

Digital Business 2022

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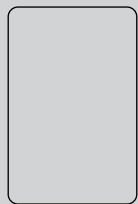
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Digital Business

2022

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Samuel G Kramer
Baker & McKenzie

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Digital Business*, formerly *e-Commerce*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Turkey and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Samuel Kramer of Baker & McKenzie LLP, for his assistance with this volume.



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LEGAL AND REGULATORY FRAMEWORK

Government approach

1 | How can the government's attitude and approach to internet issues best be described?

The Malaysian government acknowledges the need to address internet issues (low internet speed, cybercrime, illegal internet content) and has been taking active steps and measures to address the same, for example:

- expanding the coverage and quality of internet in Malaysia through its national broadband initiatives;
- taking proactive steps in dealing with cybercrime related complaints; and
- taking steps to curb illegal or prohibited content in Malaysia (ie, by blocking illegal websites (gambling sites etc).

Legislation

2 | What legislation governs business on the internet?

There is no one single piece of legislation in Malaysia that specifically governs business on the internet. Business on the internet is governed by a number of different pieces of legislation under Malaysian law, namely and primarily (non-exhaustive):

- the Electronic Commerce Act 2006;
- the Consumer Protection Act 1999 and Consumer Protection (Electronic Trade Transactions) Regulations 2012;
- the Contracts Act 1950;
- the Trade Descriptions Act 2011;
- the Sale of Goods Act 1957;
- the Personal Data Protection Act 2010; and
- the Communications and Multimedia Act 1998.

Each of the above governs different aspects of the business on the internet, the applicability of which may depend on the nature of the business on the internet (eg, the Consumer Protection Act 1999 only governs the supply of goods and services to consumers and will not be applicable to a business-to-business online transaction).

Regulatory bodies

3 | Which regulatory bodies are responsible for the regulation of e-commerce, data protection and internet access tariffs and charges?

The regulatory bodies are:

- in respect of e-commerce transaction, primarily the Ministry of Domestic Trade and Consumer Affairs;
- in respect of personal data protection, the Department of Personal Data Protection; and

- in respect of internet access tariffs and charges, the Malaysian Communications and Multimedia Commission.

Jurisdiction

4 | What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions or disputes in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

In determining the jurisdiction for internet-related transactions or disputes, the Malaysian courts may consider the following:

- the choice of law in the terms governing the transaction (having regard to the doctrine of freedom of contract);
- the physical presence and business location of the seller;
- the place of performance of the contract;
- the location in which the services are being provided or the goods are being manufactured or supplied;
- whether the laws governing the transactions or disputes have extra territorial effect; and
- the other factors in determining the forum for which the transaction has the closest and most real connection.

Establishing a business

5 | What regulatory and procedural requirements govern the establishment of digital businesses in your jurisdiction? To what extent do these requirements and procedures differ from those governing the establishment of brick-and-mortar businesses?

When embarking on a digital business, it is good to identify the nature of the business and activities which will be transacted digitally. The legislation and regulations which will apply to such business or activities (in its non-digital form) will have to be adhered to, notwithstanding the fact that the business or activities will be carried out digitally. If the business or activities relate to financial services, to give an example, all activities related thereto, including the promotion thereof, will have to comply with legislation and regulations that apply to such financial services (even though it is conducted digitally).

CONTRACTING ON THE INTERNET

Contract formation

6 | Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Yes. A contract is formed and concluded electronically when the contracting party affixes an 'electronic signature' on the electronic

contract, which may consist of any letter, character, number, sound or any other symbol or any combination thereof.

'Click-wrap' contracts are a form of electronic message (information generated, sent, received or stored by electronic means) and its enforceability is statutorily recognised therefore, no specific requirement needs to be met.

Applicable laws

7 | Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

Yes. The relevant laws are the Digital Signature Act 1997 and the Electronic Commerce Act 2006. These laws do not distinguish between business-to-consumer and business-to-business contracts.

Electronic signatures

8 | How does the law recognise or define digital or e-signatures?

A digital signature is a transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine:

- whether the transformation was created using the private key that corresponds to the signer's public key; and
- whether the message has been altered since the transformation was made.

An e-signature can be in the form of any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature.

