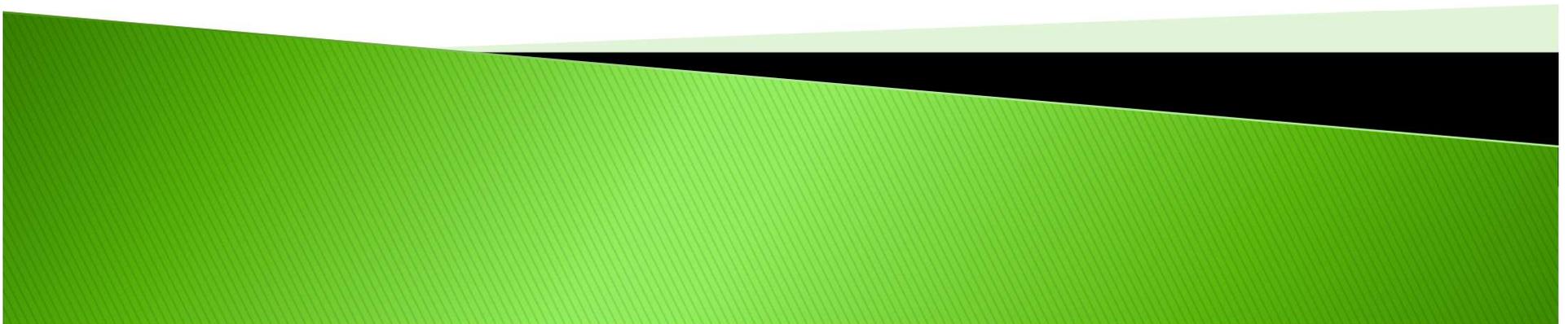


# BANGLADESH

## Legal Readiness for Cross-border Paperless Trade

Donald J. Lewis  
UNESCAP Legal Consultant  
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# Summary of Findings and Issues

- ▶ The current legal system for electronic transactions in Bangladesh is based on the **Information & Communication Technology Act** (2006, amended in 2009 and 2013) (ICTA)
- ▶ ICTA provides a sound foundation for e-commerce and paperless trade in Bangladesh
- ▶ However, e-commerce law and concomitant technologies have rapidly evolved – prompting the need for revision of ICTA and related Bangladesh legislation
- ▶ Proposed 2019 revisions to ICTA as well as the draft revised **Customs Act** (2018) are intended to address gaps and anomalies in Bangladesh's current e-commerce and related legislation



# Electronic transactions and signatures law

## Functional equivalence

- ▶ ICTA mandates *functional equivalence* of electronic records and digital signatures to paper-based documents and written signatures
- ▶ However, the *functional equivalence* of electronic records is significantly eroded in Chapter IX of the Customs Act which provides:
  - The Commissioner of Customs may...require the owner who has delivered or transmitted a *bill of entry* (i.e. import declaration form) in *electronic form* to submit to the appropriate officer a *paper bill of entry duly signed* by the owner or his authorized agent...
- ▶ This provision in the Customs Act underscores the current practice of NBR Customs to require the submission of *paper* documentation, including *paper* customs declarations, notwithstanding their submission in *electronic form* via the Asycuda World system



# Electronic transactions and signatures law

## Digital signatures, certificates and the PKI System

- ▶ ICTA envisages a system of digital signatures and digital certificates used to *authenticate and ensure trust* in the use of electronic records
- ▶ PKI (Public Key Infrastructure) system is established by ICTA
- ▶ Certifying Authorities (CAs) are authorized to issue digital signature certificates to subscribers which are the basis for digital signatures in Bangladesh
- ▶ However, according to UNCTAD and others, the current government-operated PKI system may *not* be *technologically neutral*



# Electronic transactions and signatures law

Digital signature certificates and legally recognized digital signatures appear to be *only available* through the government-operated PKI system. *Any other* digital signatures, not created by the PKI system, may not be legally recognized

Relevant ICTA sections include:

- ▶ Chapter II.7: legal recognition of digital signature
- ▶ Chapter II.5: authentication by digital signature
- ▶ Chapter V.36: issue of digital certificate by Bangladesh Certifying Authority (CA)



