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Stocktaking of developments in dispute resolution in the digital economy – future work proposals

Note by the Secretariat

Contents

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I. Introduction

1. At its fifty-sixth session in 2023, the Commission considered the notes by the Secretariat on taxonomy and preliminary findings of the stocktaking of developments in dispute resolution in the digital economy (A/CN.9/1154 and A/CN.9/1155). The notes were prepared as part of the project on the stocktaking of developments in dispute resolution in the digital economy (DRDE) (hereinafter "stocktaking project" or "DRDE project").

2. Having considered the notes, the Commission requested the secretariat to continue to implement the stocktaking project, including the "World Tour", and to put forward proposals for possible legislative work with a focus on the topics on the recognition and enforcement of electronic awards and on electronic notices of arbitration and their delivery. Additionally, the Commission requested updates on the progress made.[1]

3. Summaries of the discussions held in the implementation of the stocktaking project from July 2023 to March 2024 are contained in document A/CN.9/1189. In essence, the development of digital technologies and technology-enabled services and the efforts made to leverage them to enhance the quality of dispute resolution processes have been notable. Such technologies or services range from using videoconferencing for online hearings, online platforms or blockchain for case management, and relying on electronic forms of submissions and evidence, to using artificial intelligence (AI) for extracting information, predicting outcomes, and drafting submissions and decisions. This is in line with the work on digitizing trade, including to facilitate paperless trade.

4. The findings of the stocktaking project indicate that the need to develop an internationally harmonized legal framework or guidance is not necessarily pressing nor mature in all areas. As for the conduct of online hearings, arbitral institutions have developed protocols or guidelines which sufficiently ensure the integrity of such hearings and further work does not seem to be warranted. With respect to the use of AI in dispute resolution, real use cases in which AI tools are deployed in a potentially controversial manner are still limited and the gaps to be addressed and the solutions needed are not yet clear enough to carry out legislative work, while continued monitoring may be warranted. The findings further demonstrate that UNCITRAL texts are flexible enough to accommodate the evolving use of different technologies. Furthermore, the use of technologies has been reflected in the UNCITRAL Expedited Arbitration Rules and the need to address technical matters, which may involve digital technologies, in resolving disputes has been tackled by Working Group II in its work on specialized express dispute resolution.[2]

5. At the same time, the findings of the stocktaking project[3] suggest that the reliance on electronic awards and electronic notices of arbitration are impeded and there is merit in removing or reducing obstacles. Parties, arbitral tribunals, and arbitral institutions continue to rely on paper-based awards, especially because competent authorities require parties to supply paper-based awards in their enforcement procedures. There is, however, a general acknowledgement that digitizing the process of making, delivering and enforcing arbitral awards results in time and cost savings. Doing so aligns with the broader trend towards achieving quicker and more efficient dispute resolution, which comes at a time when undue delays are becoming increasingly unacceptable. The findings suggest that the legal framework developed by UNCITRAL could be updated to remove real or perceived obstacles to relying on electronic awards. Similarly, given that the delivery of notice

[1] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), paras. 203–215.

[2] A/CN.9/1181.

[3] For findings on electronic awards, see A/CN.9/1189, paras. 14–16, 31–33, 39–43, 49–61 and 69–71. For findings on electronic notices of arbitration, see ibid., paras. 28–30, 42 and 62–64.

of arbitration is another phase in arbitral proceedings that continues to be paper-based,[4] work on the delivery of electronic notices may also be timely.

6. The exploratory work on platform-based dispute resolution suggests that dispute resolution services on platforms are developing in forms that are different from conventional dispute resolution.[5] As such, there may be a need to explore their specificities in light of fundamental standards applicable to dispute resolution, such as party autonomy and due process.

7. In light of the foregoing, this note proposes legislative work on the recognition and enforcement of electronic awards (section II, A) and on electronic notices of arbitration and their delivery (section II, B). It also suggests continuation of the exploratory work on platform-based dispute resolution and the monitoring of the use of AI tools in dispute resolution.

II. Proposed legislative work

A. Recognition and enforcement of electronic arbitral awards

1. General remarks

8. As highlighted by the discussions held during the "World Tour" since the inception of the DRDE project in December 2021, enabling the reliance on electronic awards is expected to play a crucial role in achieving further time and cost efficiencies, thereby complementing efforts to streamline arbitral proceedings. Furthermore, as evidenced by the impact of the COVID-19 pandemic on traditional mail and courier services, digitizing the processes in arbitral proceedings, including that relating to awards, will ensure the uninterrupted delivery of justice in the event of similar disruptions.[6] This will also align with the development of digital trade generally and in particular the transition of courts to paperless proceedings.

