refuse to pay the outstanding account, unless summons has been issued by the courts prior to the expiration date. The High Court Rules provide time limits for the completion of each stage of the proceedings. The parties do not always adhere to these time limits as they commonly grant each other time extensions within which to fulfil their obligations. These time periods can be further extended by interim applications brought by the parties.

Collection @ Euler Hermes

It is always advised to attempt collection prior to any legal action in order to maximize chances of successful recovery and avoid legal costs and delays. Our key principle is to collect in close proximity to the debtor, using a series of letters, emails and phone calls in the local debtor language. Our World Collection Network of Euler Hermes offices and external providers are experts in professional trade debt collection and negotiation, ensuring positive outcomes while retaining important client relationships. Euler Hermes can handle the complete collections process from amicable, pre-legal action through to judgment and enforcement.

Provisional measures

Creditors may apply to the courts for provisional measures to be put in place while waiting for judgment. There are two kinds of interdicts, namely interim and final. The test is whether or not a clear right exists. Interim interdicts are granted for specific periods of time but may be extended to protect certain rights until action has been finalized. A rule nisi is an interim order granted by a court, often ex parte against whom the relief is being sought, calling upon the person to give reasons on (or before) a date specified to state why a final order should not be granted. Rule nisi are often used in urgent applications. If a clear right is proved, a final interdict may be granted.

Lodging an appeal

Leave to appeal must be sought within 15 court days after the date of delivery of the judgment or order in question. The application for leave to appeal will then be set down and heard by the same judge who presided over the proceedings in question. Where leave to appeal is granted it will either be to the Supreme Court of Appeal (“SCA”) or to a full bench (usually three judges) of the High Court concerned. A further appeal may lie from a full bench to the SCA. As a general rule, leave to appeal will be granted where there is a reasonable prospect of another court coming to a different decision.

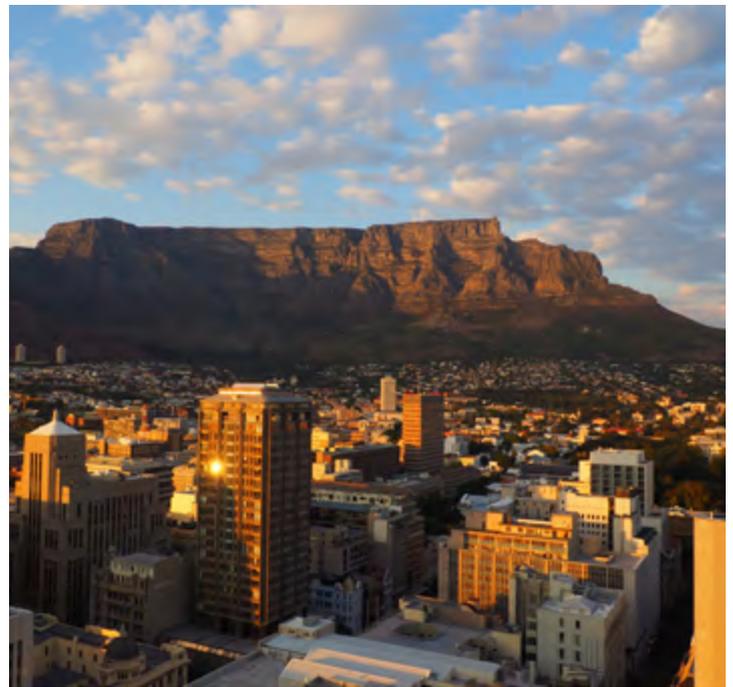
Enforcing court decisions

Obtaining judgment in one’s favor is not necessarily the final step in the litigation process. In many cases the party against whom the judgment is granted (the “judgment debtor”) will willingly comply with the judgment. It may happen, however, that the debtor is unwilling to comply with a judgment. In such a case, it will be necessary to distinguish between a judgment in which the court orders the judgment debtor to perform some act, known as a judgment ad factum praestandum, and a judgment which orders the judgment debtor to pay a sum of money, known as a judgment ad pecuniam solvendam (like an order to pay damages arising out of a delict).

