

KYRGYZ REPUBLIC
DRAFT REPORT
EXECUTIVE SUMMARY

DRAFT June 11 2022

The era of Covid-19 has underlined what the world already knew, that the way to more effective and efficient trade, both domestic and foreign, runs through electronic communications. However, innovative business methods using such communications often encounter legal frameworks designed for paper or print media. These encounters can lead to uncertainty and sometimes to barriers to efficient transactions. Over the past quarter century, the legal frameworks have been adjusted to accommodate and even to promote electronic transactions.

The present document reviews and reports on the legal framework for e-commerce in the Kyrgyz Republic, with a view to helping ensure that its content – statutes, decrees, orders, decisions - serves the country's purposes.

The basic activity of electronic commerce is the commercial transaction, often a sale from one party to another. Most of the substantive law of sales is “media neutral” – it can apply to material or online transactions equally. Only in a few places is statutory reform required. The Kyrgyz Republic has undertaken that reform, notably in the recent Law about Electronic Commerce (2021). That law declares as a principle of electronic commerce the “recognition of the legal force of electronic documents, regardless of the method of their conclusion and signing.”

Moreover, the Law contemplates substantial numbers of transactions being conducted through “trading platforms”, defined as “a set of software and hardware that ensures the sale of goods and/or works and/or services via the Internet.” The trading platform provides a forum for sellers of goods to put their wares on the market, presumably in the expectation that sellers do not have the skills or equipment themselves to address the Internet directly.

The Law about electronic commerce and the Law about electronic signature (2017) create an authentication regime that is flexible for transacting parties, while maintaining appropriate security for more important or public purposes. Parties may often choose to use a simple electronic signature, but in some cases they will prefer or need to use an unqualified (enhanced) e-signature or a qualified (enhanced) e-signature. Enhanced e-signatures are created using a kind of cryptography and can be called “digital signatures”. The latter class – qualified e-signatures - relies on certificates by a government-accredited certification center, whose characteristics are prescribed by law.

It is fair to say that Kyrgyz law is largely consistent with international best practices on e-transactions. However, the technical infrastructure in the Kyrgyz Republic creates challenges, notably in weak broadband coverage outside the capital city. Further, cultural preferences endure for cash transactions supported by paper documents. Electronic payment systems limit potential growth of e-transactions.

The government has taken a number of steps beyond the transactional legislation to promote and develop e-commerce. There are plans to develop a national “single window”, by which importers and exporters can communicate with a single virtual office, which distributes all documents to

regulatory authorities that need to deal with the goods or services in question – including Customs – and channels approvals back to the businesses that need them. Legislation is in preparation to support the single window and ensure that all government ministries and agencies can communicate among each other.

An electronic portal of public services offers nearly 1000 such services online to the public. As this grows, the comfort level of the population with relying on e-communications will grow as well. The portal system offers people the possibility of being identified to the system through passports or other secure identity documents. Once so identified, the system provides them with a simple electronic signature – verified by government – that people can use in private transactions, not only with government. This has the potential to increase trust in e-communications substantially.

The Kyrgyz Republic has recently joined the Revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures. This allows for a risk-based assessment of shipments going through Customs, saving time and personnel. Managing high volumes of sometimes low-value shipments can still be a technological challenge. Proper management of cross-border flows also rely on certificates of origin of the goods shipped. Making these certificates electronic and thus faster to use is part of a government Action Plan on e-commerce. Private sector collaboration is anticipated in this.

The international dimension of trade law is important for e-commerce. It can add legal capacity to traders where domestic law falls short (though Kyrgyz law tends not to in most areas), or it can set trading partners on an equal legal footing. Harmonization is always helpful. Several free trade agreements in recent years contain provisions to facilitate electronic commerce, and the trend is to fuller legal co-operation and integration.

Regional economic co-operation agreements sometimes also provide either rules (e.g. the Eurasian Economic Union, EAEU) or capacity building (e.g. the Central Asia Economic Cooperation project, CAREC) to advance e-commerce.

In addition, a number of instruments directly affect the local and cross-border law of e-commerce. The United Nations Electronic Communications Convention is an important example, along with the UNCITRAL Model Laws on electronic commerce, signatures, and transferable records.

Some conventions that deal with specific subjects nonetheless leave room for e-communications (e.g. the Convention on the International Sale of Goods, CISG) or allow for them for the purposes of the instrument (e.g. the International Plant Protection Convention and the Convention on Trade in Endangered Species.)

Finally, technical standards and guidelines are available on the international level that help contribute to local expertise and permit international harmonization short of actual law-making. The information technology security standards of the International Standards Organization (ISO) and the single-window recommendations of the United Nations Centre for Trade Facilitation (CEFACT) are leading examples.

In addition to removing legal barriers to electronic commerce, both domestic and international, and harmonizing the cross-border legal regime, a number of commercial activities need to be regulated differently in the electronic era. The Ministry of the Economy and Trade of the Kyrgyz Republic published a five-year draft Action Plan on e-commerce laws and regulation that addressed a number of those areas.

The report canvasses several areas of actual or potential regulation and evaluates the need for more activity and the proposals of the Action Plan. It notes that legal regulation, however, is only one element of encouraging e-commerce. Without a level of economic activity and corresponding technical infrastructure, laws will not produce e-commerce on their own.

Moreover, a 'cultural' trust of remote transactions and technology will be needed before law and technology will stimulate the activity desired. Some of the regulatory provisions discussed in the report may contribute to the trust, such as adequate consumer protection, privacy rules and freedom from cybercrime. And any such regulation will only be as good as the resources the state can put into enforcing it.

