2. Malaysia

This report was prepared by JETRO based on the research conducted by Deloitte Touche Tohmatsu (Deloitte KassimChan Management Consultants Sdn Bhd) in November 2001.

2.1 Consumer Protection Law regarding B2C

2.1.1 Legal Framework

Malaysia generally follows the British “Caveat Emptor” (let the buyer be aware) principal. This means, parties are allowed to conduct business dealings with each other on terms agreeable between them. The parties are deemed to be knowledgeable and able to take care of their respective interests. Generally the parties involved in the transaction do not owe any duty to look after the interest of the other party to the transaction i.e. the buyer takes care of himself.

Within this general concept, the government has enacted various legislations and set up institutions to protect the specific interests of consumers. The legislation and institutions are described in the following sections.

The following are the statutes and guidelines governing consumer protection in Malaysia.

**Statutes**
1. Consumer Protection Act 1999
3. Contracts Act 1950
4. Trade Descriptions Act 1972
5. Food Act 1993
6. Direct Sales Act 1993
7. Penal Code
8. Hire Purchase Act 1967

**Guidelines**

Malaysian Code of Advertising Practice 1990

The above laws and guidelines basically protect the following rights of the consumers:
The right to basic needs – to be entitled to basic goods and services
The right to safety - to be protected against products, production processes and services hazardous to life
The right to choose - to be entitled access to a variety of products and services at competitive prices
The right to be informed – to be entitled to adequate information enabling the making of an informed choice or decision
The right to be heard - to advocate consumers interests including the right of representation in governmental and other policy making bodies
The right to redress- to obtain a fair settlement of just claims

The scope of the above laws and guidelines are detailed in the following section.

(1) Consumer Protection Act 1999

(i) Introduction

The Act came into force on 15th November 1999 to provide for the protection of consumers as well as the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims. It applies in respect of all goods and services that are offered or supplied to one or more consumers in trade.

The Act defines goods as:

"…goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes-

(a) goods attached to, or incorporated in, any real or personal property;
(b) animals, including fish;
(c) vessels and vehicles;
(d) utilities; and
(e) trees, plants and crops whether on, under or attached to land or not,

but does not include choses in action, including negotiable instruments, shares, debentures and money…"

Under the Act, "Services" include:

"…any rights, benefits, privileges or facilities that are or are to be provided, granted
or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of service;"

A consumer is defined as a person who-

(a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and

(b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of-

(i) resupplying them in trade;
(ii) consuming them in the course of a manufacturing process; or
(iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land;"

"Trade" means:

“any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services;”

According to section 6 of the Act, parties cannot by contract agree not to apply this Act.

The Section 2(2)(g) of the Consumer Protection Act excludes electronic transactions from its ambit unless prescribed otherwise by the Minister of Domestic and Consumer Affairs. At the time the Act was being debated, the Minister presumed that electronic commerce will be regulated by other cyberlaws and excluded it from the Consumer Protection Act 1999.

Therefore the Consumer Protection Act does not cover software and services purchased over the internet. The Sale of Goods Act 1957 and the Contracts Act 1950 would be the existing laws relevant to sale transactions over the internet.

(ii) Misleading and deceptive conduct

The Act prohibits misleading and deceptive conduct, false representation and unfair practice. In relation to conduct, representation or practice, “false”, “misleading” or “deceptive” includes conduct, representation or practice which is capable of leading
a consumer into error. With regard to misleading conduct, section 8 of the Act prohibits conduct that:

(a) in relation to goods, is misleading or deceptive, or is likely to mislead or deceive, the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity, of the goods; or
(b) in relation to services, is misleading or deceptive, or is likely to mislead or deceive, the public as to the nature, characteristics, suitability for a purpose, or quantity, of the services.”

The Act further prohibits the following false or misleading representations:

(a) that the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model;
(b) that the goods have had a particular history or particular previous use;
(c) that the services are of a particular kind, standard, quality or quantity;
(d) that the services are supplied by any particular person or by any person of a particular trade, qualification or skill;
(e) that a particular person has agreed to acquire the goods or services;
(f) that the goods are new or reconditioned;
(g) that the goods were manufactured, produced, processed or reconditioned at a particular time;
(h) that the goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits;
(i) that the person has any sponsorship, approval, endorsement or affiliation;
(j) that concerns the need for any goods or services;
(k) that concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or
(l) that concerns the place of origin of the goods.

In connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land, section 11 of the Act states that no one shall:

(a) falsely represent that any person has any sponsorship, approval, endorsement or affiliation; or

(b) make a false or misleading representation concerning any or all of the following:
(i) the nature of the interest in the land;
(ii) the price payable for the land;
(iii) the location of the land;
(iv) the characteristics of the land;
(v) the use to which the land is capable of being put or may lawfully be put;
(vi) the existence or availability of facilities associated with the land.

The Act further prohibits providing misleading indications as to price. Section 10 of the Act provides the following definition for the word “price”:

(a) the aggregate of the sums required to be paid by a consumer for or otherwise in respect of the supply of the goods or services; or

(b) any method which will be or has been applied for the purpose of determining the aggregate.

(iii) Unfair Practices

Sections 13 to 18 govern unfair practices in relation to advertisements, free offers, the acts of demanding and accepting payments without intending to supply a future services contract. Bait advertising is when a person advertises goods or services which he does not intend to offer for supply or does not reasonably believe he can supply at the price initially offered and in reasonable quantities, having regard to the nature of the market in which he carries on business.

This act also prohibits a person from offering any gift, prize or other free item without the intention of providing it or without the intention of providing it as offered. A claim that goods are limited will only be allowed if the maximum quantity of goods offered for sale and the specific time period or dates for which the goods are offered for sale are stated clearly.

A person is also not allowed to demand or accept payment if he has no intention of supplying the goods or services or he does not reasonably believe that he will be able to supply the goods or services. Future services contract means a contract for consumer services that will be provided on a continuing basis and as prescribed by the Minister from time to time.

A consumer is entitled to cancel a future services contract by words or conduct but he will be subjected to certain charges by the supplier. Nevertheless he is able to
obtain a refund from the supplier for payment made over and above that which he was entitled to. There is a presumption of liability for conduct or representation made or published in an advertisement, on the person who directly or indirectly claims to supply goods and services and/or on the person on whose behalf the advertisement is made unless the contrary is proved.

(iv) Safety of goods and services

Part III of the act contains provisions relating to the safety of goods and services. Safety standards in relation to goods may relate to:

"…the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods;

…the testing of the goods during or after manufacture or processing;

…the form and content of markings, warnings or instructions to accompany the goods."

Generally, the person supplying or offering to supply goods or services shall adopt and observe reasonable safety standards, expected by a reasonable consumer.

There is a general prohibition against the supply, offer of advertisement for supply of any goods or services which do not comply with the prescribed safety standards. The importation of unsafe goods is also prohibited.

The Minister may from time to time declare any goods or any class of goods to be prohibited goods where the goods or goods of that class have caused or are likely to cause injury to any person or property or is otherwise unsafe. Such a declaration may require the supplier to:

- recall the prohibited goods;
- stop the supply of these goods;
- stop advertising these goods;
- disclose any information to the public relating to the characteristics of these goods which render them unsafe, the circumstances which make these goods unsafe and any other matters relating to these goods or the use of these goods;
- repair these goods; and
- refund the price paid or the value of the consideration given for these goods.
(v) Guarantees in Respect of the Supply of Goods -Part V

A consumer is entitled to an express guarantee by the manufacturer for goods which are supplied to him. According to section 38 of the Act, an express guarantee is an undertaking, assertion or representation in relation to:

"…the quality, performance or characteristics of the goods;

…the provision of services that are or may at any time be required in respect of the goods;

…the supply of parts that are or may at any time be required for the goods;

…the future availability of identical goods, or of goods constituting or forming part of a set of which the goods in relation to which the undertaking, assertion of representation is given or made from part of; or

…the return of money or other consideration should the goods not meet any undertaking by the guarantee."

The following implied guarantees are applied in a transaction for goods:

- Implied guarantee as to title;
- Implied guarantee as to acceptable quality;
- Implied guarantee as to fitness for particular purpose;
- Implied guarantee that goods comply with description;
- Implied guarantee that goods comply with sample;
- Implied guarantee as to price; and
- Implied guarantee as to repairs and spare parts.

The consumer has a general right of redress against suppliers where the goods fail to comply with these implied guarantees. The consumer is entitled to the following remedies:

- Requiring the supplier to remedy the failure
- Reject the goods
- Obtain damages in compensation.

The consumer also has a right of redress against the manufacturer for a breach of the
manufacturer's guarantee.

