

International Comparative Legal Guides



Fintech 2021

A practical cross-border insight into fintech law

Fifth Edition

Featuring contributions from:

A&L Goodbody

Advokatfirmaet BAHR AS

Afridi & Angell

Anderson Mōri & Tomotsune

Appleby

Astana International Financial Centre (AIFC)

AZB & Partners

Bär & Karrer

BBA//Fjeldco

Bird & Bird LLP

Bredin Prat

Carey Olsen Jersey LLP

Chandler MHM Limited

Christiana Aristidou LLC

DDPV Studio Legale

De Brauw Blackstone Westbroek

DivinaLaw

DQ Advocates Limited

Ellex

FINREG PARTNERS

Furtună și Asociații

Gilbert + Tobin

Gorrißen Federspiel

Hammad & Al-Mehdar

Janson Baugniet

Jonathan Cardenas, Chair, Financial Services
Technology Joint Subcommittee

KPMG Law Firm

Lazcano Sámano, S.C.

Lee & Ko

Lloreda Camacho & Co.

LPS L@W

Mannheimer Swartling

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga
Advogados

McMillan LLP

PFR Attorneys at Law

QUORUS GmbH

RHTLaw Asia LLP

RIAA Barker Gillette

Shearman & Sterling LLP

Shearn Delamore & Co.

Slaughter and May

Triay Lawyers

Udo Udoma & Belo-Osagie

Uría Menéndez

Uría Menéndez – Proença de Carvalho

VD Law Group

Walalangi & Partners (in association with
Nishimura & Asahi)

ICLG.com

Expert Analysis Chapters

- 1** **The Collapse of Cryptography? Considering the Quantum Threat to Blockchain**
Ben Kingsley & Emily Bradley, Slaughter and May
- 4** **AIFC's Initiatives for Emerging Venture Capital in Central Asia**
Kairat Kaliyev, Arslan Kudiyar, Nazgul Baitemirova & Aigerim Omarbekova, Astana International Financial Centre (AIFC)
- 8** **Fintech SPAC Transactions in Europe and the United States**
Jonathan Cardenas, Chair, Financial Services Technology Joint Subcommittee

Q&A Chapters

- 14** **Australia**
Gilbert + Tobin: Peter Reeves, Richard Francis & Emily Shen
- 22** **Austria**
PFR Attorneys at Law: Bernd Fletzberger
- 29** **Belgium**
Janson Baugniet: Muriel Baudoncq
- 34** **Brazil**
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados: Pedro Eroles & Marina Procknor
- 41** **British Virgin Islands**
Appleby: Rebecca Jack
- 47** **Canada**
McMillan LLP: Pat Forgione & Anthony Pallotta
- 55** **Colombia**
Lloreda Camacho & Co.: Santiago Gutiérrez & Adriana Galeano
- 61** **Cyprus**
Christiana Aristidou LLC: Christiana Aristidou & Evdokia Marcou
- 69** **Czech Republic**
FINREG PARTNERS: Ondřej Mikula & Jan Šovar
- 74** **Denmark**
Gorrissen Federspiel: Tue Goldschmieding & Morten Nybom Bethe
- 80** **France**
Bredin Prat: Bena Mara & Ariel Axler
- 88** **Germany**
Bird & Bird LLP: Dr. Michael Jünemann, Jörg-Alexander Paul & Dr. Barbara Geck
- 94** **Gibraltar**
Triay Lawyers: Javi Triay & Jay Gomez
- 101** **Hong Kong**
Slaughter and May: Peter Lake & Mike Ringer
- 112** **Iceland**
BBA/Fjeldco: Stefán Reykjalin
- 119** **India**
AZB & Partners: Srinath Dasari, Vipul Jain & Rachana Rautray
- 125** **Indonesia**
Walalangi & Partners (in association with Nishimura & Asahi): Sinta Dwi Cestakarani, Andhika Indrapraja & Indira Setyowati
- 131** **Ireland**
A&L Goodbody: Kevin Allen, Peter Walker & Chris Martin
- 143** **Isle of Man**
DQ Advocates Limited: Adam Killip & Andrew Harding
- 148** **Italy**
DDPV Studio Legale: Luciano Vasques & Chiara Sciarra
- 156** **Japan**
Anderson Mōri & Tomotsune: Ken Kawai, Kei Sasaki & Takeshi Nagase
- 163** **Jersey**
Carey Olsen Jersey LLP: Peter German, Chris Griffin & Huw Thomas
- 172** **Korea**
Lee & Ko: Jongsoo Yoon & Hyun Koo Kang
- 178** **Lithuania**
Ellex: Ieva Dosinaitė & Julija Šlekonytė
- 184** **Malaysia**
Shearn Delamore & Co.: Christina Kow & Timothy Siaw
- 192** **Mexico**
Lazcano Sámano, S.C.: Alfredo Lazcano & Andrea Avedillo
- 197** **Netherlands**
De Brauw Blackstone Westbroek: Willem Röell & Christian Godlieb
- 205** **Nigeria**
Udo Udoma & Belo-Osagie: Yinka Edu, Joseph Eimunjeze & Pamela Onah
- 213** **Norway**
Advokatfirmaet BAHR AS: Markus Nilssen & Eirik Basmo Ellingsen

