



# **E-commerce law in the Kyrgyz Republic**

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# Overview

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# E-transactions in the Kyrgyz Republic

- “Commerce” = one or more transactions with a view to profit.
- The basic law of transactions is found in the Civil Code.
- The Civil Code is media neutral, i.e. it applies to information about transactions in any medium: oral, written, telegram, telex, fax or (other) electronic.
  - The law requires certainty in the facts of the transaction:
    - The parties
    - The object (e.g. what is being bought or sold)
    - The price
  - Without this information, a transaction will not be enforceable.

# Law about electronic commerce

- The Law about Electronic Commerce was passed in December 2021 and came into force in May 2022.
- An “electronic transaction” is a civil legal transaction between participants in electronic commerce through information and communications technologies.
- Two relevant principles set out in this Law:
  - The legal effectiveness of electronic transactions
  - Recognition of the legal force of electronic documents, regardless of the method of their conclusion or signing.
    - Documents may be machine-readable or human-readable.
    - But not documents for notarization or public procurement

# Electronic trading platforms

- “Trading Platforms” are “a set of software and hardware that ensures the sale of goods and/or works and/or services via the Internet.”
- Obligations of trading platform operators include:
  - making the seller’s goods and services available;
  - keeping separate the seller’s and the platform operator’s interests;
  - creating a policy for users of the platform “ensuring the quality of goods and services” and “protecting the interests of consumers and information of a personal and commercial nature;”
  - providing the ability to search the platform for goods or services sorted by price, sales and other criteria, and
  - assisting participants in an electronic transaction in protecting their rights and interests.

# Electronic Signatures

- ▶ It is particularly important in e-commerce to be able to know who one is dealing with – and many of the usual indications of identity, like a recognized face or familiar handwriting, are absent.
- ▶ A number of methods of performing the function of a signature have been devised. The outline of Kyrgyz law is in the second appendix, below.
- ▶ Kyrgyz law is currently very flexible as to what transacting parties may choose to accept from one another by way of signature.
  - ▶ Public sector uses may be more restrictive, as higher levels of confidence may be required to give them effect.
- ▶ The law also provides for “trust services” to provide greater confidence in authenticating documents that involve high-value transactions.

# E-commerce in practice

- ▶ Although the statutory framework for e-commerce is largely up to date and in accordance with international standards, the volume of e-transactions is considered to be low.
- ▶ Several reasons have been suggested:
  - ▶ The Law on electronic commerce is new, and businesses are not familiar with it.
  - ▶ Implementing regulations for the new law have not been made
  - ▶ Many people still do not trust electronic communications and prefer to use paper
  - ▶ Electronic payments can still be difficult and inefficient, so businesses and consumers still transact in traditional ways for traditional payments.

## E-commerce in practice (2)

- ▶ The Kyrgyz Republic has made a number of advances in supporting the use of and confidence in e-communications.
- ▶ The government has launched an electronic portal to government services in the Republic that currently has close to 1000 public services offered electronically to residents.
- ▶ The government has also developed a method of identifying citizens electronically for purposes of access to the portal that can be used by citizens (on request) to authenticate them in third-party transactions (i.e. not just in relations with the government.)
- ▶ The Republic is now a member of the Revised Kyoto Convention on customs procedures, which provides for electronic processing of shipments based on likely risks associated with the shipments.



# Law reform

- ▶ Change is not only the ability to follow form requirements e.g. signatures. More is needed.
- ▶ **Consumer protection** – the key principles are timely information about e-transactions and the ability to remedy error or wrongdoing.
  - ▶ The global standard is UN Guidelines for online consumer protection
- ▶ **Privacy** – the key principle is informed consent of the individual
  - ▶ The global standard is Organization on Economic Cooperation and Development (OECD) Guidelines and Council of Europe Convention to implement the Guidelines
    - ▶ Leading example: EU General Data Protection Regulation (GDPR)
- ▶ **Cybercrime** – the key principles ban unauthorized access to data and harming data (malware)
  - ▶ The global standard is the Council of Europe (Budapest) Convention
- ▶ **AND:** E-payments, public access to information, dispute resolution, liability

