



Cross-border paperless trade: a legal readiness checklist

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Legal and Technical Working Group of the Interim Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation

Introduction

1. The checklist serves to identify potential legal gaps and highlight what may need to be done to ensure the laws support engagement in cross-border paperless trade, as envisaged in the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific, which was adopted by the Economic and Social Commission for Asia and the Pacific (ESCAP) in 2016.
2. It should be noted that the checklist is not intended to assess the readiness of a country to join the Framework Agreement. This treaty contemplates that its parties ensure that their legal systems support the use of electronic communications and gradually adapt their laws for the purpose of cross-border paperless trade. It is not necessary for Governments to modernize their laws before ratifying or acceding to the Agreement.¹ Paperless trade implementation is a work in progress, and the Agreement is a tool meant to support such progress regardless of the level of readiness of a country.
3. In line with the substantive provisions of the Framework Agreement, the checklist organizes legal issues into four major parts as follows: (a) electronic transactions and signatures law; (b) laws regarding paperless trade systems; (c) cross-border aspects; and (d) other considerations. Each part is divided into sections. In each part and section of the checklist, key legal issues are highlighted, and a list of focus questions is proposed.
4. The checklist is intended for use by all stakeholders involved in paperless trade facilitation and not only for legal specialists. While it includes references to legal concepts, it does so in general terms in order to reach a broad audience. Each question should be seen as the starting point for a broader reflection on the state of the law in the given area.
5. The term “law” should be understood to include statutes, regulations, administrative measures and any other binding rules. All questions about national laws can be applied to subnational laws as appropriate. In completing the checklist, it is recommended that the user indicate, where possible, the legal authority for the answers, for example the statute, regulation or other rule relevant to the answers. Some relevant obligations may arise through contracts as well.
6. Additional guidance on how to use this checklist is provided in a separate online guide.² A number of examples of country reports on readiness assessments for cross-border paperless trade carried out by ESCAP are also available online.³ In addition, a general introduction on legal issues related

¹ Detailed information on the Framework Agreement, including an explanatory note and answers to frequently asked questions, is available at www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific.

² <https://readiness.digitalizetrade.org>.

³ Available at www.unescap.org/resources/readiness-assessments-cross-border-paperless-trade.

to cross-border paperless trade may be found in the ESCAP publication *Electronic Single Window Legal Issues: A Capacity-Building Guide*.⁴

A. Electronic transactions and signatures law

7. Part I of the checklist is focused on laws related to electronic transactions and electronic signatures. These concerns are addressed either directly or indirectly in articles 5, 6 and 7 of the Framework Agreement. In particular, the first three principles included in article 5 (on general principles) represent the principles guiding the legislative texts on electronic commerce prepared by the United Nations Commission on International Trade Law (UNCITRAL) and, as such, are an expression of international consensus.⁵ Approximately half of the Governments in Asia and the Pacific have adopted at least one UNCITRAL text on electronic commerce.⁶
8. In order to promote interoperability to the extent possible, similar rules should apply to electronic communications exchanged among commercial operators and between commercial operators and public authorities. In the paperless trade facilitation environment, this means that trade-related data exchanged in commercial documents may be reused for submission to single windows. This should ensure high data quality with respect to its origin, integrity, accuracy, completeness and other characteristics.

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|------------|---|-----------------|
| | <p>Related provisions of the Framework Agreement:</p> <ul style="list-style-type: none"> • Article 5 on general principles. • Article 6 on the national policy framework, enabling domestic legal environment and paperless trade committee. • Article 7 on the facilitation of cross-border paperless trade and development of single-window systems (more specific questions on the single window appear below in part II). | |
| I.A | <p>Electronic transactions law: general principles</p> <p>This section is aimed at identifying the general features of electronic transactions law, including whether they implement internationally recognized general principles.</p> | |
| I.A.1 | What is the legal status of electronic transactions? | |
| I.A.2 | If an electronic transactions law exists, is it based on uniform models? | |
| I.A.3 | What are the conditions, if any, for the legal recognition of electronic transactions? | |

⁴ ST/ESCAP/2636.