Consumer Protection has its own statute in the Kyrgyz Republic, updated in 2022. The Law about electronic commerce also offers a number of consumer measures, including disclosure rights and timely delivery. The Action Plan looks for a register of online stores, publication of product safety information and protection of the local market from inferior products. It also advocates closer harmonization with EAEU requirements.

The present report agrees with the Action Plan. The law should be administered in a way that consumers are aware of their legal rights and have a practical, affordable and timely means to enforce them. Co-ordination with the rules of the EAEU can only improve the effectiveness of the standards to be applied.

Privacy laws in the Kyrgyz Republic conform to international best practices, relying on consent of the persons whose information is collected or used and ensuring secure storage of the data. People have a right to access data held on them and to have it corrected or updated. An agency of the state is responsible for enforcing these rights. As it happens, studies have shown that data collectors may not know how to comply with the law. Some consumers are worried about privacy in any event. Cross-border data flows are subject to fairly standard conditions about equal protection at the destination.

The Action Plan promotes a data localization rule by which personal information would need to be kept in the Republic. This report cautions that such rules are often inconsistent with free trade agreements.

Data protection generally aims to secure the confidentiality of commercial data rather than personal. There is little free-standing legislation on this topic at present. This report suggests making a statute, perhaps based on good examples from the country's trading partners.

Transparency of public information has principally a political rather than a commercial value. The relevant statutes in the Kyrgyz Republic have to do with e-governance and information in the hands of public bodies. However, information containing commercial and professional secrets (or state secrets) is not subject to disclosure. It may be more important for commercial parties that one is able to get information on future legislation and regulations from a detailed website, so one can know the legal context for one's activities, whether or not electronic.

Cybercrime is a feature of Internet communications these days. The Kyrgyz Republic has standard prohibitions against unauthorized access to computers and the distribution of malware. The usual criminal prohibitions against misrepresentation, fraud, forgery and theft would apply in the electronic medium as in traditional forms. The administration of inquiries and enforcement will

be difficult because of the cross-border nature of much cybercrime, and co-operation with neighbouring states and international bodies will be important.

Electronic payments are supported by statute that gives the National Bank of the Kyrgyz Republic the power to regulate the payment system in which commercial banks participate. Procedures about electronic money are established by a resolution of the Board of Directors of the National Bank. Banks need a licence to handle e-money. All e-money in the country must be denominated in the national currency.

However, most buyers even of online goods prefer to pay with cash. Bank cards do not allow online payments when issued; the cardholder needs to write an application and apply in person at the bank for permission to trade online.

The draft Action Plan would increase the number of services for which one can pay through e-wallets and online banking, but not on a fast schedule. The issues with e-payments seem more technical than legal at this point.

Dispute resolution is an essential part of commerce, knowing that one can sort out issues of defective delivery or non-payment in an official way. Courts can be expensive and hard to understand, so alternative methods of dispute resolution are often helpful. Mediation and arbitration are both known in Kyrgyz law. They are particularly useful in cross-border disputes where one is not bound to rely on the courts of an opposing party.

While online dispute resolution (ODR) seems promising in some parts of the world, a self-operated system is complex to set up. There are no plans to do ODR in the short to medium term in the Kyrgyz Republic.

Civil liability can be a force for promoting good conduct and for remedying harm done by negligence. Intermediary liability is a key element of this topic. Participants in e-commerce rely on a number of intermediaries, from Internet service providers to communications companies to trading platforms. For cross-border trade, there may also be Customs authorities and a single window operation.

There may be policy reasons not to require such intermediaries to bear the full cost of their negligence. They may be public bodies, or the system may need them to stay in operation and stay solvent. Many countries limit the exposure of taxpayer-funded bodies to substantial money judgments.

The Law about electronic commerce deals expressly with the liability of intermediaries. An intermediary is not liable for the legality of transmitted or stored e-messages or goods and services, so long as the intermediary is not the originator of communications and does not alter their content.

These provisions are in the mainstream of intermediary liability rules in the world. It is important that limitations of liability be disclosed before trading begins, so that potential traders can evaluate their risks and perhaps the need for insurance.

Law Reform generally can be conducted on the basis of the Action Plan, with a few minor qualifications. The question of how far the state prescribes or tries to control private activities depends on participants' tolerance of risk in order to get the benefit of innovation: Are businesses allowed to fail? Can parties protect themselves or must the state protect them?

It is thought that the government should not try to consolidate the various relevant statutes in the field, but should ensure coordination so that when one is reformed, the impact of that reform on the others is considered. Views on such matters should include private as well as public sector experts and stakeholders.

Action Plan items of interest beyond those already mentioned include joining the OECD project on the valuation of digital trade, a very important consideration of tax policy and impact, and expanding e-signatures to allow remote signing, including possibly remote notarization (a question that raises technology questions about the availability of video links.)

A large number of international treaties or other instruments would be of benefit to the Kyrgyz Republic as well. Some of them are described in the main text, and a consolidated list closes the report. Notable in the list are the ESCAP Framework Agreement on the Facilitation of Cross-Border Trade in Asia and the Pacific and the United Nations Convention on the use of Electronic Communications in International Contracts.

The report concludes by urging harmonization with neighbouring states and trading partners, as the international dimension increasingly drives commercial relations and thus law reform priorities.

Where paperless trade – domestic and cross-border – is not happening, the cause is often not deficiencies in legislation or regulation but in technology and culture, and in financial resources to take advantage of opportunities that do exist.

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