

# **ADB PROJECT ON E-COMMERCE LAW IN MONGOLIA**

**TA6618**

## **DRAFT REPORT**

### **EXECUTIVE SUMMARY**

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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 Mongolia, with a view to helping ensure that its content – statutes, decrees, orders, decisions - serves the country's purposes.

#### **Electronic transactions**

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. Mongolia has begun that reform, notably in amendments to the Civil Code and in laws on electronic signatures, privacy and cybersecurity, among others.

The Civil Code now says that transactions that are required by law to be registered, notarized or in writing may be made electronically, if accompanied by an electronic signature within the meaning of the Law on Electronic Signatures. (Notaries are authorized by separate law to notarize documents electronically.)

#### **Electronic signatures**

The Law on Electronic Signatures contemplates both “electronic” and “digital” signatures. The former, цахим гарын (“tsakhim garyn”), are defined as electronic data attached to or combined with information in order to identify the person who signed the information. The latter, тоон гарын (“toon garyn”), is “created through encryption and conversion using a private electronic signature key (‘private key’)”. Besides allowing the identification of the signatory (the holder of the private key), a digital signature must allow a person verifying it to know if the signed information has been modified after its signing or is incomplete.

Digital signatures are accompanied by a certificate from a certification centre saying who controls the digital signing data. The Law provides rules for the operation of the certification centre and related practices (“trust services”), the whole system being known as a public key infrastructure, or PKI.

The Law on Electronic Signatures says that a digital signature has the legal effect of a handwritten signature.

The Law also contains several provisions suggesting flexibility in deciding how to use digital signatures and contemplates a number of regulations to say how the digital signature system is to be set up. Those provisions have not yet been given effect and the regulations are not yet published. As a result, digital signatures are not yet widely used in private transactions. They are more common between citizens and state agencies, because the government distributed digital signing data to many citizens based on their national identity cards.

Private transactions are nevertheless done electronically. In particular, products are bought and sold in trading platforms, both national and international. It is not always clear how the law supports the kind of signatures used in those transactions.

At present there is no clear indication why one might want to use a digital rather than an electronic signature. The rules on electronic signatures are spread among different legal texts.

An argument can be made that more consistent and more explicit analysis is needed on the e-signature regime in Mongolia, to ensure that signatures are as secure as they need to be, but within that context, private parties are given as much choice as possible to decide how secure they want to be. The public interest is not the same for all parties and all transactions.

The report recommends adopting the UN Electronic Communications Convention, to which Mongolia recently became a party, to apply to domestic law as well. An appendix to the report reviews the implications of doing so. Supplementary provisions would need to be incorporated to deal with topics discussed elsewhere in the report.

### **Trading platforms**

Substantial numbers of transactions are conducted in Mongolia through “trading platforms,” which offer software and hardware that ensure 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 use of trading platforms raises legal issues of basic validity of the transactions, the suitable protection of consumers and personal privacy, and the fairness treatment of users, mainly merchants, among each other and in competition with the platform itself. Such issues can be addressed in laws on those topics or can be combined into an e-commerce law that focuses on their application to the platforms.

### **A law on electronic commerce: other contents**

Besides e-documents and e-signatures and trading platforms, international best practices suggest other provisions for a general law on e-commerce. Among them are a general “non-discrimination” provision that information may not be denied legal effect solely because it is in electronic form. Other rules deal with the place and time of sending and receipt of electronic messages, the right to make contracts when no human being is paying attention (e.g. website sales) and the right to correct errors in online orders.

Stakeholders both public and private, on consultation, have also suggested ensuring fairness in regulation and in tax policy between formal merchants and social media sellers.

## **E-Commerce in practice**

There is some evidence that the challenges to doing business electronically do not arise principally from deficiencies in the law but from practical, cultural and technological barriers.

On the cultural side, some buyers prefer to rely on ink signatures on paper, even though e-signatures are permitted by law. To some extent, businesspeople may be waiting to see if some of the regulations that may be made under the Law on Electronic Signatures and other new related statutes are workable for them.

A stakeholders' meeting in June 2022 mentioned a number of factors creating difficulties for e-commerce in Mongolia:

- Border issues – delays, closures impeding import and export of goods.
- Delivery generally is difficult and expensive, especially in remote areas.
- Quality assurance for goods and services is not reliable.
- Information security needs improvement.
- E-payments could be better: coordinate payment systems
- Fraud and fake websites are too common, but secure systems are expensive
- Signature data on a SIM card on a phone is easier to use than on an identity card. There are businesses in Mongolia that provide a SIM-based digital certificate.
- Promotion and education of e-commerce would help people be more comfortable with it.
- Interoperability of systems is a practical and economic benefit to traders, regulators and customers.

