

Ease of Doing Business - Enforcing Contracts

*A localised perspective on the efficacy of
enforcing contracts in Malaysia*

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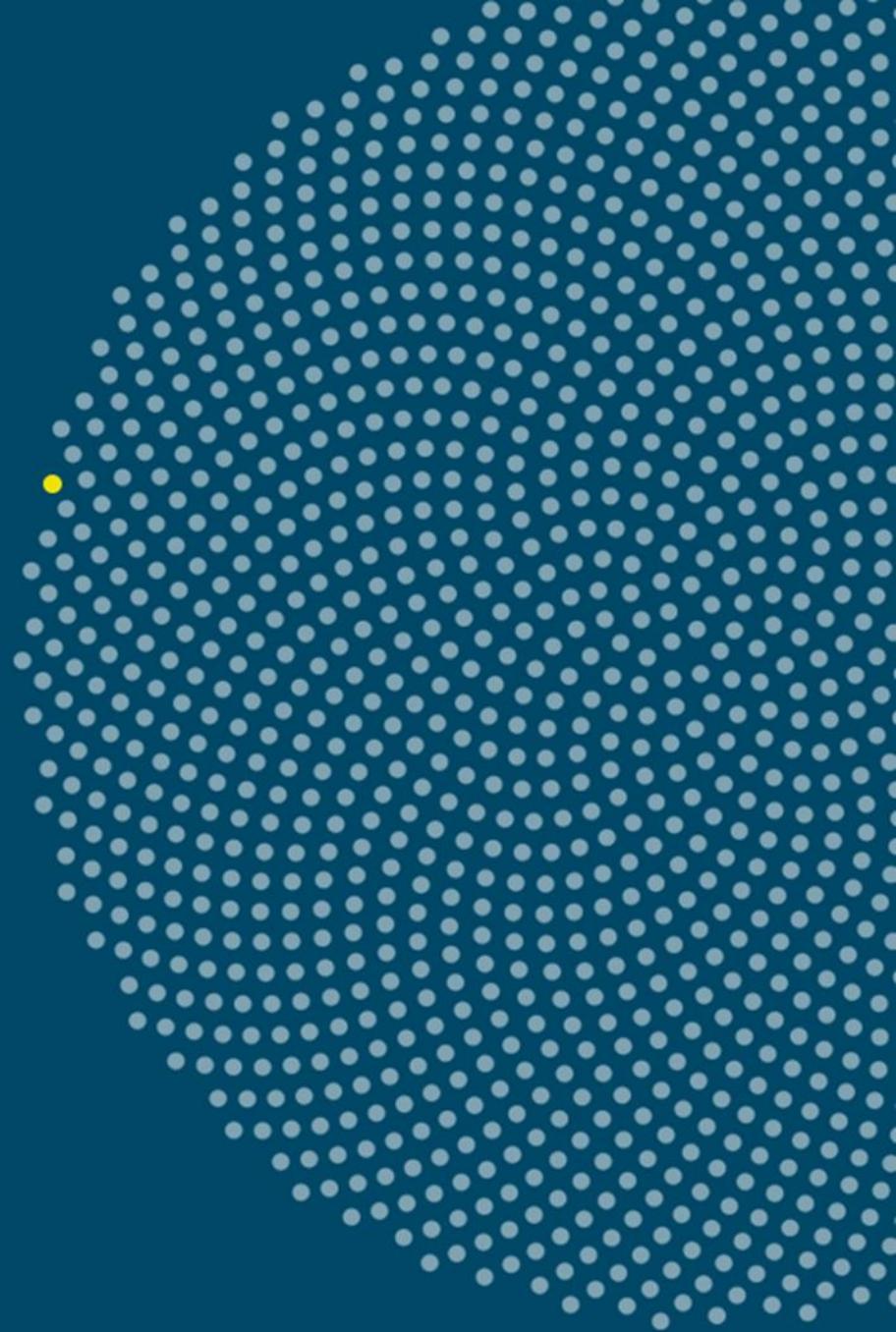


OVERVIEW

- Introduction to the Malaysian Judicial System and its Rules and Regulations
- Methodology adopted in this study
- Provision of a localised perspective of the data used by the World Bank Group (“**WBG**”)
- Current Contracts Enforcement System in Malaysia
- Recommendations on Ways Forward in Malaysia

