

Interpreting the New York Convention in line with Dispute Resolution in the Digital Economy

(Updated Proposal of the Kingdom of Bahrain)

I. BACKGROUND

1. At its **75th session**, the Commission mandated Working Group II to address the recognition and enforcement of electronic arbitral awards and, subsequently, electronic notices of arbitration. The Commission provided the Working Group with a broad mandate to identify issues and explore them without prejudice. At the Commission's request, the Secretariat organized a two-day colloquium during **the 80th session** of the Working Group, during which this topic was considered.
2. The UNCITRAL Colloquium consisted of four panels. The first discussed issues related to electronic awards from the perspectives of arbitral institutions. The second discussed the experience of digitalization in national court proceedings, focusing on the electronic rendering and enforcement of judgments. The third provided an overview of existing UNCITRAL texts on electronic commerce and electronic communication. The fourth panel focused on the consistency across UNCITRAL instruments and capitalizing on the solutions they provide. The Colloquium concluded with a roundtable discussion.
3. In that context and for the purposes of the roundtable, the Kingdom of Bahrain's delegate, Professor Marike Paulsson, presented an analysis of the scope of The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

II. WORKING PAPER

4. During **the 81st session** of the Working Group II, [the Kingdom of Bahrain submitted a proposal](#) to promote informed discussion on how to ensure the recognition and enforcement of electronic arbitral awards under the New York Convention. During this session, the delegations of Bahrain, Mexico, and Switzerland submitted a joint draft Recommendations text on the Interpretation of the New York Convention that addressed their concerns and aimed to find a compromise. This draft was sent to the delegations via email for review. The purpose of this updated document is to reaffirm and expand the original objectives by incorporating developments since **the 81st session** of the Working Group II and the jointly proposed draft recommendations. The main goal remains: to ensure the recognition and enforcement of electronic arbitral awards under the New York Convention, thereby strengthening confidence in arbitration adapted to digital realities.

A. Premises

5. It is essential to ensure consistency and predictability in interpreting and applying the New York Convention while incorporating subsequent international instruments, especially the 1985 UNCITRAL Model Law on International Commercial Arbitration (as revised in 2006), the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and the United Nations Convention on the Use of Electronic Communications in International Contracts. Additionally, interpretation should align with

modern technological advancements, in accordance with the Vienna Convention on the Law of Treaties (1969).

B. Draft Text for Consideration

6. Below is a synthesized draft of the Recommendations on the Interpretation of the New York Convention, which addresses the various positions expressed by the delegates during the **81st session** of Working Group II.

Draft Recommendations on the Interpretation of the New York Convention

[Secretariat Text up through Recalling that the Conference of Plenipotentiaries....]

Recalling that pursuant to article 31 of the 1969 Vienna Convention on the Law of Treaties, the New York Convention shall be interpreted in good faith, considering its purpose as well as customary practices in international trade;¹

Recalling that the purpose of the New York Convention is the promotion of efficiency in international arbitration as a method of dispute resolution in international trade;²

Recognizing the possibilities that technological advances present for the efficient and expedient rendering of arbitral awards, the increasing use of electronic means in international commerce, and the growing practice of rendering arbitral awards [in electronic form] [electronically] [in forms other than in hard copy paper];

Recognizing the need for clarity and harmonization of court practices in relation to the enforcement of arbitral awards [in electronic form] [rendered electronically] [in forms other than in hard copy paper] pursuant to the New York Convention;

Recognizing that the drafters of the Convention were focused on accommodating modern trade practices;³

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as Subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts; *[verbatim from 2006 Recommendations]*

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards, *[verbatim from 2006 Recommendations]*

1. *Recommends* that the New York Convention be interpreted in a technologically neutral manner, ensuring that arbitral awards [in electronic form] [rendered electronically] are not treated less favorably than those [rendered] in hard copy paper form;

1 Article 31, Vienna Convention on the Law of Treaties (VCLT).

2 Final Act and Text of the Convention 140_doc-22-e-conf-26-8-rev-1.pdf.

3 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the third meeting on 21 May 1958, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)):

2. *Recommends* that the term “arbitral awards” as used in the New York Convention not be interpreted as excluding arbitral awards [in electronic form] [rendered electronically] or in any other form aligned with modern commercial usages;
3. *Recommends* that an arbitral award [in electronic form] [rendered electronically] constitute an “original” in the sense of article IV(1)(a) of the New York Convention where there exists reliable assurance as to the integrity of the information contained in the award in electronic form from the time it was first generated in its final form, and that information is capable of being displayed to the person to whom it is intended to be made available.

