



# Creating an enabling legal environment for cross-border paperless trade

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6-7 December 2018

## Paperless trade facilitation

- Trade facilitation aims at simplifying procedures and controls relating to movement of goods → reduce direct and indirect trade costs.
- Information and communication technology helps trade facilitation through concepts such as paperless trade and electronic single window (“SW”) facilities.
- Requires a combination of policy decisions, legal framework and IT infrastructure.
- An enabling legal environment is needed to ensure enforceability of laws, regulations and contractual agreements.

## Establishing an enabling legal environment

- Goal: remove legal obstacles to the use of electronic communications (B2B, B2G and G2G).
- Existing law is not amended:
  - contract law, customs code, etc.
- Factors to take into account include:
  - Legal tradition, namely attitude towards regulation vs. enabling laws;
  - Prevailing cultural and economic models;
  - Technological: single window architecture, e-signature/authentication methods.
- Desirable to apply same legislation to private and public sector to the maximum extent possible.

## The legal environment for paperless trade facilitation: 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 the technology used in their electronic exchanges.
- B2B e-commerce laws are often based on UNCITRAL texts.
- Legal uniformity facilitates mutual legal recognition of electronic exchanges and “legal interoperability”.

## The legal environment for paperless trade facilitation: the public side

- Electronic SW perform regulatory functions that fall under the scope of customs law, a branch of public / administrative law.
- Commercial operators must comply with those regulatory functions.
- One consequence is that commercial operators may be asked to use specific SW exchange formats and technologies.
  - This brings additional compliance costs that may discourage from using SW facilities.
- SW technical and legal standards are not uniform.
  - This hinders mutual legal recognition of electronic exchanges and, therefore “legal interoperability”.

## The legal environment for paperless trade facilitation: reconciling private and public side

- International trade is a B2B transaction; SW is a B2G transaction; Cross-border SWs are a G2G transaction
- Legislative needs: enable domestic B2G exchanges and G2G exchanges across borders
- In successful cases, the same laws are applied to the private and public sector.
  - This approach facilitates submission of trade-related data by commercial operators.
  - It also reinforces regulatory functions.
- For these reasons, the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific relies on the adoption of UNCITRAL texts.

## Legal topics relevant for paperless trade facilitation

- UN/CEFACT Rec. 35 lists the legal topics relevant for paperless trade facilitation, including electronic single windows.
- They include:
  - e-transactions and e-contracting;
  - authentication/security (e-signatures/IIdM);
  - data protection and retention, including data archiving and sharing;
  - cybercrime, digital forensics.
- Legislative needs may be identified through a comparison of best international legal standard against existing legislation (“checklist”).

## Electronic transactions and signatures law

- Core component of the enabling side of e-commerce law
- Allows to adapt traditional contract and civil law to the electronic environment without amending it
- Based on four fundamental principles:
  - Technology neutrality
  - Functional equivalence
  - Non discrimination
  - Party autonomy
- UNCITRAL texts offer global model legislation
  - They are a de facto standard in most of Asia and all of the Pacific



## Cyber security

- Cyber security is a leading concern for both private and public sector.
- IT systems can be more or less secure than paper-based ones, depending on architecture and operating standards.
- The pursuit of cybersecurity should not hinder the use of electronic communications:
  - Need to differentiate among users and types of transactions.
- Identity management issues
- An useful tool for cross-border cooperation is the Convention on Cybercrime of the Council of Europe (Budapest Convention), which also increasingly provides a template for national laws

## Privacy and data protection law

- Deals with matters related to the use of data, including personal data, such as:
  - Consent to data processing and withdrawal of consent
  - Access to personal data: correction, transfer (right to data portability), deletion (right to be forgotten)
  - Unauthorized access to data (data breach)
- Regional and global models
  - EU General Data Protection Regulation
  - APEC Data Privacy Pathfinder
  - Convention for the protection of individuals with regard to automatic processing of personal data (CETS 108)

## Other priority legal issues: taking of evidence, confidentiality

- Importance of facilitating taking of evidence in investigations and of ensuring admissibility of evidence in criminal and other proceedings:
  - Including across borders.
- SW is based on exchange of commercially-sensitive data:
  - duty to keep confidentiality remains unchanged
- Agreements on paperless trade facilitation and single windows provide policy guidance:
  - WTO TFA, FA-PT, e-commerce chapters of FTAs

## UNCITRAL's mandate

- The core legal body of the United Nations system in the field of commercial law
- Active for 50 years on the basis of universal membership
- UNCITRAL's mandate:
  - Progressive harmonization and modernization of international trade law by preparing and promoting the use of legislative instruments in key areas of commercial law
- UNCITRAL started working on legal aspects of electronic commerce already in the 1980s:
  - Electronic Data Interchange (EDI)
  - Cross-border electronic payments