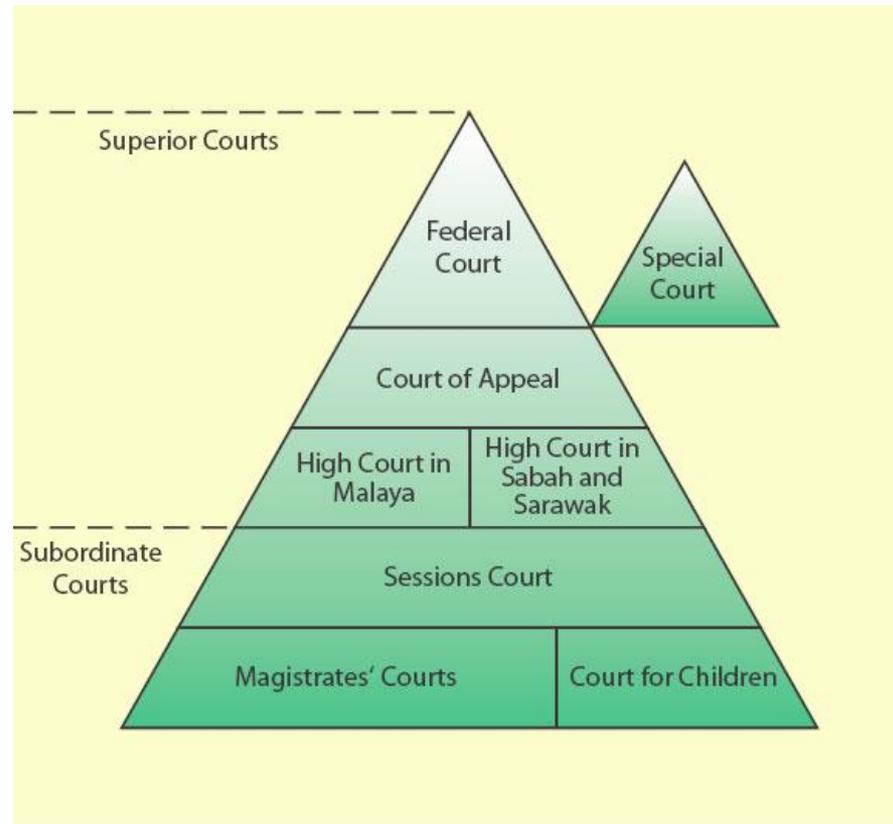
INTRODUCTION

*The Malaysian Judicial
System and Civil
Procedure Rules*



INTRODUCTION TO MALAYSIAN JUDICIAL SYSTEM AND CIVIL PROCEDURAL RULES

- The diagram on the right shows the hierarchy of Malaysian courts



INTRODUCTION TO MALAYSIAN JUDICIAL SYSTEM AND CIVIL PROCEDURAL RULES

Monetary Jurisdictions of First Instance Courts

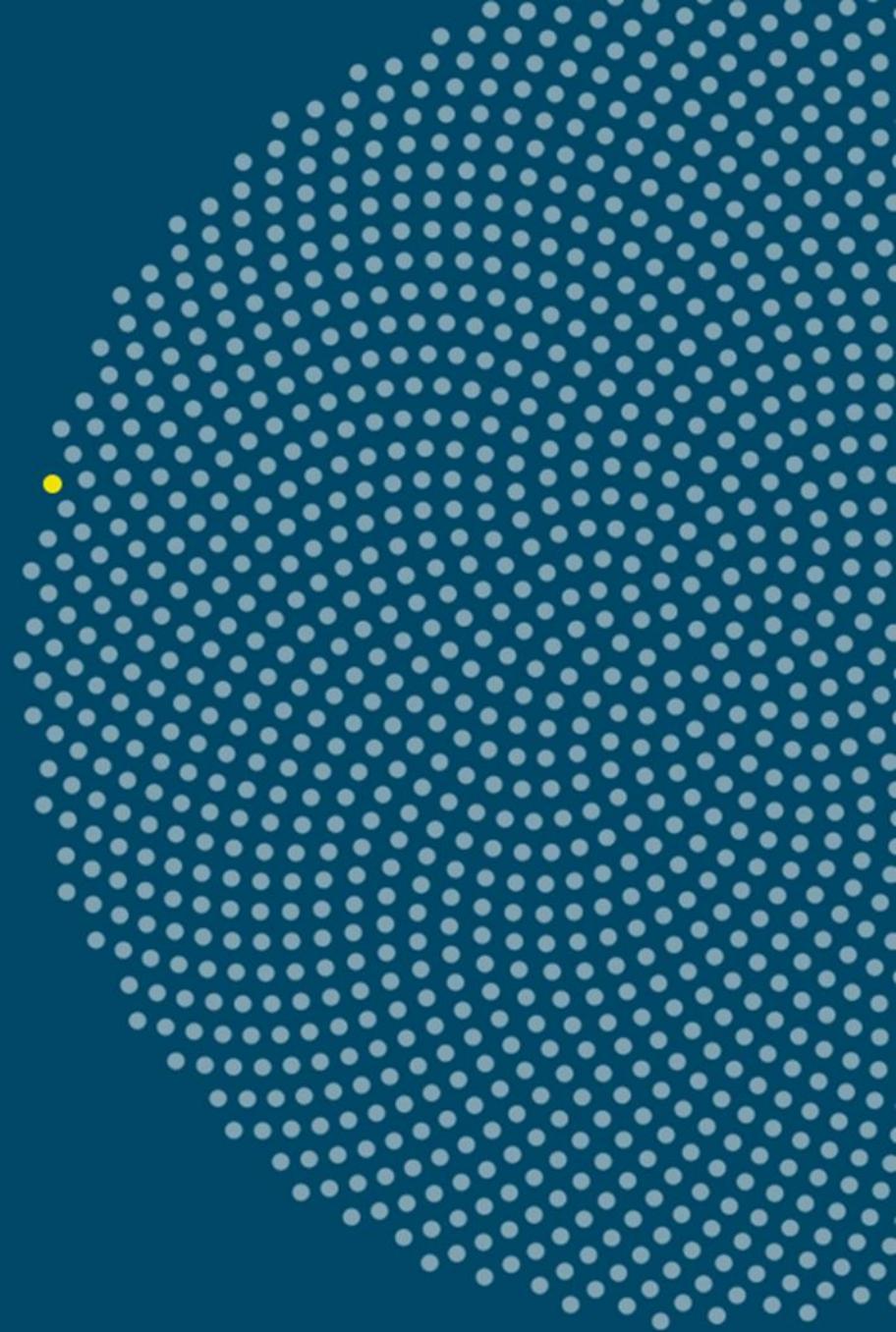
Claim Value (RM)	First Instance Court
RM1 – RM100,000	Magistrates' Court
RM100,001 – RM1,000,000	Sessions Court
RM1,000,001 and above	High Court