The remedy of the creditor is to follow a process known as “execution,” which is set out in the specific rules of the High Court and Magistrate’s Court. Such procedures provide a mechanism by which court orders may be enforced, and ensure the effectiveness and integrity of the process of judicial decision-making.

In general terms, the process of execution entails the attachment and sale by public auction, by the sheriff of the court, of the property of the judgment debtor in order to realize money and thereby satisfy a money judgment. The property may be moveable, immovable or incorporeal. This procedure amounts to an individual debt-collecting (execution) procedure, since it can operate effectively only where the debtor has sufficient assets to meet the amount of the judgment debt.

If the debtor cannot pay the debt and has no executable assets, the debtor is technically insolvent. In such an instance, creditors will have to revert to other debt-collecting devices, such as an application for the liquidation or winding-up of the judgment debtor (as provided by the Companies Act or the Close Corporation Act).



How long could legal action take?

The length of the action will vary depending upon the complexity of the case. Each step within the legal action framework has specificities attached to it. What has not been taken into account is the time factor of the attorneys working on the matters, drawing up of the said documents and the sheriff serving the summons, judgments and / or the Warrant of Executions. The sheriffs have a 45 business day period in which they can serve the said documents before they expire, making the process quite lengthy. The creditors and attorneys are dependent on the sheriffs to expedite the service of the documents in a timely manner. However, certain regions are slower than others.

How much could this cost?

Legal costs are payable by a client to his attorney for any expenses incurred for such items as telephone calls, faxes, photocopies or payments to the sheriff of the court for service of a document etc. The South African Attorneys Association (SAAA) was formed to underscore the independence of the profession. They issue fee guidelines to the industry. The requirement that legal practitioners must provide the client with clear explanations, advice on the likely success of the matter, an explanation of the cost implications and how the costs are likely to be calculated. This goes a long way to avoid overreaching and disputes about fees.

It is impossible to determine all the likely financial implications of any matter upfront. The words “to the best of his/her ability, in the light of the then available information” is normally inserted when quoting or estimating a cost.

Verbal explanation of every aspect of the cost estimate notice cannot be a requirement in all cases. It would be time-consuming and unnecessary in cases where there is an established relationship between the practitioner and the client. Clients should be allowed to waive this requirement in writing.



Alternatives to legal action

Alternative Dispute Resolution methods (ADR)

ADR does not form part of court procedures and only applies if the parties agree to it.

In arbitration proceedings, evidence is usually given orally. During the arbitration process, parties do make disclosures and such disclosures are not privileged unless they are privileged by the law of general application. The parties usually agree that the arbitrator can rule on the manner in which evidence can be placed before the arbitrator. This enables evidence to be given by witness statements in certain circumstances.

In mediation proceedings, no evidence is usually given, as the procedure is designed to help the parties reach an agreement between themselves. Documents produced or admissions made during mediation proceedings are usually privileged, since they form part of a settlement process and mediation proceedings are usually confidential. Where parties appoint an arbitrator or a panel of arbitrators to make a ruling, it is final and binding.

On account of the time that it takes to get to trial, as well as the appeal procedures involved, arbitration is regarded as a speedy and effective means of resolving disputes.

Foreign forums

Foreign judgments are capable of being executed in South Africa, provided that certain criteria are met.

The procedure is to bring an application to court setting out reasons why the judgment is capable of being executed in the Republic. There has to be justifiable grounds for doing so as well as a consent or a link between the debtor and the jurisdiction of that foreign country. It is unlikely that the courts in South Africa will allow a judgment granted against a local company by a foreign court to be executed on the basis of efficiency or lack thereof of the local court system.

In respect to obtaining judgment against a foreign entity locally and

then executing the same in a foreign territory, the same is possible provided that the country in question has a procedure that will allow it.