C. Analysis

i. Introduction

7. The purpose of this second submission is to reiterate the importance of reminding all delegations of the essence of the New York Convention, drafted after World War II. It also reiterates the fundamental elements of international law as codified in the Vienna Convention on the Law of Treaties. It's imperative for the working group to be cautious of amendments to the New York Convention and the advantages of soft law mechanisms.
8. The expansion of international trade in the aftermath of World War II highlighted the need for effective dispute resolution mechanisms in cross-border commercial transactions. The New York Convention emerged as a response to the widespread reluctance to engage in business with countries lacking robust judicial systems for enforcing contractual obligations.
9. Commercial arbitration, which had existed for generations, evolved into a more formal and sophisticated system following World War I, with many countries updating their arbitration legislation. Arbitration was perceived to offer benefits such as economy, speed, and confidentiality, even if these advantages are debated in today's international commercial arbitration circles.
10. The same impulses that led to the Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927 came to the fore, and efforts to create a unified framework for recognizing and enforcing foreign arbitral awards began in the 1950s. The International Chamber of Commerce (ICC) and the United Nations Economic and Social Council (ECOSOC) proposed draft conventions.⁴ These initial proposals generated limited enthusiasm and did not progress significantly; yet they were first steps of the process toward the New York Convention.⁵

⁴ Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention (ICC Publication No. 174 1953), reprinted in ICC Ct. Bull. 32, 32 (1998); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 32, U.N. Doc E/Conf.26/8/Rev.1 (1958) (in the Annex); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires - Rep. on the Enforcement of International Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention), Art. III(b), Annex at 1, U.N. Doc. E/2704 and U.N. Doc. E/AC.42/4/Rev.1 (Mar. 28, 1955) (The Annex contains the ECOSOC Draft).

⁵ Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), p. 4.

11. In the summer of 1958, during the United Nations ECOSOC Conference on International Commercial Arbitration, held at the United Nations Headquarters and attended by representatives from 45 nations, the final text of what is now the New York Convention was adopted.⁶ The text was based on Dutch delegate Pieter Sanders' proposal, which simplified the enforcement process by eliminating the need for double exequatur.⁷
12. The New York Convention's primary goal was to establish uniform international standards for recognizing and enforcing foreign arbitral awards, significantly streamlining the process.⁸ As of the date of submitting this proposal to the UNCITRAL Secretariat, 172 states have ratified the New York Convention, representing a remarkable achievement in international cooperation over the past 66 years.
13. While concerns about the effectiveness of national courts persist in some regions, the New York Convention has significantly eased the process of enforcing arbitration awards internationally. Over 3,000 national court decisions are reported in the Yearbook of Commercial Arbitration.⁹ Kofi Annan, Former Secretary-General of the United Nations, in 1998 stated:

This landmark instrument has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations. As you know, international trade thrives on the rule of law: without it parties are often reluctant to enter into cross-border commercial transactions or make international investments.¹⁰

ii. Current discussions at UNCITRAL Working Group II: Dispute Settlement

14. Working Group II in (A/CN.9/1190) proposes developing an instrument for the recognition and enforcement of electronic arbitral awards, addressing the growing use of electronic means in arbitration proceedings and ensuring that the legal framework keeps pace with technological advancements. It seeks to complement the New York Convention by providing a clear legal basis for the recognition and enforcement of awards issued electronically, including the definition of electronic awards and the interpretation of existing conventions in light of technological developments.

⁶ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the twenty-fifth meeting on 10 June 1958, U.N. Doc. E/Conf.26/SR.25 (Sep. 12, 1958)

⁷ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Netherlands: amendments to Articles 3, 4, 5, Annex, U.N. Doc. E/Conf.26/L.17 (May 26, 1958).

⁸ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/Conf.26/8/Rev.1 (1958).

⁹ ICCA Yearbook Commercial Arbitration, accessible at <https://www.arbitration-icca.org/icca-yearbook-commercial-arbitration>.