(vi) Guarantees in Respect of the Supply of Services

The following implied guarantees are applied in a transaction for services:

- Implied guarantee as to reasonable care and skill;
- Implied guarantee as to fitness for particular purpose;
- Implied guarantee as to time of completion; and
- Implied guarantee as to price.

The consumer has a general right of redress against suppliers where the services fail to comply with these implied guarantees. The consumer is entitled to the following remedies:

- Requiring the supplier to remedy the failure
- Reject the service
- Obtain damages in compensation.

The consumer also has a right of redress against the manufacturer for a breach of the manufacturer's guarantee.

(vii) Product liability

The Act governs the situation where damage is caused by a defect in a product. "Product" is defined as "any goods including a product which is comprised in another product by virtue of being a component part, raw material or otherwise."

Section 68 of the act provides that any of the following people can be held responsible:

- the producer of the product;
- a person holding himself out to be a producer of the product; or
- a person who has in the course of business imported the product into Malaysia to supply it to another person

"Damage" means

"Death or personal injury or any loss of or damage to any property including land."
For the purposes of a claim under the Civil Law Act 1956, the Act states that any damage for which a person is liable under section 68 is deemed to have been caused by the person's wrongful act, neglect or default. The liability for loss or damage caused by a defect in the product cannot be limited by any contract term, notice or other provision.

(viii) Enforcement

In order to enforce offences under the Consumer Protection Act, the following powers may be effected by the Assistant Controller:

1. Power to investigate the commission of any offence including the powers to require the attendance of any relevant persons and or examination of persons acquainted with the case;
2. Powers of search and seizure;

The extent of these powers are provided for in Part XIII of the Act.

An Assistant Controller of Consumer Affairs is a public officer who is appointed by the Minister of Domestic Trade and Consumer Affairs and is under the general control and direction of the Minister. The Assistant Controllers, the Deputy Controllers and other appointed officers are under the direction and control of the Controller of Consumer Affairs who is also appointed by the Minister of Domestic Trade and Consumer Affairs.

(2) Sale of Goods Act 1957

This Act applies to states in West Malaysia. The United Kingdom Sale of Goods Act would also apply in East Malaysia by virtue of Section 5 of the Civil Law Act 1956 which states:

(1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principles and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England, in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

The Sale of Goods Act 1957 was originally enacted in 1957 and revised in 1990 to include the states of Malacca and Penang. The earlier laws were largely modelled on the United Kingdom Sale of Goods Act 1893.

In the absence of express conditions and warranties, the Sale of Goods Act prescribes implied terms and conditions as to the quality and fitness for purpose of goods supplied under a contract of sale to safeguard the interests of consumers. Section 16 of the Act states that

(a) where a buyer makes known expressly or by implication to the seller the particular purpose for which the goods are required, relying on the seller that the goods are of a description which it is in the course of business to supply, there is an implied condition that the goods are reasonably fit for that purpose.

(b) where goods are bought by description from a seller who deals with goods of that description there is an implied condition that the goods shall be of merchantable quality.

The burden of proof falls upon the buyer of the goods who has suffered injury due to buying the goods. Any right, duty or act by the seller can be excluded by the parties by express agreement or by the course of dealings or by usage."

In the event such an implied condition is not complied with, the consumer is entitled to a few remedies which include the right to reject the goods, repudiate the contract and obtain a refund. In some cases the consumer may be entitled to compensation.

This Act would cover e-commerce transactions if the particular item purchased falls within the definition of "goods". One limitation of this definition however is that "goods" are restricted to tangible goods. Therefore, it is doubtful whether the sale of software over the Internet would be subject to the protection available to consumers afforded by the act since in some cases it would not be delivered to the consumer in a physical medium.
However, as indicated in the UK case of *St Albans City Council v ICL*, the common law principal that the software should be "reasonably capable of achieving its intended purpose," would apply to software delivered online.

(3) Contracts Act 1950

This is the basic Act governing legislation relating to contracts, covering the essential elements of a contract, the performance of contracts, the consequences of a breach of contract, indemnities, guarantees, agency etc. It generally follows the common law.

The formation of a binding contract is completed when an offer is made, a clear unequivocal acceptance and provision of consideration and an intention to be bound by the contract.

Under the interpretation section of the Act, an offer is known as a "proposal" i.e. "when one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent to that other to the act or abstinence".

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.

The person making the proposal is called the "promisor" and the person accepting the proposal is called the "promisee".

However, there may also be confusion whether a statement made is intended to be an offer or a mere invitation to treat, inviting offers from potential consumers.

In the context of electronic commerce transactions, the contractual rights and liabilities are not very clear. The question arises whether the content provider of a web site is making an “offer” which is capable of being a contract once accepted by a customer or just making an “invitation to treat” (i.e advertisement / sales promotion) in which case no contract is formed when the customer places an order.

Assistance may be drawn from the courts in the United States of America, who have considered a web site as mere invitation to treat/advertising. If the advertisement by web site owners to the world at large were to amount to offer then if these proposals are accepted, the makers of the offer will become the promisor and be contractually bound, when they were merely advertising their products.

On the other hand, the merchants from a web site may intend to be contractually bound
upon receiving a response by e-mail from a customer. Accordingly, it will all depend on the intention of the parties.

(4) Trade Descriptions Act 1972

The Act governs laws relating to merchandise marks by prohibiting misdescription of goods provided in the course of trade and false or misleading indications as to the price of goods as well as ensuring information or instructions relating to goods to be marked on or to accompany the goods or to be included in advertisements.

Under the Act, "goods" includes ships, aircraft, vehicles, animals, plants and growing crops and all kinds of movable property. 

In relation to computer software, the software is technically a computer program which sets out instructions or commands necessary to perform specific functions. Such a program would usually be contained in a physical medium such as a disk, magnetic tapes, etc. These physical mediums such as computer hardware and peripherals come within the definition of goods under the Act as well as under the Sale of Goods Act. However, software per se cannot be classified as goods under the Trade Descriptions Act or as goods under the Sale of Goods Act.

Nevertheless, there have been American and Australian authorities to support the proposition that software is in fact goods although the issue was not conclusively determined in these cases. The American case was between Clements Auto Co. v. Service Bureau Corp. 444 F.2D169 (1971) and the Australian case was between Toby Constructions Products Pty Ltd v. Computa Bar (Sales) Pty Ltd (1983) 2 NSWLR. 48.

As mentioned in the case of St Albans DC v. ICL (1996) 4 All ER 481:

"if a disk carrying a program is transferred by way of sale or hire, and the program is in some way defective so that it will not instruct or enable the computer to achieve the intended purpose, the seller or hirer of the disk will be in breach of the terms as to quality and fitness for purpose implied by the Sale of Goods Act."

“Advertisement” includes every form of advertising (whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication) by display or notices or by means of catalogues, price lists, circular labels, cards or other documents or materials or by the exhibition of films or of pictures or photographs, or by means of radio or television or in any other way.
Section 4 describes a trade description to be an indication direct or indirect and by whatever means given of any of the following matters with respect to any goods or parts of goods:

(a) nature or designation;
(b) quantity, size or gauge;
(c) method of manufacture, production, processing or reconditioning;
(d) composition;
(e) fitness for purpose, strength, performance, behaviour or accuracy;
(f) the standard of fineness of articles made of precious metals;
(g) any physical characteristics not included in the preceding paragraphs;
(h) approval by any person on conformity with a type approved by any person;
(i) place or date of manufacture, production, processing or reconditioning;
(j) person by whom manufactured, produced, processed or reconditioned;
(k) other history, including previous ownership or use.

(i) Prohibition of a false trade description (Section 3)

A person is deemed to be guilty of an offence under the Act if he in the course of trade or business applies a false trade description to any goods or supplies or offers to supply any goods to which a false trade description is applied.

A false trade description is one that is false to a material degree or is misleading and likely to be taken as false to a material degree.

(ii) Applying a false trade description (Section 6)

A person is said to apply a trade description to goods if he affixes or annexes it to or in any manner marks it on or incorporates it with the goods themselves or anything in, on or with which the goods are supplied or places the goods in, on or with anything which the trade description has been affixed or annexed to, marked on or incorporated with, or places any such thing with the goods or uses the trade description in any manner likely to be taken as referring to the goods.

An oral statement may also amount to the use of a trade description.

The Act will be applicable to items sold through the Internet because an indication relating to a trade description can be given to any goods or part of goods on the Internet.
(iii) Presumption of liability in advertisers (Section 7)

With regard to trade descriptions used in advertisements, there is a presumption if liability on the person who directly or indirectly offers to supply the goods or services and/or the person on whose behalf the advertisement is made.

(iv) Definition Orders (Section 10)

The Minister has powers to assign meanings to any expressions used in relation to goods that are in the interest of persons to whom those goods are supplied or exported.