9. Despite their benefits, electronic awards are not widely used in practice yet. The standard practice is still that awards are made in paper form and delivered to the parties and supplied to courts in that form. Obstacles to facilitating the reliance on electronic awards can be found in: (i) domestic laws implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) that explicitly require awards to be made on paper and transmitted physically, or are perceived as such; (ii) domestic laws on enforcement proceedings and their administration that continue to foresee the use of paper-based documents; and (iii) fragmentation of domestic laws on electronic signatures in different jurisdictions. As a result, the overarching issue is that electronic arbitral awards may not be enforceable under such legal frameworks.

10. The New York Convention provides the basic framework for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. Article IV of the Convention requires the party seeking recognition or enforcement to provide the original award or a duly authenticated copy, the original arbitration agreement or a duly certified copy thereof as well as possibly a certified translation if the award or arbitration agreement is not in the official language of the country where recognition or enforcement is sought. The New York Convention, however, does not oblige and incentivize its Contracting States to enact and implement laws for the recognition and enforcement of electronic awards.

11. The United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) provides for uniform rules to remove obstacles to the use of electronic communications in international contracts. Article 20(1) of the ECC expanded its application to electronic communications exchanged in connection with

[4] A/CN.9/1189, para. 42 and A/CN.9/1155, para. 46.
[5] A/CN.9/1189, paras. 75–82.
[6] Ibid., paras. 33 and 49.

contracts covered by other international conventions, such as the New York Convention, unless such application has been excluded by a Contracting State. Thus, electronic communications exchanged in connection with the formation of such contracts, including those containing an arbitration agreement, benefit from the favourable regime provided by the ECC, which assures that contracts formed and other communications exchanged electronically are as valid and contractually binding as their traditional paper-based equivalent.[7]

12. For arbitral awards, however, existing UNCITRAL texts do not refer to the use of electronic means.[8] For instance, article 31 of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (MAL), which sets forth the general requirements on the form and contents of the award, provides that the award should be made in writing (article 31(1)) and that the award should be signed by the arbitrator or arbitrators (article 31(2)). The MAL, however, does not stipulate how awards in electronic form could meet the form requirements. This is in contrast to article 7, option I, paragraph 4 of the MAL, which provides the functional equivalence rule for arbitration agreements in electronic form or article 7, option II, which does not require arbitration agreements to be "in writing".

13. Emphasizing that uncertainty possibly persisted even if parties agreed to, and rules of arbitral institutions foresaw the making of electronic awards, the Commission, at its fifty-sixth session in 2023,[9] suggested that the secretariat should present legislative options in putting forward that topic as future work. The Commission also suggested that the secretariat should consider the reasons that led the Commission not to consider possible amendments to the New York Convention in relation to the requirements for the written form of arbitration agreements, as well as the circumstances on which the Commission was able to rely when adopting the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2006 Recommendation).[10]

14. The following presents legislative options to address this topic and lists potential issues that may arise.[11] These findings and options are based on the inputs from practitioners, academics and stakeholders consulted in the DRDE project and are intended to assist but not pre-empt any future deliberations, should work on this topic be undertaken by a working group. They are also not intended to endorse any specific interpretation of the legal texts referenced.

2. Legislative options

(a) Supplementary convention or protocol on the recognition and enforcement of electronic arbitral awards

15. One option is to develop a supplementary convention or a protocol to the New York Convention (a "draft instrument"). This approach aims to uphold the New York Convention as the foundation of international arbitration while addressing the specificities of electronic awards in a separate instrument, providing for the obligation to recognize and enforce electronic awards and to ensure that competent authorities accept electronic awards supplied via electronic means in their recognition and enforcement procedures.

16. A draft instrument may include provisions on: (i) scope of application and relationship with the New York Convention; (ii) definitions; (iii) obligation of

[7] A/CN.9/569, paras. 73–79 reflect the discussion on a possible inclusion of the New York Convention in the list of international instruments to which the draft convention on the use of electronic communications in international contracts applies.

[8] UNCITRAL, *Taxonomy of legal issues related to the digital economy* (United Nations publication, Sales No. E.12.V.11), para. 161.

[9] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), paras. 208–209.

[10] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex II.

[11] A/CN.9/1189, paras. 14–16, 31–33, 39–43, 49–61 and 69–71.

contracting States to recognize and enforce electronic awards; and (iv) formal requirements for the recognition and enforcement of electronic awards. The use of electronic means for the formation of arbitration agreements may also be addressed in the draft instrument.

Scope of application and relation with the New York Convention

17. If the preparation of a draft instrument is to capture the obligation of the contracting States to recognize and enforce electronic awards and to ensure that their competent authorities recognize and enforce electronic awards supplied via electronic means without affecting the provisions of the New York Convention, a clarification on how it complements the existing international arbitration framework by providing a precise delineation of the scope or subject matter may be needed.