¹⁰ Kofi Annan, Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration, in Enforcing Arbitration Awards under the New York Convention – Experience and Prospects, 1 (United Nations 1999), as cited in Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), p. 1.

15. Bahrain cautions against misinterpreting language that appears explanatory but is actually designed to introduce a new treaty. The 1969 Vienna Convention on the Law of Treaties (VCLT), in Article 2, defines a “treaty” as:

*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*¹¹

16. This definition emphasizes three key elements: (i) it is an agreement between States, (ii) governed by international law, and (iii) creates obligations for those States. Therefore, whether it is called an instrument, supplementary convention, agreement, treaty, protocol, or by any other nomenclature, so long as it fulfills the elements, it functions as another treaty on the enforcement of awards.¹² The name given to an international agreement is not decisive of whether it is a treaty, though it may provide some evidence.¹³ A new treaty is limited by realism, fragmentation, differing interpretations, compatibility challenges, and the same constraints offered by the notions of sovereignty. The Kingdom of Bahrain urges the delegates to revisit the origins of the New York Convention with the use of its drafting history records and interpret it in line with modern trade practices.

iii. Vienna Convention on the Law of Treaties

17. To determine whether an electronic award falls within the scope of the 1958 New York Convention, it should accordingly be examined through the lens of the Vienna Convention on the Law of Treaties, 1969 (VCLT).
18. Article 31 of the VCLT mandates a good faith interpretation, employing a teleological approach that aligns with customary practices, particularly those in international trade.¹⁴ This interpretation should consider the ordinary meaning of terms within their context and in light of the treaty's object and purpose.
19. Richard Gardiner, an authority on the VCLT, explains that “ordinary” refers to what was regular, normal, or customary at the time of the treaty's conclusion.¹⁵ At the time of negotiating the New York Convention in the 1950s, telegrams, telexes, and paper awards, reflected the then modern international trade practices when defining terms dealing with the notion of “awards”.
20. In today's digital economy, an ordinary reading might encompass modern practices of electronic signatures when defining an “award”. In the future, practices could involve technologies one cannot yet foresee. In the summer of 1958, Argentina’s delegate astutely observed:

¹¹ Article 2, VCLT.

¹² D.P. Myers, in his work "The Names and Scope of Treaties" lists 40 different names for treaties. See D.P. Myers, The Names and Scope of Treaties, *American Journal of International Law*, Vol. 51(3), pp. 574-605.

¹³ Richard K. Gardiner, *Treaty interpretation* (Oxford, 2008), p. 21.

¹⁴ Article 31, VCLT.

¹⁵ Richard K. Gardiner, *Treaty interpretation* 127 (Oxford, 2008), as cited in Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), p. 34.

*The effectiveness of a law depended upon the extent to which it reflected reality.*¹⁶

21. Electronic awards fall within the scope of the Convention because digital documentation and authentication are now accepted commercial practices; a contextual reading under Article 31 VCLT supports such inclusion.
22. There are sufficient bases in the New York Convention and its drafting history to argue that electronic awards should fall under the Convention, simply because it is customary in modern trade, and such a customary approach to interpreting a text is what the VCLT prescribes.¹⁷ The flexibility inherent in the New York Convention's text, the drafters' intention, and means of interpretation accommodate evolving trade practices and allow for adjudicators to adapt their application without necessitating a new treaty.
23. It's worth noting that this debate is not new. Other visionaries were ahead in considering this issue, Gerold Herrmann observed:

*While a-national (or “free-floating”) awards are more common in the imaginative world of radical de-localizers than in the real world, we may wish to anticipate future space awards, rendered in cyberspace (virtual “CYBITRATION©” awards by seatless online arbitration centers) or in outer space (“ORBITRATION©” By the “Galactic Arbitration Center”).*¹⁸

24. The drafting history of the New York Convention reveals that the delegates were focused on accommodating modern trade practices while being realistic about implementation, as demonstrated by the Japanese delegate's statement:

*Japan whose economy and prosperity were affected in the manner in which international trade flowed, was always ready to assist in removing obstacles to such trade and thus to facilitate business intercourse.*¹⁹

The same sentiment is reflected in the Bulgarian delegate's statement:

[T]he conclusion of a convention would indirectly promote trade, in particular between countries belonging to different economic and social systems, and that it would also contribute to the development of international law and co-operation between nations...The primary purpose of the Convention should be

¹⁶ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the fifth meeting on 22 May 1958, at 5, U.N. Doc. E/Conf.26/SR.5 (Sep. 12, 1958) (comments of Mr. Ramos (Argentina)).