# UNCITRAL Texts on Electronic Commerce

1996

- UNCITRAL Model Law on Electronic Commerce

2001

- UNCITRAL Model Law on Electronic Signatures

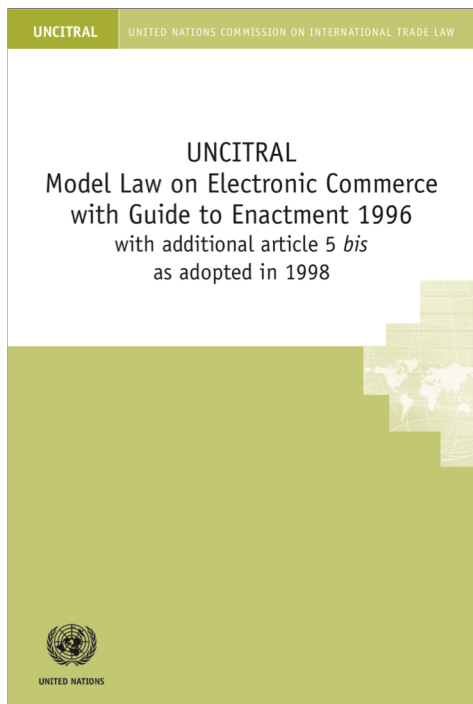
2005

- United Nations Convention on the Use of Electronic Communications in International Contracts

2017

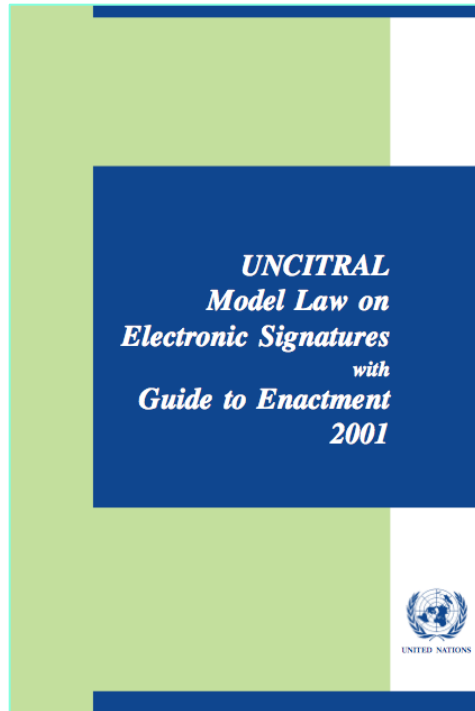
- UNCITRAL Model Law on Electronic Transferable Records

# UNCITRAL Model Law on Electronic Commerce (MLEC)



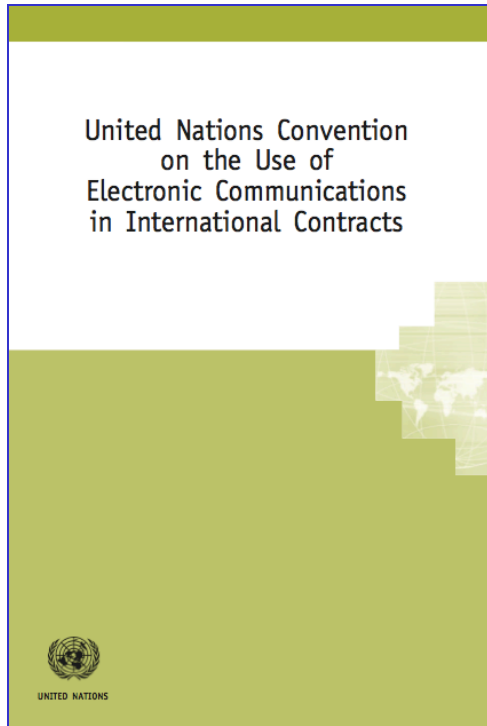
- MLEC aims to enable the commercial use of modern means of communications and storage of information.
- It is based on the three fundamental principles of technology neutrality, non discrimination and functional equivalence in electronic media for paper-based concepts such as "writing", "signature" and "original".
- It also establishes rules for the formation and validity of contracts concluded electronically and for the attribution and retention of data messages.
- Enacted in over 70 States.

# UNCITRAL Model Law on Electronic Signatures (MLES)



- MLES aims at bringing additional legal certainty to the use of electronic signatures.
- It establishes criteria of technical reliability for the equivalence between electronic and hand-written signatures. It follows a technology-neutral approach, which avoids favoring the use of any specific technical product.
- It establishes basic rules for assessing possible responsibilities and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process.
- Enacted in over 30 States.