- Given the value of claim in the Case Study Assumption designed by the WBG (i.e. RM68,435), the claim would be filed in the Magistrates' Court.

INTRODUCTION TO MALAYSIAN JUDICIAL SYSTEM AND CIVIL PROCEDURAL RULES

- The Civil Procedural Rules that are applicable to the different levels of Courts are:
 - For the Federal Court – the **Rules of the Federal Court 1995**
 - For the Court of Appeal – the **Rules of the Court of Appeal 1994**
 - For the High Court, Sessions Court and Magistrates Court – the **Rules of Court 2012**

THE CASE STUDY AND THE APPLICABLE ASSUMPTIONS



● THE CASE STUDY

The questionnaire for the 'Enforcing Contracts' indicator (“**Questionnaire**”) is premised on the following case study:

- After a domestic company (“**Seller**”) agrees to sell to another domestic company (“**Buyer**”) custom-made furniture, the furniture is delivered to the Buyer.
- The Buyer refuses to pay for the goods as it alleges that they are of inadequate quality. The Seller insists that the goods are of adequate quality and demands payment of the contract price
- Following the Buyer’s refusal to pay, the Seller sues the Buyer. The court decides 100% in favour of the Seller and orders the Buyer to pay the contract price.

THE ASSUMPTIONS OF THE CASE STUDY

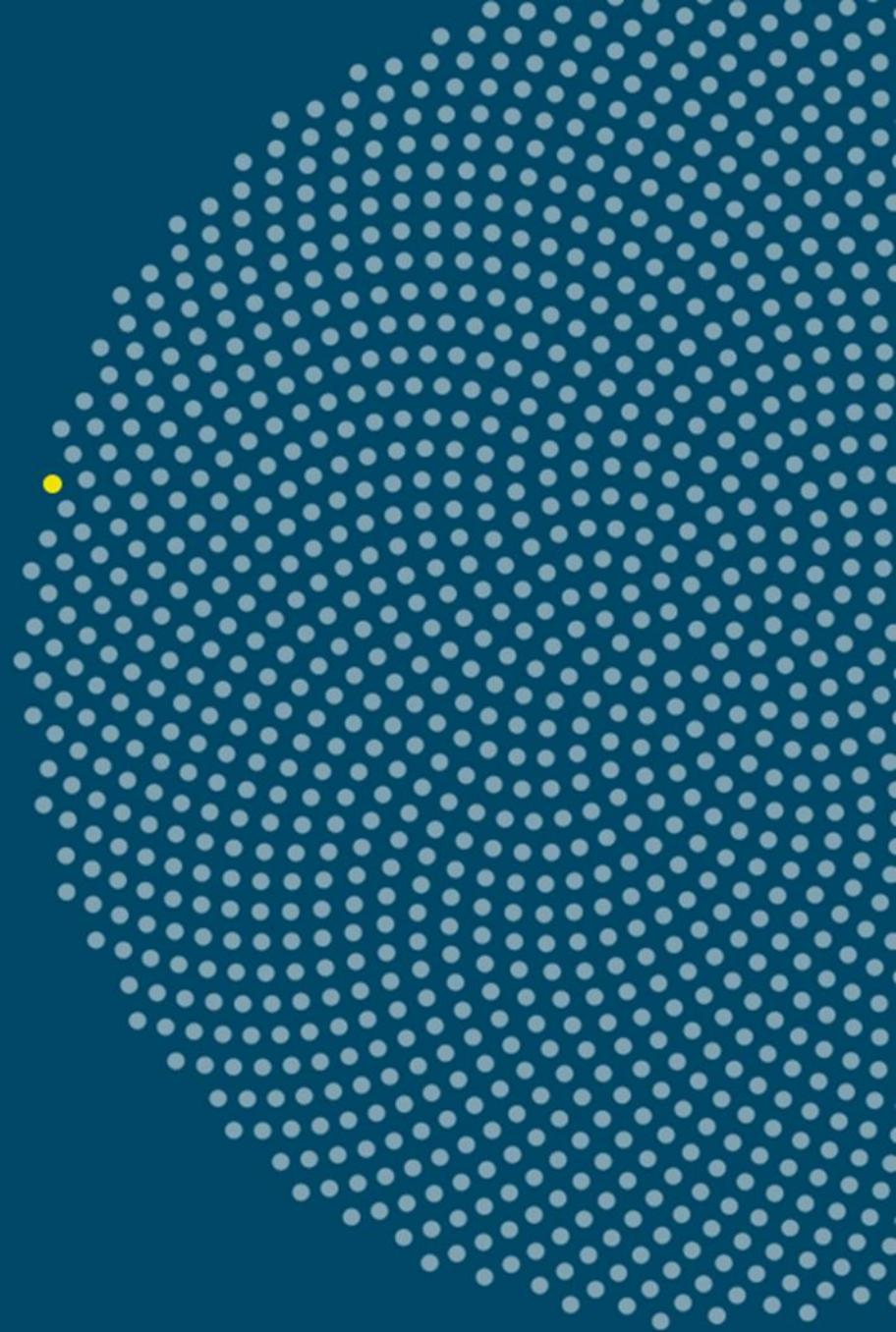
The Case Study assumptions are as follows:

