

# Jurisdictional Survey:

Interaction  
between  
UNCITRAL  
Arbitration & E-  
Commerce Texts

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October 2, 2024



# BACKGROUND



## Issues relating to recognition and enforcement of electronic arbitral awards (A/CN.9/WG.II/WP.238)

- “E-awards **not widely used** in practice yet.”
- “Standard practice is still that awards are made in **paper form**, delivered to the parties and supplied to courts in that form.”
- This perception arises due to (i) domestic law implementing the New York Convention, (ii) enforcement procedures in many jurisdictions, and (iii) fragmentation in laws.
- This presentation looks at (i) signature requirement across jurisdictions, and (ii) “delivery to each party” across jurisdictions.
  - How can existing UNCITRAL instruments e-commerce texts help supplement the UNCITRAL framework?

# CIARB Guidance Note on Remote Dispute Resolution Proceedings (2020)

## 7. Dispute resolution clauses

7.1 In the context of both current and future proceedings it is important to demonstrate parties' affirmative agreement to the use of a particular type of remote proceeding.

7.2 Parties should be aware of any applicable regulations or requirements of relevant domestic jurisdictions regarding the use of remote or non-physical proceedings in dispute resolution. In certain jurisdictions, domestic court proceedings may be suspended under local public health restrictions and there may be no facility for remote hearings with those courts. It is each party's responsibility to ensure compliance of their procedures with relevant and applicable domestic laws. The Guidance Note should be used only where it is not in conflict with applicable laws and regulations.

7.3 Due to differences in legal opinions and interpretations across jurisdictions, remote means of reaching a resolution to a dispute might be questioned by some enforcing domestic courts or may be used a ground for challenge by parties. Parties should be aware of this possibility and adjust where necessary to ensure enforceable resolutions to disputes.

7.4 Even though digital technology is rapidly becoming a widely accepted business and legal tool, it is advisable to keep key procedural documents in both soft and hard copies, containing signatures of participants where necessary.<sup>5</sup> The same applies to arbitral awards, mediated settlements or any other outcomes of remote dispute resolution proceedings, as some national courts may reject enforcement if such documents were produced solely via digital means.

## 8. Choice of neutrals

8.1. CIARB understands that parties' choice of neutrals will be influenced by numerous factors. However, in order to assure efficiency in remote dispute resolution proceedings, consideration of a potential neutral's practical acquaintance with and a positive attitude towards remote proceedings is strongly recommended.

8.2. Remote proceedings inherently limit personal connections between all participants to a dispute. Therefore, active listening and verbal engagement, expressive body language and clear speech, as well as any other step necessary to create a comfortable professional environment should be used. This is particularly important for neutrals who should take every opportunity to assure parties of their full attention to proceedings.

8.3 Neutrals in remote arbitration proceedings should make themselves visible and audible to all the parties in the proceeding at all times, save in cases of deliberations and/or discussions between members of the arbitral tribunal.<sup>6</sup>

Even though digital technology is rapidly becoming a widely accepted business and legal tool, it is advisable to keep key procedural documents in **both soft and hard copies**, containing signatures of participants where necessary.

The same applies to arbitral awards, mediated settlements or any other outcomes of remote dispute resolution proceedings, as some national **courts may reject enforcement if such documents were produced solely via digital means.**



# Signature Requirement

Chapter 2



# The Problem

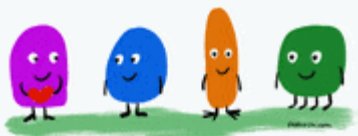


## **UNCITRAL Model Law (2006), Art. 31: Form and Contents of Award**

“(1) The award shall be made in writing and **shall be signed** by the arbitrator or arbitrator(s). In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”

### **What does the UNCITRAL Model Law not state?**

- What level of formality is needed for the signature?
- Do we need a wet signature?
- Can we use a digital signature (i.e., signature authenticated by third party)?
- Can we use an image of a signature?



# Global Survey . . .



**Q: Would courts consider an award that is signed (i) by inserting an image or (ii) more securely digitally signed as original for the purposes of recognition and enforcement of that award?**

## HIGH DEGREE OF VARIANCE . . .

**MODEL 1: Image and Digitally signed are both valid (England and Wales)**

English law has recognized various forms of electronic signatures and case law confirms that they satisfy requirements for signature where there is evidence that the signatory intended to authenticate the document.

**MODEL 2: Image and Digitally signed are both valid unless proved otherwise (Australia)**

Australian courts will typically treat an arbitrator's signature or certification as **prima facie evidence** of valid certification unless disproved by a challenging party.



# Global Survey . . .



## **MODEL 3:** Image and Digitally signed are probably valid (Argentina)

No express provision under Argentinian law on this issue but Argentine courts are enforcing all types of electronically signed decisions and given that the court proceedings have become digitalized, it is likely that image and digitally signed awards will be accepted as valid for the purpose of recognition and enforcement of awards.

## **MODEL 4:** Images not valid, digitally signed valid (Austria)

- According to the Supreme Court, the authenticity of the arbitrator's signatures need to be confirmed; It cannot be confirmed with an image of an arbitrator's signature. Therefore, even though not addressed directly, an image would not be considered as original for purposes of recognition and enforcement.
- As regards digitally signed awards, the digital signature can only be authenticated if it fulfils the requirements of a qualified electronic signature issued by a trusted service provider under the Austrian Signature and Trusted Services Act (implementing EU Regulation No. 910/2014 of 23 July 2014).