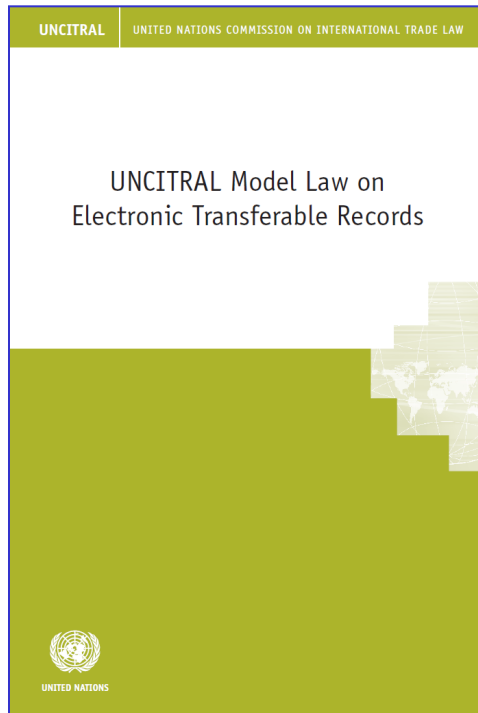
# UN Electronic Communications Convention (e-CC)



- The e-CC builds up on and updates the provisions of UNCITRAL Model Laws.
- It aims at enhancing legal certainty and commercial predictability where electronic communications are used across borders.
- It contributes to enabling paperless trade by, among others:
  - 1) validating the legal status of electronic transactions by setting general functional equivalence requirements of “writing”, “original” and “signature”;
  - 2) preventing medium and technology discrimination;
  - 3) enabling cross-border recognition of electronic signatures;
  - 4) permitting the use of electronic means in alternative dispute resolution mechanisms.
- Status: 18 signatories, 10 State parties.



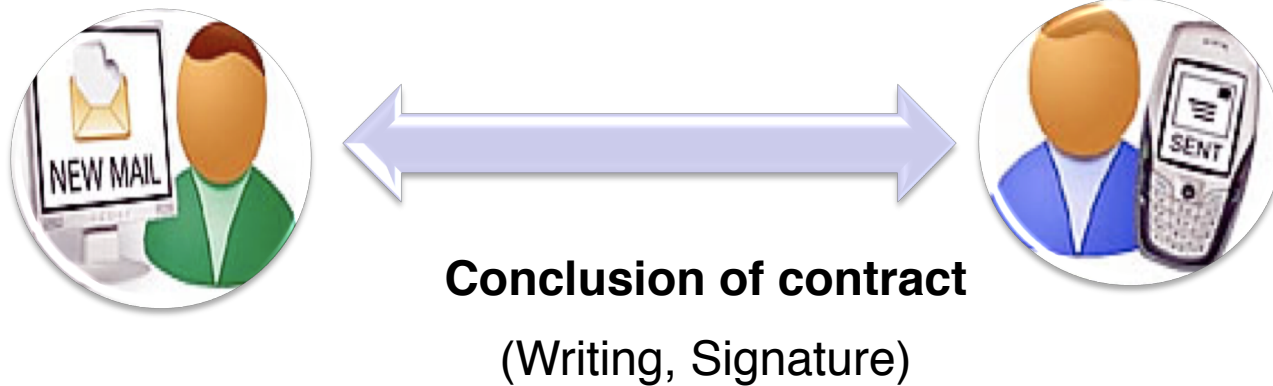
# UNCITRAL Model Law on Electronic Transferable Records (MLETR)



- MLETR enables the use of electronic transferable records, which are electronic equivalents of documents or instruments incorporating the right to delivery of goods or payment of sums of money. It allows to issue a single electronic record replacing transport, finance and customs documents.
- It enables paperless trade facilitation since bills of lading contain accurate, updated and complete information on the goods shipped and are therefore valuable data sources for single window submissions.
- Technology-neutral and specifically compatible with the use of blockchain.