- Both the Buyer and Seller are domestic companies, located in Kuala Lumpur.
- The Seller sues the Buyer to recover the amount due under the contract. The value of the claim is RM68,435.00.
- The court deciding the case is located in Kuala Lumpur and is the first instance court with jurisdiction over commercial claims of RM68,435.
- The Seller fears that the Buyer may dissipate assets, move assets out of the jurisdiction or become insolvent. Therefore, if such a procedure is allowed before the competent court, the Seller requests and obtains attachment of the Buyer's movable assets prior to obtaining a judgment.

THE ASSUMPTIONS OF THE CASE STUDY

- The Buyer opposes the claim, which is then disputed on the merits. An opinion on the quality of the goods delivered by the Seller is required and is given by an expert during the court proceedings.
- The judgment is 100% in favour of the Seller and the Buyer is required to pay the agreed contract price to Seller.
- The Buyer does not appeal the judgment.
- The Seller starts enforcing the judgment when the period allocated by law for appeal expires. It is assumed that the Buyer has no money in his bank accounts. As a result, the Buyer's movable assets are attached and stored in preparation for a public sale.
- A public sale is organised, advertised and held to sell the Buyer's movable assets. The assets are sold and the value of the claim is entirely recovered by the Seller.

METHODOLOGY



● METHODOLOGY UTILISED IN THIS STUDY

- Documentary analysis of the *Doing Business* 2017 data of the ‘Enforcing Contracts’ indicator
- The “**black letter**” analysis in interpreting the law
- Questionnaires and interviews of stakeholders of the enforcement of contracts in Malaysia such as court magistrates, registrars, bailiffs and lawyers
- Our observations of the enforcement of contracts as litigation practitioners in Malaysia