⁵ The Framework Agreement contains the internationally recognized criteria for these laws, such as non-discrimination of the use of electronic communications (the laws apply in the same way, or with the same effect, to paper and electronic documents), technological neutrality (the laws do not specify what technology to use to achieve the legal effect) and functional equivalence (electronic documents have the same practical or legal effect as their paper equivalents, even if they have different characteristics).

⁶ For a list of UNCITRAL texts on electronic commerce, see part III .

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|------------|---|-----------------|
| I.A.4 | Does the law establish functional equivalence between paper documents and electronic communications? | |
| I.A.5 | What is the legal status of electronic contracts? | |
| I.A.6 | Are there special rules for the use of electronic communications in paperless trade? | |
| I.A.7 | In particular, are there special rules for the use of trade-related data and documents in electronic form, such as certificates of origin, invoices and phytosanitary certificates? | |
| I.A.8 | Are there special rules for the use of electronic transferable records such as bills of lading? | |
| I.B | <p>Electronic signatures and trust services</p> <p>Electronic signatures serve to identify the originator of an electronic communication and ascertain their intention with respect to that communication. Certain types of electronic signatures, namely digital signatures based on public key infrastructure certificates, may provide additional information, for instance on the integrity of the data message and on timestamping.</p> <p>Many laws deal with the legal recognition of electronic signatures. However, legislative approaches may vary significantly, in particular with respect to technological neutrality and the recognition of service providers.</p> <p>Trust services are electronic services that provide assurance on the quality of data. Trust services are often used to establish confidence in the use of electronic communications.</p> | |
| I.B.1 | Does the law address how electronic signatures, including for identification, authorization and authentication, are added in an electronic environment? Does it require the use of a specific technology or method for electronic signatures or is it technology neutral? | |
| I.B.2 | Does the law adopt a functional equivalence approach for electronic signatures? | |
| I.B.3 | Is the law based on international standards? | |
| I.B.4 | Does the law recognize foreign electronic signatures? | |
| I.B.5 | Are there special rules for the use of electronic signatures in paperless trade? | |
| I.B.6 | Does the law deal with trust services? | |
| I.C | <p>Privacy and data protection</p> <p>Privacy and data protection are important elements of the legal landscape of electronic commerce as they may impose conditions to data transfer between the parties. This section is aimed at identifying laws relating to privacy and data protection, with special attention to those relevant to paperless trade.</p> | |
| I.C.1 | Is there a law on privacy and data protection? If so, what are its features? Is it based on international standards? | |
| I.C.2 | Does domestic law address the transfer of data abroad? | |

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|------------|--|-----------------|
| I.C.3 | Do international agreements contain provisions relevant to privacy and data protection? | |
| I.C.4 | Does the law require data localization? If so, does it apply to paperless trade? | |
| I.C.5 | Are there any special rules on privacy and data protection for paperless trade? | |
| I.C.6 | Does the law protect the confidentiality of commercial information in electronic form? | |
| I.C.7 | Are there provisions on cybercrimes that are applicable to paperless trade? | |
| I.D | <p>Data sharing</p> <p>Paperless trade systems are often built around the notion of a single window for customs operations, which involves collecting trade-related data and documents and sharing them among participants. This process raises delicate issues. Besides general rules on privacy, data protection and data retention, specific legal texts may address data sharing, especially among public entities.</p> | |
| I.D.1 | Are there agreements or policies for collecting, accessing, using and sharing data among government agencies participating in a paperless trade system? | |
| I.E | <p>Data retention and electronic evidence</p> <p>The legal effect of electronic records often depends on their evidentiary value, i.e. the ability to use those records before a court to substantiate a legal claim. This section is aimed at clarifying which retention and evidence rules apply.</p> | |
| I.E.1 | Does the law establish general requirements for data retention, including a minimum and maximum retention period? Do they apply to electronically stored data? | |
| I.E.2 | Does the law require or favour the use of specific trust services or service providers for data retention? | |
| I.E.3 | Do data custodians, such as data centres, assume liability for loss or damage to electronically stored information? Is such liability contractual, statutory or both? | |
| I.E.4 | Is electronic evidence admissible in judicial and other proceedings? | |
| I.E.5 | Is electronic evidence that is generated, stored or collected abroad admissible? If so, under which conditions? | |

B. Laws regarding paperless trade systems

9. Part II of the checklist is focused on laws related to implementing and developing a paperless trade system (including but not limited to a single window system). These matters relate in particular to articles 6 and 7 of the Framework Agreement. The wide scope of article 6 can encompass several aspects of creating an enabling national policy framework for paperless trade. In article 7, parties are specifically encouraged to implement and develop a cross-border paperless trade system, in particular a single window. Accordingly, in part II, issues related to the implementation of a single window and/or other paperless trade system(s) are covered first. Part II also includes questions on end-user agreements, service-level agreements and memorandums of understanding on paperless trade.