- 221** **Philippines**
DivinaLaw: Danny E. Bunyi, Jay-R C. Ipac,
Emma Ruby J. Aguilar & Shiela Camile S. Esquivel
- 227** **Portugal**
Uría Menéndez – Proença de Carvalho:
Pedro Ferreira Malaquias & Hélder Frias
- 236** **Romania**
Furtună și Asociații / VD Law Group: Mihai Furtună &
Sergiu-Traian Vasilescu
- 242** **Russia**
QUORUS GmbH: Maxim Mezentsev & Nikita Iovenko
- 250** **Saudi Arabia**
Hammad & Al-Mehdar: Suhaib Adli Hammad
- 257** **Senegal**
LPS L@W: Léon Patrice Sarr
- 263** **Singapore**
RHTLaw Asia LLP: Ch'ng Li-Ling & Aaron Lee
- 269** **Spain**
Uría Menéndez: Leticia López-Lapuente,
Isabel Aguilar Alonso & Carolina Albuérne González

- 278** **Sweden**
Mannheimer Swartling: Anders Bergsten &
Carl Johan Zimdahl
- 285** **Switzerland**
Bär & Karrer: Dr. Daniel Flühmann & Dr. Peter Ch. Hsu
- 295** **Taiwan**
KPMG Law Firm: Kelvin Chung & Lawrence Ong
- 301** **Thailand**
Chandler MHM Limited: Wongsakrit Khajangson &
Nuanporn Wechsuanarux
- 307** **United Arab Emirates**
Afridi & Angell: James Bowden, Zaid Mahomed &
Alex Vromans
- 314** **United Kingdom**
Slaughter and May: Rob Sumroy, Ben Kingsley,
Natalie Donovan & Selmin Hakki
- 323** **USA**
Shearman & Sterling LLP: Reena Agrawal Sahni

Digital Edition Chapter

- 331** **Pakistan**
RIAA Barker Gillette: Mustafa Munir Ahmed &
Saira Khalid Khan

Malaysia



Christina Kow



Timothy Siaw

Shearn Delamore & Co.

1 The Fintech Landscape

1.1 Please describe the types of fintech businesses that are active in your jurisdiction and the state of the development of the market, including in response to the COVID-19 pandemic. Are there any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications)?

The developments in 2020 in terms of sectors included:

e-KYC

- In June 2020, Bank Negara Malaysia (BNM) issued the policy document on Electronic Know-Your-Customer (e-KYC) (the **e-KYC Guidelines**). The intention is for e-KYC to enable the digital on-boarding of customers anytime and anywhere, removing the need for customers to visit the physical premises of a financial institution to open an account. The e-KYC Guidelines are expected to facilitate greater innovation for the Malaysian financial sector, including in end-to-end offering of digital financial services.
- In May 2020, KiplePay signed an agreement with the cloud computing arm of Chinese technology firm Tencent Holdings to provide e-KYC services. KiplePay will build a localised e-KYC solution in Malaysia through the KipleID e-KYC, leveraging Tencent Cloud's machine-learning and facial recognition technologies to assist financial institutions in digitising their Know-Your-Customer processes.

Digital banking

- In December 2020, BNM issued the Licensing Framework for Digital Banks (the **DBL Framework**), which sets out the requirements relating to applications for the establishment of a digital bank in Malaysia. The DBL Framework places particular focus on financial inclusion, requiring applicants for a digital banking licence to ensure quality access and responsible usage of financial services, particularly to underserved or unserved markets, such as retail, micro, small, and medium enterprises in a sustainable manner. BNM has indicated that up to five licences may be issued to qualified applicants, with notification on the grant of licences being made by the first quarter of 2022.

COVID-19

- 2020 saw the fintech landscape in Malaysia shift towards more “retail investor”-centric models as a result of COVID-19, most notably in increased adoption of equity crowdfunding and peer-to-peer lending platforms (discussed further in section 2 below) and digital investment managers.
- In April 2020, BIMB Investment Management Berhad, a Bank Islam Malaysia subsidiary, partnered with tech provider Valuefy Solutions to launch the BEST Invest app, a non-automated robo-intelligence system with which investors can build *Shari'ah* and environmental, social and corporate governance (ESG)-compliant investment portfolios. During its launch between April and November 2020, around 20,000 individuals signed up for an account with BEST Invest.
- Raiz was launched in July 2020 as a partnership between Permodalan Nasional Berhad, one of the largest fund management companies in Malaysia, and Raiz Invest Australia. Raiz focuses on micro-investing by rounding up user transactions to the next ringgit and investing the change.
- Singapore-based robo-advisory StashAway released StashAway Simple in Malaysia in July 2020, a cash management solution that leverages on a partnership with Eastspring Investments Berhad to allow investors to put short-term spare change in a money market fund with the ability to instantly cash out.

