# Introduction to legal texts on electronic commerce

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# Outline

1. Benefits of e-commerce
2. E-commerce fundamentals
3. Legal agenda for e-commerce
4. Legal obstacles, barriers and uncertainties
5. Fundamental legislative principles
6. Policy approaches to electronic signatures' technology
7. UNCITRAL texts on electronic commerce

# Benefits of e-commerce

- Increased efficiency and reduced costs
- Ability to reuse electronic data
- Ability to operate remotely
- Increase overall gover-nance
- New business opportun-ities.

# E-commerce fundamentals

## Closed networks

- Provide access to a limited number of pre selected customers
- Parties know each other

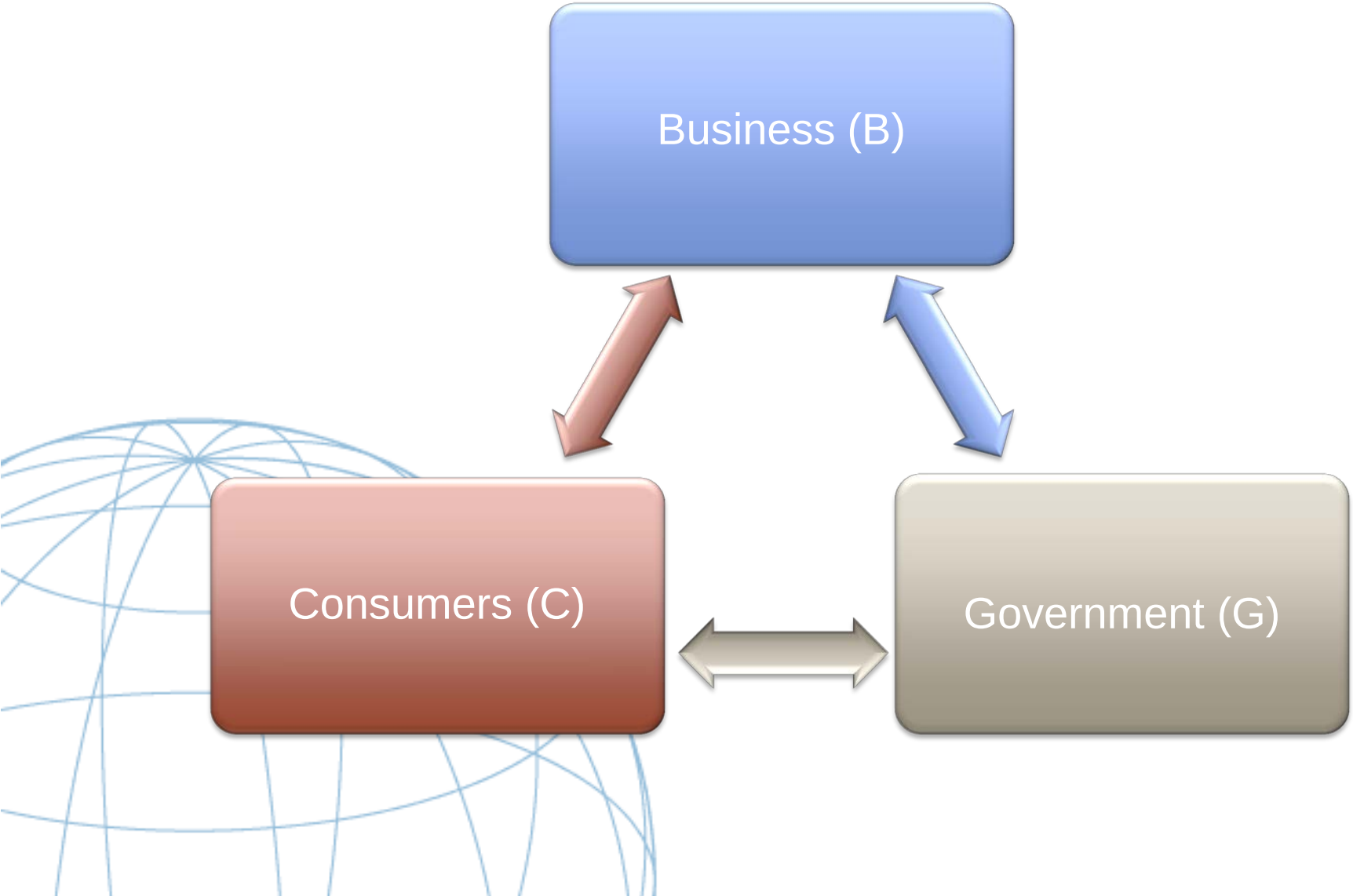
Preliminary consent to contractual agreement