(v) False and misleading indications as to price of goods (Section 14)

A supplier who offers for sale goods of any description at a lesser price than the recommended price shall be guilty of an offence under the Act.

(vi) False representation as to supply or approval of goods (Section 15)

It is an offence for a person to give a false indication direct or indirectly that any goods or services supplied by him or the methods adopted by him have been approved by any person including any government or government department or agency or any international body or agency whether in Malaysia or abroad.

(vii) Trademark infringement and passing off action (Section 16)

A trademark owner can apply to the High Court for a trade description order declaring that the infringing trademark or get up is a false trade description under the Act.

Where a business has registered a trademark and another business sells goods or provides services under the same trademark without permission from the first business, there may be an infringement of the registered trademark. The actions of the second business could be a type of unfair competition where it benefits from the reputation of the first business associated with the registered trademark.

Passing off is the use of an unregistered mark such that the third party using the mark passes off, or represents, the goods or services as their own. The law of passing off concerns unfair competition more generally in situations where there does not need to be a registered trade mark or any other intellectual property right. Where a second business does something so that the public is misled into thinking
that the activity is associated with a first business and as a result the first business suffers some damage, then it may be possible for the first business to sue the second business for passing off. This area of law arises out of the common law rather than statute.

(viii) Cross Border transactions - Prohibition of importation of goods bearing false indication of origin (Section 17)

Where a false trade description is applied to any goods outside Malaysia and the false indication or one of the false indications given or likely to be taken as given thereby is an indication of the place of manufacture, production, processing or reconditioning of the goods or any part thereof, the Minister may make an order prohibiting the import of the goods into Malaysia.

(ix) Abetting of offences committed abroad (Section 21)

Any person in Malaysia who assists in or induces the commission in any county of an act in respect of goods which if the act was committed in Malaysia, would be an offence under section 3 of the Act if either -

(a) the false trade description concerned is an indication (or anything likely to be taken as an indication) that the goods or any part thereof were manufactured, produced, processed or reconditioned in Malaysia; or

(b) the false trade description concerned consists of or comprises an expression to which a meaning is assigned by an order made under section 10 of the Act and where that meaning is so assigned under specified circumstances under the order, the trade description is used in those circumstances.

(x) Exemption (Section 31)

Notwithstanding all the prohibitions mentioned above, the Minister may also by order specify that any of the matters included in Section 4 (1) of the Act shall not apply with regard to any description of goods which are intended for despatch to a destination outside Malaysia or for any specific use or purpose as mentioned in the order.

(xi) Time limit for prosecution (Section 19)

The time limit for prosecution of an offence under the Act is three years from the
commission of the offence or one year from its discovery by the prosecutor whichever is the earlier.

The Enforcement Division of the Ministry of Domestic Trade And Consumer Affairs is responsible for all matters relating to enforcement under the Act, with powers to search, inspect and seize.

(5) Food Act 1993

The Act prohibits a number of offences and seeks to protect the public against health hazards and fraud in the preparation, sale and use of food. The first of these offences related to the prohibition of adulteration of food. Section 13 of the Act provides as follows:

“(1) Any person who prepares or sells any food that-

(a) has in or upon it any substance which is poisonous, harmful or otherwise injurious to health;
(b) consists in whole or in part of any diseased substance or foreign matter, or is otherwise unfit for human consumption;
(c) is the product of a diseased animal or an animal which has died otherwise than by slaughter;
(d) is the product of a diseased vegetable substance; or
(e) is adulterated,

commits an offence and is liable on conviction to imprisonment for a term not exceeding five years or to fine or to both”.

The second offence relates to the prohibition against the sale of food not of the nature, substance or quality demanded. This offence is provided for by section 14 (1) of the Act which states:

"Any person who sells any food which is not of the nature, or is not of the substance, or is not of the quality (as specified under this Act and any regulation made thereunder) of the food demanded by the purchaser, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years or to fine or to both."

Sections 15 and 16 of the Act both seek to protect consumers against the sale of products which have been falsely labeled. Sections 15 and 16 of the Act provide as follows:
"15. Where a standard has been prescribed for any food, and person who prepares, packages, labels or advertises any food which does not comply with that standard, in such a manner that it is likely to be mistaken for food of the prescribed standard, commits an offence and is liable on conviction to imprisonment for a term not exceeding three years or to fine or to both.

16. Any person who prepares, packages, labels or sells any food in a manner that is false, misleading or deceptive as regards its character, nature, value, substance, quality, composition, merit or safety, strength, purity, weight, origin, age or proportion or in contravention of any regulation made under this Act commits an offence and is liable on conviction to imprisonment for a term not exceeding three years or to fine or to both."

The Act also prohibits the practice of wrongfully advertising food and deceiving a purchaser with regard to the condition and description of the food. Upon conviction, this carries the punishment of a term of imprisonment for a term not exceeding three years or to a fine or to both.

If an offender is found guilty of any one of these acts, the Act confers the power upon the court to cancel any license issued to such a person in addition to any penalty which it may lawfully impose.

The Act covers the sale of food purchased over the Internet from foreign based sellers and delivered in Malaysia.

(6) Direct Sales Act 1993

This act provides for the regulation of direct selling and seeks to protect consumer rights from indiscriminate direct sales and mail order practices. It defines a direct sale as “a door-to-door sale and a mail order sale”.

The definition of "mail order sale" is provided by the Act as "…the sale of goods or services which a person conducts, either by himself or through any person authorised by him, by receiving an offer for a sale contract by mail".

It is an offence under the Act for a person to carry on any direct sale business unless it is a lawfully incorporated company and it holds a valid licence. Failure to obtain a licence will attract the punishment provided for in section 4 (2) of the Act and cause the offender to be liable:
(a) if such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit and, for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;
(b) if such person is not a body corporate, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both and, for a second or subsequent offence, to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding six years or to both."

The Act endeavours to protect consumers by making the following acts offences:

- calling at any premises for the purpose of negotiating door-to-door sales on days and between hours that have not been prescribed;
- calling at any premises for the purpose of negotiating door-to-door sales without indicating the purpose of his visit before entering the premises;
- refusing to leave the premises at the request of the occupier of the premises or any person acting with the actual or implied authority of the occupier;
- neglecting to produce his national registration identification card and his authority card
- issuing a false authority case which contains any false or misleading information;
- supplying or advertising the supply of any goods or services by mail order which are not in accordance with the Act;
- neglecting to include in an advertisement for the supply of goods or services by mail order:
  (a) his name and licence number;
  (b) his address which shall not be a postal box number;
  (c) his telephone number;
  (d) a detailed description of the goods offered or services to be provided;
  (e) the places and times where a sample of the goods may be inspected;
  (f) the price of the goods or services;
  (g) the cost of delivery, if any, and the manner of delivery, of the goods; and
  (h) the time when the goods or services could be expected to be delivered or performed.

- furnishing false or misleading information in an advertisement for the supply of goods or services by mail order;
- neglecting to make available a sample of the goods supplied by mail for the inspection of the public at the places and times specified in the advertisements.
As far as advertising under the Act is concerned, the Act prohibits advertising a sale. Section 19 of the Act provides as follows:

"(1) No person shall supply or advertise for the supply of, by mail order, any goods or services except in accordance with this Act or the regulations. 
(2) Any person who contravenes subsection (1) shall be guilty of an offence."

It is submitted that the word "mail order" would extend to the advertisement for the supply of goods and services via e-mail as well. This is because there is no definition for the words "mail order" in the Act. Upon consideration of section 62A of the Interpretation Acts 1948-1967, electronic forms of retention or dispatch are allowed where no particular mode is specified. Accordingly, since no specified form of delivery is provided, mail order may be delivered electronically. Thus, electronic mail would generally need to comply with the Direct Sales Act 1993.

The Act provides for the powers of investigation, arrest, search and seizure to the relevant authorities upon receiving information of an infringement of this Act.

Where goods and services are sold through the Internet, no actual contract is sent to the buyer other than that appearing on the site. On the assumption that a web site makes an offer to the world at large, the contract is made by acceptance of the sale by the buyer. This would render the Act inapplicable to the sale of goods through the Internet. Further section 1 (3) of the Act excludes the following situations from its ambit:

(a) where the purchaser or prospective purchaser is a body corporate;  
(b) where any contract of insurance and reinsurance issued by an insurer registered under the Insurance Act 1963 is involved; and  
(c) where any contract of takaful and re-takaful issued by a takaful operator registered under the Takaful Act 1984 is involved.

Hence, if the purchaser in an e-commerce transaction were a body corporate, the transaction would be outside the scope of this Act.

