



Basic features of the legal environment for paperless trade

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Trade facilitation

- Trade facilitation aims at simplifying procedures and controls relating to movement of goods.
- The goal of trade facilitation is to reduce direct and indirect trade costs
 - benefits for professional end users and consumers
- At a policy level, more cross-border trade = economic development
- No prejudice to border control but mutual reinforcement
- Information and communication technology helps trade facilitation through concepts such as paperless trade and electronic single window facilities

The intersection of policy, law and technology

- Paperless trade often understood as a technological process
 - This is not enough
- Paperless trade requires first a high-level consensus and policy decisions
- A sound legal framework is needed to enforce laws, regulations and contractual agreements
- The legal framework may include:
 - laws/statutes;
 - implementing decrees and regulations;
 - voluntary standards (co-regulation);
 - contractual provisions (e.g. on the terms of the Single Window service).

Paperless trade

- Notion built around trade facilitation in customs operations through electronic single windows
 - submission of information related to import/export is a **B2G** national transaction
- Goal to set up cross-border single windows
 - that exchange is a **G2G** international transaction
- But the underlying commercial transaction is **B2B**
- Key challenge: re-use information from **B2B** transaction
 - it has the best data quality (timely, complete, accurate)
- To do so, we need to favour, not disrupt **B2B** data flows

The legal environment: the private side

- B2B exchanges fall under the scope of commercial law.
- The overarching principle of commercial law is “party autonomy” or “freedom of contract”.
- One consequence is that parties are free to choose content and technology of their electronic exchanges.
- B2B e-commerce laws are often based on uniform texts (UNCITRAL).
- When so, as a result, they are similar.
- This facilitates mutual legal recognition of electronic exchanges and, therefore “legal interoperability”.



The legal environment: the public side

- Electronic single windows perform control functions and therefore fall under the scope of customs law, which is a branch of public / administrative law
- These are regulatory functions that private parties must comply with.
- One consequence is that parties are not free to choose any detail of their electronic exchanges, but must adopt certain formats and technologies.
- This brings additional compliance costs that may discourage private parties.
- SW standards are not yet necessarily uniform.
- This hinders mutual legal recognition of electronic exchanges and, therefore “legal interoperability”.

The legal environment: reconciling private and public side

- In successful cases, B2B laws are applied to the public sector to the fullest extent possible.
- Limited number of provisions needed to address technology requirements.
- Transition to paperless environment offers an occasion to review and reengineer processes and streamline existing laws.
- This is the reason why it was suggested that the draft agreement should rely on the three universal principles of the law of electronic transactions.
- This would reinforce regulatory functions, too, by facilitating submission of all trade-related data.



General principles of e-transactions law

1. Principle of non-discrimination
2. Principle of functional equivalence
3. Principle of technology neutrality
 - How can they be applied to single windows?



Principle of non-discrimination

“A communication shall not be denied validity on the sole ground that it is in electronic form.”

- May need an explicit statutory provision with respect to customs operations
- Once the law allows the submission of electronic information, and the infrastructure is in place, it is a matter of creating an adequate corporate culture (in-house training, etc.)

Principle of technological neutrality

“Legislation shall not impose the use of or otherwise favour any specific technology.”

- Open to future developments.
- Possibility to have detailed provisions on technology requirements in implementing regulations.
- Many Single Window facilities set requirements for the submission of data in a certain manner, including the use of certain authentication technologies (PKI-based).
 - Is this always needed? This might deter business buy-in (additional costs) and mutual recognition (national encryption standards).
 - Distinguish data submission and data storage /analysis, professional and occasional users, etc.

Principle of functional equivalence

“Purposes and functions of paper-based requirements may be satisfied with electronic communications, provided certain criteria are met.”

- For instance, the “writing” requirement is met if the electronic communication is accessible for future reference
- Functional equivalent notions should be set forth the general law on electronic transactions.
- As a result, all references to “writing”, “original” and “signature” in the customs law are satisfied according to the requirements of the electronic transactions law.

Electronic signatures: the challenges

- Number of different rules for electronic signatures:
 - In the same jurisdiction, private vs. public sector, and in different branches of the public sector.
 - Across borders.
- Cross-border recognition of electronic signatures on a technology-neutral basis is mandated by Free Trade Agreements.
- However, at the bilateral level it is rare.
- At the multilateral level, article 9(3) e-CC.
 - Practical example of how the e-CC complements the draft arrangement.