Data retention

9 | Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

Yes. Electronic contracts must:

- be retained in the format in which it is generated, sent or received, or in a format that does not materially change the information contained in the electronic message that was originally generated, sent or received;
- be accessible and intelligible so as to be usable for subsequent reference; and
- identify the origin and destination of the electronic message and the date and time it is sent or received.

Breach

10 | Are any special remedies available for the breach of electronic contracts?

No. Any breach of electronic contracts will be given the same treatment as a physical or non-electronic contract.

SECURITY

Security measures

11 | What measures must be taken by companies or ISPs to guarantee the security of internet transactions? Is encryption mandatory?

Companies and ISPs licensed pursuant to the Communications and Multimedia Act 1998 (CMA) by the Malaysian Communications and

Multimedia Commission (MCMC) may be required to comply with technical codes prepared by the technical standards forum or the MCMC as a licence condition that mandates encryption. Other than CMA licensees, guarantees by companies as to the security of internet transactions are mostly in the form of contractual representations and warranties.

Government intervention and certification authorities

12 | As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

In the specific case of offences under the Digital Signatures Act 1997 (DSA), police officers conducting a search (with a warrant) or a search and seizure (without a warrant) are to be given access to computerised data whether stored in a computer or otherwise, including being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of computerised data. Certification authorities for digital signatures using public-key cryptography are to be licensed pursuant to the DSA by MCMC. Laws as to their liability are contained in the DSA.

Electronic payments

13 | Are there any rules, restrictions or other relevant considerations regarding the use of electronic payment systems in your jurisdiction?

Yes. The operation of payment systems (including electronic payment systems) in Malaysia requires the Central Bank of Malaysia's prior approval. It is common that e-commerce platform owners engage and contract with the existing approved payment system operators (eg, Visa or MasterCard) in Malaysia to facilitate payments and funds transfer with its customers over the internet.

14 | Are there any rules or restrictions on the use of digital currencies?

Yes.

E-money

The issuance of electronic money (prescribed as a 'designated payment instrument' pursuant to the Malaysian Financial Services Act 2013) requires the prior approval of the Central Bank of Malaysia. Electronic money having the following elements will fall under the ambit of the Financial Services Act 2013: (1) a payment instrument that stores fund electronically in exchange for funds paid to the issuer; and (2) such payment instrument is able to be used as a means of making payment to any person other than the issuer.

Cryptocurrency

Cryptocurrency has yet to date to be recognised as a legal tender in Malaysia. The Central Bank of Malaysia is of the view that:

Cryptocurrencies are not suitable as a general payment instrument as they do not exhibit the universal characteristics of money and face some limitations, including price volatility and vulnerability to cyber threats. Accordingly, digital assets are not a payment instrument that is regulated by the Central Bank of Malaysia and does not constitute money that is legally accepted for the exchange of goods and services (not a legal tender) in Malaysia.

DOMAIN NAMES

Registration procedures

15 | What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

MYNIC is the official .MY domain registry recognised by the Internet Corporation for Assigned Names and Numbers (ICANN), which administers the registration of domain names. Registration of .MY domain names will be via MYNIC's official resellers.

It is not possible to register a country-specific domain name without having a presence in Malaysia. Entities looking to register a country-specific domain name need to be incorporated in Malaysia, or if it is a representative or regional office, it must be supported by an official letter from the Malaysian Ministry of International Trade and Industry showing the registration of the representative or regional office. If it is a foreign office, it must be supported by an official letter from the Malaysian Ministry of Foreign Affairs regarding the approval of the setting up of a foreign office.

Rights

16 | Do domain names confer any additional rights beyond the rights that naturally vest in the domain name?

No additional rights are conferred beyond the rights that naturally vest in the domain name.

Trademark ownership

17 | Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Yes. Where an owner of a trademark can successfully prove (1) that the disputed domain name is identical or similar to a trade or service mark of the said owner, and (2) that the 'pirate' registrant registered or used the disputed domain name in 'bad faith', subject to the 'pirate' registrant proving its rights and legitimate interests in the disputed domain name, the registration of the disputed domain name will be transferred to the owner or deleted.

Dispute resolution

18 | How are domain name disputes resolved in your jurisdiction?