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# Setting an agenda

- ▶ **Legislation and regulations are only one element of electronic commerce:**
  - ▶ Economic development: computers, infrastructure, innovation & rewards
  - ▶ Cultural views: risk tolerance, doing business with strangers, comfort with immaterial things
- ▶ **Self-regulation vs state regulation**
  - ▶ Initiative vs need to control
  - ▶ Competence to choose vs hand-holding
  - ▶ Private interests vs public policy
- ▶ **State capacity to regulate**
  - ▶ Accrediting and disciplining trust (certification) service providers
  - ▶ Offering consumer protection directly, creating liability regime, dispute resolution
  - ▶ Overseeing best privacy practices, enforcement
  - ▶ Investigating and prosecuting cyber-crime (domestic & international)

# International context

Law reform may have recourse to international texts of different kinds,

- ▶ as inspiration for domestic legislation
- ▶ to govern cross-border trade.
  
- ▶ **Agreements to facilitate e-communications**
  - ▶ ESCAP Framework Agreement on Facilitation of Cross-border Paperless Trade (no standard to meet to join; can come in at any level)
  - ▶ World Trade Organization Trade Facilitation Agreement
  - ▶ Revised Kyoto convention on customs administration
  
- ▶ **Agreements on substantial law that expressly or impliedly allows e-comms**
  - ▶ Convention on the International Sale of Goods (CISG)
  - ▶ CMR Convention (on the contract for the international carriage of goods by road), similar convention on rail transport

## International context (2)

- **Instruments of general application**
  - UNCITRAL texts (see Appendix)
  - UN Centre for Trade Facilitation (CEFACT) guidelines
  - International Standards Organization (ISO) standards
- **Regional trade agreements** (European Union, Eurasian Economic Union)
- Bilateral or multilateral **special purpose agreements**
  - Includes conventions that may be applied by particular agencies for their cross-border purposes
    - E.g. electronic phyto-sanitary certificates

# Law reform: consumer protection

- ▶ A. Law on Consumer Protection (1997, 2022)
  - ▶ Duties of sellers and consumers, re quality of goods, threats to health and safety, delivery, payment
  - ▶ State-based enforcement agency established (Coordination Council for the Protection of Consumer Rights)
  - ▶ Sellers required to accept payments electronically
- ▶ B. Law about electronic commerce (2021)
  - ▶ Duties of sellers include information rights re seller, goods and services
  - ▶ Ensure the delivery of goods or provision of services in the agreed manner and at the agreed time
  - ▶ Also: platform operators have duties to consumer and merchants transacting through the platform

# Consumer protection agenda

- 2022 Ministry draft action plan:
  - Create a register of online stores
  - Increase safety protection for consumer goods
  - Protect against inferior projects
  - Harmonize laws with EAEU regulations (including platform rules)

## ADB Report recommendations:

Agree with Action Plan

Emphasize importance of harmonization with regional rules and best practices

# Law reform: privacy

## ► Privacy protection

### ► Law on personal information (2008)

- Personal data is collected only with consent of the data subject, with certain standard exceptions such as public records, need for public health information, and the like.
- Some sensitive information (health, religion, sexual preference) is subject to stricter controls and fewer exceptions to consent.
- Collection is limited to purposes disclosed at the time of collection and shall not be kept longer than that purpose requires.
- “Arrays” of personal data (databases, archives) must be registered with the state
- The data subject has the right to access his or her personal data in an array and to have it corrected, updated or removed if the evidence supports such a step.
- The State Agency for the Protection of Personal Data under the Cabinet of Ministers of the Kyrgyz Republic enforces compliance with these rules, can set new policy.

# Privacy agenda

- The draft action plan proposes 'tightening' the requirements to protect personal information collected in e-commerce transactions.
- It also recommends a data localization rule that would require personal information about Kyrgyz citizens to be held and processed in the Republic.