## Open networks

- Accessible to all
- Parties do not know each other

Enabling legislative framework + Contractual agreement

# Actors of electronic transactions



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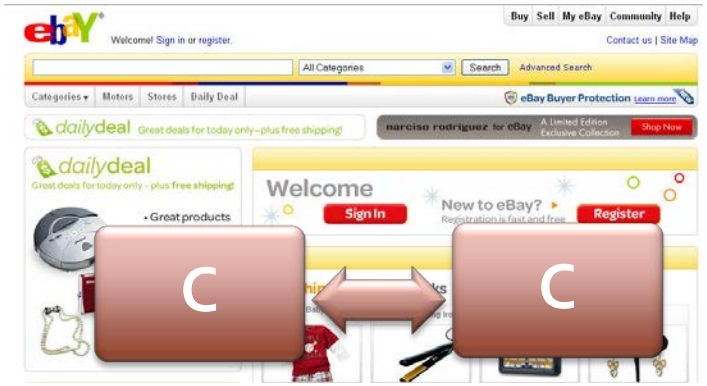
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Welcome! Sign in or register.
dailydeal
Welcome
Sign In
New to eBay?
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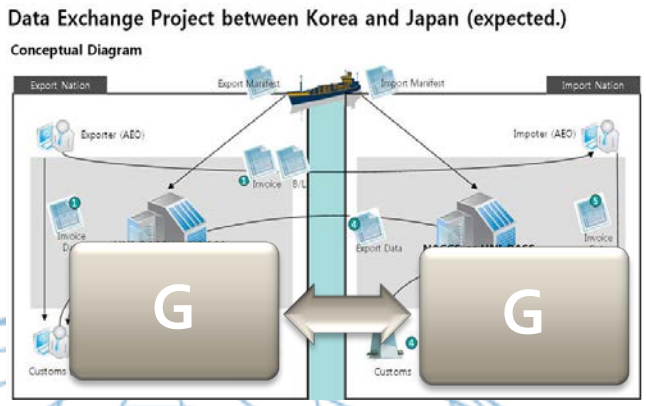
Data Exchange Project between Korea and Japan (expected.)
Conceptual Diagram
Export Nation
Import Nation
Exporter (AEO)
Importer (AEO)
Customs
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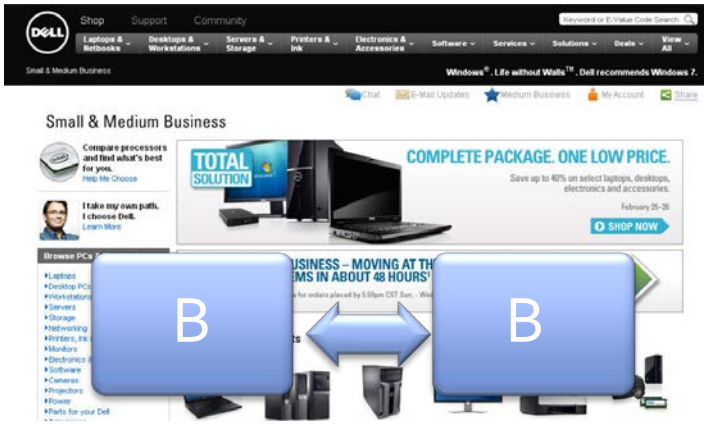
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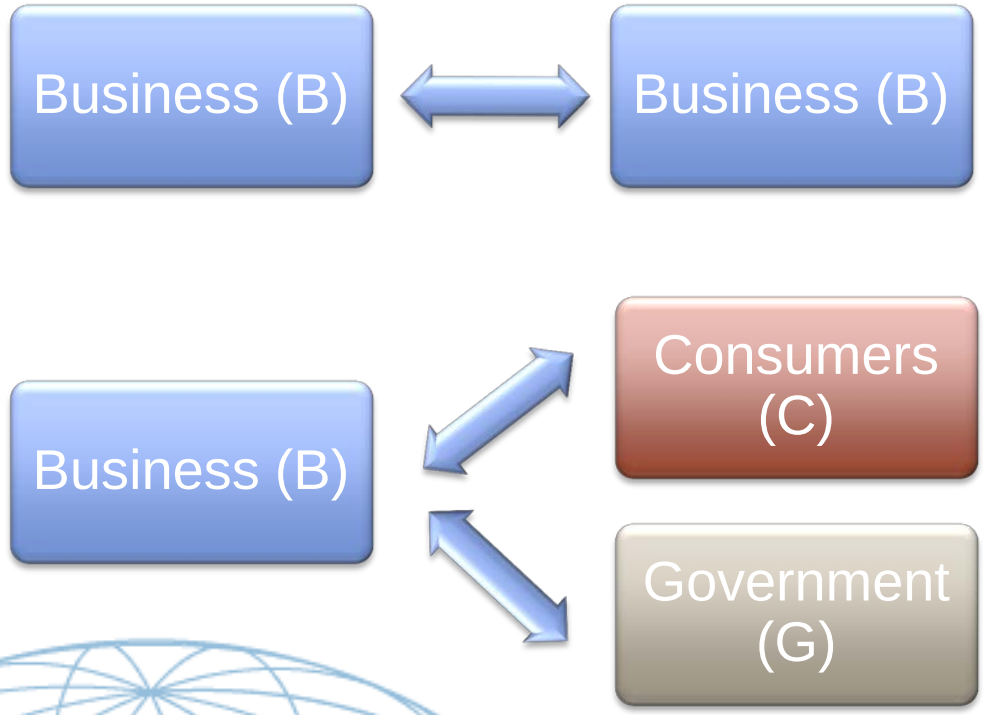