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|-------------|---|-----------------|
| | <p>Related provisions of the Framework Agreement:</p> <ul style="list-style-type: none"> • Article 6 on the national policy framework, enabling domestic legal environment and paperless trade committee. • Article 7 on the facilitation of cross-border paperless trade and development of single-window systems. | |
| II.A | <p>Establishment of a paperless trade system</p> <p>The establishment and operation of a paperless trade system often requires a set of dedicated laws and regulations. This section is aimed at identifying those laws and regulations as well as the basic features of governance of the paperless trade systems.</p> | |
| II.A.1 | Does a dedicated paperless trade system, such as a single window, exist? If so, what legal instruments are used to establish and operate it? How do these instruments define the rights and obligations of the participants? | |
| II.A.2 | Which government agencies participate in the paperless trade system? On what legal basis? | |
| II.A.3 | Is there a central body tasked with setting up and managing the paperless trade system? | |
| II.B | <p>Quality of information exchanged with the paperless trade system</p> <p>The main function of the paperless trade system, including the single window, is to facilitate the exchange of trade-related data and documents in electronic form. The information is originally submitted on paper or electronically by commercial operators that have a duty to make complete and correct statements. Moreover, in an electronic environment, there could be special procedures to attribute the declarations originating from the various participants. Electronic signatures may play a significant role in the attribution of the declarations.</p> | |
| II.B.1 | Does the law on the substantive requirements of trade-related data and documents also apply to paperless trade? | |
| II.B.2 | Are there specific rules for the exchange of trade-related data and documents in electronic form? | |

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|-------------|---|-----------------|
| II.C | <p>Service-level agreements and memorandums of understanding</p> <p>A number of legal texts, such as service-level agreements, memorandums of understanding, end-user agreements and other contractual agreements, are relevant to the operation of a paperless trade system. These legal texts define the obligations of the participants in the paperless trade system. For instance, service-level agreements define the obligations of the service provider with respect to the availability of the system, response time, processing time and other technical requirements that are critical to define to ensure the availability and smooth operation of the system.</p> | |
| II.C.1 | <p>Are there service-level agreements or memorandums of understanding governing paperless trade operations? If so, who are the parties and what is the legal authority for concluding these agreements?</p> | |

C. Cross-border aspects

10. Part III of the checklist is focused on the cross-border aspects of paperless trade, which directly relate to the ultimate goal of the Framework Agreement. Certain cross-border aspects are already raised in part I as they relate to general matters that may be relevant to paperless trade facilitation. The questions in part III are specific to cross-border paperless trade facilitation. They are inspired by the Agreement, in particular article 8 on cross-border mutual recognition of trade-related data and documents in electronic form; article 9 on international standards for exchange of trade-related data and documents in electronic form, and article 10 on the relation to other legal instruments enabling cross-border paperless trade.
11. A key issue in achieving seamless cross-border paperless trade is the legal recognition of trade-related data and documents of one country by the authorities of another. Recognition involves attributing a legal status to electronic messages exchanged across borders. A variety of legal mechanisms may achieve that goal. Some of them will apply to certain types of transactions (for instance, business-to-business or business-to-government transactions), while other legal mechanisms will apply only to specific types of documents or data sets, or to specific types of trust services (for example, electronic signatures). Some legal mechanisms will establish legal recognition in a technology-neutral manner, or without regard for the method or technology used, while others will do so in a technology-specific manner. With respect to legal form, some mechanisms are treaty-based and therefore may be directly legally binding. Other mechanisms favour the harmonization of legal systems through the adoption of uniform laws, while still others are based on bilateral or regional agreements or memorandums of understanding and similar technical arrangements.
12. In article 8 of the Framework Agreement, the mutual legal recognition of trade-related data and documents in electronic form is promoted and the notion of substantially equivalent level of reliability is used to indicate that mutual legal recognition can be based on the general principle of technology neutrality. However, no specific legal recognition mechanism is established. Rather, the expression of this criterion is left open to various options. Accordingly, many of the questions in part III are aimed at identifying which laws and technical arrangements may contribute to achieving mutual legal recognition. The scope of the questions also extends to include the broader focus of articles 9 and 10 on laws and other relevant agreements that prohibit, restrict or facilitate cross-border data flows for paperless trade and any related activity. An indicative list of relevant international instruments is provided at the end of part III for ease of reference.