(7) Penal Code

According to section 292 of the Penal Code, it is an offence to commit the following acts:  
● to distribute, publicly exhibit or put into circulation any obscene drawing, painting, representation or object;
to convey any obscene object for the above purposes;
- to take part in or receive profits from any business in the course of which the offender knows or has reason to believe that those obscene objects are conveyed, publicly exhibited or put into circulation;
- to advertise or make known that any person is engaged in or is ready to engage in any act which is an offence under the above offences;
- to make or publish defamatory statements or representations with the intention to harm.

(8) Hire Purchase Act 1967

This Act governs the rights and responsibilities of the owners and hirers of consumer goods and motor vehicles. Section 7 of the Act provides for the following conditions and warranties to be implied in every hire-purchase agreement:

(a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;
(b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass;
(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

In every hire-purchase agreement there shall be an implied condition that the goods shall be of merchantable quality but such a condition shall not be implied where the hirer has examined the goods or a sample thereof, as regards defects which the examination ought to have revealed; or if the goods are second-hand goods and the agreement contains a statement to the effect that -

(i) the goods are second-hand; and
(ii) all conditions and warranties as to quality are expressly negative, and the owner proves that the hirer has acknowledged in writing that the statement was brought to his notice."

The Act imposes a duty on the owners and sellers of the goods to supply the consumer with all the documents and information pertaining to the hire-purchase transaction. In the event of a failure on the part of the owner or the seller of the goods to carry out this duty, section 9 (2) of the Act provides that while the default continues;

(a) the owner shall not be entitled to enforce -
(i) the agreement against the hirer;
(ii) any right to recover the goods from the hirer;
(iii) any contract of guarantee relating to the agreement;

(b) any security given by the hirer in respect of money payable under the agreement or given by a guarantor in respect of money payable under such a contract of guarantee as aforesaid shall not be enforceable against the hirer or the guarantor by any holder thereof."

It is further provided by the Act that if the owner or the seller continues to be in default for a period of one month, the owner shall be guilty of an offence and shall upon conviction, be liable to a fine not exceeding one thousand ringgit.

(9) Communication and Multimedia Act 1998

The act came into force on 1st April 1999. It provides for and regulates the converging multimedia and communications industry. The Act comes under the purview of the Ministry of Energy, Communications and Multimedia.

The Act provides for wider accessibility and availability of services or facilities to consumers at reasonable, fair and affordable prices, a wider range of choices in services and providers and assurance or security and safety to consumers.

Section 188, Part VIII of the Act protects consumers against possible infringements by network service or applications providers. The Act states that a person who provides any network service or applications service shall-

(a) deal reasonably with consumers; and
(b) adequately address consumer complaints.

A network service is defined by section 2 of the Act as:

"…a service for carrying communications by means of guided and/or unguided electromagnetic radiation."

A network service provider means:

"… a person who provides network services."

In the interests of consumer protection, Section 189 of the Act has made provisions for a
consumer forum to be set up at the discretion of the Commission to prepare a consumer code which must include model procedures for:

- meeting consumer requirements in a reasonable fashion;
- handling complaints from consumers and disputes between consumers and suppliers
- the setting up of an inexpensive arbitration process other than a court
- the provision of procedures for the compensation of customers in case of a breach of a consumer code
- systems for the protection of consumer information.

According to section 190 (2) of the Act, the consumer code should include among others:

(a) the provision of information to customers regarding services, rates and performance;
(b) the provisioning and fault repair of services;
(c) the advertising or representation of services;
(d) customer charging, billing, collection and credit practices; and
(e) any other matter of concern to consumers."

Section 191 of the Act states that after the preparation of this consumer code, it must be published and notice of its publication must be advertised in at least one Malay and one English newspaper for at least three consecutive days.

As far as the resolution of consumer disputes is concerned, Section 195 of the Act appoints the Malaysian Communications and Multimedia Commission as the body which is able to resolve consumer complaints in relation to matters of customer service and consumer protection. The Commission has the responsibility to formulate guidelines pertaining to the handling of consumer complaints.

The Malaysian Communications and Multimedia Commission is established under the Malaysian Communications and Multimedia Commission Act 1998 with supervisory and regulatory powers over communications and multimedia activities in Malaysia and enforcement of the same.

2.1.2 Organizations

The government and non-governmental organizations that are involved in the consumer protection are as follows:

(1) Governmental Organisations

(i) Ministry of Domestic Trade and Consumer Affairs – Consumer Affairs Division

The government ministry which is related to consumer protection in Malaysia is the Ministry of Domestic Trade and Consumer Affairs. The Ministry has several divisions, namely

- The Registrar of Company and Business
- Intellectual property
- Domestic Trade and Consumer Affairs
- Enforcement

The Ministry's services in consumer affairs include the following:

- Issues direct selling licenses;
- Regulates prices;
- Regulates the pricing of controlled goods such as sugar, flour, cooking oil, petroleum etc.
- Standardises the price of cooking oil and petroleum;
- The enforcement division of the Ministry investigates and prosecutes complaints and attempts to resolve consumer disputes.

(ii) The National Consumer Advisory Council

This was established to advise the Minister of Domestic Trade and Consumer Affairs on matters concerning consumer issues and operation of law, promotion of consumer rights and any other matters for the proper and effective implementation of the Consumer Protection Act.

(iii) Tribunal for Consumer Claims

A consumer may lodge a claim with this tribunal for any loss suffered concerning his interests as a consumer under the Consumer Protection Act within three years from the date the cause of action arose. Upon lodging a claim with the tribunal, the
claimant cannot refer the claim to court unless the court proceedings commence before the lodgement with the tribunal or the claim before the tribunal is withdrawn, abandoned or struck out.

The Tribunal only has jurisdiction where the total amount claimed does not exceed ten thousand ringgit. This jurisdiction may be extended by agreement between the parties concerned. The tribunal has no jurisdiction in respect of claims for the following matters:

- recovery of land/estate or interest in land in which the title to land /estate or interest in land, or any franchise, is in question; and
- disputes concerning entitlement under a will or settlement, goodwill, chose in action, trade secret or other intellectual property.

The tribunal may make the following awards:

- Payments of money from one party to another as compensation
- Supply or re-supply of the goods concerned
- Replacement/repair of the goods concerned
- Refund of the price paid for the goods concerned
- An order that a party comply with the guarantee given
- An order that the contract be varied or set aside, wholly or in part
- An order that costs to or against any party be paid
- An order that interest be paid on any sum or monetary award at a rate not exceeding right per centum per annum, unless the parties have agreed otherwise
- An order that the claim be dismissed.

Under Section 2 (2)(g) of the Consumer Protection Act 1999, "trade transactions" affected by electronic means are not covered under the act unless otherwise prescribed by the Minister. To date, no such order has been made so e-commerce transactions remain outside the ambit of the Tribunal.

In this regard, the Government has indicated that it is considering promulgating additional legislation to protect consumers with regard to e-commerce transactions. Also, the Tribunal has no jurisdiction over foreign retailers (source: http://www.bakerinfo.com/apec/malayapec_main.htm, Jan 2001)

(2) Non Governmental Organisations
(i) Federation of Malaysian Consumers Association

The main non-governmental organization which aims at protecting consumer rights in Malaysia is the Federation of Malaysian Consumers Association (FOMCA, http://www.angelfire.com/me/fomca.html). It is a voluntary, non-profit, non-political and civic organization which works closely with government and non-governmental organizations. At present it is affiliated to 12 state consumer associations. They are:

- Selangor and Federal Territory Consumers' Association (SCA)
- Consumers Association of Melacca (CAM)
- Johor Consumers Association (JCA)
- Consumers Association of Negeri Sembilan (CANS)
- Consumers Association of Perlis (CAPs)
- Consumers Association of Kedah (CAKE)
- Perak Consumers Association (PCA)
- Kelantan Consumers Association (KCA)
- Consumers Association of Terengganu (2PTR)
- Consumers Association of Sabah (CASH)
- Consumers Association of Sarawak (CAS)

It's non affiliates are:

- Consumers Association of Penang (CAP)
- Consumers Association of Taiping (CAT)
- Education and Research for Consumers (ERA)
- Consumers Organisation of Air Keroh, Melaka

(ii) The Consumers Association of Penang

The Consumers Association of Penang is the Regional Office in the Asia Pacific region for Consumers International, a federation of consumer organizations dedicated to the protection and promotion of consumers interests worldwide.

2.1.3 Consistency between the OECD guideline and legal concept in the country

The consumer protection laws in Malaysia are generally consistent with the OECD guidelines for Consumer Protection in the Context of Electronic Commerce.
The OECD Guidelines require that businesses engaged in electronic commerce should have due consideration to the interests of consumers and act in accordance with fair business, advertising and marketing practices. It specifies that businesses engaged in Business-to-Consumer transactions provide accurate, clear and easily accessible information about themselves.