- In B2B transactions, parties may adjust rules to actual commercial needs, respecting the limits set by the law.

- Transactions with governmental entities and with consumers may require a special set of rules.

- Specific trade fields may also require an additional set of rules (e.g., electronic transport documents).

# Legal agenda for e-commerce

- Electronic transactions
- Rules of evidence
- Electronic and digital signatures
- Electronic payment
- E-government
- Consumer protection
- Privacy protection
- Computer crime, cyber crime
- Content regulation
- Intellectual property rights
- Mobile commerce

# Examples of applications

**Examples of applications that may share same legislative principles of a general e-commerce law:**

- e-payments through large banking closed systems such as SWIFT;
- m-payments to pay small sums through mobile phones;
- use of digital IDs or credit cards for authentication purposes (e.g., airport check-in);
- electronic single window (trade facilitation);
- e-procurement (increasing transparency and efficiency in private and governmental purchases).

# Lessons Learned

**Legislation should:**

- facilitate rather than regulate electronic commerce;
- adapt existing legal requirements;
- provide legal validity and raise legal certainty.

**In order to do so, legislation should be based on three fundamental principles:**

- non-discrimination;
- functional equivalence;
- technological neutrality;

**and should allow for variation by contractual agreement.**

# Legal obstacles, barriers and uncertainties

# Sources of legal obstacles to e-Commerce: formal requirements

- **Legal concepts based on the existence of a tangible medium:**

  "instrument", "document", "original", "signature"

- **Legal concepts based on geographic location:**

  "delivery", "receipt", "dispatch", "surrender"

# E-Commerce and Private Law

- **E-Commerce creates new issues:**
  - Classification difficulties: the *virtual goods/services*
  - New contract types: *web hosting*, *web server* etc.

**… but the essence of business transactions remains the same.**

- **Conventional law has not become obsolete…**
  - "On line" contracts are not different from "off line"
  - Medium of a transaction is generally irrelevant for the law.

**…and nevertheless, it requires some adaptation.**

# E-commerce and private international law

**Applicable law uncertain**

- Is there a valid contract?
- What are the terms of the contract?
- Choice of law clauses and the conflict between country-of-origin and country-of-destination

**Conflicts of jurisdiction**

- Where can/should parties file suit?
- Which court can claim jurisdiction?
  - Passive web sites
  - Interactive web sites
- Choice of forum clauses and their limitations in B2C transactions

# Recognition and evidentiary value of electronic communication

- **If there is no Law on electronic transactions:**
  - Do the courts adopt a liberal interpretation to form requirements and evidentiary rules?
  - Or do they take a restrictive approach?

- **If there is a Law on electronic transactions:**
  - Does it limit the types of electronic records that are legally recognized?