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|--------------|---|-----------------|
| | Related provisions of the Framework Agreement: <ul style="list-style-type: none"> • Article 8 on cross-border mutual recognition of trade-related data and documents in electronic form. • Article 9 on international standards for exchange of trade-related data and documents in electronic form. • Article 10 on relation to other legal instruments enabling cross-border paperless trade. | |
| III.A | International agreements relevant for cross-border paperless trade facilitation | |
| III.A.1 | Which international agreements relevant to paperless trade facilitation are in force in your country? | |
| III.A.2 | Are there technical or operational international agreements providing for legal recognition of electronic communications or documents? | |
| III.A.3 | Are contracts used to provide for mutual recognition of electronic communications and signatures? | |
| III.B | International standards, guidelines and recommendations | |
| III.B.1 | Which standards, regulations or guidelines are in use for the cross-border exchange of trade-related electronic communications? | |

Treaties and model laws relevant to cross-border paperless trade facilitation

13. A number of international treaties are relevant to cross-border paperless trade facilitation, because their adoption and implementation may provide a significant contribution to addressing some or several of the legal challenges arising from cross-border paperless trade facilitation. In particular, those treaties may be useful in achieving legal recognition, usually on a multilateral basis. Model laws may also be useful in facilitating mutual recognition as their enactment by jurisdictions brings national laws closer. Sharing legal concepts and provisions significantly enhances mutual understanding of how the law operates, which may pave the way to granting legal recognition. Additional important provisions may be found in bilateral and multilateral free trade agreements, namely in the chapters on electronic commerce and on customs or trade facilitation. Those agreements and any other relevant legislative texts should be added to the list.⁷

Legal readiness checklist: non-exhaustive list of treaties and model laws

| <i>Treaty/Model Law</i> | <i>Implementation status</i> |
|---|------------------------------|
| Customs and trade facilitation | |
| Association of Southeast Asian Nations (ASEAN) Single Window Agreement (2005) and Legal Protocol (2017) | |

⁷ User may add or delete from the list as necessary.

| <i>Treaty/Model Law</i> | <i>Implementation status</i> |
|--|------------------------------|
| Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (2016) | |
| World Trade Organization Agreement on Trade Facilitation (2013) | |
| Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006) | |
| International Convention on the Harmonization of Frontier Controls (1982) | |
| Transport | |
| Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) (1956) | |
| Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road concerning the electronic consignment note (2008) | |
| Customs Convention on the International Transport of Goods under Cover of TIR Carnets (1975) | |
| Convention concerning International Carriage by Rail (1980) | |
| International Maritime Organization Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965, as amended (2005) | |
| International Maritime Organization Guidelines for the Use of Electronic Certificates (2016) | |
| United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) (1978) | |
| United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) (2008) | |
| Electronic transactions | |
| United Nations Convention on the Use of Electronic Communications in International Contracts (2005) | |
| UNCITRAL Model Law on Electronic Commerce (1996) | |
| UNCITRAL Model Law on Electronic Signatures (2001) | |
| UNCITRAL Model Law on Electronic Transferable Records (2017) | |
| Convention on Cybercrime of the Council of Europe (Budapest Convention) (2001) | |

| | |
|---------------------------------|------------------------------|
| <i>Treaty/Model Law</i> | <i>Implementation status</i> |
| Others (please specify): | |