1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?

Except for those specifically approved by the Securities Commission Malaysia (the **SC**), digital asset exchanges (**DAXs**) are prohibited from operating in Malaysia. The SC has currently registered three DAX operators: Luno Malaysia; SINEGY Technologies; and Tokenize Technology. Operating an exchange without prior authorisation is an offence under the securities law of Malaysia, and offenders may be liable to a fine or imprisonment or both.

The SC and BNM has emphasised that despite developments in policies and regulations relating to cryptocurrencies and digital assets (discussed in section 3 below), digital assets are not a payment instrument regulated by BNM and are not legally accepted for the exchange of goods and services as legal tender in Malaysia.

The issue of certain digital tokens and digital currencies is regulated by the SC as referred to in question 3.1 below.

2 Funding For Fintech

2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?

Malaysia has both conventional and Islamic financial and capital markets providing debt and equity financing. Financial institutions like banks and development financial institutions (which have specified sector objectives like the Small Medium Enterprise Development Bank Malaysia Berhad) provide debt financing. An established debt capital market also exists, in both conventional and *Shari'ah*-compliant issues. Equity financing can be raised by listing on the stock exchange of Bursa Malaysia Securities Berhad, which is further discussed in question 2.3 below, venture capital investment, or utilising an equity crowdfunding platform approved by the SC under the equity crowdfunding framework.

Entities that focus specifically on financing to the technology sector include:

- Malaysia Debt Ventures Berhad, Malaysia's leading technology financier, which has various schemes, including an Intellectual Property Financing Scheme of RM200 million, to enable companies with IP rights (IPRs) to use their IPRs as additional collateral to obtain financing;
- Cradle Fund Sdn Bhd. (**Cradle**), owned by the Ministry of Finance. Cradle focuses on pre-seed, early, seed and start-up financing, and provides non-financial assistance to local tech start-ups. In 2020, Cradle launched its CIP Ignite and CIP Accelerate grant programmes, focusing on assisting technology companies and spin-offs from universities and research institutes to develop prototypes and subsequently commercialise products;
- the Malaysian Digital Economy Corporation Sdn Bhd. (**MDEC**), wholly owned by the government, which focuses on building a sustainable digital ecosystem;
- the Malaysia Venture Capital Management Berhad (**MAVCAP**); and
- the Malaysian Technology Development Corporation (**MTDC**).

Equity crowdfunding (**ECF**) and peer-to-peer (**P2P**) platforms in particular saw increased volumes of investment over the course of the year, with the SC reporting that over RM1 billion was raised in 2020 across various platforms. Local ECF player pitchIn announced in November 2020 it had raised total funds of over RM100 million on the platform, the first ECF platform to reach the milestone in Malaysia. Increased adoption of ECF and P2P platforms has been driven in part by a liberalisation of the regulations by the SC in response to the turbulent financing landscape for small and medium-sized enterprises (**SMEs**) due to COVID-19, as seen when the SC lifted fundraising limits on ECF platforms and allowed ECF and P2P financing platforms to operationalise secondary trading in April 2020.

2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?

SMEs account for 98% of businesses in Malaysia. SME Corporation Malaysia is the Central Coordinating Agency under the Ministry of International Trade and Industry (**MITI**) in Malaysia that formulates overall policies and strategies for SMEs, and coordinates the implementation of SME

development programmes across all related government ministries and agencies. SMEs in Malaysia are given preferential tax rates as well as a wide range of tax incentives for businesses in the manufacturing, services and agriculture sectors. Fiscal incentives include:

- The angel tax incentive granted to angel investors in technology-based start-ups administered by Cradle Fund Sdn Bhd.
- Pioneer status with income tax exemption of various percentages by the Malaysian Industrial Development Authority (**MIDA**).
- Partial corporate tax exemption for entities in the Malaysian Digital Hub under MDEC.
- Malaysia Tech Entrepreneur Programme under the MDEC to attract individuals and help them set up and develop their start-ups in Malaysia, subject to specified conditions.
- The Multimedia Super Corridor (**MSC**) Malaysia status recognition by the MDEC for ICT and ICT-facilitated businesses that meet specified criteria available to local and foreign companies. Specific incentives are granted to MSC Malaysia Status entities, including the MSC Malaysia Bill of Guarantees, 100% exemption from taxable statutory income, 100% investment tax allowance, eligibility for R&D grants, and the freedom to source capital and borrow funds under specific waivers from the foreign exchange administration requirements of Malaysia.