The Malaysian Domain Name Dispute Resolution Policy (governs the terms of resolving a dispute between the respondent of a .my domain name and the complainant over the respondent's registration or use of a domain name, or both.

Generally, where a complainant can successfully prove (1) that the disputed domain name is identical or similar to a trade or service mark of the complainant, and (2) that the respondent registered or used the disputed domain name in bad faith, subject to the respondent proving its rights and legitimate interests in the disputed domain name, the registration of the disputed domain name will be transferred to the complainant or deleted.

ADVERTISING

Regulation

19 | What rules govern advertising on the internet?

The rules, legislation and self-regulatory codes governing advertising on the internet in Malaysia includes (among others):

- the Content Code registered with the Communications and Multimedia Commissioner;
- the Consumer Code registered with the Communications and Multimedia Commissioner;
- the Communications and Multimedia Act 1998;
- the Consumer Protection Act 1999; and
- the Trade Descriptions Act 2011.

In addition to the above, the advertisements relating to specific products (eg, advertisements relating to medical products, treatment and facilities and food and advertisements involving professional like lawyers and doctors) may be governed under specific legislation.

Definition

20 | How is online advertising defined? Could online editorial content be caught by the rules governing advertising?

The term 'advertisement' is widely defined in most of rules. Despite that, none of the definitions explicitly include editorial content. Accordingly and considering the ordinary meaning of 'editorial content', it may be argued that 'editorial content' is distinguishable from an 'advertisement' and therefore not caught by the rules to the extent such rules are applicable to advertisements (depend on the construction and nature of the editorial content).

Misleading advertising

21 | Are there rules against misleading online advertising?

Yes. The examples of rules against misleading online advertising in Malaysia include:

- The Consumer Protection Act 1999, which prohibits bait advertising and false or misleading statement and conduct. The Consumer Protection Act 1999 applies to business-to-consumer transactions.
- The Trade Descriptions Act 2011, which prohibits false trade descriptions and false or misleading statements (including statements in any advertisement through electronic means), conduct and practices in relation to the supply of goods and services generally.
- The Communications and Multimedia Act 1998, which prohibits the provision of any content which is indecent, obscene, false, menacing or offensive in character with the intent to annoy, abuse, threaten or harass any person. This statutory obligation is imposed on a content applications service provider or other person using a content applications service.
- The Content Code, which prohibits misleading advertisements among others. The Content Code (voluntary in nature) states that advertisers must hold documentary evidence to prove all claims made in an advertisement whether direct or implied that are capable of objective substantiation. Claims that have not been independently substantiated should not exaggerate the value, accuracy, scientific validity or practical usefulness of the product advertised. It generally applies to advertisements communicated electronically.
- The Consumer Code, which is a voluntary code established under the Communications and Multimedia Act 1998 to protect the consumers in relation to telecommunications services. The Consumer Code provides that a telecommunication service provider must not make a savings claim in advertising materials (including website materials) unless it is true and if each reasonable inference from the advertising materials as to savings can be substantiated. Savings, qualifiers and disclaimers should be used, where applicable, in compliance with the Consumer Code.

Restrictions

22 | Are there any products or services that may not be advertised on the internet?

Yes. The advertisements relating to the following non-exhaustive list of products or services are generally unacceptable:

- cigarette, tobacco and its accessories;
- marriage agencies and friendship clubs;
- the occult and fortune tellers;
- unlicensed employment agencies;
- any form of gambling (betting and gambling tips);
- clothing that is printed with words or symbols that have an inappropriate message;
- scenes that are indecent, sexually explicit or impolite;
- pornography;
- pigs, pork products and their derivatives;
- betting and gambling;
- fire crackers;
- banned items under the Postal Services Act 1991 (for the purpose of cheating or misleading);
- death notices, funeral and burial monuments;
- disco scenes; and
- slimming products unless approved by the Medicine Advertisements Boards.

Advertisements of specific services or products (on the internet or otherwise) may be regulated under specific legislation.

Hosting liability

23 | What is the liability of content providers and parties that merely host the content, such as ISPs? Can any other parties be liable?