18. For the sake of clarity, a draft instrument may also provide that it complements the New York Convention and stipulate that its provisions apply unless expressly provided otherwise. Namely, the provisions of the New York Convention that do not require the consideration of the specificities of electronic awards, such as articles V, VI and VII of the Convention, may remain unchanged in the application of this draft instrument.

19. Furthermore, 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 (see para. 46 below).

20. By clearly defining the scope and purpose and affirming that this instrument aligns with, rather than alters, the existing provisions of the New York Convention, potential concerns about any impact on their interpretation may be addressed.

Definition

21. The New York Convention does not define the term “arbitral awards” and the same approach may be followed. For example, the term “electronic arbitral award” may be defined as an arbitral award in the form of data messages.

22. This definition could encompass an award made in the form of data messages and maintained in this form throughout in the subsequent phases, i.e., when it is delivered to the parties and supplied to the court for enforcement.

23. This definition could also encompass an arbitral award made on paper but subsequently converted into electronic form and delivered to the parties via electronic means. Such a comprehensive definition could ensure that a wide range of scenarios is covered.

24. It is foreseeable that circumstances may arise in which a paper-based award and its electronic equivalent co-exist.[12] This could raise several questions such as, if a paper-based version of the arbitral award was delivered physically and, at the same time, its electronic version was delivered electronically to the parties, the delivery of which version triggers the commencement of time limits for actions such as setting aside proceedings. A possible response to this question may be that such time limits commence when the party receives the paper-based version or the electronic version of the arbitral award whichever happens first and that the timing of receipt will be for the parties to substantiate as a matter of fact. Additionally, if discrepancies exist between the paper-based and electronic awards, determining which version prevails would become necessary.

25. In practice, so-called “courtesy copies”, such as scanned versions of the paper-based original awards, are at times electronically communicated to the parties for informational purposes while the paper-based versions are being physically

[12] The concurrent use of different means of communications was already foreseen in the UNCITRAL Notes on Organizing Arbitral Proceedings, 7. Means of communication, para. 57.

delivered. This also raises a question how those courtesy copies of awards could be kept out of the meaning of "electronic arbitral award".

26. The definitions of the terms "data messages" and "electronic communication" could align with those provided in UNCITRAL texts on electronic commerce, including the ECC, ensuring consistency across UNCITRAL texts. Accordingly, the term "data messages" may be defined as information generated, sent, received or stored by electronic, magnetic, optical or similar means; and the term "electronic communication" may be defined as any communication by means of data messages.[13]

Obligation to recognize as binding and enforce electronic awards

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".

Formal requirements for recognition and enforcement of electronic awards

28. The essentials of a draft instrument may be a provision which stipulates that the party applying for recognition and enforcement should supply via electronic means to the competent authority the electronic award, arbitration agreement and, if required, translation of the electronic award.

29. A party seeking recognition and enforcement of an arbitral award pursuant to article IV(1) of the New York Convention is required to supply to the competent authority "[t]he duly authenticated original award or a duly certified copy thereof" and "[t]he original agreement referred to in article II or a duly certified copy thereof". In contrast, a draft instrument may provide that a party is required to supply via electronic means to the competent authority the "electronic arbitral award" and the electronic version of the arbitration agreement. The electronic version of the arbitration agreement may either be an arbitration agreement formed electronically or that formed on paper but later converted into an electronic file.

30. There is a question as to whether to retain the notions of "original" and "copy" in relation to electronic awards and arbitration agreements formed or supplied by electronic communications. The notions of original and copy may be difficult to reconcile with electronic communications, which are the means through which the electronic award and the arbitration agreement are supplied to courts. If the term "original" was defined as the medium on which information was fixed for the first time, practically, originals could never be supplied. While originality of documents may be of importance in certain commercial transactions, under article IV(1) of the New York Convention, originals and copies are both treated equally as acceptable. As such, electronic awards and arbitration agreements may not need to be distinguished between originals and copies, but regardless, the integrity of electronic awards and arbitration agreements needs to be preserved for their recognition and enforcement.[14]

31. Different entities involved in enforcement proceedings within a State, which may often be courts but also land registries, may be in different phases of digitizing their processes. There could be situations where a State may have completely digitized court proceedings, but processes administered by land registries be still paper-based. To enable such a State to become a contracting State, a draft instrument may allow reservations on specific authorities.

32. If the electronic award is not made in the official language of the country in which the award is relied upon, the party applying for recognition and enforcement of an electronic award should produce a translation of these documents into that

[13] Article 4(b) and (c) of the ECC.

[14] UNICTRAL, *Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, paras. 166–170.

language. In this regard, a draft instrument may stipulate that the party should produce and supply the translation electronically to the competent authority.

Electronic arbitration agreements

33. Article 20(1) of the ECC ensures that articles 9(2) and (3) apply to the use of electronic communication in connection with the formation or performance of arbitration agreements under the New York Convention. Hence, the issue as to the use of electronic means for the formation of arbitration agreements is resolved in the Contracting States to the ECC. Nevertheless, containing the necessary arbitration-related provisions within a single instrument could be beneficial, considering that a valid arbitration agreement is a precondition for an enforceable award.

