A legal guide on engaging in cross-border paperless trade

taking into account regional and international laws and regulations and best practices

CONCEPT NOTE

DRAFT ONLY FOR DISCUSSION at the ad-hoc session of the Standing Committee of the Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific (CPTA) to be held online on 23-24 January 2024

BACKGROUND

A legal guide for cross-border paperless trade is to be developed under the decision of the Parties to the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (CPTA) during the 2nd Meeting of the Standing Committee. Paragraph 16 of the report states: "The Standing Committee requested the secretariat to prepare a draft guide on engaging in cross-border paperless trade taking into account regional and international laws and regulations and best practices as appropriate. The draft guide will be presented at the next regular session of the Standing Committee for its review and consideration."

To ensure a robust guide that adequately supports the Parties, the meeting will discuss based on a concept note for the Legal Guide encompassing the context, objectives in supporting countries engaging in cross-border paperless trade, and a proposed table of contents.

CONTEXT

The Guide should situate its issues in the context of the benefits of paperless trade, both domestic and international. The benefits can be briefly stated: they are not in doubt. But a reminder may help focus the attention on the most useful legal methods to ensure its successful implementation.

The questions are not about the production or distribution of goods. For our purposes, they are questions of facilitating the trade in goods by commercial or regulatory documents. The proper documents are needed to ensure both that any transaction is permitted (i.e. it is not an offence, and it complies with applicable regulations) and that it is legally effective (i.e. it is valid and enforceable in commercial practice and in the event of a dispute.)

While this kind of analysis is needed even for domestic commerce, it becomes more difficult when the goods and supporting documents cross national borders. Are the same documents needed in another country, and are goods originating in another country properly supported when they come to the first country?

Such questions have been asked and answered for a long time in cross-border trade, and there are widely accepted answers, which the Guide will mention. The novelty arises when the supporting documents become electronic. Is a collection of electrons a document at all? How does one decide to trust it? How does it fit into one's legal and regulatory system? Should one focus on 'data' rather than 'documents', and what difference would that make?

Although such questions have been considered for more than 30 years, accepted answers are not evenly distributed. Some places are comfortable with cross-border paperless trade, others are just beginning.

OBJECTIVE

This document will serve as a guide to the legal issues arising in cross-border paperless trade, to indicate the most commonly accepted solutions to those issues, and to suggest methods for countries to implement or adapt those solutions to facilitate their own participation in that trade.

The Guide will start by reviewing the existing solutions, or approaches to solutions, for the challenges of facilitating trade with documents from foreign countries. Foreign documents may in some cases reflect different principles or rules of law about the underlying transactions. It is not just about a one-to-one comparison of documents.

Much of this analysis will turn on the use of electronic communications, for the reasons mentioned. For this purpose, it will become important – in ways it has not been for paper documents – to focus on the parties to the transactions, the originators and recipients of the documents or the data. What private commercial parties may find acceptable between themselves – in a business-to-business (B2B) transaction – may not be acceptable when some public sector entity is involved, such as a customs authority or a regulator of some kinds of activity. The documents may need to be more reliable in such cases because of the public interest in the integrity of the process and of the records of it. So the rules for the use of data in such circumstances (B2G) may need to be different.

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There are three broad methods to resolve legal issues – and documentary issues – that arise when trading partners are in countries with different legal systems.

1. **Choice of law:** Trading partners may choose the law of one of them to apply to the documents used to support their transactions. This may be a global choice or a choice tailored to the parties' needs. Most legal systems allow some choice for purely private transactions. When regulatory issues arise, some domestic rules may be mandatory and not subject to being bargained away by private interests.

    a. The Guide will describe briefly the reasons why parties might choose one set of laws over another. Some of them are the bargaining power of the parties, the suitability of one law over the other to govern the transaction or the documents, the closeness of connection of the transaction to one country, the ease of recourse to the legal system – courts, arbitrators, regulators – of one party or the other.
    b. For paperless trade, the ability of one legal system to better accommodate electronic documents or data could be decisive.
        i. However, the use of electronic communications may raise questions of public policy, or of technical capacity to receive and process them. As a result, it may

be beyond the power of private parties to apply a foreign law to transactions that must comply with domestic rules too.

c. There may be less opportunity to choose the applicable law if one party to an exchange of communications is a public body – a B2G dealing. Governments are usually bound to their own laws. A private actor could agree to follow a foreign government's laws, though, or to comply with its rules.