The general rule is that the content providers should be liable for the published contents. The concept of innocent carrier embedded in the Content Code provides that any services providers providing access to any content but have neither control over the composition of such content nor any knowledge of such content is deemed an innocent carrier for the purpose of the Content Code. An innocent carrier is not responsible for the content provided. Despite the foregoing, it is pertinent to note the following:

- the Communications and Multimedia Act 1998 indicates that it is the responsibility of the content applications service provider (internet content hosts and internet access service providers) or other persons using a content applications service (the website operator) to ensure that content provided is not indecent, obscene, false, menacing or offensive in character with the intent to annoy, abuse, threaten or harass any person; and
- recent development in Malaysian case laws suggest that a platform owner that merely facilitates content may be held responsible for the content facilitated in certain circumstances. It will be interesting to observe the application of this recent development to the advertising industry.

FINANCIAL SERVICES

Regulation

24 | Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

The advertising or sale of financial services products to consumers or to businesses, via the internet, are regulated if the products fall within

the purview of the relevant financial services legislation or regulation (namely, the Financial Services Act 2013, the Capital Markets and Services Act 2007, the Moneylenders Act 1951 and its related regulations).

DEFAMATION

ISP liability

25 | Are ISPs liable for content displayed on their sites? How can ISPs limit or exclude liability?

An ISP that merely provides network access and has no knowledge and no part to play in the contents that pass through its system is generally considered a 'mere conduit' and is not commonly held liable for the contents on their websites.

A court has recently held an online news portal guilty of contempt for comments posted by third parties although they were removed promptly once the offensive statements were known. This decision imposed an onerous burden on what would traditionally be regarded as mere conduits willing to comply with the flag and takedown process. The decision is likely, however, to only affect online intermediary platforms that have editorial control over third-party comments. The case can be distinguished and on balance, should not affect the liability of ISPs that have no control over third-party user content.

Taking the cue from this case, ISPs that may nevertheless be concerned to limit liability may consider introducing strict filter systems that detect offensive contents and ensure that it is prompt in removing any offensive contents once it has knowledge of them.

Shutdown and takedown

26 | Can an ISP shut down a web page containing defamatory material without court authorisation?

Although technically, an ISP may do so, depending on its policy and the terms entered with its users, this is not commonly undertaken. Section 263(2) of the Communications and Multimedia Act 1998 may, however, be relied on by the Malaysian Communications and Multimedia Commission or other authorities to request ISPs to disable access by end users to an online location for the purpose of preventing the commission or attempted commission of an offence under any written law in Malaysia. No court order is needed.

INTELLECTUAL PROPERTY

Third-party links, content and licences

27 | Can a website owner link to third-party websites without permission?

Generally, a link (or more precisely a hypertext link) to a third-party website can be done without first seeking permission. However, if the third-party website expressly indicates that it does not allow linking, then it would be best practice to seek permission first.

28 | Can a website owner use third-party content on its website without permission from the third-party content provider? Could the potential consequences be civil in nature as well as criminal or regulatory?

No as such use of third-party content without permission from the third-party content provider would expose the website owner to severe consequences such as civil actions initiated by the third-party content provider or trademark infringement.

If the use of the third-party content is alleged to circumvent or cause or authorises circumvention of any effective technological measures,

such use could be an offence under the Copyright Act 1997 and the offence may attract criminal sanctions.

29 | Can a website owner exploit the software used for a website by licensing the software to third parties?

The website owner can only exploit the software if it is also the owner of the software used on the website, as otherwise, the website owner's use is subject to its licensing terms when it first licensed the said software.

30 | Are any liabilities incurred by links to third-party websites?

If the links to third-party websites are just hypertext links and not framing or embedding the contents of the third-party websites, such links should not expose the website owner to any liabilities.

Video content

31 | Is video content online regulated in the same way as TV content or is there a separate regime?

Online video content and TV content are regulated in the same way by the Malaysian Communications and Multimedia Commission.

IP rights enforcement and remedies

32 | Do authorities have the power to carry out dawn raids and issue freezing injunctions in connection with IP infringement?

The enforcement authorities have the power to carry out dawn raids in connection with the offences of counterfeiting a trademark under the Trademarks Act 2019 (TMA) and dealings with infringing copies of copyrighted works under the Copyright Act 1987 (CA). However, the power to grant freezing/*Mareva* injunctions against IP infringers vest in the courts, and not the enforcement authorities.

33 | What civil remedies are available to IP owners? Do they include search orders and freezing injunctions?