# Fundamental legislative principles

# Non-discrimination

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

**Conclusion of contract**

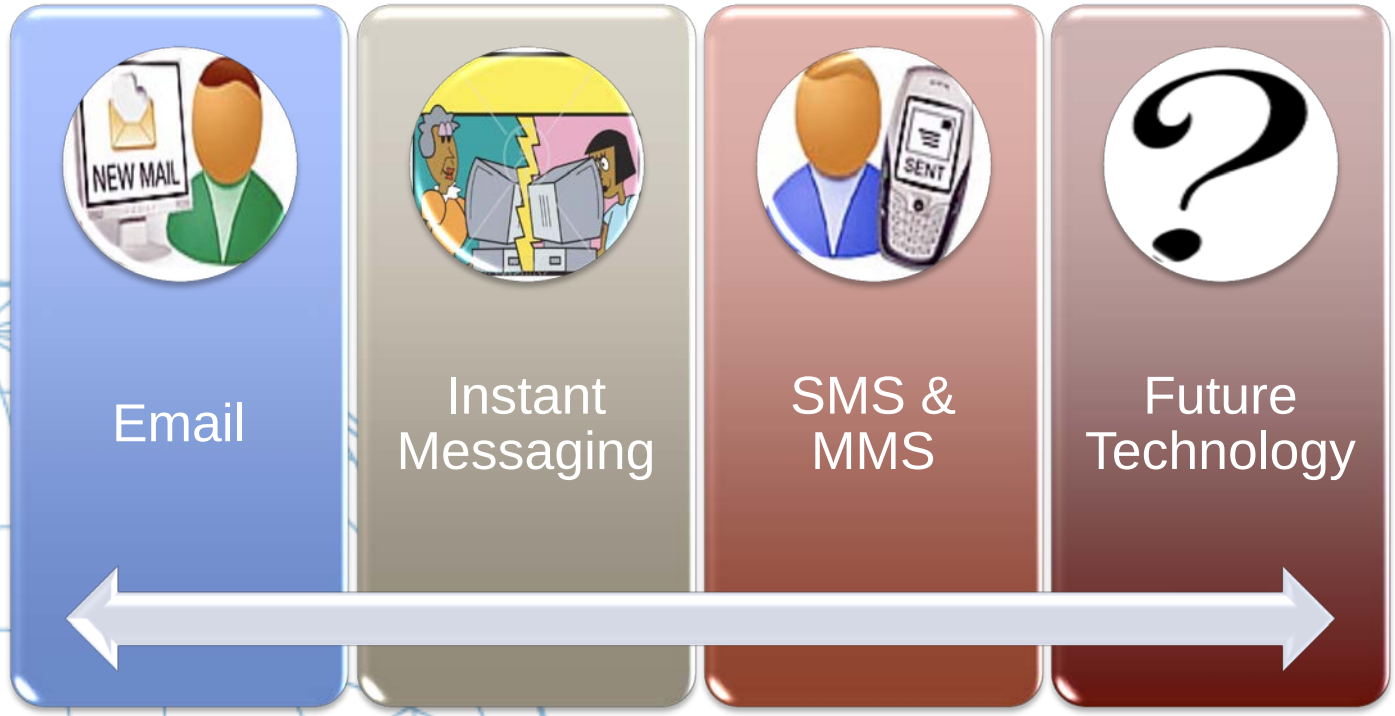
(Writing, Signature)

# Functional equivalence

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

# Technological neutrality

- Equal treatment of different technologies (EDI, e-mail, Internet, instant messaging, fax, etc.)
- Possibility to have detailed provisions on technology requirement in the regulations implementing e-commerce legislation.