Enforcing foreign awards

It is possible to enforce foreign civil judgments in South Africa by registering the judgment with a local court under the Enforcement of Foreign Civil Judgments Act No. 32 1998. However, the scope of this Act is extremely narrow. A foreign judgment is not directly enforceable in South Africa but constitutes a cause of action that will be enforced by South African courts if the following requirements are met:

- Foreign court must have had international competence as determined by South African law;
- Judgment must be final and conclusive and must not have become superannuated;
- The enforcement of the judgment must not be contrary to South African public policy (which includes the rules of natural justice);
- Judgment must not have been obtained by fraudulent means;
- Judgement must not involve the enforcement of a penal or revenue law of the foreign state; and
- Enforcement must not be precluded by the Protection of Businesses Act 99 of 1978.

In South African law, prescription is regarded as substantive; therefore, a South African court seized with the question of whether a claim to the enforcement of a foreign judgment has prescribed will apply the relevant foreign law.

Litigation @ Euler Hermes

Should legal action be necessary, Euler Hermes can provide support throughout the legal process from judgment to enforcement via our World Collection Network of Euler Hermes offices and external providers. Legal action can often be complicated and expensive, so you will be informed of all costs prior to any action and advised on which route is best to take.



Handling insolvent debtors

Judicial management is still a limited option and the threat of liquidation proceedings is often a catalyst to bring the parties to the table to implement a settlement.

Liquidation places a company in financial difficulty under judicial protection. At the date of the liquidation the rights of creditors are frozen to prevent certain creditors from being preferred and/or enhancing their position at the expense of others. Additionally, a liquidator is appointed to realize and distribute the assets to creditors. All insolvent estates are administered under the control of the Master of the High Court. Insolvency in South Africa is primarily governed by the Insolvency Act 24 of 1936 (the Insolvency Act), which governs the sequestrations of the estates of individuals, trusts and partnerships that are insolvent. The winding-up and reorganization of companies is governed by the Companies Act 61 of 1973 (the Companies Act), which incorporates by reference portions of the Insolvency Act in dealing with companies that cannot pay their debts. Close corporations are in turn governed by the Close Corporations Act 68 of 1984. Enquiries or interrogations by trustees or liquidators are convened either in the magistrates' court or under the auspices of a commissioner appointed by the master.



Insolvency proceedings

Out-of-Court proceedings

All liquidations have to be applied for and approved by the courts. The Liquidation and Distribution account is drawn up by the executor / trustee or liquidator and submitted to the Master of the High Court for approval.

Restructuring the debt

Business Rescue aims to do exactly what the name says, to rescue or rehabilitate a company which is under financial distress. A "Business Rescue Plan" must be drawn up by a provisionally licensed business rescue practitioner who possesses the necessary industry knowledge, has the capacity to take on the specific business rescue and has no conflicts of interest with the business. This "Business Rescue Plan" will then be put to a vote by the creditors and once successfully voted in, the business rescue practitioner must implement and oversee the business rescue plan in an attempt to save the company.

This gives the company the opportunity it needs to reorganize and restructure its affairs and to structure a payment scheme with its creditors while continuing to trade as normal.

Insolvency @ Euler Hermes

Euler Hermes works closely with debtors, creditors and lawyers to provide support during insolvency and restructuring processes. With many options available when it comes to insolvency action, we can offer advice on which option is most suitable.

Winding up proceedings

Once a liquidation order is granted by the court, directors are divested of their powers and subsequent unauthorized dispositions of property are void. Creditors cannot initiate proceedings against the company and all proceedings by or against the company are stayed until a liquidator is appointed.

Liquidators must realize the assets of the company and distribute the proceeds to the creditors.

Creditors are dependent on the liquidator to maximize their dividends by ensuring that assets are sold for the highest possible purchase price and by pursuing claims against delinquent directors and other parties who may be liable to the company.

Liquidators act on the direction of creditors, which are given at formal meetings. Urgent directions can be obtained from the court.

Priority rules

Secured creditors rank first on insolvency and are paid from the proceeds of the sale of the secured asset. Where a secured creditor's claim is not satisfied in full, the unpaid balance is considered a concurrent claim (see below, Concurrent creditors).