In addition to the above, as part of its COVID-19 economic recovery plan the Malaysian Government has implemented the Pelan Jana Semula Ekonomi Negara (**PENJANA**) programme. This programme includes an initiative specifically targeted at financing for SMEs, including the SME Digitalisation Matching Grant totalling RM100 million, the SME Technology Transformation Fund totalling RM500 million, and the Smart Automation Grant totalling RM100 million capped at RM1 million per company.

2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

The conditions for a business to conduct an IPO in Malaysia would depend on the market it intends to list on. Bursa Malaysia Securities Berhad has three securities markets: (i) the Main Market; (ii) the ACE Market; and (iii) the LEAP Market. The LEAP Market was introduced to provide SMEs and other companies, from all industries including fintech, with greater fundraising access and visibility. Only sophisticated investors may invest in the LEAP Market. The LEAP Market provides opportunities for start-up fintech companies that may otherwise find it difficult to meet the Main Market or ACE Market listing requirements. To list on the LEAP Market, an applicant must:

- be a public company incorporated in Malaysia;
- not be: (i) a subsidiary or holding company of a corporation currently listed on the Main Market or ACE Market of the Exchange, and the listing of such applicant will result in the existing listed corporation within the group ceasing to have a separate autonomous business of its own and not be capable of sustaining its listing in the future; (ii) an investment holding corporation with no immediate or prospective business operations within its group; or (iii) an incubator, including a technology incubator;
- engage an adviser, approved by Bursa Malaysia Securities Berhad, to carry out both the initial listing activities and post-listing activities, to assess the suitability for listing and submit the application for admission to the LEAP Market; and
- achieve a minimum shareholding spread of 10% of its ordinary shares upon admission to the LEAP Market.

2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

In August 2020, JurisTech acquired iMoney, a local financial comparison aggregator. In September, Merchantrade, a digital money services business operator, e-wallet operator and e-money issuer, acquired a 100% interest in Valyou, a mobile fintech digital remittance service provider and e-money issuer also operating its own e-wallet. In November, CapBay, a Malaysian P2P supply chain financing platform, acquired a 29% stake in Kenanga Capital Islamic, forming a joint venture with Kenanga Investment Bank Berhad to create an Islamic supply chain finance fintech firm.

3 Fintech Regulation

3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

Where a fintech business falls within any business, or includes an activity that is regulated or licensed in Malaysia, the regulatory and legal requirements to conduct such business or activity must be complied with in accordance with the applicable Malaysian laws.

Fintech activities that involve banking, investment banking, insurance or *takaful*, money changing, remittance, operating a payment system or issuing payment instruments business will come under the purview of BNM. The Financial Services Act 2013 (FSA) is the statute that regulates and provides supervision of conventional financial institutions, payment systems and operators thereof and the oversight of the money market and foreign exchange market. BNM also regulates the Islamic financial sector, largely under the Islamic Financial Services Act 2013.

The SC, which regulates the Malaysian capital markets, has adopted a Digital Markets Strategy intended to enhance access to financing, increase investor participation, augment the institutional market and develop synergistic ecosystems for the capital markets in Malaysia. Stockbroking, provision of investment advice, financial planning, dealing in derivatives and advising on corporate finance are among the activities regulated by the SC under the Capital Markets and Services Act 2007 (CMSA).

Both BNM and the SC introduced a series of new regulations involving fintech over the course of 2020. Some highlights include:

- in June, BNM issued its updated policy document on Risk Management in Technology (the **IT Risk Guidelines**). These IT Risk Guidelines prescribe minimum standards to prevent the exploitation of weak links in interconnected networks and systems that may cause detriment to financial institutions and the wider financial system that all financial institutions are expected to follow;
- also in June, BNM issued the e-KYC Guidelines, as discussed in section 1 above;
- in October, the SC issued the Guidelines on Digital Assets (the **Digital Asset Guidelines**), which set out requirements relating to fundraising activities through digital token offerings, operationalisation of initial exchange offering (IEO) platforms, and provision of digital asset custody. The Digital Asset Guidelines follow on from the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 (the **Digital Asset Order**), which states that all digital currencies and digital tokens that satisfy the requirements set out

in the Digital Asset Order are prescribed as securities for purposes of securities laws. The Digital Asset Guidelines and Digital Asset Order are discussed further in question 3.2 below; and

- in December, BNM issued the DBL Framework, discussed in section 1 above.

3.2 Is there any regulation in your jurisdiction specifically directed at cryptocurrencies or cryptoassets?

Yes, the SC is the primary regulator of the digital asset industry in Malaysia and have developed a regulatory framework that treats certain digital currencies and digital tokens as securities under the purposes of securities law. As part of this framework the SC has issued the Digital Asset Order and the Digital Asset Guidelines. These digital asset-specific regulations must be read along with the relevant provisions of securities laws that apply to digital assets, namely those in the CMSA.

