

International legal frameworks and best practices relevant to Cross-Border Paperless Trade

Article 10 of the Framework Agreement (FA) provides,

(1) the Parties may, where appropriate, adopt relevant international legal instruments concluded by United Nations bodies and other international organizations; and,

(2) the Parties shall endeavour to ensure that the cross-border exchange of trade-related data and documents in electronic form is consistent with international law as well as regional and international regulations and best practices, as identified by the institutional arrangements established under the present Framework Agreement.

As clarified in the Explanatory Note, although the FA does not entail any legal obligation to adopt other international agreements, the FA is aimed at operating in a complex legal environment and interacting with the international legal instruments and other legislative and regulatory standards to promote further harmonization of the law on electronic transactions and cross-border paperless trade. It is worth noting that international legal instruments may support implementation of the FA, while the FA itself may also support their implementation.

Under Article 10.1, the Parties are called upon to take into account and formally **adopt** in their domestic laws the applicable international conventions, for example the United Nations Convention on the Use of Electronic Communications in International Contracts, a treaty that contains the most modern restatement of electronic transactions law with respect to both general principles and operational rules. An illustrative reference list of international legal instruments relevant to Art.10.1 is provided as followed.

- ✧ United Nations Convention on the Use of Electronic Communications in International Contracts (2005)
- ✧ World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006)
- ✧ World Trade Organization Trade Facilitation Agreement (2013)

Under Article 10.2, the Parties are encouraged to **ensure** their domestic laws and regulations regarding cross-border exchange of trade-related data and documents in electronic form **consistent** with the relevant and applicable international conventions, standards or best practices, irrespective of regional or global, legally binding or non-binding.

An illustrative reference list of most relevant and applicable international conventions and other instruments are **identified** [with excerpted provisions in the Appendix] for the Parties' consideration in the legal interoperability exercise.

- ✧ United Nations Convention on the Use of Electronic Communications in International Contracts (2005)
- ✧ United Nations Commission on International Trade Law Model Law on Electronic Commerce (1996)
- ✧ United Nations Commission on International Trade Law Model Law on Electronic

Signatures (2001)

- ✧ (Draft) United Nations Commission on International Trade Law Model Law on Electronic Transferable Records (tbd July 2017)
- ✧ World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006)
- ✧ World Trade Organization Trade Facilitation Agreement (2013)
- ✧ International Maritime Organization Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965, As Amended (2005)¹
- ✧ International Maritime Organization Guidelines for the Use of Electronic Certificates (2016)
- ✧ United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Recommendation and Guidelines on establishing a Single Window (Recommendations 33)
- ✧ United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Recommendation on Establishing a Legal Framework for International Trade Single Window (Recommendation 35)
- ✧ United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Recommendation on Single Window Interoperability: Supporting Cross Border Interoperability of Trade Regulatory Single Window Systems (Recommendation 36); *in public review (tbd March 2017)*
- ✧ United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Technical note on terminology for single window and other electronic platforms; *in public review*
- ✧ Regional Agreements and Guidelines applicable to FA Parties
 - Agreement to Establish and Implement the ASEAN Single Window and related Protocols²
 - APEC Privacy Framework and APEC Cooperation Arrangement for Cross-Border Privacy Enforcement (CPEA, 2010)
 - Relevant paperless trade related provisions in Transfer Pacific Partnership (TPP) and ASEAN-AU-NZ

¹ International Maritime Organization Facilitation Committee enacted the Annex on Mandatory requirements for electronic exchange of information on Cargo, Crew and Passengers to the Convention on Facilitation of Maritime Traffic in April 2016. Because of the technical reason, the full text of that Annex is not found.

² There are two Protocols on legal enforcement and establishment of ASEAN Single Windows respectively, supporting the implantation of the Agreement.

Appendix

Excerpted Provisions of the Identified International Conventions and Other Instruments

For the easy reference of the Parties, the relevant provisions from the illustrative list of the international and regional laws, international standards and guidelines are provided as followed. It is strongly recommended that the Parties look into the full texts of each document to understand all the excerpted provisions in the context.

✧ **United Nations Convention on the Use of Electronic Communications in International Contracts (2005)**

Preamble

Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the *principles of technological neutrality and functional equivalence*, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law.

Article 4. Definitions

For the purposes of this Convention:

(a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

(b) “Electronic communication” means any communication that the parties make by means of data messages;

(c) “Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy;

(d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(e) “Addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) “Automated message system” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

(h) “Place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

Article 8. Legal recognition of electronic communications

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

Article 9. Form requirements

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

(b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.

5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

Article 10. Time and place of dispatch and receipt of electronic communications

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of

the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

✧ **United Nations Commission on International Trade Law Model Law on Electronic Commerce (1996)³**

Article 5 bis. Incorporation by reference (as adopted by the Commission at its thirty-first session, in June 1998) Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.

