



E-COMMERCE LAW IN MONGOLIA

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WHAT IS E-COMMERCE?

World Trade Organization (WTO) definition

Electronic commerce, or e-commerce, is defined as the "production, distribution, marketing, sale or delivery of goods and services by electronic means" (1998). An e-commerce transaction can be between enterprises, households, individuals, governments and other public or private organizations.

World Trade Organization, online:

https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm

TRADE AND (E-)COMMERCE (2)

Trade focuses on the transaction; commerce may also focus on the broader economic activity.

commerce includes all the activities necessary to facilitate trade, which means to deliver goods or services from manufacturers to consumers. Such activities include arranging transportation, providing banking and insurance services, promoting the products via advertising and storing the product in warehouses, etc. to complete this entire process successfully.

As a result, the expression “e-commerce” tends to refer to all of those activities when conducted through electronic means of communication, whether or not they might be part of “trade.”

ELECTRONIC TRANSACTIONS IN MONGOLIA

These activities, when electronic, may not need additional legislative or regulatory support. The “activities to facilitate trade” are already authorized in electronic form by a law that covers e-transactions and e-signatures. Mongolia already has such laws, in the Civil Code and the Law on Electronic Signatures.

- ***Civil Code of Mongolia***, article 42¹.1, article 43.2.4, 196.1.8
- ***Law on electronic signatures***, 2021.
- In short: a transaction to be in writing may be electronic if signed with an electronic signature under the Law on that topic, and if notarized if otherwise required to be.
 - Law on Notaries allows for notaries to sign electronically as well.

ELECTRONIC SIGNATURES

- There are many ways to sign a document electronically. The Law on Electronic Signatures (enacted in 2021, in force in May 2022) defines an electronic signature as electronic data attached to or combined with the information in order to identify the person who signed [the document.]
- The United Nations E-communications Convention (in force in Mongolia) speaks of using “a method ... to identify the party and to indicate the party’s intention in respect of the information contained in the electronic communication.” (Intention is usually inferred from the context, not the form, of the signature.)
- The Law on Electronic Signatures does not give specific legal force to electronic signatures, though the Civil Code does.
- The Law on Electronic Signatures says that a digital signature has the same effect in law as a handwritten signature.

ELECTRONIC SIGNATURES (2)

Signature technology, and Mongolian law, recognize both “electronic signatures” цахим гарын (“tsakhim garyn”) and “digital signatures” тоон гарын (“toon garyn”).

Digital signatures are a class of electronic signature that are created using an encryption key used with a certificate from a certification center identifying the person who has the authority to use the key. They also permit the recipient of the signed document to know if its text has been altered since it was signed.

- Mongolian laws, and especially translations of Mongolian laws, do not always distinguish clearly whether they mean to refer to electronic signatures generally or to digital signatures specifically.
- It can be difficult to manage a system for producing digital signatures. Many private transactions do not need such a high degree of security.
- Moreover, the system of certificates and certification centres, with control lists for revoked certificates, is still not in operation six months after the Law on Electronic Signatures came into force. As a result, private transactions are not yet being done with digital signatures under the new Law – though many are done on platforms etc.

ELECTRONIC SIGNATURES (3)

- Many countries, including several Asian countries, authorize a kind of “hybrid” e-signature system, in which digital and non-digital electronic signatures co-exist, for different purposes.
 - Some such purpose are communications with the state and its agencies, and high value contracts.
 - Parties to commercial transactions are given a lot of power to decide what signature technology they want to use.
- The e-Mongolia project offers e-government services across the country. At present nearly 2000 services are offered, at the national and local levels.
 - Digital signatures are usually used by citizens dealing with government under these programs.
- The public sector in Mongolia uses a number of other authentication methods that might be a model for some kinds of private sector use.
 - There are also commercial e-signature systems available for purchase.

OTHER POSSIBLE CONTENTS OF AN E-COM LAW

- Besides electronic transactions and electronic signatures, International models of e-commerce laws offer other possible contents for a law on e-commerce generally.
- For example, the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures (and the E-Communications Convention) offer rules for:
 - Non-discrimination (media neutral laws: the law treats information the same whether it is on paper or in electronic form)
 - Electronic evidence
 - Record retention
 - Timing of sending and delivery of electronic messages
 - Contracts without human intervention
 - Correction of mistakes when dealing with a computer

OTHER POSSIBLE CONTENTS OF AN E-COM LAW (2)

- Moreover, a meeting of Mongolian stakeholders (public and private sectors) suggested other content for a generally applicable law for e-commerce:
 - Fairness among businesses engaged in e-commerce
 - Equal benefits and equal burdens, e.g. in taxes, charges
 - Protection against cybercrime
 - Product-specific standards e.g. online sale of medical supplies
 - Practical matters –
 - border procedures
 - delivery problems (“addressing”)
 - information security
 - better e-payment systems.

