

# UNCITRAL and electronic awards: Exploring desirable approaches

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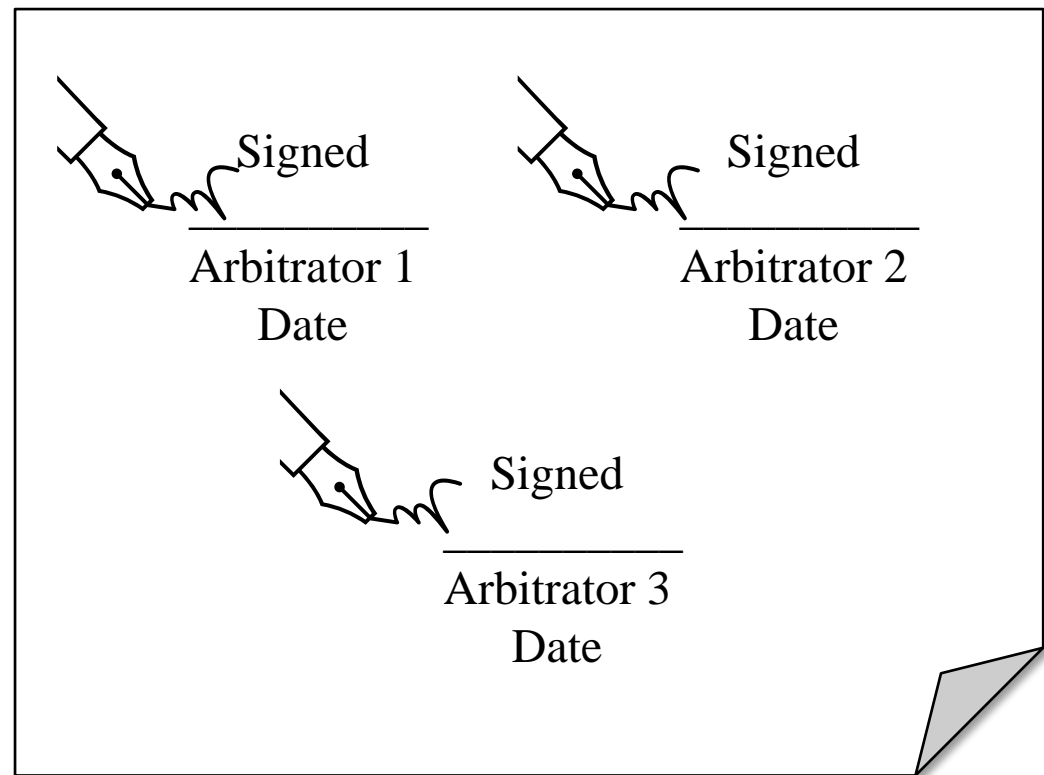
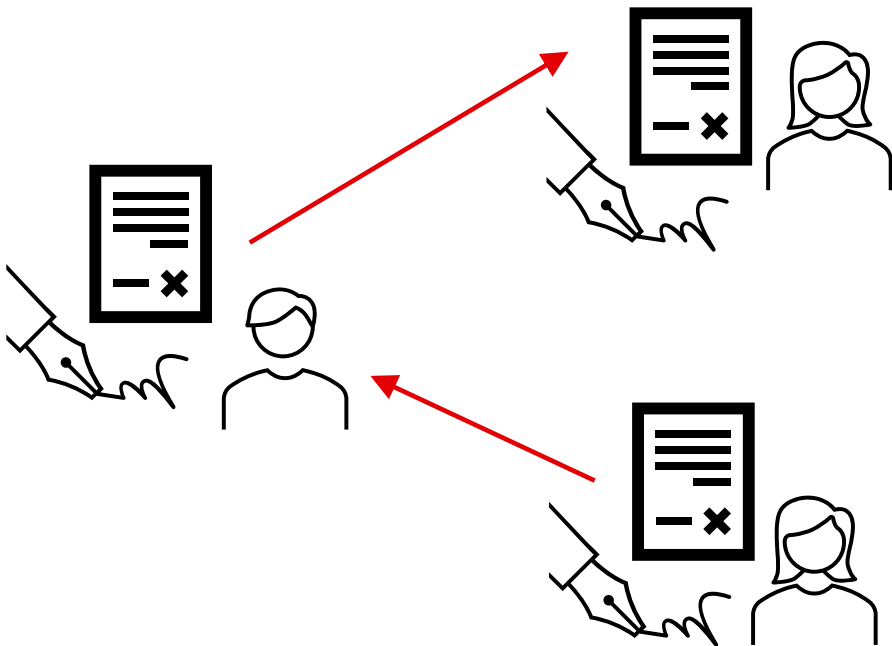
## AGENDA

1. **Definition** of electronic award
2. Supplementary **convention** or **protocol**
3. **Recommendation** on the interpretation of the New York Convention
4. Amendment to the **Model Law**



# Electronic awards: *status quo*

- Electronic **courtesy copies** are **common**
- **Digital originals** are **far less common**



# Status quo / 1

In a **minority** of seats, the *lex arbitri* **expressly empowers** the tribunal to render a **digital original**

## **Example: Article 1072b(3) Dutch Code of Civil Procedure**

The award referred to in Article 1057(2). **may also be made in electronic form** by providing it with a **qualified electronic signature** as referred to in Article 3(12) of Regulation EU. No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market repealing Directive 1999/93/EC (OJ 2014 L 257).