Article 9. Admissibility and evidential weight of data messages

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

(a) on the sole ground that it is a data message; or, (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Article 10. Retention of data messages

(1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:

(a) the information contained therein is accessible so as to be usable for subsequent reference; and

(b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

(c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

(2) An obligation to retain documents, records or information in accordance with

³ 2005 United Nations Convention on the Use of Electronic Communications in International Contracts has updated and renewed the relevant provisions in the 1996 Model on Electronic Commerce. Those provisions that have been updated are therefore not included here.

paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.

(3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

✧ **United Nations Commission on International Trade Law Model Law on Electronic Signatures (2001)** ⁴

Article 3. Equal treatment of signature technologies Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6, paragraph 1, or otherwise meets the requirements of applicable law.

Article 12. Recognition of foreign certificates and electronic signatures

1. In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had:

(a) To the geographic location where the certificate is issued or the electronic signature created or used; or

(b) To the geographic location of the place of business of the issuer or signatory.

2. A certificate issued outside [the enacting State] shall have the same legal effect in [the enacting State] as a certificate issued in [the enacting State] if it offers a *substantially equivalent level of reliability*.

3. An electronic signature created or used outside [the enacting State] shall have the same legal effect in [the enacting State] as an electronic signature created or used in [the enacting State] if it offers a *substantially equivalent level of reliability*.

4. In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph 2 or 3, regard shall be had to recognized international standards and to any other relevant factors.

5. Where, notwithstanding paragraphs 2, 3 and 4, parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

✧ **World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006)**

3.11. Standard

The contents of the Goods declaration shall be prescribed by the Customs. The paper format of the Goods declaration shall conform to the UN-layout key.

For automated Customs clearance processes, the format of the electronically lodged Goods declaration shall be based on international standards for electronic information exchange as

⁴ 2005 United Nations Convention on the Use of Electronic Communications in International Contracts has updated and renewed the relevant provisions in the 2001 Model on Electronic Signatures. Those provisions that have been updated are therefore not included here.

prescribed in the Customs Co-operation Council Recommendations on information technology.

3.18. Transitional Standard

The Customs shall permit the lodgement of supporting documents by electronic means.

3.21. Transitional Standard

The Customs shall permit the lodging of the Goods declaration by electronic means.

6.9. Transitional Standard

The Customs shall use information technology and electronic commerce to the greatest possible extent to enhance Customs control.

7.4. Standard

New or revised national legislation shall provide for :

- electronic commerce methods as an alternative to paper-based documentary requirements;
- electronic as well as paper-based authentication methods;
- the right of the Customs to retain information for their own use and, as appropriate, to exchange such information with other Customs administrations and all other legally approved parties by means of electronic commerce techniques.

APPENDIX

1. General requirements in respect of seals and fastenings:

The seals and fastenings shall :

- (a) be strong and durable;
- (b) be capable of being affixed easily and quickly;
- (c) be capable of being readily checked and identified;
- (d) not permit removal or undoing without breaking or tampering without leaving traces;
- (e) not permit use more than once, except seals intended for multiple use (e.g. electronic seals);
- (f) be made as difficult as possible to copy or counterfeit.

Specific Annex F

8. Recommended Practice

National legislation should provide for the use of electronic funds transfer for the payment of drawback.

9. Recommended Practice

Travellers should be permitted to make an oral declaration in respect of the goods carried by them. However, the Customs may require a written or electronic declaration for goods carried by travellers which constitute an importation or exportation of a commercial nature or which exceed, in value or quantity, the limits laid down in national legislation.

✧ **World Trade Organization Agreement on Trade Facilitation (2013)**

ARTICLE 7: RELEASE AND CLEARANCE OF GOODS

7.2 Nothing in this Article shall prevent a Member from:

- (a) differentiating its procedures and documentation requirements based on the nature and type of goods, or their means of transport;
- (b) differentiating its procedures and documentation requirements for goods based on risk management;
- (c) differentiating its procedures and documentation requirements to provide total or partial exemption from import duties or taxes;

- (d) applying electronic filing or processing; or
- (e) differentiating its procedures and documentation requirements in a manner consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures.

ARTICLE 10: FORMALITIES CONNECTED WITH IMPORTATION, EXPORTATION AND TRANSIT

10.2 Acceptance of Copies

2.1 Each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export, or transit formalities.

2.2 Where a government agency of a Member already holds the original of such a document, any other agency of that Member shall accept a paper or electronic copy, where applicable, from the agency holding the original in lieu of the original document.

2.3 A Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.

10.4 Single Window

4.1 Members shall endeavour to establish or maintain *a single window*, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.

4.2 In cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or data requirements shall not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public.

4.3 Members shall notify the Committee of the details of operation of the single window.

4.4 Members shall, to the extent possible and practicable, use information technology to support the *single window*.

ARTICLE 12: CUSTOMS COOPERATION

12.4 Request

4.1 The requesting Member shall provide the requested Member with a written request, through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language, including:

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_1564

