

Signing the Arbitral Award in Wet Ink: Resistance to Technological Change or A Reasonable Precaution?

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Electronic signatures (e-signatures) may affect in some cases arbitration's most valuable characteristic: the enforceability of the arbitral award.

In most jurisdictions, and in particular pursuant to Article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration, arbitral awards must be rendered in writing and contain the arbitrators' signatures. The enforceability risks of authenticating an arbitral award with an electronic signature will vary according to the applicable law at the place of enforcement (i.e. the *lex fori*) or by the laws of the arbitral seat. Such analysis also includes a judicial review of the national and international laws that regulate e-signatures. In some jurisdictions, arbitral awards may need to be signed in handwriting (wet ink) to be considered as valid. Therefore, despite the current need of moving towards remote process, the traditional practice of signing awards in wet ink may still be, in some cases, a reasonable precaution to reduce non-enforceability concerns in cross-border disputes.

Required formalities of the award under the New York Convention

Article IV(1)(a) of the New York Convention (NYC) requires the party applying for recognition and enforcement of an arbitral award to supply to the court, at the time of the application, the “*duly authenticated original award or a duly certified copy thereof*”. The NYC is silent on the requirements for an authentication or certification to be valid, and the applicable law under which such questions shall be determined.

Authentication refers to the formality by which the signature in the original is attested to be genuine whereas certification is the formality by which the copy is attested to be a true copy of the original (see [here](#) and [here](#)). Such formalities differ from State to State. The requirements of who may legalize the attestation of the award will also vary under different jurisdictions.

The NYC is also silent on the issue of e-signatures in arbitral awards. This silence should be interpreted in favor of technology when considering the pro-enforcement bias of the NYC. Courts also seem to be liberal in accepting the authentication and certification of an arbitral award when they are satisfied that the award was rendered just as it was supplied (see [here](#), [here](#), and [here](#)). Nevertheless, in the case of e-signatures, some jurisdictions may take a different approach according to the applicable law to the authentication and certification of the award. Thus, the local applicable formal requirements that an award may be subjected to will depend on a case-by-case analysis.

Applicable law to the authentication and certification of the award

The task of determining which law shall govern the authentication and certification of the award is uncertain. It is disputed whether the authentication and certification of the award mentioned in Article IV(1)(a) NYC shall be governed by the regulations set out in the *lex fori* or by the *lex arbitri*.

Under Article 4 of the 1927 Geneva Convention, authentication or certification of an award had to be done according to the law of the country in which the award was made. The drafters of the NYC opted for a different approach and deliberately omitted to indicate the law that governs authentication or certification “*to allow a greater latitude with regard to this question to the tribunal of the country in which*

the recognition or enforcement was being requested”.

The prevailing, but not uniform, view is that, for matters of efficiency, authentication and certification shall be governed by the applicable *lex fori* in which recognition and enforcement are sought.

Does the applicable law recognize e-signed foreign arbitral awards?

An electronically signed arbitral award may provide the same level of credibility as an award signed in wet ink in terms of its authenticity and integrity under most jurisdictions.

An e-signature is data in an electronic form, logically associated with a data message, which is used *“to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”* (see Article 2(a) of the UNCITRAL Model Law on Electronic Signatures with Guide to Enactment).

In principle, most jurisdictions should permit the arbitral award to be signed with an e-signature. Authorities have held in this regard that *“the advanced electronic signature of any arbitrator on an electronic award will be treated as being equivalent to a handwritten signature in Germany”* (see here) - as long as it complies with the requirements set out in the EU Regulation No. 910/2014. This example should be valid *mutatis mutandis* to other EU countries.

Nevertheless, in an international context, further factors need to be carefully assessed concerning e-signature(s) such as, for example: the specific type of electronic signature used, the process by which the signature is generated, and the applicable domestic and international e-signature regulations.

Some Latin American countries may require in some cases the existence of a reciprocity treaty in order to recognize the certification of a foreign document with an e-signature (see Argentina - Article 16 of Law 25.506, Costa Rica - Article 13 of Law 8454). In Dubai, formalities for foreign electronic signatures may also be applicable for arbitral awards (see here).

Considering the above, it is essential that the applicable law that regulates the formal requirements of an arbitral award recognizes electronic signatures and that

the e-signature in question meets such legal requirements. In case a local court refuses to recognize and enforce an award because of its signature, the award creditor could still resubmit an enforcement application with improved documentation (see [here](#)), but such procedure will delay the enforcement of the arbitral award.

International arbitration practice

Most institutional arbitration rules do not explicitly recommend the practice of signing arbitral awards with an e-signature, but state the award shall be in writing and/or signed by the arbitrators (see Article 35 of the [2018 HKIAC Rules](#), Article 42 of the [2017 SCC Rules](#), Article 32.4 of the [2016 SIAC Rules](#) , Article 30 of the [2014 ICDR Rules](#)).

Article 32.6 of the [2012 Swiss Rules](#) specifies that “*originals*” of the award shall be signed by the arbitrators (see also [ICC’s Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#)).

The common practice in some institutions is for the arbitral tribunal to sign the award in wet ink, scan it as a PDF attachment, upload it to the virtual platform (if any) or send it electronically, and send a signed hard-copy original of the award to the parties and/or the institution by courier or registered mail (see, for example, [SCC’s Platform Guidelines](#)).

According to [CIArb’s Guidance Note on Remote Dispute Resolution Proceedings](#), “[e]ven 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 award [...] as some national courts may reject enforcement if such documents were produced solely via digital means.**” (emphasis added) Thus, in an age of digital technology, it seems that there remains a preference for signing arbitral awards in wet ink.

Nevertheless, the [recently revised LCIA Rules](#) take a different stance. Article 26.2 of the [2020 LCIA Rules](#) (effective 01 October 2020) sets as the default rule that, unless otherwise agreed by the parties, or if the arbitral tribunal or LCIA Court directs otherwise, “*any award may be signed electronically*”. The author is not

aware of other international arbitration rules with a similar provision on e-signatures in arbitral awards. The [draft of the 2021 ICC Rules](#) is silent on e-signatures, but evidences a general shift away from paper filings ([see here](#)).

Conclusions

The e-signature of arbitral awards was not contemplated in the drafting of the NYC and under some jurisdictions arbitral awards may still need to be signed in wet ink. Arbitrators should therefore carefully assess the formal legal requirements in any potential enforcement forum before e-signing an arbitral award electronically. Such practice may be welcomed in some cases, depending on the jurisdictions involved.

There are no known cases to date in which the recognition or enforcement of an award has been refused because of the lack of compatibility of an electronic signature in an arbitral award. This issue, however, is likely to arise soon. In case it does, the award creditor may seek to resubmit the award with improved documentation. If the NYC were to be reformed to adapt it with technological change, Article 9 of the [United Nations Convention on the Use of Electronic Communications in International Contracts](#) could be seen as a starting drafting point concerning the form requirements of an arbitral award and arbitration agreement (for more on this topic, see [here](#)). It is yet to be seen if the LCIA Court or the parties will direct the tribunal to sign the award in wet ink or if the arbitrators will opt out themselves from the default option listed in Article 26.2 of the [2020 LCIA Rules](#).