2. **Harmonization of law:** An alternative to choosing the law of one trading partner over that of another is for them both to have recourse to common legal rules. These may have several sources.

    a. Countries may have common legal traditions. Several ESCAP member states have laws based on English common law. Several others have laws arising from membership in the Commonwealth of Independent States.
    b. International organizations (public or private) have developed widely acceptable rules for many kinds of transactions and documents. This may be done on a global or regional basis. States that agree to make those international rules part of their own law can then trade more easily with others that have done the same.
    c. Many such rules now involve the acceptance of electronic communications. Such communications may be the whole subject of the convention or model law, or they may be dealt with as part of rules about types of transactions or the means of carrying them out.
        i. These rules may be treaties or conventions, in which case little variation is likely in how those laws apply from place to place (though some conventions allow some latitude in some circumstances.)
        ii. These rules may be in model laws that countries may choose to implement in different ways, to suit their own legal systems.
        iii. These rules may be in guidelines or model documents, especially where they are adopted by private alliances like the International Chamber of Commerce or quasi-public bodies like the International Standards Association or The Hague Conference on Private International Law.

3. Mutual recognition: States may choose to give legal effect to (i.e. 'recognize') documents or data from another country because their intended effect is the same and their ability to achieve the effect is trusted. This may require more of an individual analysis of particular documents, the legal and administrative system they come from, and the types of transactions in which they are to be used.

    a. The decision to recognize documents or data from another country may require support, not just in knowing the system of origin, but also in express undertakings of reliable procedure for creating documents and ensuring reliable treatment afterwards.

b. A relevant example is found in article 8 of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (CPTA). The provision requires parties to the Agreement to "provide for mutual recognition of trade-related data and documents in electronic form". It then contemplates that contracting states may enter into bilateral and multilateral arrangements to 'operationalize' this recognition. Recognition is not a simple action.

The Guide will go on to consider in more detail how all of these techniques for giving legal effect to foreign documents and data may be applied in practice. It will review the main international agreements and model laws available to ESCAP member States and how they have been adopted or implemented to date, and how they should be adopted or implemented by states that have not yet done so. It will also address the principal challenges to mutual recognition of electronic data and documents from abroad.

The Guide will draw to some extent on existing resources including the Legal Readiness Checklist for Cross-border Paperless Trade and the associated Readiness Assessment Guide for Cross-border Paperless Trade, both available at: https://readiness.digitalizetrade.org.

1/ Choice of law

2/ Harmonization of law

- Selected Conventions
  - CPTA
  - Electronic Communications Convention
  - World Trade Organization: Trade Facilitation Agreement
  - World Customs Organization: Revised Kyto Convention on Customs Procedures
  - Free trade agreements
    - In general
    - 'modern' FTAs that address data issues e.g. Digital Economy Partnership Agreement (DEPA), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
  - Other relevant conventions
    - Generic trade agreements e.g. Convention on the International Sale of Goods (CISG)
    - Agreements for particular sectors, e.g. transportation (Convention on the contract for the international carriage of goods by road – CMR Convention), the Rotterdam Rules (carriage by sea)
    - Council of Europe: Budapest Cybercrime Convention
- Selected Model Laws and Guidelines
  - UNCITRAL: four main e-communications model laws (Model Law on Electronic Commerce, Model Law on Electronic Signatures, Model Law on Electronic Transferable Records, Model Law on Identity Management and Trust Services.)
  - UNECE/Centre for Trade Facilitation: Recommendation 35 on legal issues re Single Windows
  - ASEAN: Protocol on the ASEAN Single Window

    - Organization on Economic Cooperation and Development (OECD): Guidelines on the Protection of Privacy and Transborder Data Flows
    - United Nations Guidelines for Consumer Protection
- Private models
    - International Chamber of Commerce: Uniform Customs and Practice for Documentary Credits and similar models for business

3/ Mutual recognition

- CPTA article 8 was mentioned above. Parties need to describe a substantially equivalent level of reliability.
- Agreements on the rules or conditions for mutual recognition can involve some complicated technology.
- To a large extent, mutual recognition depends on the comfort of the parties – public or private – in relying on the documents and data to be exchanged between the parties. Different parties may have different degrees of comfort with the same technology, so arriving at generally acceptable rules may be difficult.
- Comfort levels and practices and responsible officials may change over time.
- Parties may need to be satisfied with adequate reliability – reliability that is 'appropriate in the circumstances', in the words of the Model Law on Electronic Commerce. There will be no universal solution more precise than that, though agreements among particular parties about particular transactions using particular documents or data may be drafted in more detail.
- Substitutes for technical reliability may be satisfactory to some transacting parties.
- The Guide may explain why the agreement between The Netherlands and the Republic of Korea (2012) is unsatisfactory as a model and suggest a better focus.
- The use of software solutions to provide reliability may be limited by mandatory rules of law or form requirements in some countries.

4/ Relation of cross-border rules to domestic rules

- How domestic rules affect international rules
- How international rules affect domestic rules

5/ Aligning the domestic framework with selected international frameworks