Section 20 of the Malaysian Direct Sales Act 1993 states that an advertisement by any person for the supply of goods or services shall contain:

- The name and license number of the supplier
- His address
- His telephone number
- A detailed description of the goods offered or the services to be provided
- The places and times where a sample of the goods may be inspected
- The price of the goods or services
- The cost of delivery, if any, and the manner of delivery, of the goods; and
- The time when the goods or services could be expected to be delivered or performed.

Failure to state the above particulars would be an offence.

The OECD guidelines advocate clearly identifiable advertising and special care with regard to certain classes of people such as children, the elderly, the seriously ill and others who may not have the capacity to fully understand the information with which they are presented.


The OECD Guidelines provide for dispute resolution mechanisms. It is important that these mechanisms are adequate given the global nature of e-commerce transactions. It emphasizes alternative dispute resolution procedures which are especially popular in cross-border disputes.

The Malaysian Arbitration Act 1952 applies to all arbitrations without drawing a distinction between international and domestic arbitration except for those held under the Convention on the Settlement of Investment Disputes Between States and Nationals of other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 (UNCITRAL Arbitration Rules) and the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration. In addition, the Communications and
Multimedia Act 1998 further provides for a similar dispute resolution procedure for consumer complaints. (see section 195 of the Act).

The Malaysian Mediation Center set up under the auspices of the Malaysian Bar Council is also an alternative method of dispute resolution and is gaining momentum in Malaysia.

2.1.4 Choice of Law and Jurisdiction of the court

In Malaysia, parties generally have freedom to contract. The Privy Council in Ooi Boon Leong v. Citibank N.A. (1984) 1 MLJ 222 confirmed that parties to an agreement have much scope to negotiate and incorporate terms acceptable to them.

In relation to this parties are free to agree on the choice of law and jurisdiction of the courts. Notwithstanding this, Section 5(2) of the Civil Law Act 1956 states as follows:

"In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England, in the like case as the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law"

Therefore under this section the law of England as is applied currently would be applicable to these states.

Furthermore, Section 4 of the Consumer Protection Act 1999 provides that the Act shall have effect notwithstanding any contract term which applies or purports to apply the law of another country where the term appears to the court to have been imposed wholly for the purpose of enabling the party imposing it to evade the operation of this act.

On the assumption that no jurisdictional agreement has been reached between the consumer and businesses, the court will determine what is the parties' implied/inferred choice of law from the terms and nature of the contract, the place of performance and the general circumstances of the case. This can either be the jurisdiction which the consumer belongs to or the jurisdiction of the business. The court will examine and determine objectively which forum has the closest and most real connection to the dispute and decide that as the forum which has real connection (ref: American Express Bank Limited v. Mohamed Toufic Al-Ozeil (1995) 1 MLJ 116; James Capel (Far East) Limited v. YK Fung Securities Sdn. Bhd (1996) 2 MLJ 97)
The jurisdiction of the Malaysian Courts is laid down in section 23(1) of the Courts of Judicature Act 1964 as set out below:

"Subject to the limitations contained in Article 128 of the Constitution, every High Court shall have jurisdiction to try all civil proceedings where-

(a) the cause of action arose;
(b) the defendants or one of several defendants resides or has his place of business;
(c) the facts on which the proceedings are based exist or are alleged to have occurred; or within the local jurisdiction of the Court

The interpretation of the scope of section 23(1) of the Courts of Judicature Act 1964 has been discussed in the case of *Bank Bumiputera Malaysia v. International Tin Council & Anor* (1989) 2 CLJ 961 held among other things that the said section provides extra-territorial jurisdiction to the High Court of Malaysia in cases where overseas foreigners are sued as co-defendants with local residents.

If the plaintiff's cause of action falls within one of the heads or grounds set out in Order 11 rule 1(1) or rule 2 of the Rules of the High Court 1980, the Malaysian courts would have jurisdiction over a non-resident defendant. The most relevant provision in Order 11 rule 1(1) of the Rules of the High Court 1980 for web-based e-commerce transactions is rule 1(1)(c) which provides as follows:

"Where a writ does not contain any claim for damage, loss of life or personal injury arising out of-

(i) a collision between ships, or

(ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two of more ships; or

(iii) non-compliance on the part of one or more of two or more ships, with the collision regulations made under section 251 of the Merchant Shipping Ordinance 1952;

service of a notice of writ out of jurisdiction is permissible with the leave of the Court in the following cases, that is to say-

(d) if an action begun by the writ relief is sought against a person domiciled or
2.1.5 Disclosure for Foreign Countries

There is no known publication / websites on consumer protection in Malaysia specifically for foreign nations. However, we have located some foreign publications which have focused on aspects of the Malaysian consumer protection system. Some of these are:

1. Consumers International, Newsletter

2. Baker & McKenzie, Global E-Commerce Law

3. APEC E-commerce Legal Guilde

4. Fair Trading Magazine - International Enquirer
   Published by the Office of Fair Trading,
   Fleetbank House, 2-6 Salisbury Square,
   London EC4Y 8JX

5. Publication of the United Nations Economic and Social Commission for Asia, in the Rural Development Section of the Population and Rural and Urban Development Division, article entitled: "Sustainable food production, income generation and consumer protection in Malaysia.

6. The book entitled European Journal of International Law, the International Practice of the European Communities: Current Survey

7. Newsletter by the Consumer Unity & Trust Society (CUTS), D-217, Bhaskar Marg, Buni Park, Jaipur 302016 India.
   [http://www.cuts-india.org/about.htm#top](http://www.cuts-india.org/about.htm#top)

2.2 Personal Information Protection Law in Public Sector regarding B2C
2.2.1 Legal Framework

Different countries treat privacy issues differently. For example, in the United States, privacy is a constitutional right. In Europe members of the EU have the European Data Protection Directive. On the other hand, countries following the common law system, such as Malaysia do not have a general law to protect personal information.

There is no comprehensive personal data protection law in Malaysia. Currently, personal data protection is generally based on case law with legislative protection for some specific personal data. Recently, Malaysia has sought to compile its own set of personal information protection laws in the form of a **Personal Data Protection Bill** which is yet to come into force.

Besides the Personal Data Protection Bill, the following are the existing statutes which partly deal with the protection of personal information in Malaysia.

- Computer Crimes Act 1997
- Banking and Financial Institutions Act 1989
- Digital Signature Act 1997
- Communications and Multimedia Act 1998

The Malaysian Personal Data Protection Bill adopts the co-regulatory data protection model. Under this model, the law usually applies to all use of personal data unless exempted and extends to most industries and business sectors. However, the law provides for the participation of industry players in formulating codes of practice for their individual industries or sectors.

Our research indicates that currently there are no export or import restrictions of encryption technology in Malaysia.

(1) Personal Data Protection Bill (Draft)

This Bill seeks to regulate the collection, holding, processing or use of personal data by any person to provide protection to an individual's personal data and safeguard the privacy interests of such an individual. This Bill is expected to be tabled by the end of 2001.

This Bill applies to personal data which directly relates to an individual. This individual is called the data subject. Data subject have the right of access and rights to prevent the collection of data which are likely to cause damage or distress. The Bill is also applicable
by the data user which is the person who controls the collection, holding, processing or use of personal data.

The Bill applies to automated and non-automated personal data files in the public and private sectors. The data subject may make a complaint to the Registrar of a suspected breach of any requirement of the bill. He may seek compensation through civil proceedings for damage or distress caused to him as a result of a contravention of this act.

The Bill envisages the appointment of a commissioner, the establishment of the Personal Data Protection Tribunal, the registration of data users, codes of practice and aspects relating to inspections, investigations and enforcement.

As far as trans-border transfers of data are concerned, the bill is only applicable if the collection, holding and processing takes place in Malaysia or is controlled by a data user whose principal place of business is in Malaysia. The bill is not applicable to personal data held or collected outside Malaysia. Only transfers of data to destinations approved by the Minister or which those which fall under the exemptions, are allowed. The exemptions extend to

- the transfer of data for domestic and recreational purposes
- certain employment-related personal data
- cases where the application would prejudice certain public or social interests, for example, national security, defence and international relations.

Upon obtaining the force of law, non compliance with the provisions of this Bill would result in the imposition of fines not more than RM200,000.00 or a term of imprisonment not more that 3 years or both.

(2) Computer Crimes Act 1997

Personal information stored in computers can be easily tapped into by unauthorized persons/entities. This gives rise to concern since extensive personal information, such as credit card details, medical records and personal contact information are available over the Internet. This act affords protection to individuals / entities against the misuse/authorized access of personal information through the use of computers.