METHODOLOGY AND INDICATORS UTILISED BY WBG

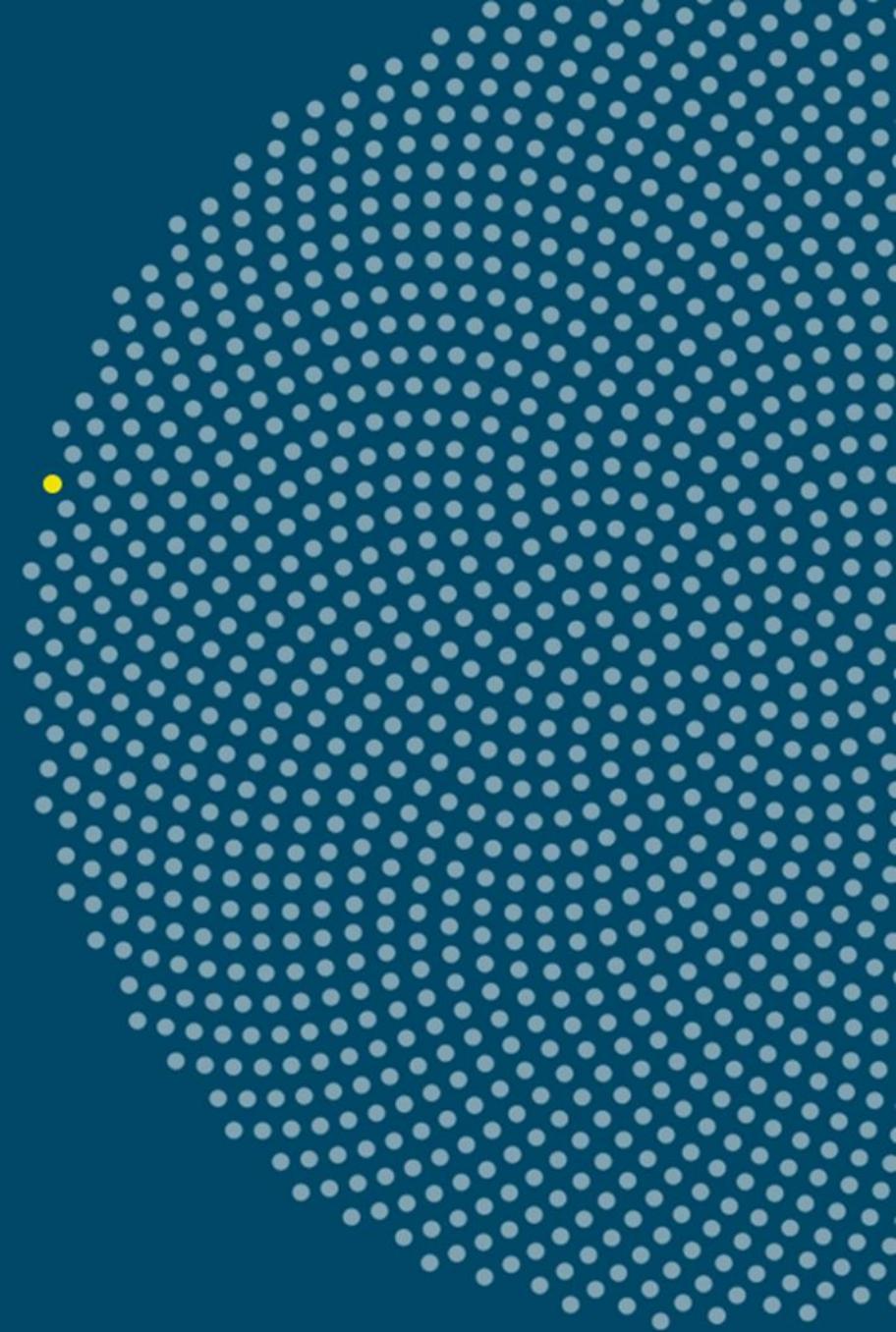
The Reported Data is collated from the responses to the Case Study Assumptions. The WBG then assessed the responses and published the Reported Data based on three criteria:

1. Time
2. Cost
3. Quality of Judicial Process Index

Malaysia's performance for Enforcement of Contracts in 2016 & 2017

Indicator	2016	2017
Time (days)	425	425
Cost (%of claim)	37.3	37.3
Quality of judicial process index (0-18)	12.0	12.0

**LOCALISED
PERSPECTIVE**
of WBG's Reported Data





EXAMINING THE REPORTED DATA IN COMPARISON WITH LOCALISED EXPERIENCE

A. Does the Reported Data reflect the practical reality in respect of Time?



REPORTED DATA ON TIME

- The total number of days reported for the time period between the filing of the suit up to complete enforcement of judgment is 425 days

Stages	Number of days
Filing and service	35
Trial and judgment	270
Enforcement of judgment	120
TOTAL	425



REPORTED DATA ON TIME – Filing and Service

- In the Questionnaire, the “Filing and Service” stage includes pre-filing steps (eg: serving notices of demand, preparation of pleadings (or statements of case) by legal counsel etc.).
- Hence, the 35 days reported for this stage includes pre-filing steps.
- However, the Reported Data did not state that the “**Filing and Service**” stage included pre-filing steps or otherwise.
- Hence, the Reported Data may wrongly suggest to readers that the “Filing and Service” stage alone takes 35 days.



REPORTED DATA ON TIME – Filing and Service

Further, there is a discrepancy between the Reported Data and practical reality.

- Even taking into account the pre-filing steps, it takes only 15 – 17 days to file and serve originating processes, not 35 days.
- By itself, the file and serve originating process only takes less than 1 week.

Practical reality in Kuala Lumpur

Milestones	Number of days
Preparing and Issuing Letter of Demand	5
Gathering evidence and preparing statement of claim	5 – 7
Filing, Extraction and Service of Cause Papers	5
TOTAL	15 - 17



REPORTED DATA ON TIME – Trial and Judgment

The reported number of 270 days for “Trial and Judgment” appears to have been taken from the key performance index (“KPI Period”) for Malaysian Courts to conclude a trial within 9 months.

- However, based on our interview with the KL Magistrates, cases that go to trial generally take approximately 6 months (180 days).



REPORTED DATA ON TIME – Enforcement

The reported number of days for the enforcement phase (i.e. 120 days) does not necessarily represent the typical period taken by the Malaysian Magistrates Courts to complete the enforcement phase; which generally is faster.

- Based on our interviews with the KL Magistrates, it only takes **approximately 75 days** from the date of the judgment after trial to the date of completion of enforcement via Writ of Seizure and Sale for judgment creditor to recover the judgment sum.