34. A draft instrument may stipulate how the requirements of "in writing" and "signed by the parties" with regards arbitration agreements may be met through electronic means.[15]

35. This could follow the functional equivalent approach taken in the ECC. The functional equivalent approach is a method in which an analysis of the purposes and functions of the traditional paper-based requirements is carried out with a view to determining how those purposes and functions could be fulfilled through electronic means, and extends the scope of notions such as "in writing" and "signature" so as to be applicable to electronic means.

36. As for the "in writing" requirement, the draft instrument may provide that the requirement that an arbitration agreement be in writing under article II(1) of the New York Convention is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference, as per article 9(2) of the ECC.[16]

37. Regarding the signature requirement, following article 9(3) of the ECC, a draft instrument may provide that the requirement that an agreement should be signed by the parties or contained in an exchange of letters or telegrams under article II(2) of the New York Convention is met in relation to an electronic arbitration agreement if: (a) a method is used to identify the parties and to indicate the parties' intention in respect of the information contained in the arbitration agreement; 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 (a) above, by itself or together with further evidence.

38. The question as to whether an arbitration agreement formed by electronic means meets such requirements affects the jurisdiction of the arbitral tribunal. While (i) and (ii) above are sufficient for transactional purposes, in the context of disputes, a suggestion was made that an additional standard for the parties as to the circumstances under which signatures embodied in the electronic arbitration agreement should be recognized as valid may be provided. Accordingly, it was suggested that in addition to (i) and (ii) above, a draft instrument may stipulate that the requirement is also met when the method used is deemed to have fulfilled the function of a signature under the law to which the parties have subjected it or, failing any indication thereon, under the law of the place of arbitration.

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[15] UNCITRAL, *Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, paras. 50–51. Specific requirements on electronic formation of arbitration agreements are needed because an electronic communication or a data message, in and of itself, cannot be regarded as an equivalent of a paper document as it is of a different nature and does not necessarily perform all conceivable functions of a paper document. While paper-based documents are readable by the human eye, electronic communications or data messages are not unless they are printed on paper or displayed on a screen.

[16] Ibid., para. 146. The word "accessible" is meant to imply that information in the form of data messages should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained.

Historical background and other considerations

39. The suggestion of the Commission to consider the reasons which led to the 2006 Recommendation and the amendment to the MAL, while the New York Convention remained unchanged, is suggestive of further analysis as to whether the same reasons apply to the preparation of a draft instrument.

40. It is recalled that, at its thirty-second session in 1999, the Commission had before it a note by the Secretariat entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460, paras. 22–31), in which the extent to which modernization of the New York Convention was needed with respect to the formation of arbitration agreements.

41. The Commission felt that work might be needed on two general issues, namely, the issue (i) of the written form requirement and its implications with respect to modern means of communication and electronic commerce, and (ii) of consent by the parties to an arbitration agreement where the arbitration agreement was not embodied in an exchange of letters or telegrams.[17] Various views were expressed as to the means through which modernization of the New York Convention could be sought, including: by way of (a) an additional protocol; (b) model legislation for adoption by States, which would apply pursuant to article VII(1) of the Convention; (c) in addition to such model legislation, guidelines or other non-binding materials to guide State courts in the application of the Convention; or (d) a separate convention to deal with situations which arose outside the sphere of application of the Convention, including situations where the arbitration agreement failed to meet the form requirement established in article II(2) of the Convention.[18] The Commission referred the issues to a working group for further consideration.[19]

42. At its thirty-second session (Vienna, 20–31 March 2000) and thirty-sixth session (New York, 4–8 March 2002), the Working Group considered at length the various arguments for and against the preparation of a protocol to amend the New York Convention. Support was expressed for the preparation of a protocol based on the argument that an interpretative instrument was not sufficient to deal with the practical problems and the existing disharmony in the application of article II(2) of the New York Convention. At the same time, there was hesitation based on the fact that the Convention was widely adopted and extremely successful and that discussing changes to the Convention could lead to reopening other provisions. In support, it was said that formally amending or creating a protocol to the New York Convention would likely exacerbate the existing lack of harmony in its interpretation, because the adoption of such a protocol or amendment by a number of countries would take a significant number of years and create more uncertainty in the interim.[20]

43. While the concerns above raised on the preparation of an amending protocol to the New York Convention to modernize article II(2) of the Convention may in some ways be valid in contemplating whether a draft instrument should be prepared, the circumstances on which the consideration of a draft instrument will be based may be fundamentally different.