A computer is defined under the act as:

"an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage
and display functions, and includes any data storage facility or communications facility
directly related to or operating in conjunction with such device or group of such
interconnected or related devices, but does not include an automated typewriter or
typesetter, or a portable hand held calculator or other similar device which is
non-programmable or which does not contain any data storage facility"

Computer network means

"the interconnection of communication lines and circuits with a computer or a complex
consisting of two or more interconnected computers;"

"Data" means

"representations of information or of concepts that are being prepared or have been
prepared in a form suitable for use in a computer."

A person is guilty of an offence under the act if he:

- alters or erases the program or data;
- copies or moves it to any storage medium other than that in which it is held or to a
different location in the storage medium in which it is held;
- uses it; or
- causes it to be output from the computer in which it is held whether by having it
displayed or in any other manner.

A person guilty of these offences is liable to a fine not exceeding fifty thousand ringgit or
to imprisonment for a term not exceeding five years or to both. It is important to note that
the intention a person has to commit an offence under this act need not be directed at any
particular program or data of any particular kind or a program or data held in any
particular computer.

Any unauthorized modification of the contents of any computer whether permanent or
temporary is a crime under the Act and would expose the offender to a fine of a hundred
thousand ringgit or to imprisonment for a term not exceeding seven years.

The act makes wrongful communication, whether directly or indirectly, of a number, code,
password or other means of access to a computer to another person who is unauthorized
to receive such information an offence.

The Act further provides for the irrebuttable presumption that a person is deemed to have
obtained unauthorized access if he has in his custody or control a program, data or other information held or retrieved from a computer which he is not authorized to have in his custody or control.

The provisions of the Act also assist law enforcement agencies with regards to their powers of search, seizure and the rest. In particular section 10 (1)(b) of the Act allows the police officer to require the alleged offender to provide him with reasonable assistance for the purposes of gaining access to any program or data held in a computer. By analogy this would include the giving of the subscriber's private key.

Although an offence is committed by a person outside Malaysia, the offender may be dealt with as though he had committed the offence within Malaysia if the computer or data was in Malaysia or capable of being connected, sent or used by or with a computer in Malaysia.

The Act makes abetment and attempts punishable as offences and the offender would be liable to a fine identical to the principal offence but the term of imprisonment will not exceed one half of the maximum term of the principal offence.

Enforcement is in the hands of the police who have powers of investigation, search and seizure under the Act.

(3) Banking and Financial Institutions Act 1989

This Act is to protecting confidential information and trade secrets of the banking sector. Under this Act no person who for any reason has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or in particular, the account of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, of any information or document whatsoever relating to the affairs or account of such customer.

(4) Digital Signature Act 1997

Section 79 of the Act authorises a police officer or an authorised officer conducting a search to be given access to computerised data stored in a computer or otherwise. This Section also defines access to include "being provided with the necessary password, encryption code, decryption code, software or hardware or other means required to enable comprehension of computerised data"

Notwithstanding this, the Act does not seem to authorise the police officer to be given the
private key of a subscriber. This is because the word "private-key" is specifically defined in Section 2 of the Act to mean:

"the key of a key pair used to create a digital signature".

A private key seems to be excluded from the general definition of "access". Thus, it isarguable that the disclosure of the private key is not allowed. On the other hand, the word "include" which is used in the definition of "access" may be given a broader interpretation to mean that a subscriber's private key would be accessible to the law enforcement agency as well.

(5) Communications and Multimedia Act 1998

Section 249 of the Act contains similar provisions for police officers to gain access to computerized data as in the Digital Signature Act 1997. The same reasoning would apply with regard to the definition of "access" but with a further meaning assigned to it under section 2 (2) and (5) of the Computer Crimes Act.

Nevertheless, section 256(2) of the Act provides for the alleged offender to be protected by the privilege of self-incrimination in that for example, he may refuse to comply with a decryption order if it would result in him incriminating himself. The privilege of self-incrimination pertaining to witnesses is clearly provided for under section 132 of the Evidence Act 1950.

The exercise of this privilege is not a bar to subpoena a person to court to give evidence as a witness. He can also invoke this privilege then but this is subject to the court's determination as to the validity and sufficiency of the grounds. Further, such a privilege may be waived. Once it is shown that there is an important state/public interest worthy of protection, the court may insist on the protection of these interests which are quite unconnected with the interest or claims of the privilege holder. The court in this instance may compel disclosure. It all depends on the circumstances of the case.

(6) Other Laws and Principals Related to Protection of Confidential Information and Trade Secrets

Personal information protection laws ought to be considered in the context of confidential information and trade secrets. In Malaysia, these concepts are based on common law rather than statute.

Confidential information includes secrets of all kinds of secrets. These include secrets of a
personal, commercial, industrial or political nature. However, it is in relation to trade secrets and business information of a confidential nature that the law of confidence is of particular importance. In order to determine whether information is truly confidential, the objective test is to be employed. The objective test focuses on that the reasonable man as the recipient of the information considers to be confidential.

Even though the information concerned is deemed to be secret and confidential information, for an action to succeed it must be shown that:-

- the information in question has the necessary quality;
- the information was communicated or imparted in circumstances importing an obligation of confidence on the part of the recipient;
- there has been or may be an unauthorised use of the information to the detriment or prejudice of the owner.

(As was stated in *Coco v. Clarks* (1969) RPC 41, approved by the Court of Appeal in *Dunford & Elliot v. Johnson* (1978) FSR 143).

Section 28 of the Contracts Act disallows a restraint of trade clause in any agreement by which a person is restrained from exercising a lawful profession, trade or business of any kind unless the restraint falls within one of the three stipulated exceptions. The exceptions are:

1. Where the seller of the goodwill of a business may be restrained from carrying on a similar business within specified local limits so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

2. Where partners upon or in anticipation of a dissolution of a partnership agree that some or all of them will not carry on a business similar to that of the partnership within specified local limits.

3. Where partners agree that some or all of them will not carry on a business other than that of the partnership during the continuance of the partnership.

It is common for confidentiality clauses to be incorporated in most contracts of employment which specifically creates an obligation on the employee or ex-employee not to divulge confidential information of the employer during and even after leaving the employer's services. This obligation is confined only to two specific interests of his employer in "secret processes" i.e. trade secrets and the goodwill that exists between the employer and his customers.
Whilst the employee is employed, he must observe his duty of fidelity which he owes to his employer. However, once he leaves his employment, he is entitled to make use of all the skills and knowledge he has acquired while in the course of his employment. When faced with a dispute, judges will try to strike a balance between the employee's freedom to use his skill wherever and whenever he pleases and the need to protect the former employer's valuable information and knowledge which has been divulged to the employee while in the course of his employment.

The leading English case which is of persuasive authority in Malaysia is *Faccenda Chicken Lit. v Fowler* (1986) AER 617. This case concerned an allegation of wrongful use of the employer's sales information by the defendant, an ex-employee of the company who set up a similar business in the same area as his former employer and competed with him.

The information concerned the customers names and addresses, suitable times of delivery, prices charged, details of customers' usual orders etc. The employers action for breach of confidence failed because the information was not of the type which an employee was bound by an implied term in his contract of employment. The defendant was therefore entitled to make use of this information in the absence of an express restrictive covenant in the contract of employment.

The principles which emerged from the case are summarised as follows:

- If there is a contract of employment, the employee’s obligations are to be determined from that contract.
- In the absence of any express terms, these obligations would be implied.
- Whilst still in employment, there is an implied term imposing a duty of good faith or fidelity on the employee. This duty varies according to the nature of the contract.
- The implied term imposing an obligation on the employee after the termination of his employment was more restricted than the duty of fidelity. It may cover information of a sufficiently high degree of confidentiality such as information pertaining to the secret processes of manufacture or designs or special methods of construction.
- To determine what information is of a sufficiently high degree of confidentiality depends on the circumstances:
  - the nature of the employment – a higher obligation might be imposed where the employee regularly handled confidential material;
  - the nature of the information – it should be an authentic trade secret or at least highly confidential;
whether the employer stressed on the confidential nature of the material; and
- whether the information could be easily isolated from other material the employee was free to use.

In Malaysia an action for breach of confidence is not limited to circumstances where there is a contractual relationship. A person who has obtained an unfair advantage by using another's confidential information as his "springboard" will be stopped from doing so as enunciated in the case of Terrapin Ltd v. Builders Supply Co (Hayes) Ltd v Others (1967) RPC 375.

These considerations of whether there have been restraint of trade, breach of privacy, confidentiality or secrecy are equally applicable with regard to parties communicating through the internet as the duty to preserve confidentiality of secrecy can arise both in contract and in equity. A network provider has a duty to preserve the confidentiality and personal information of its clientele. Its employees are bound by its duty of fidelity and confidentiality.