Steps	Number of days
Pronouncement of judgment after trial	± 3-5
Filing and extraction of sealed judgment	
Filing of WSS	± 30
Date of enforcement (i.e. seizure of moveable assets)	
Advertisement of auction	± 10
Public auction	
Recovery of monies	± 30
TOTAL	± 75



EXAMINING THE REPORTED DATA IN COMPARISON WITH LOCALISED EXPERIENCE

B. Does the Reported Data reflect the practical reality in respect of Costs?

REPORTED DATA ON COSTS

- A comparison between the Reported Data and Practical Reality is set out below:

Costs	Percentage of claim value (RM68,435) - Reported Data	Percentage of claim value (RM68,435) - Reality
Attorney fees	30% (RM20, 530)	± 22%-25%*
Court fees (up to judgment)	1.1% (RM753)	± 0.44% (less than RM300)
Enforcement fees	6.2% (RM4,243)	± 6.2 %

*Based on a survey answered by litigation practitioners practicing in Kuala Lumpur, the average attorney fees range from RM15,000 to RM17,000.

REPORTED DATA ON COSTS

Breakdown of Court Fees (Reality)

Court Fees (i.e. filing fees)	(RM) (Rules of Court 2012)
Writ of Summons	100
Praecipe	8 (Item 33)
Pleadings (Statement of Claim & Reply to Defence)	16 (8 x 2)
Witness Statements	16 (8 x 2)
Judgment	80
Agreed facts	8
Issues to be tried	8
Bundle of documents	24
Summary of case	8
Total	268

EXAMINING THE REPORTED DATA IN COMPARISON WITH LOCALISED EXPERIENCE

C. Does the Reported Data reflect the practical reality in respect of Judicial Quality?



REPORTED DATA ON JUDICIAL QUALITY

- Quality of Judicial Processes Index for Malaysia (Score: **12 out of 18**)
- 4 factors considered by the World Bank:
 1. Court structure and proceedings
 2. Efficiency of Case Management
 3. Court Automation
 4. Availability of Alternative Dispute Resolution

1. Court structure and proceedings – Availability

Pre-trial Attachment

- Malaysia scored no points on the Question of whether pre-trial attachment is available in Malaysia.
- The data reported (i.e. “No” to the Question) is incorrect because:
 - section 19 of the Debtors Act 1957 provides that upon commencement of Civil Action, the Plaintiff may make an application to the Court for pre-trial attachment of assets
 - Section 99A and paragraph 10 of the Third Schedule of the Subordinate Courts Act 1948 provides that the court has jurisdiction to order the attachment and sale of any property of any person whom it might commit to prison
 - The procedure for pre-trial attachment is found in Order 74 of the Rules of Court 2012

● 2. Efficiency of Case Management – Time Standards

- Malaysia scored no points on the question of whether there are time standards (or specific deadlines) set for at least 3 court events.
- This result is based on incorrect data because Malaysia has laws and regulations setting the time standards **for 5 out of the list of 6 'court events'** set out in the Questionnaire, as can be seen in the table in the following slide:



Whether Time Standards Set For Court Events

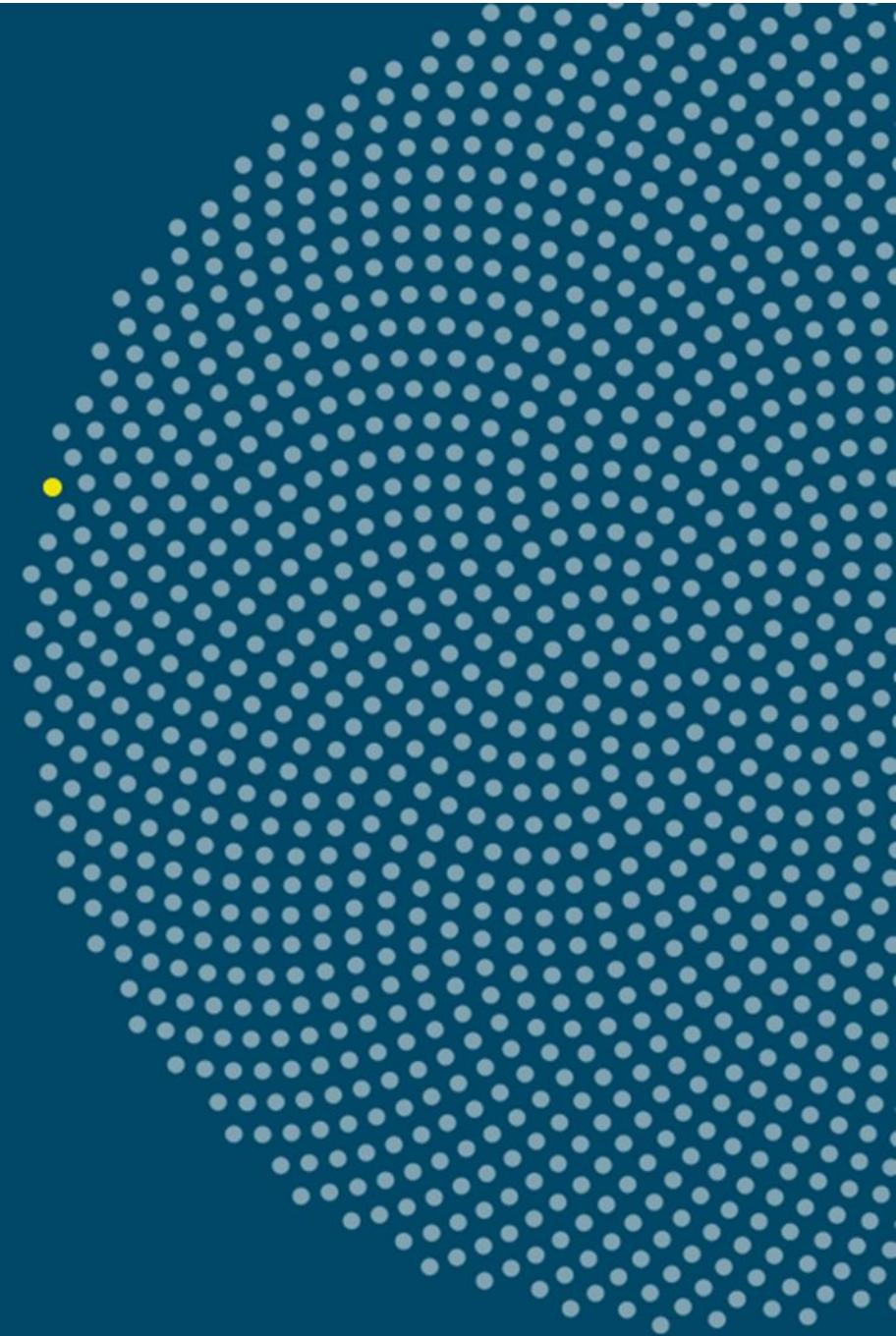
Court Events	Whether Malaysia has laws and regulations	Relevant Laws and Regulations
Service of Process	√	Order 10 Rule 1
First Hearing	√	Paragraph 8 of the Chief Justice's Practice Direction No. 2 Year 2014
Filing of Defence	√	Order 18 Rule 2 of the Rules of Court 2016
Completion of Evidence Period	√	Paragraph 6 of the Chief Justice's Practice Direction No. 2 Year 2014
Time for the expert to deliver his opinion	X	
Deadline to submit final judgment	√	Paragraph 4 of the Chief Justice's Practice Direction No. 1 Year 2008