INTERNATIONAL CONTEXT

The international context – conventions and treaties to which Mongolia is a party or may become a party – is interesting for several reasons:

- Their treatment of electronic communications may apply in Mongolia now because of the scope of the convention – so a source of legal authority beyond the Civil Code or the Law on Electronic Signatures.
 - The UN Electronic Communications Convention is a prime example.
- Their treatment may be useful in designing future laws for Mongolian use – because they are good ideas and because they may be familiar to Mongolians who have carried on international commerce.
- Trade agreements and other international law may affect how domestic transactions are allowed to occur or promote future choices – such as the WTO Trade Facilitation Agreement
- The full report of this project contains a longer discussion of the issues and the international agreements relevant to it.

FRAMEWORK FOR LAW REFORM

1. ENACT E-COMMERCE FRAMEWORK LAW, BASICALLY U.N. E-COMMUNICATIONS CONVENTION
2. DEFINE “E-BUSINESS” FOR REGISTRATION AND TAX PURPOSES
3. CREATE “HYBRID” REGIME FOR E-SIGNATURES, RESERVING DIGITAL SIGNATURES FOR HIGH VALUE OR PUBLIC SECTOR USES
4. REGULATE TRADING PLATFORMS LIKE OTHER INTERMEDIARIES
5. SUPPORT NEW CONSUMER PROTECTION LAW, PROMOTE EFFECTIVE ENFORCEMENT
6. SUPPORT NEW PRIVACY LAW, ATTENTION TO CROSS-BORDER ELEMENTS
7. ADOPT NEW TOOLS FOR FIGHTING CYBERCRIME BUT BE CAUTIOUS ABOUT OVERREACHING BY POLICE

ISSUE 1: SHOULD MONGOLIA HAVE A LAW ON E-COMMERCE?

In favour:

- Could help define what an 'e-business' is.
- Could give broader support to validity of e-transactions than the form of signature (which is now the only rule)
- Could harmonize law on domestic and cross-border dealings.

Against:

- Not needed – e-transactions are valid now under Civil Code.
- Definition of 'e-business' will vary depending on the purpose for which one needs to know.
- **RECN**: Adapt UN E-Communication Convention for the purpose.
- **RECN**: No special 'institution' needed to govern e-commerce.

ISSUE 2: SHOULD THE LAW DEFINE AN “E-BUSINESS”?

In favour:

- Permits a clearer allocation of rights and duties to e-commerce
- Allows better statistical analysis of trade practices
- Allows better assignment of subsidies or incentives to e-commerce
- DRAFT Law on Consumer Protection defines “entrepreneur,” “e-business operator”

Against:

- Any business using electronic communications is an e-business and subdivisions are artificial
- Overly rigid definitions or classifications could be a barrier to innovation

In any event: coordination with tax policy/incentives is required.

ISSUE 3: HOW TO CLASSIFY E-BUSINESSES?

Options:

- Size of business, annual revenue, annual profits? Number of employees?
 - Would this allow for an adequately targeted policy about some businesses?
- Form of business: corporation, partnership, others known to Mongolian law?
 - Could be evidence of seriousness, permanence
- Existence of physical location as well as online, proportion of business done online or in person
- Class of customer e.g. to consumers, to other businesses, to private or public sector, import, export or domestic
- Type of product or service offered
- Means by which the business goes online: its own website, a trading platform, a social medium
- Self-identification, voluntary registration as e-business (with incentive?)

ISSUE 4: SHOULD THE LAW ON E-SIGNATURES BE MADE MORE FLEXIBLE?

In favour:

- The law now gives no guidance on how much security is needed for e-signatures, except for digital signatures, where the Ministry may provide some flexibility.
- Many transactions do not need the protection of a full digital signature supported by a certificate. [Note: IETF standards – *Internet Engineering Task Force*]
- Public sector authentication can often be created by other means than a full digital signature. Private parties should have similar opportunities.
- The supports for PKI – trust services – are more expensive than necessary for many transactions.

Against:

- Digital signatures in Mongolia are relatively easy to acquire and to use, so there is no need to allow for others [BUT public sector only, so far and distribution has ended(?)]

RECN: Flexible rule based on UN E-Com Convention especially for private parties.

NOTE: rules could depend on what is being signed: nature of document, parties, value, public interest. (Many models exist e.g. Singapore, Hong Kong...)

ISSUE 5: SHOULD THE LAW REGULATE TRADING PLATFORMS?

[This issue could be part of prescribing liability of intermediaries.]

Duties of trading platforms:

- Honest representation of goods and services carried
- No unfair competition with customers of the platform
- Some degree of consumer protection, i.e. platform protects consumers against platform users' faults.
- Some degree of privacy protection, i.e. platform does not make use of trading data for its own advantage (including sale)

RECN: Yes. Should apply as well to popular foreign-based platforms: direct regulation, warnings to users.