# Electronic transactions and signatures law

## Digital signatures, certificates and the PKI System

- ▶ Bangladesh customs regulations underemphasize digital signatures and *instead* use a different authentication and identity management system: the *registered user* (username/password)*system*
- ▶ Current Customs regulations and practices may erode *functional equivalence* of digital signatures
- ▶ The future of PKI architecture – as set forth in ICTA – could be jeopardized. The use of digital signatures is open to question as a primary means to establish attribution and authentication
- ▶ There is a need for *full* alignment of Customs regulations with ICT legislation in Bangladesh



# Electronics transactions and signatures law

## New Electronic Documents

- ▶ The Bangladesh NSW and Asycuda World system plan to introduce and recognize a range of electronic documents: e-B/Ls; e-waybills; e-Phyto; and other e-licenses and e-permits
- ▶ However, ICTA is silent on specific types of electronic records or documents
- ▶ The Customs Act already recognizes *e-customs declarations* (i.e. e-bill of entry, e-bill of export) and *e-manifests*
- ▶ UN instruments, such as MLETR and the Rotterdam Rules, have legally recognized a range of electronic documents with *functional equivalence* to paper counterparts – which may be used as a reference by Bangladesh legal drafters



# Electronics transactions and signatures law

## E-Contracts

- ▶ E-contracts are closely related to electronic records/documents and digital signatures
- ▶ ICTA, following the UNCITRAL Model Law on E-Commerce, sets forth basic rules on formation of e-contracts (Chapter III: Attribution, Acknowledgement and Despatch of Electronic Records)
- ▶ It would be beneficial to the development of the Bangladesh digital economy to pursue a fuller treatment of e-contracts and obligations of the parties to e-contracts in Bangladesh legislation



# Electronics transactions and signatures law

## Data retention and electronic archiving

- ▶ ICTA recognizes electronic records *need to be kept safely* for purposes of legal validity
- ▶ Data custodians must allow for *accessibility* to electronic records/documents
- ▶ The Customs Act requires NBR Customs to keep records of transmission to/from a *registered user* using the Customs computer system (i.e. Asycuda World) for *five years*
- ▶ ICTA does not detail responsibilities of government custodians of paperless trade electronic records – such as government data centres



# Electronics transactions and signatures law

## Electronic evidence

- ▶ ICTA has no express provisions on admissibility of electronic evidence in judicial or administrative/regulatory proceedings
- ▶ – *although* it is reported such evidence may be admitted in judicial cases involving criminal offenses listed in Chapter VIII: Offences, Investigation, Adjudication, and Penalties
- ▶ Evidence Act 1872 has no express provisions on electronic evidence, but successfully invoked to admit evidence such as e-documents and email
- ▶ Chapter IX.87(b), ICTA, states that definition of “document” in section 3, Evidence Act includes *a document generated or prepared by electronic machine or technology*
- ▶ The Digital Security Act (2018), which deals specifically with *cybercrimes*, appears to allow for admissibility of electronic evidence in the prosecution of such crimes



# Paperless trade and Single Window laws

## Single Window system

- ▶ Prime Minister's Office will likely issue a decree concerning the BNSW this year
- ▶ The draft Customs Act (2018) is expected to have provisions on establishment of the Bangladesh National Single Window (BNSW) as part of development of paperless trade environment
- ▶ NBR has stated that Bangladesh is formulating a National Single Window Law
- ▶ The Government Secure Intranet (GSI) system, which electronically interlinks 56 ministries, including all prospective OGAs, along with over 18,000 government offices nation-wide, is in effect a "shadow NSW" – which should facilitate roll-out of BNSW



# Paperless trade and Single Window laws

## Information security and data confidentiality

- ▶ ICTA relies on a digital signature and certificate system and PKI (Public Key Infrastructure), backed up by certain cybercrime offenses, to provide information security
- ▶ Information security standards and codes of conduct are not specifically referenced/included in ICTA, although Chapter IV recognises application of “information security procedures”
- ▶ The Digital Security Act (DSA) (2018) is the primary legislation in Bangladesh governing information security and data confidentiality – it implements a new *data protection* regime
- ▶ DSA aims to promote the *confidentiality, integrity, and availability* (CIA) of public and private information systems and networks
- ▶ DSA protects Critical Information Infrastructures (such as government computer systems and networks) and personal data of individuals (Section 26, DSA)