2.2.2 Organizations

The following government and/or private organisations aim to protect personal information in Malaysia:

- MIMOS [http://www.mycert.mimos.my](http://www.mycert.mimos.my)
- Business Software Alliance (BSA) [http://www.bsa.org](http://www.bsa.org)

Under Section 5 of the Personal Data Protection Bill, a commissioner will be appointed to oversee personal data protection. At this point of time, it is not known whether the Commissioner will be an independent body or a governmental body.

Under Section 9 of the Bill, a Data Protection Tribunal will be established. The Minister shall appoint a person who is currently a High Court Judge to be the Chairman of the Tribunal.

2.2.3 Consistency between OECD guideline and legal concept in the country

Upon the Data Protection Bill coming into force, the provisions of the Bill will be generally consistent with the OECD guidelines on the protection of privacy and
trans-border flows of personal data.

The scope of the Malaysian Personal Data Protection Bill is **similar to OECD guidelines** that both the guidelines and the bill provide for the protection of personal data against the threat of an invasion of privacy. However the Bill also applies to non-automated personal data files in the public and private sectors as opposed to the guidelines which are confined to the automatic processing of personal data.

**A significant difference** between the Bill and the guidelines is that the guidelines advocate free trans-border flows of personal data between itself and other Member countries. The Malaysian Bill restricts transfers of data to destinations approved by the Minister. These destinations are unable to be determined at this stage since the Bill has not come into force yet.

**2.2.4 Choice of Law and Jurisdiction of the Court**

An international dispute under the Computer Crimes Act 1999 will be governed by the laws of Malaysia where for the offence, the computer, program or data was in Malaysia or was capable of being connected to or sent to or used by or with a computer in Malaysia at the material time.

Notwithstanding this, Malaysia's position in all international disputes is as stated in “2.1.4Choice of Law and Jurisdiction of the court” in this report.

An example of a case related to data protection is enclosed (*Pacific Internet Limited v. Catcha.com Ltd*)

**2.2.5 Disclosure for Foreign Countries**

There is no known publication / websites on consumer protection in Malaysia specifically for foreign countries. However, we have located that Malaysia’s personal information system has been mentioned in the following foreign publications and forums:

   http://www.rilevis.com
2.3 Web Site Trust Mark System

A web site trust mark system is a service offered by qualified firms to provide some form of assurance to web site visitors that the web site they are considering doing business follows good business practices.

At present, this system applies only to businesses in the United States and Canada. Negotiations to introduce this system are underway in the United Kingdom, New Zealand and Australia. Malaysia is not involved in this programme and there is no indication it will become a member in the near future. For information on the current web trust providers, see http://www.cpawebtrust.org, www.verisign.com and www.TRUSTe.org.

In Japan, the Japan Information Processing Development Center (JIPDEC) is the body providing certification of privacy mark (www.jipdec.or.jp).

2.4 Regulations on Domain Name

2.4.1 ccTLDs administration organization

The organization in Malaysia which controls the registration of domain names ending with the country code ".my" is the Malaysian Network Information Centre, MYNIC. It is a division of MIMOS Berhad, which is an incorporated government research and development institution. MYNIC's URL address is http://www.mynic.net

MYNIC administers six second-level domains:
- com.my For commercial organisations/activities
- net.my For network-related organisations/activities
- org.my For organisations/activities which do not qualify for other categories
- edu.my For Malaysian educational organisations only
- gov.my For Malaysian government organisations only
- mil.my For Malaysian military organisations only
Except for the .gov.my, .edu.my and .mil.my domain names, it is the responsibility of the registrant to choose most appropriate second level domain name. MYNIC does not check for the suitability or appropriateness of the domain name chosen by the Registrant.

2.4.2 Regulations on Domain Name

The Domain Name system enables registration of domain names on a first-come-first-serve basis. A person can register a Domain Name even though the Second Level Domain is not his trade mark and he has no inherent rights to the name. Usually, these acts of cybersquatting are done with the bad faith intention on the part of the registrant to confuse and mislead surfers of the Internet.

In Malaysia, there are three avenues for resolving domain name disputes, i.e.

1. by way of statute,
2. by applying common law principles; and
3. through the international Uniform Domain Name Dispute Resolution Procedure administered by the Internet Corporation for Assigned Names and Numbers (ICANN).

The above-mentioned methods are further elaborated in the following sections.

(1) By way of Statute law - Trade Marks Act 1976

This Act is the most relevant law applicable to domain name disputes in Malaysia. Under the Act, once a trade mark is registered, its proprietor will have the exclusive right to use the trade mark for the goods or services for which it has been registered. In the event another person uses a mark identical to the registered trade mark or so nearly resembling it as is likely to deceive or cause confusion in the course of trade, then the proprietor's right in the trade mark will be infringed and he will have the right of recourse to the country's civil courts.

Section 38 of the Trade Marks Act of Malaysia sets out the circumstances where infringement of a trade mark would be presumed:

"A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or registered user of the trade mark using by way of permitted use, uses a mark which is identical with it or so nearly resembling it as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trademark is registered in such a manner as to render the use of the mark likely to be
taken either-

(a) as being used as a trade mark;

(b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular, or other advertisement, issued to the public, as importing a reference to a person having the right either as registered proprietor or as registered user to use the trademark or to goods with which the person is connected in the course of trade; or

(c) in a case in which the use is use at or near the place where the services are available or performed or in an advertising circular or other advertisement issued to the public, as importing a reference to a person having a right either as registered proprietor or as registered user to use the trade mark or to services with the provision on which the person is connected in the course of trade.”

This definition of infringement is somewhat narrow because there is no express provision under the Act for situations where a third party uses a confusingly similar mark on goods or services which is not the same as or unrelated to the goods or services in the original trade mark specification. So if the infringing mark is being used for goods or services under a different classification from that in which the allegedly similar trade mark is registered under, there appears to be no recourse available for the trade mark owner under the Act.

For the purpose of trade mark registration, Malaysia classifies its goods and services according to the Nice Agreement Concerning the International Classification of Goods and Services. This international agreement has a total of 42 classes. However, Malaysia's trade mark classification system has further subdivided the 42nd international class into three more classes which means that Malaysia has a total of 45 classes. Further, as far as domain names are concerned, there is no class under goods or services that covers domain names, and arguably domain names per se are neither goods nor services. There is clearly a lacuna in Malaysian trade mark law in respect of enforcing rights in a domain name.

This restrictive definition of "infringement" under the Act is in contrast to the much wider definition of the Trade Mark Act 1994 of the United Kingdom. Section 10(3) of the UK Act provides as follows:

"A person infringes a registered trade mark if he uses in the course of trade a sign which:
(a) is identical or similar to the trade mark, and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered.

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark."

The UK case of *Marks & Spencer PLC v One in a Million Ltd* (1998) FSR 265 applied this provision and held that the defendant's use of the plaintiff's trade mark in wrongfully registering a domain name was an infringement since the defendant's use of the mark was detrimental to the mark by damaging the plaintiff's exclusivity.

There is a need for more specific laws in Malaysia to better safeguard the rights of an individual to a domain name. The United States for example has very comprehensive anti cybersquatting legislation which is directly aimed at preventing the trafficking of domain names.

(2) By Applying Common Law Principles

The second method of domain name dispute resolution is under the common law of *Passing Off*. This is a tort derived from the English common law definition. To succeed in an action for *passing off*, the plaintiff needs to prove the following three elements:

1. that the plaintiff has goodwill or reputation attached to his goods or services;

2. that there has been a misrepresentation by the defendants to the public; and

3. that the plaintiff suffers, has suffered or is likely to suffer damage “by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.” (As stated by Lord Oliver in *Reckitt & Colman Ltd v Border Inc* (1990) 17 *IPR 1*)

When considering a domain name dispute, the courts would focus on whether a wrongfully obtained domain name is a misrepresentation that is likely to lead the public into thinking that that domain name is associated with or connected to the rightful trade mark owner. The mark must first however be shown to enjoy substantial goodwill and reputation. The likelihood that people will associate a domain name comprising the trade
mark with the rightful trade mark owner's trade mark is also important.

This method of domain name dispute resolution is not subject to the trade mark classification system. In the UK case of *Marks & Spencer PLC v One in a Million Ltd* (1998) *FSR* 265, it was held that if the domain name in dispute is calculated to infringe the trade mark owner's right in future, the Courts will put a stop to it. In any event, decisions of the UK courts are of persuasive value to the courts of Malaysia.

