

Asset Discovery Steps to Consider Before and After Legal Proceedings

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1. Introduction

Money is the lifeblood of modern society and the assets that we accumulate by spending money can be seen as metaphorical organs. This is particularly so when it comes to a business where both assets and financial means are used in supporting its operations. With



that in mind, it can be vital for interested collaborators to look into assets of their possible partners before going into ventures with them. This will be doubly vital when litigation becomes necessary and debt recovery processes are underway in the courts.

With that backdrop to consider, this newsletter will look into two situations first, before a business relationship is entered, and second, when the business relationship ended, and a court judgment has been obtained based on sums owed by the counterparty.

2. Finding the property of a counterparty before entering into a business relationship.

Before entering into a business relationship, it can be vital to know the financial health of the opposite party, in the event you need to exercise your legal rights against them. With regard to companies, this can be done in 2 ways, one is by declaring certain assets beforehand. This can be done via providing certain assets as securities, via a due diligence exercise or a simple declaration of assets, to name a few.

Another will be a reference check with the authorities. Regarding the reference checks, the most common government authority that is referred to will be the Companies Commission of Malaysia or Suruhanjaya Syarikat Malaysia (“SSM”). All companies are required to provide reports which details their operations to the SSM, like most company

houses or related authorities in other countries. In the SSM database, it is possible to look out for the details of the assets a company holds in their reports. The main report that will provide such details will be the “Notes of Financial Statements” in their Annual Report to the SSM. In this, it will list out the details of the assets held by the company in question, current assets and intangible assets, to name a few. Such reports are easily accessed via the SSM website with a small fee¹.

This will also state any assets that have been charged and to whom they are charged to. With such information at hand, a party can look into other possible secured creditors and analyze if such a business venture will be worthwhile. Alternatively, if a counterparty is a listed company in the Malaysian Stock Exchange, it is possible to download their Annual Report from the website of the Malaysian Stock Exchange @ Bursa Malaysia which can be done for free.

Unfortunately for individuals, there are strict laws of personal data based on the Malaysian Personal Data Protection Act. Unless the individual counterparty has freely disclosed his or her assets, it makes the exercise of identifying assets somewhat difficult. In that regard, other methods such as payments of deposits, bank guarantees, and credit checking may be necessary before proceeding with businesses with an individual. An insolvency check could be done in ensuring an individual or company is solvent, which can be done online for a small fee².

3. Finding property once judgment is obtained via Judgment Debtor Summons (“JDS”)

In the event a party has to enforce his rights via litigation, the steps in identifying the assets will be different. Once a judgment has been obtained, they would need to rely on enforcement procedures in doing so. When this happens such a party is now a Creditor, while the counterparty is now a Debtor. Sometimes the parties are referred to as a “Judgment Creditor” and “Judgment Debtor” respectively.

The most common method in identifying property of a Debtor after obtaining a judgment is via a JDS. A JDS is a summons issued by the court to compel the Debtor to appear in court to provide information about his assets and how they can be disposed of to settle

¹ <https://www.ssm-einfo.my/>

² <https://www.myeg.com.my/services/mdi>

the judgment debt. This is provided via the Rules of Court 2012, which is read alongside the Debtors Act 1957.

Upon serving the JDS on the Debtor, the Debtor is compelled to appear in court to be examined under oath³. The Debtor will be asked to provide information concerning the Debtor's financial status of as well as the discovery of any property applicable to the payment of debt. If the Debtor is a company, the directors or officers will be required to appear in court on behalf of the company to provide information about the company's income and assets and to explain how they can be used and disposed of to satisfy the judgment debt. Witnesses may be called to confirm the explanations provided. It is possible during this time where the transfer of possession of properties be proposed as a settlement of the judgment or part of it.

In the event the Debtor does not appear in court for hearing despite the JDS being properly served on him, the court has the power to provide an order ("Court order") to which the Debtor be arrested by issuing an order of arrest and have the Debtor brought to the court to be examined⁴ or, make an ex-parte order (an order in the Debtor's absence) against him⁵. Upon the examination (or non-appearance) of the Debtor, the court may order the Debtor to pay the judgment debt either in one lump sum or by instalments⁶.

In the event the Debtor fails to comply with the Court Order despite having sufficient means to satisfy the judgment debt, a notice may be issued against the Debtor requiring the Debtor to be called to court again to explain why he failed to comply with the Court Order⁷. The Debtor will also be required to show cause why he should not be imprisoned for failing to adhere with the Court Order. It should be noted that there are other avenues of debt recovery as well. However, they have not need discussed as the Creditor would need to have known of the existence of such properties beforehand.

4. Conclusion

As highlighted above, a party has a few avenues in identifying the property of its counterparty in the event they would need to exercise their rights towards them. There are also other options that a party (ie: Judgment Creditor) can exercise if said party

³ Section 4(4) Debtors Act 1957

⁴ Section 4(5)(a) Debtors Act 1957

⁵ Section 4(5)(b) Debtors Act 1957

⁶ Section 4(6) Debtors Act 1957

⁷ Section 4(7) Debtors Act 1957

already has information with them pertaining to the counterparty who is now a Judgment Debtor. However, it is also understandable some parties do not intend to provide full and frank disclosure. As such, other steps can be exercised for a party to protect its rights, such as the aforementioned bank guarantee or deposit payments. In the event you would like to know more about the methods in discovering assets or of the other avenues shared above, please do not hesitate in contacting us.

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