# Global Survey . . .



## **MODEL 5:** Image and Digitally signed are both not recognized (Egypt)

- Egypt enacted Law No. 15 of 2004 for digital signatures but it has not been implemented in relation to signing of arbitral awards.
- Courts are accustomed to receiving signed awards – the award must be authenticated and cannot be electronically signed or submitted electronically to the court.

## **MODEL 6:** Domestic awards no image/digital signature; foreign awards uncertain (Greece)

- In domestic arbitrations, there is an explicit requirement for an arbitral award to bear a handwritten signature (Art. 892(1), GCCP).
- Such a requirement does not explicitly exist in the Greek Law on International Arbitration, which provides that an original signed hard copy of the arbitral award should be communicated to each of the parties without, however, specifying whether such a signature should be handwritten or can be electronic.



# Potential Solutions . . .

- Need “functional equivalents” for various types and levels of signature requirements.
- Draw on existing UNCITRAL model laws.

## Art. 7. Signature

“Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to **identify that person** and to indicate that **person’s approval of the information** contained in the data message; and

(b) that **method is as reliable as was appropriate** for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.”

UNCITRAL

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL  
Model Law on Electronic Commerce  
with Guide to Enactment 1996  
with additional article 5 *bis*  
as adopted in 1998



UNITED NATIONS

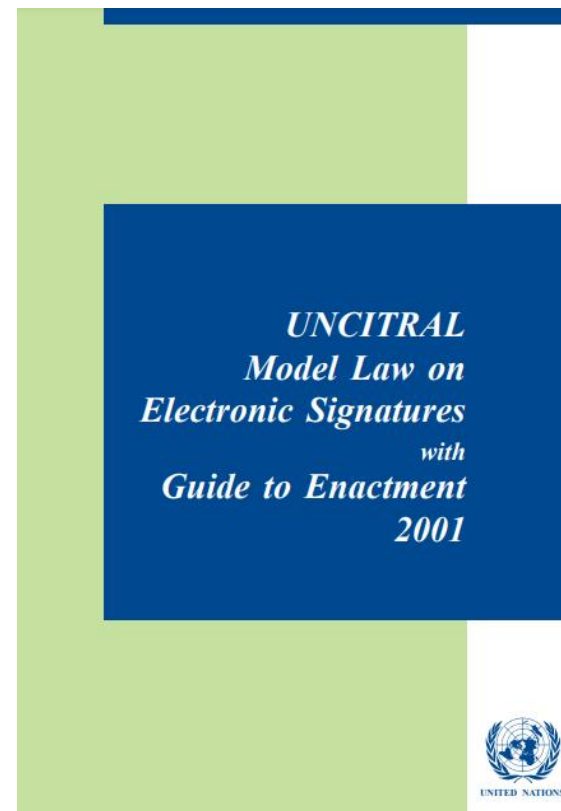
# Potential Solutions . . .

## **Art. 3: Equal Treatment of Signature Technologies**

“Nothing in this Law, except Article 5 [variation by agreement], shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfied the requirements referred to in article 6, paragraph 1 [reliable and appropriateness] or otherwise meets the requirements of applicable law.”

## **Commentary**

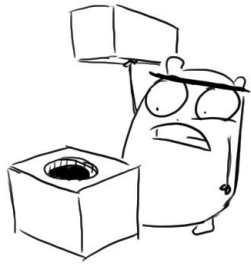
“no disparity of treatment between electronically signed messages and paper documents bearing handwritten signatures or between various types of electronically signed messages . . .”



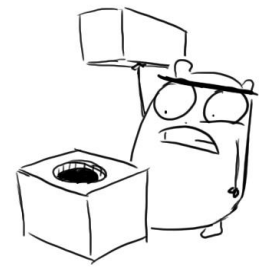
## Chapter 3

# Delivery to Each Party





# The Problem



- UNCITRAL Model Law requires delivery of the party which triggers deadlines for setting aside the award.

## **UNCITRAL Model Law (2006), Art. 34(3):**

### **Application for Setting Aside as Exclusive Recourse Against Arbitral Award**

“An application for **setting aside may not be made after three months** have elapsed from the date on which the party making that application had **received the award** or, if a request had been made under article 33 [correction and interpretation of award], from the date on which that request had been disposed of by the arbitral tribunal.”

### **Questions not answered by the Model Law?**

- When is an award deemed delivered?
- What is a reliable means for delivery?

# Potential Solutions . . .

“An electronic award is delivered if **a reliable method** is used to:

- (i) Indicate the **time and date** when the data message was received for delivery and the time and date when it was delivered;
- (ii) Detect any **alteration** to the data message after the time and date when it was received for delivery to the time and date when it was delivered, apart from the addition of any endorsement or information required [by this provision], and any change that arises in the normal course of communication, storage, and display; and
- (iii) **Identify** the sender and the recipient.”

UNCITRAL

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on  
the Use and Cross-border  
Recognition of Identity  
Management and Trust Services



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# So ... in summary

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## Chapter 4



We have the  
tools within  
legal docs. . .

. . . We need  
to integrate





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LinkedIn: <https://www.linkedin.com/in/duggalkabir/>