## ADB Report recommendations:

Agree with Action Plan's domestic proposals

Clarify that personal information may not be transferred out of the country without assurance of equivalent protection at destination

Consider data localization rules carefully for their impact on free trade and burden on cross-border commerce of maintaining multiple data bases. Possibly consult with ESCAP experts in due course.



# Law reform: data protection

- Data protection is conceived to refer to protecting the confidentiality of commercial data rather than personal information.
- Some legal protections now exist, through laws of intellectual property and cybercrime.

## ADB Report recommendations:

Legislate a comprehensive protection for commercial data, while allowing for business consent to disclosure or information-sharing.

Consider international best practices derived from national legislation in regional trading partners.

# Law reform: access to public information (transparency)

- ▶ Three statutes govern elements of access to public information.
- ▶ They guarantee broad access to information in public hands, with exceptions for 'confidential information, as well as information containing state, commercial or official secrets'. Commercial secrets include professional confidences.
- ▶ The Republic is a member of an international consortium on open government and has a website allowing access to and comment on upcoming legislation.

## ADB Report recommendations:

Maintain the spirit of these laws, clarifying the instances of confidentiality especially at the decision of the custodian of the data.

Consider express protection for whistle-blowers, i.e. people who disclose otherwise confidential information where the public interest overrides the interest in confidentiality. Some decision-making body is needed to decide such cases.

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# Law reform: Cybercrime

- ▶ The Kyrgyz Republic has laws making the standard array of online or computer-access offences crimes under its law. Its laws are consistent with those of its neighbours and trading partners.
- ▶ International cooperation is essential to track cross-border cybercriminals.
- ▶ The draft Action Plan made no recommendations for changes relating to cybercrime.

## ADB Report recommendations:

None on this topic. It is mentioned here for purposes of completeness of the list.

# Law reform: e-payments

- ▶ The Law about the Payment System of the Kyrgyz Republic governs all money in the country, including electronic payment systems.
- ▶ A resolution of the Board of the National Bank sets out procedures for e-money and applies to domestic banks and international e-money providers.
- ▶ All e-money must be denominated in the national currency.
- ▶ There is considerable resistance to e-payments in practice.
- ▶ Some inefficiencies in using credit cards for e-payments continue.
- ▶ The Action Plan proposes over time to expand the number of transactions for which e-payment may be used.

## ADB Report recommendations:

Follow the Action Plan. The challenges may be practical and technical more than legal at this stage.

# Law reform: dispute resolution

- ▶ Mediation and arbitration are both practised in the Kyrgyz Republic.
- ▶ Online dispute resolution is not practised or contemplated at present.
- ▶ There is some suggestion in international document that the Republic gives itself too many exceptions to the enforcement of foreign arbitral awards under the New York Convention on that topic. That can affect the willingness of international business to trade with partners in the Republic.

## ADB Report recommendations:

Bring Kyrgyz practices into line with the normal enforcement processes under the New York Convention.

# Other law reform

## ADB Report recommendations:

### Support the Action Plan in:

Joining the comprehensive framework of the OECD project on the valuation of digital trade and its impact on taxation. Valuation of cross-border transactions for tax purposes is a long-standing problem.

Expanding e-signatures to apply to remote signing, when the parties (and possibly witnesses or notaries) are not in the physical presence of each other. Progress on this issue may depend on widespread availability of reliable video connections.

Creating electronic certificates of origin that will be very valuable to traders and customs officials.

Giving the National Single Window a clear legislative framework, though probably supported by contracts or memoranda of understanding about service levels and liability for erroneous or untimely data transmissions.

## Other law reform (2)

### ADB Report recommendations:

Accede to a number of international instruments, including the ESCAP Framework Agreement on Cross-border Paperless Trade and the United Nations Electronic Communications Convention.

Pay close attention to applicable ISO (information security) and UN/CEFACT (single window) standards.