The common remedies for IP owners whose IP rights are found to have been infringed are an order for injunction and damages or an account of profits.

The relief of statutory damages is also available for copyright owners typically in cases where there are difficulties in ascertaining and proving actual damages or account of profits for infringement of copyright. In addition, the award for additional damages for trademark infringement and copyright infringement is also stipulated for under the TMA and CA in cases where the court is satisfied that such award is proper having regard to several factors, such as flagrancy of the infringement, the unjust benefits accrued to the infringer and the need to punish the infringer.

In IP infringement suits, pending disposal of the full trial, an IP owner may apply for the appropriate interim measures from the court such as *Anton Piller* Order (which bears some resemblance to a search warrant) and freezing /*Mareva* injunction, the grant of which is subject to the relevant requirements being fulfilled by the IP owners.

DATA PROTECTION AND PRIVACY

Definition of 'personal data'

34 | How does the law in your jurisdiction define 'personal data'?

Personal data includes any information in respect of commercial transactions that relates directly or indirectly to an individual, who is identified or identifiable from that information, including any

sensitive personal data and expression of opinion about the data subject; but does not include any information that is processed for the purpose of a credit reporting business carried on by a credit reporting agency under the Credit Reporting Agencies Act 2010.

There is also a category of 'sensitive personal data' and the processing of such data requires explicit consent of an individual.

In the event data is anonymised to the extent that an individual is not identifiable from such data, such data will not be categorised as personal data.

Registration requirements

35 | Do parties involved in the processing of personal data, such as website owners, have to register with any regulator to process personal data?

Website owners that fall within any class of data users in the Personal Data Protection (Class of Data Users) Order 2013 are required to register as data users with the Department of Personal Data Protection.

Cross-border issues

36 | Could data protection laws and regulatory powers apply to organisations or individuals resident outside of the jurisdiction?

Local data protection laws may apply to organisations or individuals resident outside Malaysia if it uses equipment in Malaysia for processing personal data. Any transfer of personal data:

- outside of Malaysia requires consent (though not explicit) of the individual; or
- through removable media device and cloud computing service is allowed upon written consent by an officer authorised by the top management of an organisation.

Customer consent

37 | Is personal data processed on the basis of customer consent or other grounds? What is the commonly adopted mechanism for obtaining customer consent or establishing the other grounds for processing?

The basis for processing personal data is consent. In addition, personal data should be processed for a lawful purpose, when it is necessary and not excessive in relation to that purpose.

Sale of data to third parties

38 | May a party involved in the processing of personal data, such as a website provider, sell personal data to third parties, such as personal data about website users?

No. It is an offence to sell personal data to third parties. If a party is found to be liable for selling personal data, such party will be liable to a fine not exceeding 500,000 ringgit or to imprisonment for a term not exceeding three years or to both.

Customer profiling

39 | If a website owner is intending to profile its customer base to carry out targeted advertising on its website or other websites visited by its customers, is this regulated in your jurisdiction?

The use of cookies is currently not regulated in Malaysia.

Data breach and cybersecurity

40 | Does your jurisdiction have data breach notification or other cybersecurity laws specific to e-commerce?

There are no mandatory data breach notification requirements or cybersecurity laws specific to e-commerce in Malaysia. The Personal Data Protection Act 2010, however, requires a data user to take practical steps to protect personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction.

41 | What precautionary measures should be taken to avoid data breaches and ensure cybersecurity?

The Personal Data Protection Standard 2015 issued pursuant to the Personal Data Protection Act 2010 established a security standard prescribing steps to be taken to ensure personal data processed electronically and non-electronically, which could avoid personal data breaches and ensure cybersecurity.

Insurance

42 | Is cybersecurity insurance available and commonly purchased?

Cybersecurity insurance is available; however, it is not commonly purchased in Malaysia.

Right to be forgotten

43 | Does your jurisdiction recognise or regulate the 'right to be forgotten'?

Malaysia does not recognise or regulate the 'right to be forgotten;' however, the Retention Principle under the Personal Data Protection Act 2010 states that personal data should not be processed for longer than is necessary.

Email marketing

44 | What regulations and guidance are there for email and other distance marketing?