# Paperless trade and Single Window laws

## Information security and data confidentiality

- ▶ Chapter VIII, ICTA, stipulates several cybercrimes related to computers (e.g. computer hacking, malware)
- ▶ Chapter Six, DSA adds cybercrimes: e.g. illegal entrance into Critical Information Infrastructures (apparently 22 categories), digital or electronic fraud and forgery, identity theft, cyber-terror, and e-transactions without legal authority



# Paperless trade and Single Window laws

## Data accuracy and integrity

- ▶ Under ICTA, data integrity is protected by PKI architecture and the use of verified digital signatures
- ▶ The Digital Security Act has as one of its objectives the protection of data integrity – achieved in part through threat prevention measures
- ▶ The Customs Act requires data accuracy and integrity for forms and documents used in cross-border trade – including e-customs declarations (i.e. bills of entry and bills of export) and e-manifests
- ▶ The Customs Act imposes obligations on importer, exporter or customs broker to provide accurate information to NBR Customs – whether forms/documents are submitted *electronically* or in *paper form*



# Paperless trade and Single Window laws

## Data sharing

- ▶ NBR has entered into MOUs with 37 OGAs as part of preparations for implementation of the BNSW. Such MOUs *may* include provisions on data sharing
- ▶ Legal limitations on such data sharing in relation to personal privacy and commercial confidentiality are partly in place by virtue of Section 26, Digital Security Act and Chapter VIII, ICTA, Punishment for disclosure of confidentiality and privacy



# Paperless trade and Single Window laws

## Service level agreements (SLAs)

- ▶ The Bangladesh ICT Department has confirmed that SLAs are in place governing internet-linked computer operations and databases
- ▶ Bangladesh Computer Council (BCC) has overall responsibility for SLAs under the National Enterprise Architecture (NEA)
- ▶ BCC apparently has an SLA in place with Bangladesh National Data Centre (and perhaps other data centres) and may incur contractual liability in the event of SLA breach
- ▶ Section 38, Digital Security Act (DSA) indicates that network service providers are normally exempted from civil and criminal liability
- ▶ Contractual undertakings, such as SLAs, are important as ICTA and DSA provide limited statutory liability of parties to SLAs



# Cross-border aspects

- ▶ Bangladesh is a member of Asian Clearing Union (ACU) which has procedures for *cross-border e-payments* (i.e. T/T, EFT). Settlement is by SWIFT. All messaging by electronic means
- ▶ Bangladesh enjoys LDC preferential access to European Union under EBA. Traders use the EU online GSP registration system for exports via the Bangladesh Export Promotion Bureau (EPB)
- ▶ Limited attention given to cross-border NSW/paperless trade interoperability – especially in SAARC and SASEC contexts, and bilaterally with India and Nepal. Emphasis placed on construction of domestic BNSW
- ▶ Bangladesh's participation in cross-border *transport and transit* arrangements with India and Nepal should provide large opportunities for future paperless trade initiatives



# Cross-border aspects

## International standards/regulations/guidelines

- ▶ Bangladesh has ratified the WTO Trade Facilitation Agreement
- ▶ Bangladesh is one of the first signatories of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific
- ▶ Bangladesh has referenced international models in drafting its national e-commerce law. ICTA bears the imprimatur of UNCITRAL Model Laws on E-Commerce and E-Signatures. Interest shown in UNCITRAL Model Law on Electronic Transferable Records (2017)
- ▶ Bangladesh has acceded to Revised Kyoto Convention – and seeks to achieve full compliance with RKC
- ▶ Bangladesh should consider UN/CEFACT Recommendations on cross-border Single Window interoperability