# Status quo / 2

In seats where no such provision exists, a **digital original** will often be an **existing and valid arbitral award**, on the basis of:

- Non arbitration-specific legislation on the **legal status of electronic documents**;
- Non arbitration-specific legislation on **digital signatures**.

E.g. in the EU, **eIDAS Regulation**: Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC



## GERMAN DRAFT BILL ON THE MODERNIZATION OF ARBITRATION LAW

Proposal:

- Possibility to issue an award in **electronic form**;
- Requirement for a **qualified electronic signature**;
- Possibility of **objection by any of the parties** or of **subsequently requesting a paper copy**.





## **SVEA COURT OF APPEAL T3385-22 (FRIENDLY V. ELSA)**

- Time-limit for the making of the award: **21 January 2022;**
- On 21 January 2022, the Tribunal's Secretary copy-pastes into a Word document the **scanned signatures** of the arbitrators, generates a PDF and sends it to the parties;
- **One week later**, the tribunal physically signs the last page of the award and **sends originals to the parties;**
- Setting aside application based on alleged failure to comply with signature requirements under Section 33(1)(3) SAA



## COMMON PRACTICE AT THE RECOGNITION AND ENFORCEMENT STAGE

Even if the law of the seat often allows (explicitly and implicitly) the issuance of a **digital original**, it may be in practice necessary for the parties to supply a **paper copy**, if they wish to:

- **Serve/notify** the award on the counterparty;
- File a request for **setting aside/annulment**;
- Commence **domestic enforcement**;
- Use the award as a title for a filing in a **public registry**;
- Rely on the **estoppel/res judicata** effect of the award in court.





# Option 1: Supplementary Convention or Protocol

# A/CN.9/1190: The Protocol's content

- **Definitions** (incl. “digital arbitral award”);
- **Obligation to recognize and enforce** electronic awards;
- **Production requirements** for the award creditor.



# Obligation to recognize and enforce

27. A draft instrument may include a provision setting forth that the contracting **States should recognize electronic awards as binding and enforce them in accordance with article III of the New York Convention.** As a matter of drafting, the provision could also replicate the text of article III of the Convention and replace the term “arbitral awards” with the term “electronic arbitral awards”.

## WOULD SUCH A PROTOCOL SEND AN UNINTENDED NEGATIVE SIGNAL?

- The Protocol **cannot affect** the interpretation of the New York Convention with respect to States that are not parties to the Protocol (Art. 31 VCLT);
- *19. A provision explicitly setting forth that **the provisions of a draft instrument should not affect the interpretation of the provisions of the New York Convention** may be included to address potential concerns about a draft instrument affecting the interpretation of the New York Convention.*



# The “core innovation”: Production requirements

## Article IV(1) New York Convention

To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The **duly authenticated original award** or a **duly certified copy thereof**;
- (b) The original agreement referred to in article II or a duly certified copy thereof

# Legal consequences of Art. IV(1) NYC

- Without a doubt, **already today**, contracting States **may** recognize and enforce a digital original, without requesting a certified paper copy
- But are the contracting States **obliged** to do so? Two possible answers:
  1. **“Maximalist” view: Yes**, and therefore, national enforcement authorities **breach** the Convention whenever they request an award creditor to produce a **paper copy of a digital original**.
  2. **“Minimalist” view: No**. The Contracting States can request the award creditor to produce a **duly certified paper copy**.

## ADDED VALUE OF THE PROTOCOL

- The protocol would require the contracting States to afford the award creditor a **more favourable treatment** that the one of Art. IV(1), which Art. VII(1) NYC allows for;
- The NYC parties that do not accede to the protocol would be allowed to request the production of **paper copies** of an electronic award;
- This divergence is **a feature, not a bug**: more favourable treatments are in any event possible under article VII(1), as can be seen e.g. in article 35 ML 2006.



# Option 2: Recommendation



# Recommendation on NYC

- Precedent: **2006 Recommendation** with regard to arbitration agreements
- **Approach 1:**
  - Reiterating that **article III** applies to **electronic awards**;
  - Interpreting **article IV(1)** as **encompassing electronic awards**.
- **Approach 2:**
  - Proposing a broad interpretation of “**arbitral award**”, encompassing **electronic awards**;
  - Reiterating that **article VII(1)** allows for more favourable derogations of article IV.

# **Option 3: Amendment to the Model Law**

# Possible amendments to the Model Law

- Art. 2: Definitions
- Art. 31(1): Written Form requirement
- Art. 35: Obligation to enforce and production requirements



Reference to **electronic arbitral award** and **electronic signatures**

## Consequences:

1. In some enacting States, simply **reiterating** what non arbitration-specific legislation already ensures (i.e. possibility to **sign** an award digitally and issue a **digital original**);
2. In other enacting States, **introducing** a new possibility for tribunals, institutions and parties to consider.

# Thank you!

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