(3) Through The International Uniform Domain Name Dispute Resolution Procedure Administered

The final avenue for domain name dispute resolution is via the **Uniform Domain Name Dispute Resolution Procedure** (URDP) which is administered by the Internet Corporation for Assigned Names and Numbers (ICANN). Any person may file a complaint against another party concerning the wrongful registration of a domain name to which the registrant does not have rights to.

Examples of dispute settled using the ICANN’s URDP related to Malaysian companies are:

*Net2phone inc vs Dynasty System Sdn Bhd, WIPO Case no. D2000-0679,*

([www.wipo.org](http://www.wipo.org))

*Skrine v. Skrine & Ors, WIPO Case no. D2000-1105*


*August Storck KG v. Origan Firmware, Case no. D2000-0576; and*

*Genting Berhad v Mr. Tan Kim Sin*

([http://www.arbitration-forum.com/domains/decisions/94735.htm](http://www.arbitration-forum.com/domains/decisions/94735.htm))

**MYNIC has not** adopted the Uniform Domain Name Dispute Resolution Procedure (UDRP) which is administered by the Internet Corporation for Assigned Names and Numbers (ICANN). Accordingly, **any domain name disputes related to domains administers by MYNIC can not be resolved using ICANN’s UDRP**.

The party requesting registration of the domain name must certify that, to its knowledge, the selected name does not violate Malaysian trademarks, intellectual property, or other laws, and that the domain name is not being registered for any activities not permitted under any law of Malaysia.

MYNIC has no responsibility to screen requested domain names to determine whether the use of a domain name by a Registrant may infringe upon the right(s) of a third party. Any
disputes between parties over the rights to use a particular name are to be settled between the contending parties using normal legal methods (e.g. through court). MYNIC does not act as an arbiter of disputes.

2.5 Electronic Authentication Business

2.5.1 Legal Framework

Malaysia's **Digital Signature Act 1997** provides the legal framework upon which the Malaysian system of electronic authentication, electronic signature and electronic certification authorities is based on.

An electronic signature or a digital signature is defined in Section 2 of the Act to mean:

"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-

(a) whether the transformation was created using the private key that corresponds to the signer's public key; and

(b) whether the message has been altered since the transformation was made;"

Malaysia's Digital Signature Act 1997 is **generally inconsistent with the OECD “technology neutrality” principal**. The Act only recognises asymmetric cryptographic technology. The Act has taken a "prescriptive approach" which limits the use of digital signatures within a public key infrastructure (PKI).

Section 2 of the Act defines a "key-pair" as:

"a private key and its corresponding public key in an asymmetric cryptosystem, where the public key can verify a digital signature that the private key creates…".

Both these keys are in the form of strings of binary codes or data which relate mathematically to each other. The private key is kept only by the party generating the message while the public key can be sent to anyone. Sometimes a public key is even distributed through an open domain on the internet in the form of a file which can be downloaded. The Public-Key-Private-Key (PKPK) technology ensures that a message transmitted via this system cannot be accessed by any one other than the person the
message was sent to.

When a message is digitally signed, the signer uses his private key and crypto program to attach his digital signature onto the document. The recipient of the message uses the sender's public key to decrypt the signature. The recipient can also verify that the document was signed with the sender's private key. The effect of a digital signature is provided for in Section 64 of the Act which states as follows:

"(1) A message shall be as valid, enforceable and effective as if it had been written on paper it-

(a) it bears in its entirety a digital signature; and

(b) that digital signature is verified by the public key listed in a certificate which-

(i) was issued by a licensed certification authority; and

(ii) was valid at the time the digital signature was created…"

A digital signature can be used by a party once it subscribes to a licensed certification authority. The certification authority issues a certificate to the subscriber. A certificate is described in the act as:

"a computer-based record which-

(a) identifies the certification authority issuing it;
(b) names or identifies its subscriber;
(c) contains the subscriber's public key; and
(d) is digitally signed by the certification authority issuing it."

This authentication system has been applied by credit card companies. "Visa" and "Mastercard" have designed a protocol called Secure Electronic Transaction (SET) to enable software developers to design their software to meet their protocol resulting in compatibility. An explanation of how this system works is found in the Visa web site at URL

http://www.visa.com/cgi-bin/vee/anti/ecomm/set/main.htm?2to

The following is the function of licensed certification authorities as stated in Section 6 (1) of the Act:

"…to issue a certificate to a subscriber upon application and upon satisfaction of the
licensed certification authority's requirements as to the identity of the subscriber to be listed in the certificate and upon payment of the prescribed fees and charges."

At this time there appears to be no immediate plans to enforce or modify the existing legal concepts and laws in respect of electronic authentication, electronic signature and electronic certification authorities.

2.5.2 Body which grants a license, accreditation or registration of CAs based on the law

The party which grants a license to a certification authority is the Controller of Certification Authorities. The Controller monitors and oversees the activities of certification authorities (http://www.cca.gov.my). The Controller of Certification is appointed by the Minister of Energy, Communications and Multimedia, as privided under the Digital Signature Act 1997.

Effective from 1 November 2001, the regulatory functions under the Postal Services Act (1991) and the Digital Signature Act 1997 have come under the jurisdiction of the Communications and Multimedia Commission.

The Energy, Communications and Multimedia Minister Datuk Amar Leo Moggie said “in an increasingly networked economy, it is natural for both postal services and digital signature certification to be integrated” (source: the Star, 2 November 2001).

2.5.3 System of designated CAs based on the law

Designated certification authorities are governed by a licence system.

The Digital Signature Act 1997 (section 4) prohibits any person without a valid licence which has been issued under the Act from operating or holding himself out as carrying on as a certification authority.

2.5.4 System of International (Overseas) designated CAs based on the law

Internationally designated certification authorities enjoy mutual authentication in Malaysia. Section 19 of the Act provides for their recognition and the considerations that apply to them. Section 19 of the Act states:

(1) The Controller may recognise, by order published in the Gazette, certification authorities licensed or otherwise authorised by governmental entities outside
Malaysia that satisfy the prescribed requirements\(^1\). Currently, such prescribed requirements have yet been issued.

(2) Where a license or other authorisation of a governmental entity is recognised under subsection (1) -

(a) the recommended reliance limit, if any, specified in a certificate issued by the certification authority licensed or otherwise authorised by the governmental entity shall have effect in the same manner as a recommended reliance limit specified in a certificate issued by a licensed certification authority of Malaysia; and

(b) Part V shall apply to the certificates issued by the certification authority licensed or otherwise authorised by the governmental entity in the same manner as it applies to a certificate issued by a licensed certification authority of Malaysia."

2.5.5 Designated CA(s) based on the law

To date, Malaysian corporations which are licensed certification authorities under the Act are as follows:

1. Digicert Sdn Bhd (“Digicert”)  
   Lot 2-1, Enterprise 1  
   Taman Teknologi Malaysia  
   57000 Kuala Lumpur, Malaysia

2. Bank Negara Malaysia (“BNM”)\(^2\)  
   Jalan Dato’ Onn  
   50480 Kuala Lumpur, Malaysia

3. MSC Trustgate.Com Sdn Bhd (“MSC Trustgate”)  
   Ground Floor, Belatuk Block  
   Cyberview Garden, 63000 Cyberjaya  
   Selangor Darul Ehsan, Malaysia.

MSC Trustgate is affiliated to a leading US Certification Authority, VeriSign. We were

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\(^1\) According to the Communications and Multimedia Commission, the said “Prescribed Requirements” have not been issued yet.

\(^2\) According to a Corporate Affairs Department officer of the Bank Negara Malaysia, there is no relationship whatsoever between the BNM and Identrust (an international authentication service agency mainly for financial institutions).
informed that MSC Trustgate has already operating the “ASEAN Centre for Certification Authorities” since September 2000. It has been a tremendous success and they are now ready to expand their operations outside ASEAN. However, further details on this centre are not available.

Both Digicert and MSC Trustgate provide various electronic authentication products to the general public, while BNM only provides electronic authentication for members of the Real Time Electronic Transfer of Funds and Securities (“RENTAS”) system.

RENTAS is a system for the transfer and settlement of high value ringgit denominated interbank funds and scripless securities transactions. Membership of the System is restricted to financial institutions licensed under the Banking and Financial Institutions Act 1989.

2.5.6 Technical Requirement

The technical requirements governing the selection of certification authorities in Malaysia according to Regulation 6 of the Digital Signature Regulations 1998 are as follows:

- A trustworthy system for the generation and management of key pairs and certificates;
- An approved digital signature scheme for the generation of key pairs and for the creation and verification of digital signatures;

(http://ktkm.netmyne.com.my)

Other duties and requirements of the certification authorities are stipulated in Part III and Part IV of the Digital Signature Act 1997.