¹⁷ For an index of the New York Convention's drafting history, see Annex II: Consolidated List of Drafting History', in Marike R. P. Paulsson, *The 1958 New York Convention in Action*, (Kluwer Law International 2016), pp. 247 – 262.

¹⁸ Gerold Herrmann, “Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture, *Arbitration International*, Vol. 5 (1999), pp. 211–236, as cited in Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), p. 112.

¹⁹ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the third meeting on 21 May 1958, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)).

*to institute rapid, simplified, clear and efficient procedures for the elimination of the consequences of differences and disagreements in business transactions.*²⁰

25. Although there were attempts to define key terms like “arbitral awards” and “arbitration proceedings”,²¹ the delegates decided not to include strict definitions in the text. This decision was influenced by concerns about national sovereignty and public policy, as well as the desire to allow flexibility for different legal systems.

*The recognition and enforcement of foreign arbitral awards raised complex problems. That explained why some provisions of the draft Convention were drawn up in rather general terms, whereas others contained some restrictions. That should not, moreover, be regarded as a defect but rather as a virtue, since it showed that its authors had tried to adapt it to reality, The variety of legal systems made it necessary to establish common standards which would state universally recognized principles, while respecting the sovereign rights of States and the principles on which their municipal law or public policy were based.*²²

26. The travaux préparatoires show that references to specific technologies like telegrams or telexes in the text were meant to reflect contemporary customs rather than provide rigid definitions.

*[I]t was not customary in international commerce to have documents signed by the two parties, even in very important transactions. An agreement which required a clause in writing would not meet present-day needs and would not be acceptable in international commerce.*²³

It is stated in article III(a) of the draft that, to obtain the recognition and enforcement of foreign arbitral awards, the parties must have agreed, in writing, either by a special agreement or by an arbitral clause in a contract, to settle their differences by means of arbitration. This provision would seem to restrict considerably the scope and importance of the Convention. It is not unusual practice in international trade to conclude an arbitration agreement by an exchange of letters or telegrams. It would therefore be better to stipulate simply

²⁰ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the sixth meeting on 23 May 1958, at 2-3, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Todorov (Bulgaria)).

²¹ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the sixth meeting on 23 May 1958, at 5, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Kaiser (Pakistan)); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 2-3, U.N. Doc. E/2822/Add.5 Annex (Apr. 13, 1956) (Hungary); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Pakistan: amendments to Articles 1, 3, 4, 56, 12 and suggestion of an additional Article, U.N. Doc. E/Conf.26/L.16 (May 26, 1958).

²² Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the sixth meeting on 23 May 1958, at 5, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Farnes (Guatemala)).

²³ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the thirteenth meeting on 28 May 1958, at 11, U.N. Doc. E/Conf.26/SR.13 (Sep. 12, 1958) (comments of Mr. Hoogstraten (Hague Conference on Private International Law)).

*that evidence in writing is required which proves the will of the two parties to settle their differences by means of arbitration.*²⁴

*Obviously there could be no recognition of a purely verbal agreement, but neither could there be a requirement of writing in the strict sense, i.e. a requirement that both parties should sign the same document. Such a requirement would be at variance with the needs and usages of international trade.*²⁵

27. By leaving the precise definitions of “award” and “arbitration” to national laws, the drafters allowed for adaptation to evolving trade practices. It was a blessing in disguise, and this flexibility has contributed to the New York Convention's enduring success and relevance.
28. Building on the consensus reflected in the joint draft recommendations, Bahrain stresses that adopting a technologically neutral interpretation of “award” ensures the Convention’s ongoing relevance without the need for a supplementary treaty. This approach prevents fragmentation while providing courts with an authoritative interpretive tool.