3. Court Automation – Publication of Judgments

- Malaysia only scored 0.5 out of 1 point for “Court Automation – Publication of Judgments”, because not all judgments at all court levels are published (Magistrates’ and Sessions Courts do not publish their judgments).
- However, non-publication of judgments of the Magistrates’ Courts may be justified because:
 - In line with our system which adopts the doctrine of stare decisis, judgments of Magistrates Courts are not binding precedents and are not required for the purpose of any appeal to this Superior Court.
 - Magistrates Courts judgments may still be obtained by the public by carrying out a file search on the courts’ official website.

CURRENT SYSTEM IN PLACE IN MALAYSIA

Enforcement of contracts

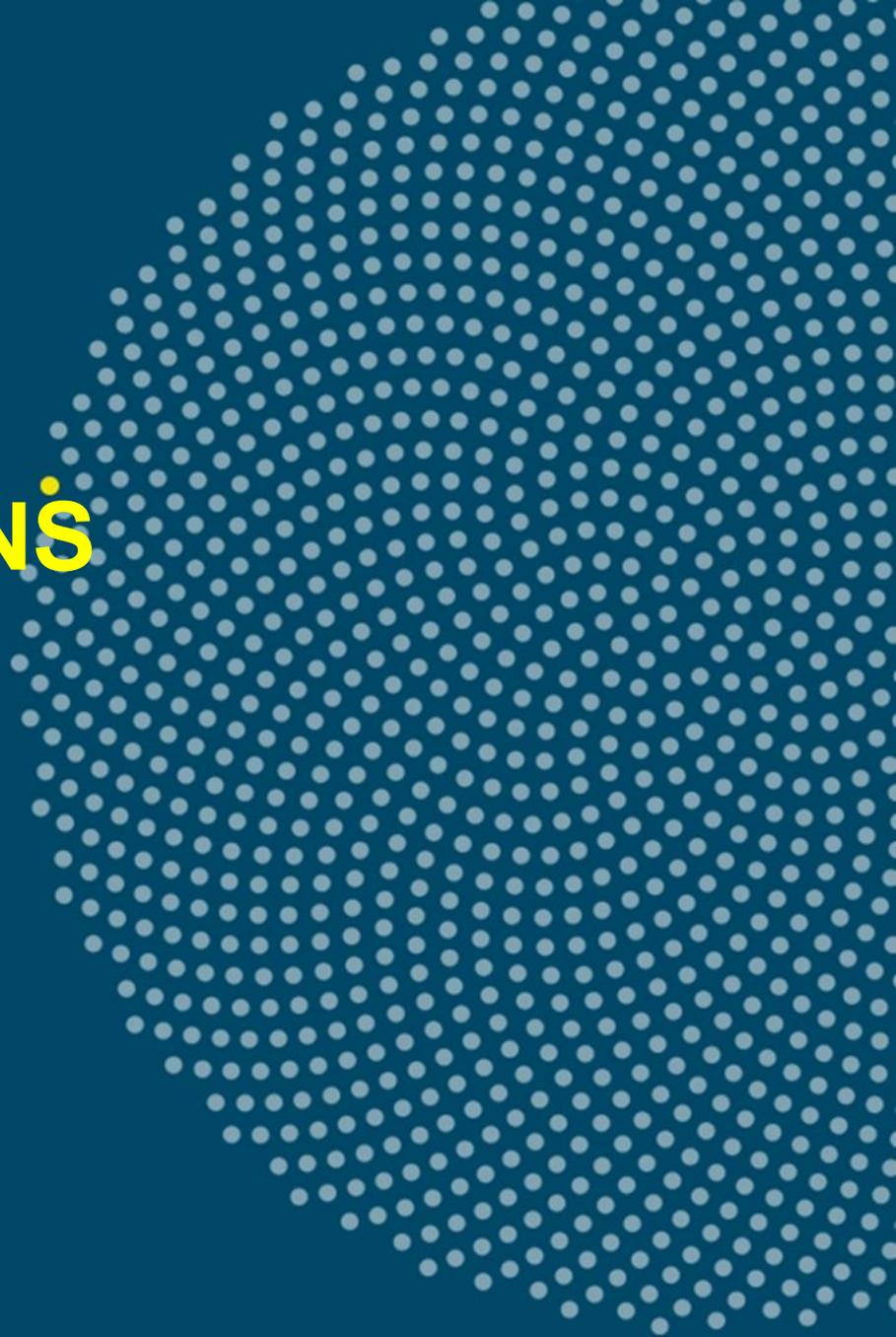


CURRENT SYSTEM IN PLACE IN MALAYSIA

- **Case Management and Tracking System**
 - Cases are divided into 3 different tracks by the Court to better manage them. The 3 tracks are cases that require oral evidence and therefore trial, cases that only require hearing based on review of documents and cases that develop from the cases that require only documents into those that require trial.
- **E-filing system**
 - An electronic system that facilitates registration of cases and filing of documents online
- **Case Management System (CMS)**
 - Electronic system for the recording and storage of information used by the Court
- **Telephonic and Video Conference Case Managements**
 - Case Management by way of telephone or video conferences
- **Queue Management Systems (QMS)**
 - Electronic system that records attendances of lawyers and micro-manages time for case managements.
- **E-Cause List**
 - Enable parties to obtain information on matters listed for the day online
- **Case Recording and Transcribing (CRT)**
 - Audio and Video recording of proceedings in court

RECOMMENDATIONS

on ways forward for Malaysia



SUGGESTED REFORMS FOR IMPROVEMENT

Full Court Automation

- Introduction of an e-service system
 - To facilitate and expedite service of originating processes, especially outside Kuala Lumpur.

Fast Track Procedures

- Introduction of “Fast Track” option to individual litigants and corporate litigants with straightforward claims. The “Fast Track” option shall include, *inter alia*, standardized directions, limited or no pre-trial hearings and limited to a one day trial