Consider law on foreign platforms in Vietnam, Laos PDR, China

Also: international preference for minimal regulation

ISSUE 6: REFORM OF CONSUMER PROTECTION

- Consumers' use of e-commerce depends on their trust that they will be able to communicate securely and receive what they order, or have a remedy if they do not.
- The availability and certainty of a remedy for complaints may be more important than the actual rules.
 - A state agency is often responsible for this remedy. The current Mongolian agency has been under-resourced.
- Draft law on consumer protection has been prepared.
- Consider Law on Advertising: fair application to all sellers

RECN: Support enactment of new Law being prepared elsewhere in government (i.e. not MDDC); ensure effective enforcement mechanisms (and resources) are provided.

ISSUE 7: PRIVACY

- The law on personal information of 2021, in force in 2022, is largely satisfactory. It is too early to recommend changes to the main part of the legislation.
- It is important that the legislation be properly enforced. The National Human Rights Commission should have the powers and the administrative capacity to carry out its duties effectively (Investigation - Response to complaints - Make orders and enforce them)
- The law allows for cross-border transfers of personal information if there is a treaty with the destination country. The law should make it a condition for such treaties that the country to which the information is transferred offers protection for personal information equivalent to Mongolia's.

ISSUE 7: PRIVACY (CONTINUED)

- There have been proposals that personal (or commercial) data relating to Mongolian residents must be processed and stored only in Mongolia.
- This “data localization” policy creates inefficiencies for cross-border enterprises, requiring them in effect to build separate data processing facilities in each country with such rules.
 - The Mongolia-Japan Trade Agreement prohibits such policies, as do many free trade agreements (unless there is a “legitimate public policy reason” for the localization rule, which would be rare though conceivable.) Mongolia-Japan Trade Agreement, article 9.10.)

RECN: That Mongolia NOT adopt a data localization policy. Insisting on equivalent protection for transfers abroad is good enough.

ISSUE 8: CYBERCRIME

- The Criminal Code provisions creating offences for the abuse of computers and the creation of malware are largely satisfactory.
 - It may be necessary to review the offences that can be committed online, if Mongolia wishes to join the Budapest Convention on Cybercrime.
- The recent Law on Cybersecurity will probably allow the administrative cooperation that is necessary to fight cybercrime effectively across borders.

ISSUE 8: CYBERCRIME (CONTINUED)

- Police have asked for increased powers to oversee bank transfers where crime is suspected.

RECN: Great caution will be needed to ensure that rights of all parties are protected.

RECN: The person alleging fraud may need to indemnify any person improperly harmed by the restriction on the transfer of funds.

- Increased administrative cooperation between prosecutors, investigators and financial institutions does not require law reform.

INTERNATIONAL PROPOSALS

- Implement the UN E-Communications Convention as Mongolia's domestic e-commerce law, with additional provisions as discussed.
 - Note can use it to interpret other treaties
- Special legal framework for cross-border e-commerce:
 - Domestic law will usually validate c-b transactions, but not always
 - 'De minimis' exemption from duties –
 - Need a cut-off value – no authoritative precedent
 - Do not apply just to postal parcels as at present
 - WCO Framework of standards on c-b e-commerce
 - General rules on managing e-trade can be difficult e.g. China, Vietnam
 - Trade in intangibles – new issues – WCO/OECD rules on transfer values, since intangibles do not stop at border.
 - Inbound e-payment rules need improvement
E.g. PayPal, other e-payment methods

INTERNATIONAL PROPOSALS (2)

- Participate in ESCAP's working groups, notably technical and legal groups, under the Framework Agreement on the Facilitation of Cross-border Paperless Trade.
- Consider joining the Regional Comprehensive Economic Partnership (RCEP), noting its e-commerce provisions.
- Consider implementing the UNCITRAL Model Law on Electronic Transferable Records when there is sufficient demand for it from the finance and trade sectors.
- Refer to ISO, CEFAC, ASEAN standards in developing the National Single Window for export and import documentation.

FURTHER WORK

- **Remote notarization:** The law on Notary authorizes notaries to create electronic notarized documents, but only (apparently) in person. Reforms to allow notarization where the signatories and the notary are not in the same place may allow for more efficient transactions.
- **Dispute resolution:** Mongolia is a party to the main international instruments about arbitration. It should probably join the UN Convention on the Enforcement of Settlements in Mediations.
- **Civil liability:** The liability of communications intermediaries for harm done by what is communicated should be clarified in law, along with their right to limit their liability by contract with their clients. (Trading platforms may be a special case.)
 - The Manila Principles on this topic should be used as a guide for law reform. These principles have been developed by civil society organizations with an interest in free speech.

WORK PLAN

- Approval of MDDC (and ADB) for the recommendations here
- Prepare final report with additions and corrections to text, refined recommendations from this meeting, and outline of drafting instructions (considering the requirements of the Law on Legislation.) (“Milestone 5”)