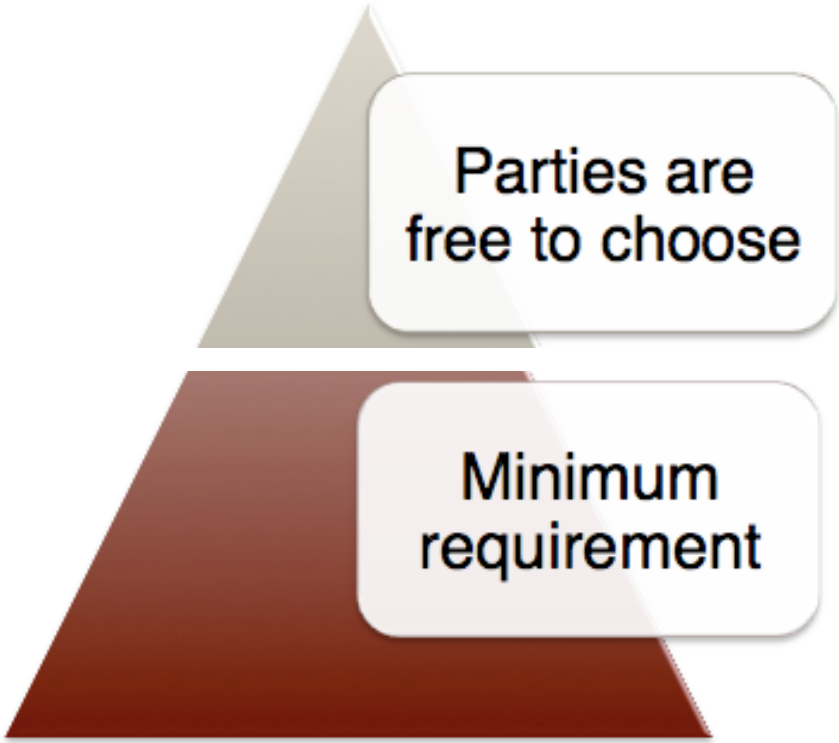
# Party autonomy

Parties should be free to choose:

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

# Policy approaches to electronic signatures' technology

# 1. Minimalist approach




- Law provides minimum requirements.
- Follows the principle of technological neutrality.
- Functional equivalence is confirmed provided that certain specified functions and requirements are met.
- Parties are free to choose signature method they deem appropriate.

Min. Requirement & Choice of ID and Password

# 2. Technology-specific approach

Sets specific technology; Parties are not allowed to choose

- Prescribes the use of a specific technology.
- Not technology neutral – risks excluding other possibly superior technologies from entering and competing in the marketplace.
- Fixing requirements before a particular technology matures.
- Parties are not free to choose signature method they deem appropriate.

Digital signature based on cryptography (PKI)

# 3. "Two-tier" legislation

Parties are free to choose method they deem appropriate

Advanced and secured signature

Any electronic signature

# UNCITRAL texts on electronic commerce

# UNCITRAL Texts

Convention | Model Law | Legislative Guide

- Negotiated with universal participation and reflect balance of national, regional, economic, legal and other interest.

- Drafted with a view to ensure compatibility with the various legal traditions.

# International harmonization of electronic commerce law

- **UNCITRAL Model Law on Electronic Commerce (1996)**

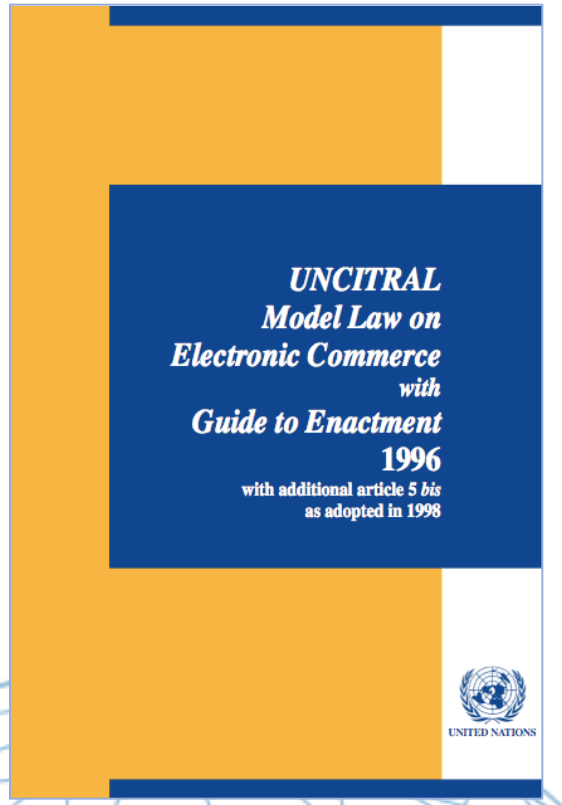
  text and list of enacting states available at:
  www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

- **UNCITRAL Model Law on Electronic Signatures (2001)**

  text and list of enacting states available at:
  www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html

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

  text and list of signatory states available at:
  http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html




- Adopted by UNCITRAL on 12 June 1996.

- MLEC is intended to facilitate commerce via the use of modern means of communications and storage of information.

- MLEC is based on the establishment of a functional equivalence in electronic media for paper-based concepts such as "writing", "signature" and "original".