iv. Proposal for UNCITRAL Recommendations or other Soft Law Mechanisms

29. The discussion surrounding potential reform highlights a critical juncture in international treaty law. Delegates considering small modifications should heed Article 40 of the VCLT, as minor changes could exacerbate fragmentation, particularly in a treaty with 172 contracting states. The notion of amendments between only certain parties, as stated in Article 41, also poses similar risks.
30. Regardless of its designation – be it a protocol, convention, or treaty – a new instrument creates binding obligations for states under international law. This raises compatibility issues with existing frameworks like the New York Convention, which may not be resolved through Article VII of the New York Convention.
31. For a protocol to gain acceptance from all 172 states, its text must be compelling, a text that could take years to draft and decades to implement. Moreover, as technology evolves rapidly, future awards may be unrecognizable when benchmarked to today's standards, all the more so considering the increasing disconnect between technological advancement and the pace of development of international law.
32. In 1958, the Japanese delegate commended the committee for achieving a balance between idealism and realism in their draft, though some nations felt it did not go far enough and preferred a more ambitious proposal akin to that of the International Chamber of Commerce (ICC). The delegates departed from ideal phrasings as they negotiated less coherent formulations. The New York Convention had to accommodate many national procedural frameworks: perfection had to be sacrificed.²⁶ The Japanese government expressed concern that the Chamber’s pursuit of perfection overlooked the existing domestic laws of many

²⁴ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Comments by France, Annex I, at 18, U.N. Doc. E/2822 (Jan. 31, 1956).

²⁵ Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary record of the ninth meeting on 26 May 1958, at 3, U.N. Doc. E/Conf.26/SR.9 (Sep. 12, 1958) (comments of Mr. Bulow (Federal Republic of Germany)).

²⁶ Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), pp. 6-7.

countries. They argued that while the forthcoming convention should be progressive enough to meet international trade requirements, it must not be so radical as to deter potential signatories. This sentiment echoed a broader theme where distinguished delegates acknowledged an “*agreement to disagree*,” encapsulated in policies surrounding public policy, constitutionality, and sovereignty.²⁷

*The Japanese Government considered that the draft before the Conference was a progressive document and a substantial improvement over the Geneva Convention of 1927. The Ad Hoc Committee deserved high praise for having produced what was a sound compromise between idealism and realism. Some countries doubtless regarded the draft as not sufficiently far-reaching and would have preferred an instrument more along the lines proposed by the International Chamber of Commerce. His Government thought, however, that the Chamber, in its zeal for perfection, had failed to pay sufficient heed to the existing state of the domestic laws of many countries. While the Convention to be concluded should be sufficiently progressive to satisfy the requirements of international trade, it must not be so revolutionary as to discourage potential signatories.*²⁸

33. Fali Nariman metaphorically described sovereigns as billiard balls, frequently colliding yet rarely moving in unison, concluding:

*International law perhaps has not achieved much, but it is good that it is there.*²⁹

34. This perspective was further illustrated by Stephen Schwebel, the former president of the International Court of Justice, who likened attempts to enhance the New York Convention through a treaty to an impossible dream reminiscent of Don Quixote's quests, suggesting that such aspirations were not merely Herculean tasks but rather unattainable ideals.³⁰
35. The fear that efforts could ultimately cause confusion is strongly felt, especially now, when revisiting the New York Convention through a protocol-based methodology seems unwise. Historically, stakeholders in arbitration viewed themselves as merchants of peace, recognizing the benefits of peaceful commerce.
36. The Working Group is invited to consider adoption of these Draft Recommendations as an UNCITRAL soft law instrument or restatement, consistent with prior recommendations on the interpretation of the New York Convention (2006).

In resubmitting the joint proposal by the three delegations as shared during the 81st session, Bahrain reaffirms its commitment to clarity, consistency, and technological neutrality in the enforcement of international arbitration awards. These recommendations stay true to the 1958 Convention while supporting its flexible application in the digital economy.

²⁷ Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), pp. 3-9.

²⁸ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires – Summary record of the third meeting on 21 May 1958*, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)).

²⁹ Fali Nariman, *Introduction to the New York Convention, The Convention and Sovereignty, Judicial Dialogue on the New York Convention*, 23 November 2013.

³⁰ Judge Schwebel's comments are recalled in Marike Paulsson, *Commercial Diplomacy as a Way Forward to Resolving Disputes When They Arise in International Trade*, Kluwer Arbitration Blog, 22 August 2018.