# Next Steps

- ▶ The ADB project team is taking feedback from the Ministry and other parts of the government of the Kyrgyz Republic and relevant public- and private-sector stakeholders.
- ▶ It will also be hosting a broader workshop with international agencies later in the summer.
- ▶ Input from both events and other communications will be considered in preparing a final report of the project for the Ministry.

## QUESTIONS?



# APPENDIX 1

## Electronic communications in general

- What is the problem with electronic communications?
  - Information is subject to hard-to-detect manipulation and deterioration
  - Identifying the people using the technology may be hard.
  - Information requires computing device to display – risk of error
  - Technology evolves quickly and unevenly and is regulated differently in different places. Whose rules apply?
- Traditional laws use words that do not readily apply to information in digital form, e.g. writing, signature, original
  - These laws are barriers to use of e-communications

# Law reform – phase 1

- Removing the barriers – United Nations Commission on International Trade Law (UNCITRAL)
  - **Model Law on Electronic Commerce** – MLEC (1996)
  - **Model Law on Electronic Signatures** – MLES (2001)
  - UN Convention on the use of Electronic Communications in International Contracts (**Electronic Communications Convention**, or ECC) (2005)
  - **Model Law on Transferable Electronic Records** - MLETR (2017)
- Nearly 80 countries have implemented all or part of the MLEC
- Fewer have implemented all or part of the MLES
- Kyrgyz Republic has now implemented some parts of MLEC

# UNCITRAL Principles

- ▶ The UNCITRAL texts are all built on the same principles:
  - ▶ **Functional equivalence:** electronic information is not the same as information on paper but should be legally effective if it can perform the same policy function as its paper equivalent.
  - ▶ **Technology neutrality:** the law should not specify what technology e-communications must use to serve as functionally equivalent to paper-based information. (see Appendix)
  - ▶ **Media neutrality/non-discrimination:** the law should give equal effect to information on paper and in electronic form.
    - ▶ Information shall not be denied legal effect solely because it is in electronic form.
  - ▶ **Minimalism:** law reform deals only with the impact of new media and does not otherwise affect substantive legal rules.

## APPENDIX 2: Electronic Signatures

- ▶ An electronic signature is “information in electronic form that is attached to other information in electronic form and (or) logically connected with it and which is used to determine the person on whose behalf the information is signed”
- ▶ The law about electronic signatures (2017) has three kinds of e-signature, but any of them is legally effective for most kinds of transaction.
- ▶ Parties to a transaction may agree to use simple signatures to meet legal signing requirements and presumably may agree on the degree of reliability, including the type of technology, that they will accept for this purpose.
- ▶ If one wants to use an unqualified e-signature as the equivalent of a handwritten signature, one must “provide for the procedure for verifying electronic signature.” Since the unqualified signature has defined characteristics, one must be prepared to show that those characteristics are present in one’s signature. An unqualified signature is supported by a certificate issued by a certification center.
- ▶ A qualified e-signature is supported by a certificate from an accredited certification center, and is the equivalent of a handwritten signature unless the law prohibits using e-documents for the purpose.

# Foreign signatures

- There is to be no discrimination against an e-signature or e-document solely because the signature certificate “is issued in accordance with the law of a foreign state.”
- An e-signature created under foreign law standards is recognized as the equivalent to a Kyrgyz signature of the same sort. While this does not expressly focus on the similarity of level of reliability of the foreign e-signature, that seems likely to be the focus of any inquiry.

# Trust services

- The 'trust' in trust services is the trust held by the person asked to rely on the e-signature that it is actually from the person it says it is from.
- Certification centers support digital certificates that link electronic signing data with legal entities (persons).
  - They often issue the signing data to the person who wants to sign, one time or generally.
  - The electronic signatures law contains considerable detail about the establishment of certification centres, the difference between accredited and non-accredited centres, their liability to other users, the contents of certificates, the duties of the parties to an e-signature of different classes, and so on.