D. Other considerations

14. For paperless trade to be conducted in the best possible manner, the Framework Agreement requires parties to create an enabling national legal framework (article 6) and remove all legal barriers. It is therefore recommended that the parties aim to build a national policy framework to implement the Agreement that addresses all the pertinent legal issues and is consistent with international legal instruments and standards for cross-border electronic data and document exchange. Besides the topics specifically addressed in substantive provisions of the Agreement, parties may also wish to deal with related issues, such as data ownership, liability, dispute settlement, electronic payment and competition, which in some cases may have been addressed in other legal agreements (see article 10). These matters may affect the effective operation of single window and other paperless trade systems, particularly in the cross-border environment.
15. These legal issues may be addressed in different sets or sources of legal rules. Therefore, there is no one-size-fits-all solution or approach. The legal framework, action plan and capacity-building programmes may and should be customized at the national level, depending on the various levels of awareness and preparedness of different member States, as already envisaged in article 6, 12 and 14 of the Framework Agreement. The list of legal issues in part IV is not exhaustive, and other relevant issues may emerge.

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|-------------|---|-----------------|
| | <p>Related provisions of the Framework Agreement:</p> <ul style="list-style-type: none"> • Article 6 on the national policy framework, enabling domestic legal environment and paperless trade committee. • Article 10 on the relation to other legal instruments enabling cross-border paperless trade. • Article 12 on the action plan. • Article 14 on capacity-building. | |
| IV.A | <p>Ownership of information in the paperless trade system</p> <p>Paperless trade facilitation involves the collection and exchange of a large amount of information. Delicate issues arise with respect to data subject rights, confidentiality and other rights on that information. For instance, the paperless trade system operator may acquire the right to use, analyse and redistribute the information submitted to the system. In other cases, the system may be designed to avoid the storage of any information, so as to simplify compliance with privacy and data retention laws.</p> | |
| IV.A.1 | What defines rights regarding information exchanged in the paperless trade system, the law or contractual agreements? | |

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|-------------|---|-----------------|
| IV.B | <p>Liability issues related to cross-border paperless trade systems</p> <p>Trading parties and other concerned entities may suffer losses from the incorrect transmission of information and may seek compensation for those losses from those liable for them under contracts among the transacting parties or, if this is not possible, under the general law of civil wrongs. This form of liability is separate from any sanction that may apply under criminal and administrative law.</p> | |
| IV.B.1 | May the operator of the paperless trade system be held liable for providing its services? | |
| IV.B.2 | May government agencies participating in the paperless trade system be held liable for their interaction with the system? | |
| IV.B.3 | May service providers, such as internet service providers and trust services providers, be held liable for interacting with the paperless trade system? | |
| IV.B.4 | May other participants in the paperless trade system (e.g. customs brokers) be held liable for their interaction with the system or their role in the passage of information or data passing through their systems? | |
| IV.C | <p>Dispute settlement and conflict of laws</p> <p>The following section is aimed at examining the dispute settlement mechanisms for the operators of a single window or other paperless trade system.</p> | |
| IV.C.1 | Do national laws deal with choice-of-forum and choice-of-law issues relevant to paperless trade facilitation? | |
| IV.C.2 | Does the law contemplate alternative means of resolving disputes in international trade, such as arbitration and mediation? Are the results of any such means clearly enforceable across borders? | |
| IV.C.3 | Are online dispute resolution mechanisms used in paperless trade facilitation? | |
| IV.D | <p>Electronic payments and electronic transferable records</p> <p>Electronic payments are the backbone of the digital economy. To the extent that electronic payments are available, they could be incorporated in the paperless trade system. Usually, this is done by using electronic funds transfers, i.e. by ordering a bank to transfer money (wire transfer) or by using credit or debit cards. In other cases, certain commercial documents may be used to perform payment or give guarantee of payment.</p> | |
| IV.D.1 | Does the paperless trade system accept or initiate electronic payments? | |
| IV.D.2 | Does the paperless trade system accept electronic transferable records? | |
| IV.E | <p>Competition laws</p> <p>The following section is aimed at examining the competition law issues involved in a single window or other paperless trade system.</p> | |

| <i>No.</i> | <i>Focus questions</i> | <i>Response</i> |
|------------|---|-----------------|
| IV.E.1 | Does a competition law exist? If so, is it applicable to single window operators or other paperless trade services providers? | |
| IV.E.2 | Does the law give authorized economic operators preferential access to the paperless trade system? | |
| IV.E.3 | Are paperless trade service providers selected on a competitive basis? Are foreign providers admitted? | |