Under the Digital Asset Guidelines, prospective issuers wishing to issue digital assets for the purposes of fundraising do so via IEOs. Only digital tokens that have been prescribed as securities under the Digital Asset Order may be offered via an IEO. Issuers raising funds via an IEO may only do so via an IEO and not through any other means. IEOs are conducted through IEO operators who approve applications from prospective issuers. IEO operators are electronic platform operators registered under the Digital Asset Guidelines to operate an IEO platform.

However, both BNM and the SC have stressed that at the current time, digital assets are not a payment instrument regulated by BNM and is not legally accepted for the exchange of goods and services as legal tender in Malaysia.

3.3 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested? Are there any regulatory 'sandbox' options for fintechs in your jurisdiction?

Malaysia is very receptive to fintech innovation and technology. Specific agencies and incentives are in place to facilitate the development of the digital economy. MDEC is an agency under the Ministry of Communications and Multimedia Malaysia that has been entrusted to develop, coordinate, and promote Malaysia's digital economy, information and communications technology industry, and the adoption of digital technology amongst Malaysians. It has helped to launch several initiatives pursuant to this goal, including:

- The Malaysia Digital Hub: a programme that has been set up to attract technology investments, support local technology innovation and create a sustainable digital ecosystem in Malaysia; and
- Orbit: a co-working space that serves both as a physical fintech innovation hub and a nexus point for both local and foreign fintech players, allowing start-ups to engage with industry leaders to ease solution development and early market entry.

Both BNM and the SC have policies encouraging fintech through the initiatives referred to above. For instance, BNM offers regulatory flexibility to entities approved in their Regulatory Sandbox, which was introduced to enable innovation of fintech to be deployed and tested in a live environment within view of regulators. This ensures compliance and promotes sustainability for early-stage fintech businesses. The Sandbox also allows BNM to review and adapt regulatory requirements

or procedures that may unintentionally inhibit innovation or render them non-viable. BNM's 2020 Annual Report highlighted the increased interest of "Insurtech" solutions, which aligns with BNM's agenda to increase insurance penetration and deepen financial inclusion in Malaysia. One *takaful* operator was approved to live test its peer-to-peer family *takaful* product in the Sandbox in 2020. BNM also noted that four other fintech companies had advanced to the preparation stage for subsequent live testing of their solutions. However, 2020 also saw a large number of participants withdrawn or not receive approval for admission to the Sandbox, either due to lack of operational readiness or failure to overcome regulatory hurdles.

In 2020, Bursa Malaysia, the primary exchange in Malaysia and which works with regulators to develop regulations and requirements relating to the exchange, announced the successful completion of the bond on blockchain proof-of-concept (POC) with Singapore-based Hashstacs Pte Ltd. The POC is designed to facilitate the growth of the bond marketplace at the Labuan Financial Exchange by harnessing the opportunities afforded by blockchain technology and the tokenisation of assets.

3.4 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?

A fintech business, or financial services business established outside Malaysia offering fintech products and services, must comply with the Malaysian laws applicable to the service or product offered. Malaysian licensing laws apply to financial services and the regulated activities set out in the CMSA, unless any waiver or exemption specifically applies by law or is granted by the regulator. Most of the financial services businesses regulated by BNM and the regulated activities supervised by the SC have to be conducted by a locally incorporated entity, so as to allow smoother monitoring of compliance with Malaysian laws. Therefore, any foreign entity will usually have to establish a local company to apply for the relevant licence or approval.

4 Other Regulatory Regimes / Non-Financial Regulation

4.1 Does your jurisdiction regulate the collection/use/ transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?

Yes. The Personal Data Protection Act 2010 (PDPA) came into force in 2013 and regulates the collection, use, processing and disclosure of personal data in Malaysia in respect of commercial transactions. The legal basis for the PDPA is to ensure information security, network reliability and integrity through the regulation of processing of personal data by a data user in any commercial transaction and protection of personal data. "Commercial transactions" by definition includes any transaction of a commercial nature, whether by way of a contract or not, including any matter relating to the supply or exchange of goods or services, agencies, investment, finance, banking and insurance, but does not include a credit reporting business under the Credit Reporting Agencies Act 2010. As such, the PDPA would be applicable to fintech businesses who are in operation within Malaysia and processes personal data such as name, address, identification card number, and bank account details.

"Personal data" has been defined widely as any information in respect of commercial transactions, which:

- (a) is being processed wholly or partly by means of equipment operating automatically in response to instructions given for that purpose;
- (b) is recorded with the intention that it should wholly or partly be processed by means of such equipment; or
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,

that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data user, 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.

4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?

The PDPA applies to data users outside of Malaysia, but which use equipment in Malaysia to process personal data other than for the purposes of transit through Malaysia. A data user that falls within this category is required to nominate a representative established in Malaysia, for purposes of the PDPA.