Domestically, the government has an extensive program – e-Mongolia – to offer services to the public by electronic means, often supported by digital signatures. Nearly 2000 such services are across at all levels of government. Such programs will help familiarize Mongolians with doing business online and increase trust in e-communications.

## **Cross-border issues**

A key element of effective cross-border e-commerce is a “single window” through which all applications for regulatory approval flow and by which regulators may indicate their approval. Mongolia has recognized the need for a single window for many years but does not expect one to be in operation until 2025.

The report discusses the elements of an e-commerce business, especially in cross-border trade. It mentions briefly the application of a *de minimis* exclusion from customs duties as applied in Mongolia, and challenges of trade in intangibles.

The Customs Authority is steadily increasing its capacity to communicate electronically, mainly through its Customs Electronic Service System. Further consultation with neighbouring countries and trading partners is needed to make this most effective. Traders will be assisted by the availability of electronic certificates of origin of their goods and services.

## **International legal framework**

The international dimension of trade law is important for e-commerce. It can add legal capacity to traders where domestic law falls short (though Mongolian law is increasingly supportive in most areas), or it can set trading partners on an equal legal footing. Harmonization is always helpful.

Mongolia benefits from its membership in the WTO Trade Facilitation Agreement. It has, to date, one free trade agreement, with Japan, with provisions to facilitate electronic commerce. Its

regional economic co-operation agreement, the CAREC, is working on capacity building 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 recently in force in Mongolia. The UN/ESCAP Framework Agreement mentioned earlier sets aspirational goals on the topic and helps build capacity as well to reach them.

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.

### **Regulatory topics**

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 report 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. Any such regulation will only be as good as the resources the state can put into enforcing it.

**Defining an e-commerce business** may be useful in order to provide legal incentives to create such a business. Tax incentives – a lower tax rate – are an important example. The report sets out a number of criteria by which one could decide to offer such incentives, including the size or permanence of the business.

Most countries do not distinguish between e-commerce and other businesses in their creation or in their regulation, in that there is no special agency devoted to regulating e-commerce separately from other forms of commerce. However, specialist regulators may operate in areas where e-commerce raises separate issues, such as protection of privacy.

**Regulating trading platforms** may bring the different elements of regulation – consumer protection, privacy, and so on – into one e-commerce statute, for ease of reference. It is probably the better policy to regulate with a light hand, allowing businesses and consumers to decide what commercial advantages or risks trading platforms present. However, models of more extensive regulation are found in China, Vietnam and the European Union, among other places. Regulatory ambition should accord with regulatory resources.

**Consumer Protection** has its own statute in Mongolia, and a new one is in the works. A draft of the new statute seems largely right in principle and in accord with international best practices. Its chapter on remote and electronic business activities will cover e-commerce. There is much information on providing full and accurate information, with remedies for defects in doing so.

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.

**Privacy** laws in Mongolia 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. The National Human Rights Commission is responsible for enforcing these rights.

Cross-border data flows are subject to treaties but not to the fairly standard condition that the transferee country offer substantially equal protection for transferred data. This should be added.

There is talk of a data localization rule by which personal information would need to be kept in Mongolia. The report cautions that such rules are often inconsistent with free trade agreements, such as the Mongolia-Japan Free Trade Agreement.

**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.

**Remote notarization** may be the logical next step from electronic notarization. There are international models available. They tend to depend on reliable online authentication tools and real-time video links to oversee the notarization, as well as secure document management after notarization.

**Cybercrime** is a feature of Internet communications these days. Mongolia 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 can be difficult because of the cross-border nature of much cybercrime, and co-operation with neighbouring states and international bodies will be important. The new law on Cybersecurity will make that co-operation easier.

**Electronic payments** are supported by the Law on National Payment System that gives the National Bank of Mongolia the power to regulate the payment system in which commercial banks participate. All e-money in the country must be denominated in the national currency.

There appear to be problems with inbound payments from abroad that hamper the ability of Mongolians to export by way of electronic transactions. Resolving these problems would be a help to the efficiency of exporters.

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 Mongolia. They are particularly useful in cross-border disputes where one is not bound to rely on the courts of an opposing party.

Mongolia is party to the principal international instruments in this area but may want to consider implementing the UNCITRAL Model Law on International Settlement Agreements resulting from Mediation.

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 Mongolia.

**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.

A frequent rule in other countries provides that 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. The Manila Principles on this topic should be considered in any law reform.

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** raises 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?

## **Conclusion**

The report concludes by urging harmonization with neighbouring states and trading partners, in legislation and in standards, 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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