44. As mentioned above, the lack of harmony in interpretation by domestic courts regarding article II(2) of the New York Convention led to discussions on its modernization, but the disharmony was primarily due to linguistic discrepancies between the different language versions of the New York Convention, all of which were equally authentic (see para. 60 below).[21] This root cause which created an unintended divide regarding the interpretation of article II(2) of the Convention existed from when it was adopted. Addressing this issue by way of a protocol

[17] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 345.
[18] Ibid., paras. 347–349.
[19] Ibid., paras. 350 and 380.
[20] A/CN.9/468, para. 92 and A/CN.9/508, paras. 43–49.
[21] A/CN.9/592, para. 87.

presumably risked suggesting that certain language versions of the Convention were endorsed, while others were perceived as insufficient.

45. The same, however, may not apply to the development of a draft instrument. Unlike article II(2) of the New York Convention, there are no linguistic discrepancies in the articles which relate to arbitral awards. Furthermore, while the divide regarding the interpretation of article II(2) of the New York Convention was unintended, article VII(1) of the Convention allows Contracting States to adopt more pro-enforcement laws on which parties may rely. Thus, the divide that may occur between Contracting States of the New York Convention that are also contracting States to a draft instrument and those that are not in the interim is a divide that is foreseen by article VII(1) of the Convention and may inherently not be an issue.

46. A question may arise on whether a draft instrument may have an impact on the rights and obligations of the Contracting States to the New York Convention. A possible concern may be that a draft instrument might lead courts to interpret the term "arbitral awards" in the New York Convention in a narrow manner. However, article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) provides that, together with the context, "any subsequent agreement *between the parties* (emphasis added) regarding the interpretation of the treaty or the application of its provisions" should be taken into account in the interpretation of a treaty. Therefore, the mere existence of such a draft instrument is not to influence the interpretation of the New York Convention. Nonetheless, this concern may be further addressed by including a provision setting forth that a draft instrument should not affect the interpretation of the New York Convention (see para. 19 above).

(b) Amendment to the MAL

47. Based on the New York Convention, the MAL contributes to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations. Whereas the MAL addresses how arbitration agreements in electronic form could meet the "in writing" requirement, it is silent on whether the same can be done with awards in electronic form. To integrate electronic awards as titles that the parties can rely on for recognition and enforcement into the MAL, the term "electronic arbitral award" may need to be defined and articles 31 and 35 of the MAL may need to be updated.

Definition

48. In line with the draft instrument, the term "electronic arbitral award" may be defined as an arbitral award in the form of data messages. The term "data message" is already defined in article 7(4) of the MAL. Alternatively, the term "award" may be defined to encompass electronic awards.

49. If the term "electronic arbitral award" is defined separately, it would need to be clarified that the provisions of the MAL that contain reference to "award" or "arbitral award" also apply to electronic arbitral awards. Such a paragraph may be added to article 2 of the MAL.

Form and contents of award

50. Article 31(1) of the MAL provides the "in writing" and signature requirements of arbitral awards. A functional equivalence rule could be provided on how and when electronic awards meet those requirements.[22]

51. As for the "in writing" requirement, the MAL could provide that the requirement is met if the information contained therein is accessible so as to be usable for subsequent reference.

[22] See article 9(2) and (3) of the ECC with regards the "in writing" requirement and signature requirement respectively.

52. Regarding the signature requirement, the MAL could stipulate that the requirement that the award be signed by the arbitrators is met in relation to an electronic award if: (a) a method is used to identify the arbitrators and to indicate that the information contained in the data messages conveys the intention of the arbitrators; and (b) the method used is either: (i) as reliable as appropriate for the purpose for which the data messages were generated or communicated, in light of all the circumstances, including any relevant agreement; or (ii) proven in fact to have fulfilled the functions described in (a) above, by itself or together with further evidence.

53. This would be similar to the approach taken in the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Model Law on Mediation) with respect to settlement agreements (articles 16(6) and 18(2)).

54. According to (a) above, an electronic equivalent of a signature must serve to identify the arbitrators and ensure that the information contained in the data messages constituting the award accurately reflects the intention of the arbitrators.[23]

55. The criteria set forth as (b)(i) above establishes a "reliability test", which takes a flexible approach to the level of security to be achieved by the method of identification in (a) above.[24] The criteria set forth as (b)(ii) above validates an electronic signature of the arbitrators whenever the method used is proven in fact to have identified the arbitrators and indicated the intention of the arbitrators in respect of the information contained in the data messages, purported to constitute the electronic award.[25]

56. A suggestion was made that in addition to (i) and (ii) above, the MAL may stipulate that the requirement is also met when the method used is deemed to have fulfilled the function of a signature under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made (see para. 38 above).

57. Article 35(2) of the MAL provides that the party relying on an award or applying for its enforcement should supply the original award or a copy thereof. There is a question as to whether the notions of "original" and "copy" should be retained in the context of provisions on electronic awards in the MAL. As mentioned above, the concept of "original" is not necessarily compatible with the notion of data messages (see para. 30 above). Considering that the party may supply either the original award or a copy thereof when applying for enforcement, it may be unnecessary to distinguish between the original and a copy. What is of essence is the integrity of the information in the data message.