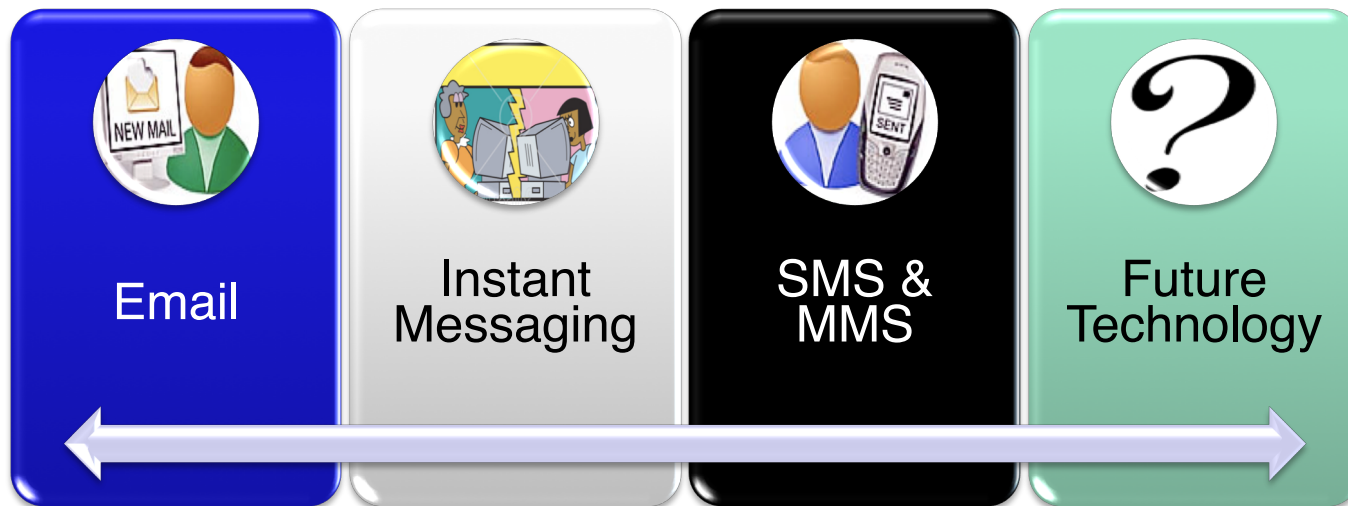
# Non-discrimination against electronic communications

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



## Technology neutrality

- Different technologies (EDI, e-mail, Internet, instant messaging, fax, etc.) should receive equal legislative treatment.
- This approach prevents barriers to the use of future technologies.



## Functional equivalence

- Establishes criteria under which purposes and functions of paper-based requirements (e.g. writing, signature, original, archived) may be satisfied.



## Party autonomy

Parties should be free to choose:

- whether to use (or not) electronic communications;
- the technology and security level appropriate for their transactions.



# Status of implementation of UNCITRAL Texts

A = adopted; S = signed; Ac = acceded

	MLEC	MLES	ECC	MLETR
Afghanistan				
Azerbaijan			Ac	
China	A	A	S	
Georgia				
Kazakhstan				
Kyrgyz Republic				
Mongolia				
Pakistan	A			
Tajikistan				
Turkmenistan				
Uzbekistan				

# The Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific

- Regional framework agreement that relies on a voluntary implementation mechanism.
- Based on two complementary principles of technical interoperability and mutual legal recognition.
- FA-PT refers to three fundamental principles directly relevant for establishing mutual cross-border recognition of electronic communications (Art 5). The same principles underpin UNCITRAL texts on electronic commerce
  - ✓ Principle of non-discrimination;
  - ✓ Principle of functional equivalence;
  - ✓ Principle of technological neutrality.

## Relation to other enabling legal instruments

- Mutual legal recognition of electronic communications at the international level may be achieved:
  - through the adoption of treaties;
  - through the harmonisation of national laws on the basis of uniform model laws.
- Article 10, paragraph 1 of the FA-PT points at the need to adopt those treaties and laws.
  - They may be global (UNCITRAL) or regional (e.g., APEC Data Privacy Pathfinder and Cross Border Privacy Rules (CBPR)).
  - They have a broader scope than paperless trade facilitation: they generally aim at promoting and enabling e-commerce.



## Way forward: general overview

- A number of uniform legal instruments exist.
- Their adoption and implementation to support cross-border e-commerce and paperless trade facilitation is a priority.
- With respect to SW exchanges, for specific agreements to cover issues such as liability of SW operators, SLAs, data sharing may be needed.
  - The FA-PT provides the legislative umbrella for those agreements.
- Sub-regional facilities may also co-exist and should be coordinated with regional and global texts.
- Legal issues may seem complex but tools to address them are available.

## Future steps

- Countries willing to engage in the digital economy need to have modern legislation in all areas
- That legislation needs to be regularly updated, just like software
  - UNCITRAL “e-commerce law 2.0”
- Issues of particular interest are:
  - Further harmonising legislation
  - Enabling cross-border exchanges
    - UN Electronic Communications Convention
  - Bridging the B2G gap in paperless trade facilitation
    - Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific
    - UNCITRAL Model Law on Electronic Transferable Records

Thank you for your attention!

For more information, please visit the UNCITRAL website:

<https://uncitral.un.org>