- MLEC established rules for the formation and validity of contracts concluded with electronic means and for the attribution and retention of data messages.

text and list of enacting states available at:
www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

**UNCITRAL Model Law, articles 5 and 5 *bis***

Information shall not be denied legal effect, validity or enforceability solely because:

- it is in the form of a data message or
- It is incorporated by reference

**UNCITRAL Model Law, article 6**

Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

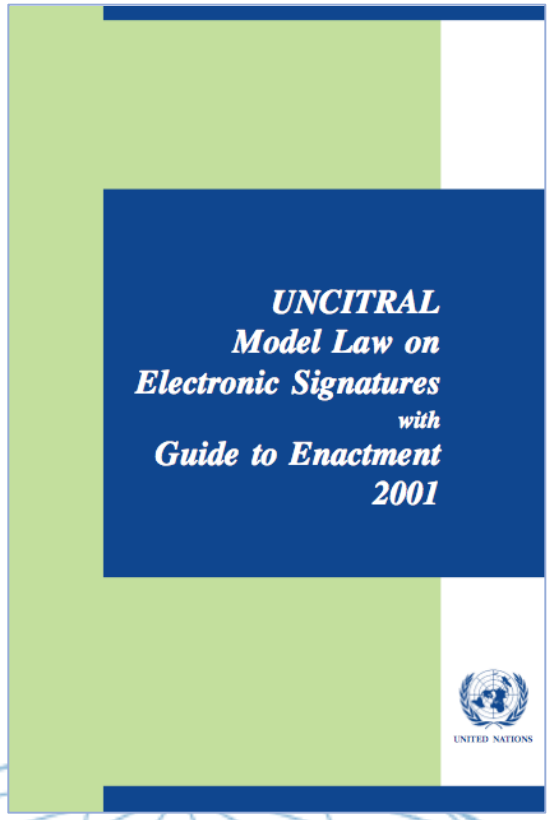
## UNCITRAL Model Law, article 8

A data message can be regarded as an "original" document if:

- There exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; an
- The information is capable of being displayed to the person to whom it is to be presented.

## UNCITRAL Model Law, article 9

In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of a data message in evidence solely because it is a data message.



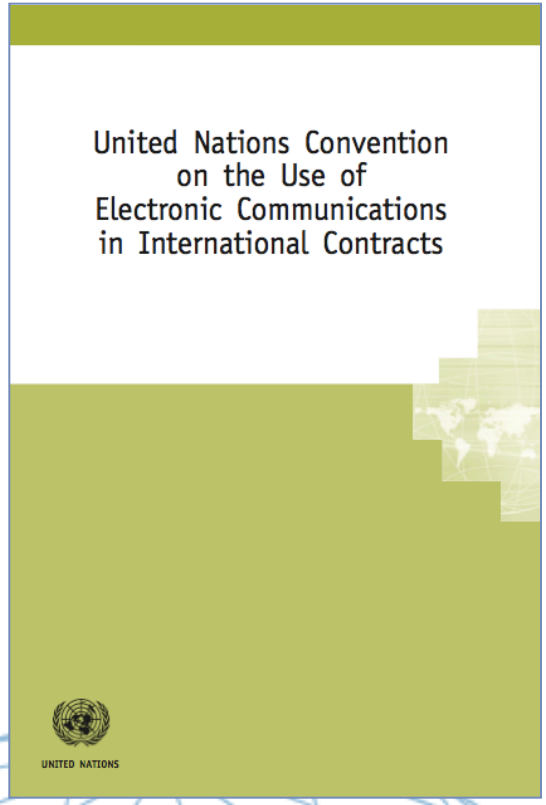

- Adopted by UNCITRAL on 5 July 2001.

- MLES aims at bringing additional legal certainty to the use of electronic signatures.

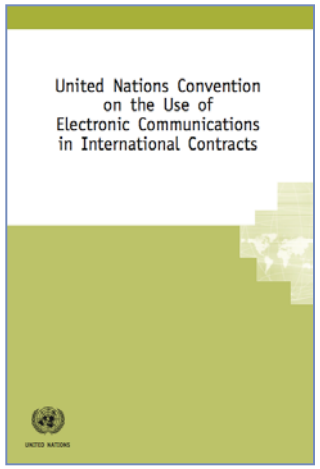
- MLES establishes criteria of technical reliability for the equivalence between electronic and hand-written signatures.