Recognition and enforcement

58. Similar to article 35 of the MAL, a provision setting forth that an electronic award that meets the above-mentioned requirements should be recognized as binding and enforced may be included in the MAL. Another possible approach would be that the form of the award would not be a ground for refusing recognition or enforcement.

Issues to be considered

59. Amendments to the MAL may be prepared independently or jointly with a draft instrument supplementing the New York Convention as was the case when the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) and the Model Law on Mediation were prepared.

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[23] UNCITRAL, *Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, para. 159.

[24] Ibid., para. 161.

[25] Ibid., para. 164. Notwithstanding the reliability test, the courts should not rely on that test to find that the electronic signature of the arbitrator is invalid when the actual identity and intention of the arbitrator are proved or when the validity of the electronic signature is undisputed.

(c) Additional recommendation on the interpretation of the New York Convention

60. The 2006 Recommendation was made to address diverging and conflicting interpretations of article II(2) of the New York Convention, which were due to discrepancies between the different language versions.[26] The underlying objective was also to encourage States to adopt the revised version of article 7 of the MAL and pro-enforcement laws.[27] An additional recommendation on the interpretation of the New York Convention in relation to electronic awards may thus be an option to consider, which may also be done jointly with the amendments to the MAL (as was the case of the amendments to the MAL in 2006) (see para. 44 above).

61. Theoretically, one possible approach of a recommendation for electronic awards may be to clarify that the term "arbitral awards" in the provisions of the New York Convention, including article III, should be construed to encompass electronic awards and that, in relation to article IV(1), Contracting States are under an obligation to ensure that their competent authorities accept electronic awards (with an arbitration agreement and, if required, a translation of the electronic award) for their recognition and enforcement supplied via electronic means. However, if this interpretation is recommended, it may only lead to highlighting that those Contracting States where such acceptance of electronic awards does not occur are taking an interpretation contrary to the recommendation. Furthermore, the discrepancies between the different language versions, which were the primary reason for the 2006 Recommendation, do not exist in the context of electronic awards.

62. Alternatively, the recommendation may state that: (i) the term "arbitral awards" in the New York Convention should be interpreted broadly and not limited to paper-based awards; and (ii) article IV should be interpreted to allow any party applying for recognition and enforcement to avail itself of rights it may have, under the law or treaties of the State where the arbitral award is sought to be relied upon, to seek recognition and enforcement of the award regardless of the form. While this approach does not have a bearing on the obligations which the Contracting States to the New York Convention undertake, it thus merely reiterates what is provided in article VII(1) of the Convention and may only have a minimal effect. To enhance the visibility and impact of the recommendation, the Commission might therefore propose directly to the General Assembly to adopt such a recommendation. This approach would differ from the one taken in 2006, offering more visibility.

B. Electronic notices of arbitration and their delivery

1. General remarks

63. Electronic communications have become an increasingly important means in arbitral proceedings. The value of conducting exchanges in arbitral proceedings via electronic means becomes evident especially when courier service or delivery by post are inhibited due to unforeseeable circumstances. In most arbitral proceedings today, some or all of the communications are carried out electronically.

64. The first phase in arbitral proceedings, however, remains exceptionally paper-based. The prevalent practice is that paper-based notices of arbitration are physically delivered. This is owing much to the significance of this phase. The effective delivery of notices of arbitration is pivotal to the conduct of arbitral proceeding and to the enforcement of arbitral awards. Arbitral proceedings may not be properly commenced and flawlessly conducted without the receipt of the notice of arbitration by the respondent. Proper delivery marks the receipt of a notice of arbitration by the respondent which commences the arbitration.[28]

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[26] A/CN.9/592, para. 87.
[27] Ibid., para. 86.
[28] Article 3(2) of the UNCITRAL Arbitration Rules.

65. Nonetheless, institutional arbitration rules have gradually shifted towards embracing electronic means for the delivery of notices of arbitration.[29] At the same time, on whether a notice of arbitration delivered via electronic means should be deemed as received by the respondent, courts have taken different approaches. It may thus be necessary to explore to what extent rules and standards in UNCITRAL texts may be updated and further guidance may be provided.

2. Court responses to electronic notices of arbitration

66. As mentioned above, whether a party was indeed given proper notice of the arbitration is an important question in the recognition and enforcement of arbitral awards. The New York Convention does not suggest any specific requirements on the form and delivery of a notice of arbitration. However, article V(1)(b) provides that if a party was not given proper notice of the arbitral proceeding, it could be a ground for refusing enforcement.