In general, the transfer of data out of Malaysia is not allowed unless the transfer is to a place specified by the Minister and notified by Gazette, namely to such countries that have in place substantially similar data protection laws as the PDPA, or an equivalent adequate level of protection. There is currently no gazette notification of any permitted country released by the Minister to date.

However, the PDPA provides that a data user may transfer personal data outside of Malaysia under certain conditions, including, among others, that:

- data subjects have given consent for the transfer;
- the transfer is necessary for the performance of a contract between the data subject and the data user; and
- the transfer is necessary for the conclusion or performance of a contract between the data user and a third party, which either is entered into at the request of the data subject or is in the interests of the data subject.

4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.

Failure to comply with the PDPA will result in the imposition of a fine between RM10,000 and RM500,000 and/or imprisonment of up to three years, depending on which section/rule has been breached. Pursuant to Section 133 of the PDPA, where a body corporate commits an offence under the PDPA, any person who at the time of the commission of the offence was:

- (a) a director, chief executive officer, chief operating officer, manager, secretary;
- (b) other similar officer of the body corporate;
- (c) was purporting to act in such capacity; or
- (d) was responsible for the management of any of the affairs of the body corporate,

may also be charged severally or jointly and be deemed to have committed that offence in the event that the body corporate is found liable.

The said person may escape liability if he proves that the offence was committed without his knowledge, consent or connivance and that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?

The following cyber security laws or regulations have general application and may apply to fintech businesses operating in Malaysia:

- (a) Communications and Multimedia Act 1998;
- (b) Communications and Multimedia Commission Act 1998;
- (c) Computer Crimes Act 1997;
- (d) Copyright Act 1987;
- (e) Consumer Protection Act 1999;
- (f) Consumer Protection (Electronic Trade Transactions) Regulations 2012;
- (g) Digital Signature Act 1997;
- (h) Direct Sales and Anti-Pyramid Scheme Act 1993;
- (i) Electronic Commerce Act 2006;
- (j) Malaysian Communications and Multimedia Content Code (Version 6, published in 2012);
- (k) Penal Code;
- (l) Personal Data Protection Act 2010;
- (m) Personal Data Protection Regulations 2013;
- (n) Personal Data Protection Standard 2015; and
- (o) Strategic Trade Act 2010.

4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.

Malaysia is a member of the Financial Action Task Force (**FATF**) and the Asia/Pacific Group on Money Laundering. The Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (**AMLA**) reflects the FATF recommendations on money laundering and anti-terrorism financing. The main offence of money laundering is engaging in a transaction that involves, acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses, removes from, or brings into, Malaysia, proceeds of an unlawful activity or instrumentalities of an offence.

Entities providing financial services, licensed stockbrokers, derivatives dealers and fund managers under the CMSA are reporting institutions under the AMLA. Entities designated as reporting institutions have to conduct customer due diligence, report suspicious transactions to BNM and maintain specific records in accordance with the provisions of the AMLA and the requirements of BNM. Specific anti-money laundering requirements apply to reporting institutions that exchange digital currency for fiat money, exchange money for digital currency, or exchange one digital currency for another digital currency in Malaysia.

The Malaysian Anti-Corruption Commission (**MACC**) enforces the Malaysian Anti-Corruption Commission Act 2009 (the **MAC Act**). The main offences under the MAC Act relate to giving or receiving gratification. Gratification is widely defined in the MAC Act. The MAC Act imposes an obligation on persons to report bribery transactions to the MACC or the police. Failure to do so will result in a fine or imprisonment or to both on conviction of the offence. The MAC Act applies to the commission of offences whether within or outside Malaysia.

The MACC maintains a database of offenders found guilty of corruption.

The **Malaysian Penal Code** also prohibits the commission of the criminal offences of bribery and corruption, such as taking a gratification in order to, by corrupt or illegal means, influence a public servant, and criminal breach of trust.

4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?

A fintech business operating in Malaysia must comply with the Malaysian laws and regulations relevant to its activities, location and legal structure. For example, the provisions of the Electronic Commerce Act 2006 govern the validity of electronic communications and transactions.

5 Accessing Talent

5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?

The main employment legislation in Malaysia includes:

- (a) Employment Act 1955 (**EA**);
- (b) Industrial Relations Act (**IRA**) 1967;
- (c) Trade Unions Act 1959;
- (d) Employment (Restriction) Act 1968;
- (e) Factories and Machinery Act 1967;
- (f) Employees' Social Security Act 1969;
- (g) Employees Provident Fund Act 1991;
- (h) Minimum Wages Order 2020;
- (i) Minimum Retirement Age Act 2012;
- (j) Factories and Machinery Act 1967; and
- (k) Personal Data Protection Act 2010.

Under the IRA, an employer that is unable to prove just cause or excuse for dismissal may be ordered by the Industrial Court to reinstate the employee concerned. What amounts to "just cause or excuse" would depend on the particular facts and circumstances of each case. The Industrial Court requires employers to provide cause and justify the reasons for terminating the services of the employee when a dispute has arisen.