# Other considerations

## Liability of the parties to paperless trade operations

- ▶ Under ICTA and DSA, network service providers are generally exempted from civil or criminal liability – except in very limited circumstances (Chapter VIII.79, ICTA; Section 38, DSA)
- ▶ Network service providers may incur *contractual* liability (e.g. under SLAs). However, such contractual liability is likely to be restricted by exculpatory clauses (e.g. *force majeure*) or by disclaimer clauses
- ▶ There is no specific statutory treatment of paperless trade service providers in ICTA or DSA
- ▶ ICTA lacks substantive provisions on SLAs
- ▶ Although network service providers are considered as “intermediaries” under ICTA, intermediate liability issues are only briefly addressed



# Other considerations

## Liability of the parties

- ▶ ICTA and DSA do not directly address issues of liability concerning *public authorities* (i.e. government agencies) participating in the Nepal paperless trade environment, including BNSW – although, under DSA, breach of confidentiality by government agencies should be actionable
- ▶ Bangladesh legislation should include treatment of liability, or exemption from liability, of the Single Window operator (i.e. NBR Customs) or OGAs for *errors or omissions leading to economic loss or damage of traders and third parties*
- ▶ The Controller of Certifying Authority (CCA) and BCC as Root CA, may potentially incur liabilities under ICTA for their acts and omissions as well as under the common law (e.g. breach of statutory duty, negligence)



# Other considerations

## Electronic payments

Bangladesh Bank has created a fully integrated, advanced, interoperable *domestic* e-payment environment – the backbone is National Payment Switch Bangladesh (NPSB)

Important banking regulations governing this e-payment system include:

- ▶ NPSB Switch Operating Rules & User Manual: Disputes Management Rules
- ▶ Bangladesh Real Time Gross Settlement (BD-RTGS) System Rules
- ▶ Bangladesh Electronic Fund Transfer Network (BEFTN) Operating Rules
- ▶ Guidelines on ICT Security for Banks and Non-Bank Financial Institutions 2015

In connection with such banking regulations, a chapter could be added to the revised ICTA governing e-payments



# Other considerations

## Electronic payments

- ▶ The Bangladesh national e-payment gateway will initially only operate as a *domestic*, internal e-payment system – but there are plans to extend at least RTGS to include large international trade electronic fund transfers (EFT)
- ▶ It is unclear to what extent foreign banks or foreign bank branches will be permitted to participate in Bangladesh NPSB system
- ▶ As regards BNSW, domestic customs duty payments can now be paid by importers electronically. Such e-Customs payments, involving government revenues, are handled exclusively by Bangladesh Bank and Sonali Bank



# Other considerations

## Electronic payments

E-payments, other than those involving government revenues, may be handled by any commercial bank in Bangladesh (e.g. HSBC) – including cross-border T/T, EFT and e-letters of credit (e-L/Cs)

However, it should be noted that strict *foreign exchange controls* are in place for cross-border trade and e-commerce payments, despite current account convertibility

Relevant regulations for international trade e-payments include:

- ▶ Bangladesh Payment and Settlement Systems Regulations 2014
- ▶ Regulations on Electronic Fund Transfer 2014
- ▶ Foreign Exchange Regulation Act 1947 (amended 2015)
- ▶ Guidelines for Foreign Exchange Transactions (2018)



# Other considerations

## Electronic payments

- ▶ Cross-border international trade payments in Bangladesh remain largely paper-based:
  - paper letters of credit (L/Cs), bills of exchange (B/Es), and documentary collections (D/P, D/A)
- ▶ It may be advantageous for Bangladesh to give further consideration to introducing e-documents in the context of international trade payments and settlements



# Other considerations

## Competition issues

- ▶ Bangladesh passed its Competition Act in 2012
- ▶ Bangladesh Competition Commission (BCC) has been established and a Chairman to the Commission appointed in 2013
- ▶ Functions of the Competition Commission include:
  - investigation of anti-competitive vertical and horizontal agreements and practices, abuses of dominant position, and combinations (i.e. mergers) and prosecution of crimes under the Act



# Other considerations

## Competition issues

- ▶ Competition Act could potentially have application in the Bangladesh paperless trade environment:
- ▶ Restrictions on the number of CAs could retard growth of the digital economy and provide opportunities for potential collusion
- ▶ Exclusive reliance on the government-operated PKI system, as authorized under ICTA, could be viewed as anti-competitive potentially restricting market entry for new technologies, such as blockchain