There are no specific regulations and guidance for email and other distance marketing; however, there is a requirement under the Personal Data Protection Act 2010 to provide an option to a data subject to opt out of unsolicited marketing.

Consumer rights

45 | What rights and remedies do individuals have in relation to the processing of their personal data? Are these rights limited to citizens or do they extend to foreign individuals?

The rights and remedies of individuals are as prescribed in the Personal Data Protection Act 2010 (PDPA) including the right to:

- access and correct personal data;
- withdraw consent to process personal data; and
- prevent processing likely to cause damage or distress, or for the purpose of direct marketing.

Foreign individuals have rights and remedies under the PDPA where their personal data is processed by a Malaysian entity or by any person employed or engaged by the said Malaysian entity or by a foreign entity who uses equipment in Malaysia for processing the personal data.

TAXATION

Online sales

46 | Is the sale of online products subject to taxation?

The scope of Malaysian income tax is territorial. Income accruing or deriving from Malaysia will be taxed in Malaysia. In so far as transactions for the sale of online products are concerned, if any of the payment for software is seen as royalty, this could be subject to withholding tax at the rate of 10 per cent of the gross amount.

In addition, with effect from 1 January 2020: foreign service providers who provide any digital service to any consumer and any person who operates an online platform or market place and provides digital services, including providing an electronic medium that allows suppliers to provide supplies to customers or transaction for provision of digital services on behalf of any person, are required to charge 6 per cent service tax. For a particular service to fall within the scope of digital service:

- the service must be delivered or subscribed over the internet or other electronic network;
- the service is one that cannot be obtained without the use of information technology; and
- the delivery of the service is essentially automated.

The focus is very much on how a particular service is delivered. If it is 'digitally' delivered, then service tax applies, regardless of its nature. The Royal Malaysian Customs Department currently appears to apply the definition of digital service in a wide manner to the extent that the provision of online software, mobile applications, online games, music, streaming services, online advertising space, etc, are caught

Server placement

47 | What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

The scope of Malaysian income tax is territorial. In essence, it is about what has been done to earn the income and where that was done. The location of a server in Malaysia would, in our view, increase the risk of income from online sales being seen as derived from Malaysia.

Company registration

48 | When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

The requirement for registration is as follows:

- service tax – any person who provides taxable services, where the total value of taxable services in a 12-month period exceeds 500,000 ringgit, is required to register not later than the last day of the month following the month in which that person exceeds the 500,000 ringgit threshold at <https://sst01.customs.gov.my/account/register-license/2>. The threshold for food and beverage-related businesses is 1.5 million ringgit; and
- sales tax – manufacturers of taxable goods, where the total sales value of taxable goods in a 12-month period exceeds 500,000 ringgit, are required to register not later than the last day of the month following the month in which he exceeds the 500,000 ringgit threshold at <https://sst01.customs.gov.my/account/register-license/1>.

Those who do not exceed the prescribed thresholds may also apply for voluntary registration.

Further, any foreign service provider who provides any digital service to a consumer, where the total value of digital services in a

12-month period exceeds 500,000 ringgit, is liable to be registered not later than the last day of the month following the month in which he exceeds the 500,000 ringgit threshold at <http://mystods.customs.gov.my>.

In addition, there is no specific tax on domestic internet sales. However, where a payment is made to a non-resident for the licence to use software, such payment may be deemed as 'royalty' and may be taxed at 10 per cent of the gross amount. Also, service tax is charged on any digital service provided by a foreign service provider.

Returns

- 49** | If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Typically, the return of goods in exchange for a refund would not have Malaysian income tax implications, assuming that the income of the offshore company is not seen as being derived from Malaysia to begin with. Further, if the offshore company and offshore retail outlet are independent, it should not give rise to transfer pricing issues. The position of the offshore company vis-a-vis an associated or related onshore retail outlet is different. The arrangement has to be done on what is demonstrated to be on an arm's-length basis. Depending on the volume of related-party transactions, the retail outlet may have to comply with transfer pricing documentation.

GAMBLING

Legality

- 50** | Is it permissible to operate an online betting or gaming business from the jurisdiction?