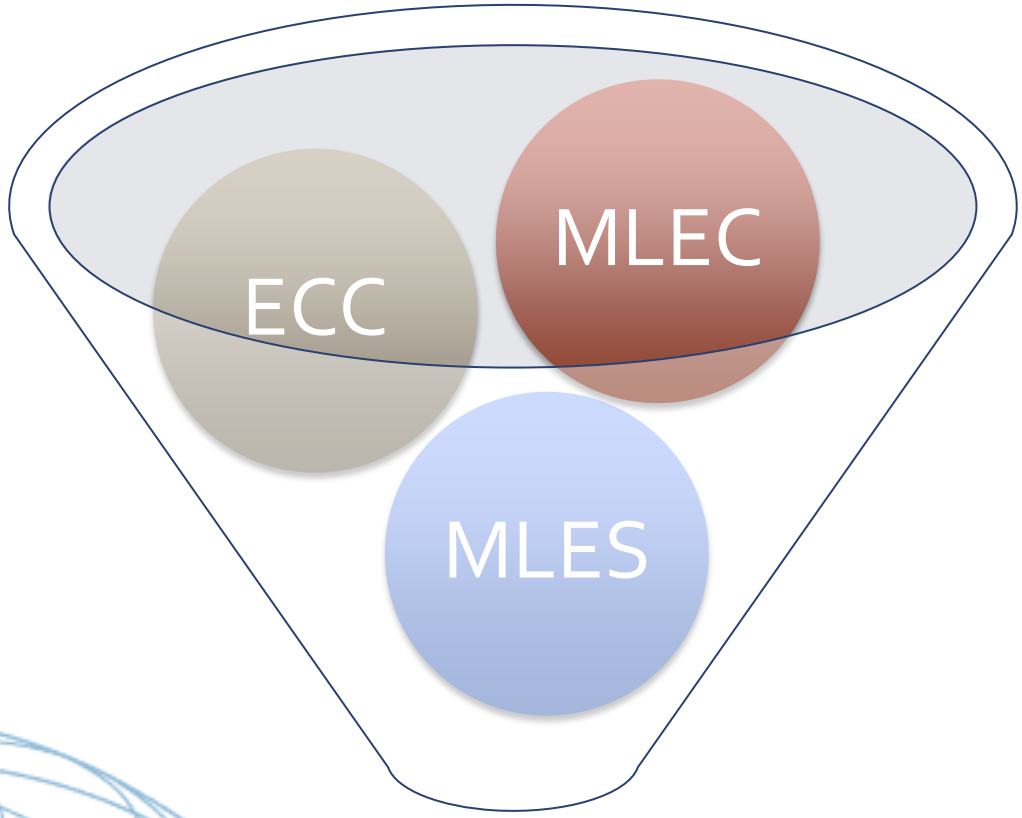
- MLES follows a technology-neutral approach, which avoids favoring the use of any specific technical product.

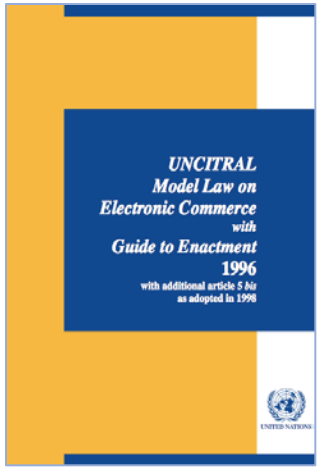
- MLES establishes basic rules of conduct that may serve as guidelines for assessing possible responsibilities and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process.

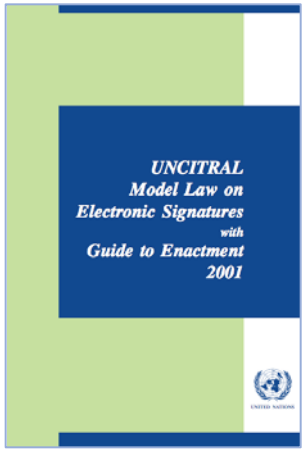



- Adopted by the General Assembly on 23 November 2005, entered into force on 1 March 2013 .
- The ECC builds up and, in certain cases, updates the provisions of both Model Laws.
- The ECC aims to enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts.
- The ECC addresses the determination of a party's location in an electronic environment; the time and place of dispatch and receipt of electronic communications and acknowledgement of receipt; the use of automated message systems for contract formation; and the criteria for establishing functional equivalence between electronic communications and paper documents.




**Comprehensive general framework for the use of electronic transactions**

# Thank You!

For more information on the work of UNCITRAL in the area of electronic commerce, please visit
http://www.uncitral.org/