Preferred creditors are creditors who do not hold security for their claims, but rank above concurrent creditors. They are paid from the proceeds of unencumbered assets in a pre-determined order as set out in the Insolvency Act 1936. Preferent creditors include employees' remuneration (up to a prescribed amount) and the South African Revenue Service. The holder of a general notarial bond is the lowest ranked preferent creditor.

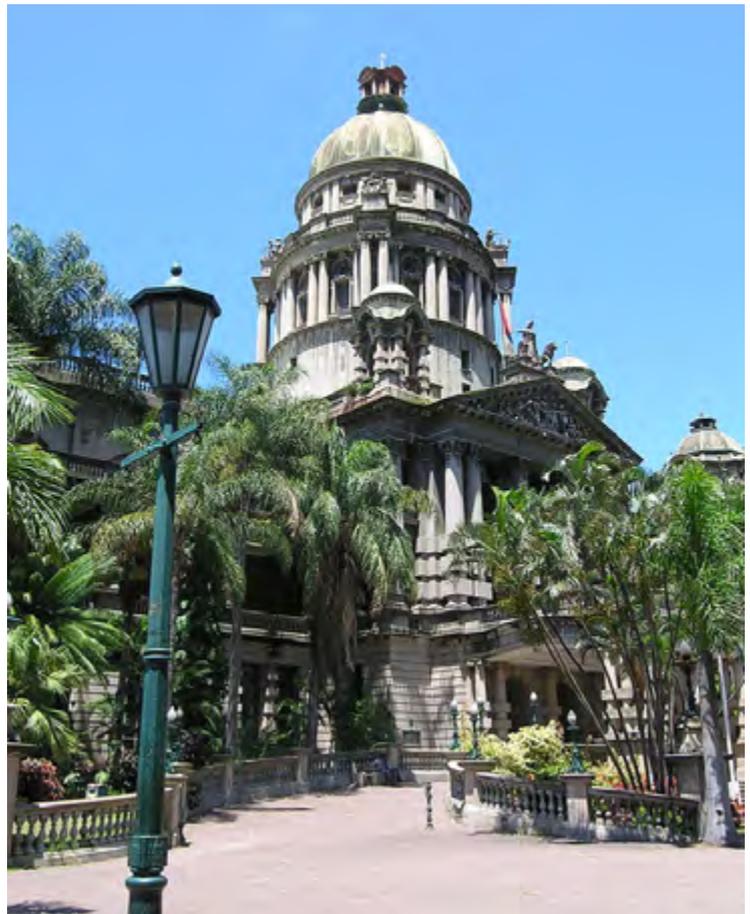
Concurrent creditors are paid from any proceeds of unencumbered assets that remain after preferred creditors have been paid in full. They are paid in proportion to the amounts owed to them.

Cancellation of suspect transactions (clawback)

The South African law allows for a six month period, wherein any payment made to a creditor may be construed as that creditor having received preferential treatment. The liquidator is entitled to request the sum be returned into the estate for distribution to all creditors.

How long could insolvency proceedings take?

A court application can be made and granted urgently, often on the same day if necessary. In normal circumstances, a provisional order can be granted within a week of the issue of the court application, if unopposed. If the application is opposed, it can take months to obtain a hearing date. The exact length of time depends on available court dates. The length of the entire winding-up process depends on the nature of the matter. Dividends to creditors can generally only be paid after confirmation of liquidation and distribution account, which is only prepared once assets are realized and cash is available for distribution. A first liquidation and distribution account can be prepared within six months of the liquidation order. Before this stage, a creditor that holds security can ask the liquidator to pay an advance dividend subject to confirmation of the liquidation account. Subsequent accounts are prepared until all the proceeds of the asset realizations have been distributed.



Necessary documents

The mandatory documents are as follows, and also appear on the claims form sent to all creditors:

- Statements of account,
- Invoices,
- Delivery notes / shipping documents,
- Credit application and
- Order form(s).

However the liquidator / trustee could request specific or other related documentation dependent on the matter.

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