67. Some jurisdictions have enacted laws which explicitly stipulate electronic communication as means to deliver notices of arbitration.[30] Nevertheless, notices of arbitration delivered electronically have been challenged and found ineffective, resulting in refusal of recognition and enforcement of arbitral awards under article V(1)(b) of the New York Convention.

68. In some cases, courts did not accept that there was effective delivery as there was no clear proof that the notice of arbitration sent by email had actually been received by the respondent, notwithstanding that the electronic method of delivery was compatible with the applicable arbitration law.[31] Also, a court refused enforcement of a domestic arbitral award, since the electronic delivery of the notice of arbitration to the email address previously provided by the respondent upon entry into a loan agreement was not sufficient safeguard to the respondent's right of defence. That court held that the arbitral institution should have confirmed with the respondent if there was any change in the contact information and address upon the initiation of arbitration.[32]

69. Courts have different views on whether delivery to a general company email address amounts to effective delivery. A court found that the delivery of a notice of arbitration to the email address that a company held out to the world as the only email address of the company amounted to an effective delivery of the notice of arbitration.[33] That court rejected the argument that a notice of arbitration sent to the generic email address would be ineffective because a serious legal matter would not be sent to that address. It held that there was no reason why "delivery of a document by e-mail – a method habitually used by businessmen, lawyers and civil servants – should be regarded as essentially different from communication by post, fax or telex".[34]

70. On the other hand, recognizing that delivery was only valid if received by an authorized individual, another court found that the delivery of the notice of arbitration

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[29] See footnotes 38, 40 and 41. This trend is also seen in procedural rules of arbitral proceedings for State-to-State dispute settlement, for example, in paragraph 15 of the Rules of Procedures of Arbitral Tribunals of the Agreement between Japan and Australia for an Economic Partnership.

[30] Indonesia, Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution article 8(1); Malaysia, Arbitration Act 2005 articles 6(2) and 23; Peru, Arbitration Act articles 12(b) and 33; United Kingdom of Great Britain and Northern Ireland, Arbitration Act 1996 section 76.

[31] China, Supreme People's Court, (2006) Min Si Ta Zi No.34. In considering the recognition and enforcement of an arbitral award made in London, the Supreme Peoples' Court of China recognized that under the United Kingdom Arbitration Act 1996, email is an effective means of delivery. However, the claimant was unable to prove sufficient evidence that the respondent was properly delivered. See also Hong Kong Court of First Instance, G v P [2023] HKCFI 2173.

[32] China, Hohhot Intermediate People's Court, Inner Mongolia Autonomous Region (2019) Nei 01 Zhi No. 87.

[33] United Kingdom, High Court of England and Wales (Queens's Bench Division Commercial Court), *Bernuth Lines Ltd. v. High Seas Shipping Ltd.* [2005] EWHC 3020 Comm.

[34] Ibid., para. 28.

to the email address of an employee of the company, who was relatively junior within the company and not highly involved in the relevant transaction, was invalid. The court was of the view that the employee was not given express nor implied authority to accept delivery of legal and arbitral processes and deal with them.[35]

3. Electronic notices of arbitration under the UARs

71. Article 2 of the UNCITRAL Arbitration Rules (UARs) outlines the procedures for communicating notices and specifies the conditions under which such notices (encompassing notifications, communications or proposals) are considered to have been received. Therefore, this article also applies to notices of arbitration and is designed so as to provide ways in which a party may give proper notice to the other party without possibly giving rise to the grounds provided in article V(1)(b) of the New York Convention, while affording the other party a reasonable opportunity to receive notice and defend itself.

72. Article 2 of the UARs recognizes electronic notices. Article 2(1) of the UARs permits the transmission of notices through any means that provides or allows for a record of its transmission, thereby encompassing both the traditional delivery of paper documents or electronic means of communication.[36] Article 2(2) of the UARs expressly mentions delivery by electronic means, such as facsimile or email. Accordingly, a notice delivered to the designated or authorized address by facsimile or email would be deemed to have been received.

73. Article 2(2) to (4) of the UARs provides for primary and substitutional ways in which notices are received or deemed to have been received. Namely, article 2(2) addresses a situation where an address has been designated by a party or authorized by the arbitral tribunal and provides that delivery by electronic means such as facsimile or email may only be made to an address so designated or authorized. Article 2(3) addresses circumstances where an address has not been designated by a party or authorized by the arbitral tribunal. In that case, a notice is received if it is physically delivered to the addressee (article 2(3)(a)) or deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee (article 2(3)(b)).

74. As a last resort, pursuant to article 2(4) of the UARs, if after reasonable efforts delivery cannot be effected in accordance with article 2(2) or (3) of the UARs, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or attempted delivery.