Betting and gaming are generally governed and prohibited under the Common Gaming House Act 1953 (CGA) and the Betting Act 1953 (unless approved by the relevant authority), which are enacted to suppress gaming and betting in Malaysia. As the CGA and the Betting Act 1953 are drafted prior to the advent of the internet, such statutes do not explicitly prohibit online betting or gaming.

Taking a purposive approach, the operation of an online betting or gaming business (involving the element of chance) would arguably fall under the ambit of the CGA and the Betting Act 1953 and therefore not permissible (unless with the approval of the relevant authority).

- 51** | Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

As no online casinos and betting websites are licensed or approved by the relevant authority in Malaysia to date and taking the purposive approach mentioned above, the use of online casinos and betting websites is technically not permissible. According to published news, the Malaysian Communications and Multimedia Commission has blocked approximately 2,195 websites promoting online gambling as at March 2021.

OUTSOURCING

Key legal and tax issues

- 52** | What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

One of the legal issues to consider when outsourcing is confidentiality and data security as the accessibility of confidential information by the

outsourcing partner may increase the risk of security breaches. Another legal issue would be the ownership of pre-existing and newly developed intellectual property rights when the outsourcing contract is not specific in the segregation of ownership.

Where there is an outsourcing or services, one should consider whether there is service tax on digital services or imported services. There is also withholding tax on payments of royalty (10 per cent of the gross amount) and services fee (10 per cent of the gross amount) made to a non-resident. The question of outsourced service also raises the issue of whether an offshore company has a permanent establishment or taxable presence in Malaysia. Malaysian law has recently been amended to widen the scope for when a person is seen as deriving income from Malaysia.

Employee rights

- 53** | What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, and do the rules apply to all employees within the jurisdiction?

If outsourcing results in redundancy and retrenchment, retrenched employees are entitled to termination benefits and union consultation that are typically stipulated in the collective agreement, and in its absence, sufficient notice of termination in accordance with the Employment Act 1955 (EA).

EA employees who have been employed under a continuous contract of employment for at least 12 months before the retrenchment are entitled to termination benefits based on the formula stated in the Employment (Termination and Lay-off Benefits) Regulations 1980.

Non-EA employees are not statutorily entitled to termination benefits; however, most employers do exercise their discretion to make such payment to non-EA employees, adopting the common law principle that employers should as far as possible, pay compensation to employees who have lost their job as a result of a retrenchment.

ONLINE PUBLISHING

Content liability

- 54** | When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability? Is it required or advised to post any notices in this regard?

A website provider will be liable for mistakes in information it provides online when a complaint is made to the relevant authorities. Content liability may be mitigated by including disclaimers in the website terms of use.

Databases

- 55** | If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

Yes it can by way of contract but not otherwise because Malaysia does not specifically protect database rights, unlike countries such as the UK that have Copyright and Rights in Databases Regulations.

DISPUTE RESOLUTION

Venues

- 56** | Are there any specialist courts or other venues in your jurisdiction that deal with online/digital issues and disputes?

There are currently no specialist courts in Malaysia for online or digital-related issues.

ADR

- 57 | What alternative dispute resolution (ADR) methods are available for online/digital disputes? How common is ADR for online/digital disputes in your jurisdiction?

Parties may agree to settle their online or digital disputes through mediation or arbitration as an alternative dispute resolution.

The Asian International Arbitration Centre (Malaysia) (AIAC) provides specialist dispute resolution services in relation to generic top-level domain names approved by the Internet Corporation for Assigned Names and Numbers, domain name disputes and sensitive names disputes.

ADR is not necessarily common for online or digital disputes, although many defamation cases, online or otherwise, will usually be directed by the courts to attempt mediation.

UPDATE AND TRENDS**Key developments of the past year**

- 58 | Are there any emerging trends or hot topics in e-Commerce regulation in the jurisdiction? Is there any pending legislation that is likely to have consequences for e-Commerce and internet-related business?

As with all other jurisdictions, lockdowns aimed at controlling the spread of covid-19 saw an increase in the use of e-commerce thereby compelling businesses affected by the lockdowns to make their presence online or existing online presence more pronounced. It appears that the pre-covid-19 e-wallet stimulus introduced by the government to help with economic recovery accelerated the take-up of e-wallets, which increased both the confidence and use of e-commerce. There is currently no pending legislation that is likely to have consequences for e-commerce and internet-related business.

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