 - Eg. Fast Track Procedures in England and Wales (Civil Procedure Rules 1998, Rule 28)

Procedural Reforms

- Introduction of practice directions to regulate the Courts’ discretion in granting adjournments
- Regulation on the maximum number of adjournments allowed by the Courts

● SUGGESTED REFORMS FOR IMPROVEMENT (cont'd)

Introduction of uniform lawyers' fees

- Introduction of uniform, or a standard guideline of, lawyers' fees for straightforward cases
 - Alternatively, make regulations that provide for default uniform scale of lawyers' fees, where fees are not agreed on earlier
 - Should be implemented in collaboration with the introduction of Fast Track Procedure (which can lead to further cost saving for the litigants)

Online Dispute Resolution

- Introduction of a forum that utilises different electronic media
- Specifically handles cases that do not require oral evidence

Equipping the Court Enforcement Officers

- Adequately equip and train bailiffs to deal with situations during enforcement swiftly and safely despite meeting any resistance
- Bailiffs' powers under the Courts of Judicature Act 1964 to use reasonable force in carrying out their duties is insufficient to deal with practical hindrances

● SUGGESTED REFORMS FOR IMPROVEMENT (cont'd)

Establishment of an independent Focus Group to Assist in WBG's Survey

- Our findings show that the Reported Data is not accurate reflection of real situations.
- The Focus Group should be formed and tasked to assist the World Bank in accessing a representative cross-section of participants to provide the relevant insight and information for WBG's studies



CONCLUSION - TAKE AWAY POINTS

- The Reported Data is a helpful guide for investors who intend to do business in the various economies. Hence, the objective approach taken is understandable.
- However, as a result of the objective approach and the need to minimise subjective elements peculiar to the Malaysian legal process and Court system, there are localised elements in Malaysia which could not be captured by the Questionnaire and the Reported Data.
- Be that as it may, there remains opportunity and room for improvement which is certainly the common goal of all stakeholders.



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Thank you! •

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