5.2 What, if any, mandatory employment benefits must be provided to staff?

The EA provides for the minimum terms and conditions of employment in respect of employees in the private sector who come within its purview. Employees covered under the EA include:

- irrespective of their occupation, persons who have entered into a contract of service under which their wages do not exceed RM2,000 per month;
- those whose wages exceed RM2,000 per month who are engaged in manual labour; or
- those who supervise other employees engaged in manual labour employed by the same employer.

The minimum standards imposed by the EA for employees covered under the Act include:

- payment of wages, advances of wages and restrictions in the deduction of workers' wages;
- maternity protection;
- protection of female workers by prohibiting them from carrying out night work, underground work and in certain places of work;

- prescribing the rest days in each week and maximum hours of work a day;
- prescribing public holidays each year, annual leave, sick leave and overtime rates payable for extra hours of work; and
- termination and lay-off benefits.

In regard to terms and conditions of employment that are not provided for under the EA, employers and employees are free to negotiate and include such terms and conditions in the contract of service.

5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

The Employment (Restriction) Act 1968 requires non-Malaysian citizens to obtain a valid work permit before they can be employed.

Fintech companies may be eligible to apply for MSC Malaysia Status from the Malaysia Digital Economy Corporation (MDEC). Companies with MSC Malaysia Status are eligible to apply for employment passes for foreign knowledge workers with the immigration unit of MDEC.

Under the Malaysia Tech Entrepreneur Programme provided by MDEC, a tech founder with no track record of established business may apply for a one-year pass, and an individual who is an established entrepreneur may obtain a five-year pass to stay in Malaysia, subject to meeting specified application requirements as set out at <https://www.mtep.my>.

6 Technology

6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

Innovations and inventions are protectable under the patent, copyright and industrial design laws as well as confidential information under the common law in Malaysia. This would include the Patents Act 1983, the Copyright Act 1987 and the Industrial Designs Act 1996.

6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

Copyright

Under the Copyright Act 1987, copyright shall initially vest in the author of the copyrighted work. The Copyright Act 1987 provides for presumptions in cases of commissioned work or work made in the course of employment. As such, subject to any contrary agreement:

- (a) where the work is commissioned by a person who is not the author's employer, copyright is deemed to be transferred to the person who commissions the work; or
- (b) where the work is made in the course of the author's employment, the copyright is deemed to be transferred to the author's employers.

Where the work is made by or under the direction or control of the government, government organisation or international body, the copyright shall initially vest in the government, government organisation or international body.

Trade marks

Under the new Trademarks Act 2019, any person claiming to be the *bona fide* proprietor of a trade mark may apply to the Registrar for the registration of that mark if the person is using or intends to use or has authorised or intends to authorise another person to use the trade mark in the course of trade. While the proprietor of a registered trade mark is the person whose name appears on the Register as the owner, the concept of proprietorship for the purposes of an application for registration depends on who is entitled to the exclusive use of the trade mark, i.e. the first person to use the mark in the course of trade and to develop business goodwill in relation to that mark.

Patents

Under the Patents Act 1983, the right to a patent belongs to the inventor unless the invention is made by an employee (including government employees, and employees of a government organisation or enterprise) or pursuant to a commission, in which case the right to the invention will be deemed to accrue to the employer or the person who commissioned the work, subject to any contrary agreement.

Industrial designs

Under the Industrial Designs Act 1996, the author of the industrial design is entitled to make an application for registration, except for:

- (a) industrial designs created pursuant to a commission or money or money's worth – the person who commissioned the work is the original owner;
- (b) industrial designs created by an employee in the course of employment – the employer is the original owner; and
- (c) industrial designs subject to any contrary agreement.

6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

Except for copyright where registration is voluntary and common law rights such as passing off, one must have a patent, trade mark or industrial design registration in Malaysia to enjoy protection of these rights in Malaysia.

Malaysia is a member of the following Intellectual Property international treaties/conventions/agreements:

- (a) Paris Convention for the Protection of Industrial Property 1883.
- (b) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).
- (c) Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (NICE Classification).
- (d) Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (Vienna Classification).
- (e) Madrid Protocol (implemented on 27 December 2019).
- (f) Patent Cooperation Treaty.
- (g) Berne Convention for the Protection of Literary and Artistic Works 1886, as revised by the Paris Act of 1971.
- (h) World Intellectual Property Organization (WIPO) Copyright Treaty.
- (i) WIPO Performances and Phonograms Treaty.