75. In accordance with article 2(2), the delivery of a notice of electronic means such as email may only be made to a designated or authorized address. The reason for such limitation was that, considering the risk that email addresses such as general email addresses were not regularly consulted or used at all, there was a need to contain that risk and ensure that notices were not overlooked.[37]

4. Electronic notices of arbitration under institutional rules

76. An examination of institutional arbitration rules enables the gauging of contemporary changes in this respect. In contrast to the UARs, some institutional arbitration rules recognize electronic means of delivery even if the parties have not specifically designated an address for arbitral proceedings.

77. Certain institutional rules require the submission of arbitration requests be made electronically, either by email to an address previously agreed or designated by a party for the purpose of receiving any communication or other electronic means, such as

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[35] United Kingdom, High Court of England and Wales, *Glencore Agriculture BV (formerly Glencore Grain BV) v. Conqueror Holdings Ltd.* [2017] EWHC 2893 Comm.

[36] See also articles 3 and 34(2)(a)(ii) of the MAL, which are provided in a manner sufficiently flexible to encompass various means to communicate notices.

[37] UNCITRAL Summary record of the 908th meeting, A/CN.9/SR.908, para. 62.

via an electronic filing system.[38] In the absence of such designation or agreement on the use of the filing system, and if delivery by electronic means to a specific email address has been regularly used in the parties' previous dealings, any written communication delivered to a party by the same electronic means is treated as having been received by that party.[39]

78. Some institutional rules provide that, in the absence of a designated address, notices can be transmitted to the facsimile number or email address which the recipient holds out to the public at the time of such communication.[40]

79. Others have embraced the delivery of notices to online destinations, including email addresses, via electronic means as substitutional ways of delivering notices. Specifically, the delivery of electronic notices may be made to the email address the recipient holds out to the public at the time of such communication, if delivery cannot be effected after reasonable efforts have been made to deliver the notice through ways with more certainty in terms of bringing the content of the notice to the other party's attention.[41] This provides an additional avenue for a situation where the delivery of the notice cannot be effected at a physical address.

5. Possible work on electronic notices of arbitration

80. In light of the above, the Commission may wish to explore ways to enable a broader application of electronic means for notices in the arbitration framework, including a notice of arbitration. This may take the form of a revision of the UARs or a guidance text. The aim would be to provide legal certainty and address the extent to which electronic means for the delivery of notices of arbitration could be integrated, taking into account the provisions of the New York Convention and court responses under domestic law.

81. Specifically, article 2 of the UARs may be expanded to incorporate the delivery of notices via electronic means in circumstances where an online destination, such as an email address, is not designated by the parties in the arbitration agreement or otherwise.

82. As for the development of a guidance text, considering that courts in some States require confirmation of receipt, the guidance text could address circumstances in which there is a designated email address for the delivery of notices and how receipt can be confirmed. The text may provide relevant examples on the forms of proof of actual receipt.

III. Next steps

83. A finding of the stocktaking project, including its discussions in the "World Tour", is the desirability of developing an instrument for the recognition and enforcement of electronic awards, which could play an essential role in achieving increased efficiencies and resilience of arbitral proceedings. The Commission may wish to consider mandating a working group to proceed with work on the recognition

[38] Articles 1.3, 4.1, 4.2 and 4.3 of the LCIA Arbitration Rules 2020; articles 3.1 and 4.3 of the Dubai International Arbitration Centre Arbitration Rules 2022; articles 4.2 and 8.3 of the Netherlands Arbitration Institute, Arbitration Rules 2024; article 4 of the World Intellectual Property Organization, Arbitration Rules 2021; articles 3.1 and 3.1.1 of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Arbitration Rules (2022).

[39] Article 4.3 of the LCIA Arbitration Rules 2020.

[40] Article 3.1(c) of the HKIAC Rules.

[41] Article 2(4)(c) of the CRCICA Arbitration Rules 2024.

and enforcement of electronic arbitral awards.[42] If so, this document could serve as the basis for the deliberations as well as the approach taken in preparing the Singapore Convention and amending the Model Law on Mediation to address electronic settlement agreements.

84. The Commission may also wish to consider whether work on electronic notices of arbitration and their delivery is desirable possibly after the completion of or jointly with the work on electronic awards.

85. Regarding platform-based dispute resolution (see A/CN.9/1189, paras. 74–81), the Commission may wish to continue to monitor and explore the area. It may also wish to request the secretariat to continue its exploratory work in collaboration with the Inclusive Global Legal Innovation Platform on Online Dispute Resolution and taking into account the work at the Asia-Pacific Economic Cooperation, the International Organization for Standardization and the International Council for Online Dispute Resolution, and propose further work, including any standards to be developed, at the next session of the Commission in 2025. Lastly, the Commission may wish to suggest that the Secretariat continue to monitor the evolving use of AI tools in dispute resolution and to assess the desirability and feasibility of developing any legal standards in that regard.

[42] The Commission may wish to recall that, at its forty-sixth session, in 2013, it agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (iv) whether duplication might arise with work being undertaken by other international organizations. *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 303–304.