6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

There are currently no specific rules or restrictions on monetisation or exploitation of IP in Malaysia. IP in Malaysia is generally exploited either by way of creating licences for the use of IP or co-development of new inventions/products, or selling the IPR for a value. There has been significant progress in the development and the implementation of IP monetisation mechanisms, including:

- The Industrial Designs (Amendment) Act 2013, which came into force on 1 July 2014, allows for a registered industrial design to be the subject of a security interest in the same way as other personal or movable property.
- Malaysia's new Trademarks Act 2019 came into force on 27 December 2019 and provides for multi-class filings as well as the implementation of the Madrid Protocol which would assist with the monetising of trade mark rights in Malaysia and elsewhere. A registered trade mark is recognised as personal or movable property and may be the subject of a security interest.
- The Malaysian Competition Commission (**MyCC**) Guidelines on Intellectual Property Rights and Competition Law, effective from 6 April 2019, was issued to

provide guidance on MyCC's approach on the interface between competition and activities or dealings relating to intellectual property assets. While exclusivity of rights and monetisation of IP encourages innovation and improved product or service quality, the Guidelines provide for situations involving intellectual property where the Competition Act 2010 will be applicable and certain acts may be deemed to be anti-competitive or the abuse of a dominant position.

- Proposal for income tax exemption of up to 10 years on qualifying IP income derived from patent and copyright software of qualifying activities in Malaysia's 2020 Budget. There has also been a proposal to improve the research and development (**R&D**) framework in Malaysia by allocating funds to intensify R&D projects in Malaysia.

Efforts have also been taken to assist and encourage continuity in the registration of intellectual property rights during the COVID-19 pandemic. Amongst the efforts are the enactment of the Trademarks (Waiver and Modification of Fee) Regulations 2020 and the Patents (Waiver of Fee) Regulations 2020, whereby MyIPO is offering fee exemptions for specific trademark and patent matters between 1 January 2021 and 30 June 2021 for companies and individuals affected by COVID-19. These matters include waiver of surcharge for late payment of patent annual fees and waiver of fees for extension of time for proceedings other than for opposition.



Christina Kow was admitted to practise in the High Court of Malaya in 1986. She holds an LL.B. and B.Com. from the University of Melbourne, Victoria, Australia. She is the head of the financial services practice in Shearn Delamore & Co. and regularly advises multinational banks and other financial institutions and capital market intermediaries on regulatory matters. Her areas of advice cover foreign exchange administration, the regulation of financial institutions, payment systems, securities (including collective investment schemes, securities borrowing and lending, and licensing of regulated activities) and derivatives.

She also has extensive experience in financing transactions, having acted for borrowers as well as lenders in different transactions, including onshore and offshore financing transactions under conventional as well as *Shari'ah*-compliant facilities.

Shearn Delamore & Co.

Level 7, Wisma Hamzah-Kwong Hing, No. 1
Leboh Ampang
50100 Kuala Lumpur
Malaysia

Tel: +60 3 2027 2786
Email: christina@shearndelamore.com
URL: www.shearndelamore.com



Timothy Siaw graduated with a B.Sc. and an LL.B. from Monash University, Australia in 1990 and has been admitted as a Barrister and Solicitor of the Supreme Court of Victoria and as an Advocate and Solicitor of the High Court of Malaya. Tim heads the Telecommunications, Media & Technology practice group of the firm. He has practised for over 25 years in the areas of information technology, intellectual property, media, communications, competition, data protection, and consumer protection. He advises on the regulatory requirements and compliance under the purview of the Malaysian Communications and Multimedia Commission. Tim negotiates and drafts ICT, technology transfer and licensing agreements. Tim is the author for the Cable and Satellite Broadcasting Association of Asia (CASBAA), reports on Malaysia's OTT TV Policies and has contributed to the annotations of the various statutes in relation to Intellectual Property for Lexis-Nexis. Tim has been identified as a leading lawyer in various publications including *Chambers Asia*, *The Legal 500 Asia Pacific*, *Asialaw*, *Who's Who Legal*, *Euromoney Expert Guides* and *IAM Patent 1000* over the years.

Shearn Delamore & Co.

Level 7, Wisma Hamzah-Kwong Hing, No. 1
Leboh Ampang
50100 Kuala Lumpur
Malaysia

Tel: +60 3 2027 2660
Email: timothy@shearndelamore.com
URL: www.shearndelamore.com

Shearn Delamore & Co. is one of the largest award-winning full-service law firms in Malaysia with more than 100 lawyers and 290 support staff. The firm has the resources to manage complex cross-border transactions, projects and matters.

The firm's clients include multinationals, private equity firms, government agencies and individuals. It is regularly instructed by and works with international law firms. The firm's global reach and network include member firms of the World Law Group, the World Services Group, the Employment Law Alliance and other international organisations.

Shearn Delamore & Co.'s diverse experience and interdisciplinary collaborations enables the firm to provide its clients with a complimentary range of skills to meet their needs. The firm is consistently ranked highly by *Chambers and Partners*, *International Financial Law Review (IFLR) 1000*, *The Legal 500 Asia Pacific* and *Asialaw Profiles*.

www.shearndelamore.com

Shearn Delamore & CO.

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs

Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms