



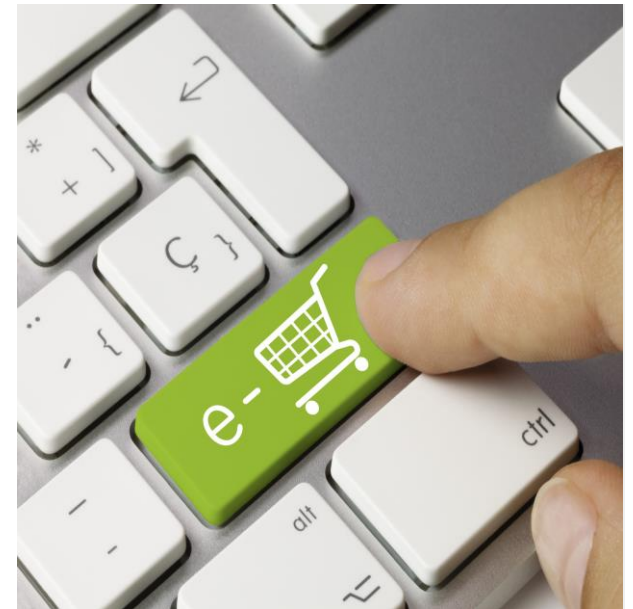
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# e-CC: ELECTRONIC COMMUNICATIONS CONVENTION

## ENFORCING ARBITRAL AWARDS IN ELECTRONIC FORM

8 APRIL 2016

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# OUTLINE

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- The New York Convention and Arbitration Agreements
- Practical issues under the current regime
- Current Trends: Revisions to the Model Law
- The Electronic Communications Convention (ECC)
- The ECC and the New York Convention
- Conclusion: Why adopt the ECC?

# THE NEW YORK CONVENTION AND ARBITRATION AGREEMENTS

- **156 State Parties:** provides for the international recognition and enforcement of arbitral awards and arbitration agreements
- Thailand acceded to the Convention in 1959; the Convention entered into force in 1960
- Under **Article II** the Convention obliges domestic courts of member states to recognize and enforce arbitration agreements that are in writing; **Article II (2)** defines writing to include ***“an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”***.
- Under **Article IV**, the recognition and enforcement of arbitral awards is made conditional upon the submission of ***“the original agreement referred to in article II or a duly certified copy thereof”***.



# PRACTICAL ISSUES UNDER THE CURRENT REGIME

- Rise in importance of **electronic communications** in establishing commercial relationships
- The New York Convention was drafted in the 1950's; it does not take stock of modern realities and the **progressive dematerialization of commercial documents**
- The Convention's objectives are undermined where domestic courts refuse recognition and enforcement of arbitral awards and agreements when the **writing** or **signature** requirement under Article II is not satisfied
- Example: A Norwegian Court refused to enforce an English award because, in its view, an exchange of e-mails did not satisfy the writing requirement under Article II(2) of the NY Convention, despite such an exchange being recognized under English law as acceptable evidence of a valid agreement to arbitrate. (*Halogaland Court of Appeal, 16 August 1999, (2002) XXVII YBCA 519*)

# CURRENT TRENDS: REVISIONS TO THE MODEL LAW

- **2006 revision to UNCITRAL Model Law**– states can choose to incorporate an updated definition of “Arbitration Agreement” into national law
- Article 7 (4) (Option I) Model Law provides : ***“The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference...”***
- Several jurisdictions have aligned their domestic arbitration laws with Article 7 (Option I) of the Model Law; Eg: s.2A(5) of the Singapore International Arbitration Act (Cap.143A Ed. 2002)
- S.5(6) English Arbitration Act 1996: ***“References in this Part to anything being written or in writing include its being recorded by any means.”***
- However, an arbitration agreement that is regarded as valid in one country may not be so regarded by the courts of the country in which the award falls to be enforced: **Need for intervention at Treaty level**

# THE ELECTRONIC COMMUNICATIONS CONVENTION (ECC)

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- Adopted in **November 2005**; entered into force on **1 March 2013**; **7** formal state parties
- The ECC facilitates the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically **are as valid and enforceable as their traditional paper-based equivalents.**
- The ECC is an enabling treaty whose effect is to remove formalities required by other international trade treaties (such as the **New York Convention**) by establishing equivalence between electronic and written form, while preserving **party autonomy** (Article 3 ECC).
- Under Article 1, the ECC applies where
  - the applicable rules of private international law provide for the law of an ECC state party to be applied to electronic communications in a particular instance; or
  - if the parties have validly chosen the law of a state party to the ECC as applicable law, or have chosen the ECC itself where the choice of non-State law is allowed.

# THE ECC AND THE NEW YORK CONVENTION I

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- Article 4(a) ECC defines “Communication” as: ***“any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract”***
- Article 20 ECC establishes **functional equivalence** between electronic and paper form with regard to “communications” to which other international treaties listed therein apply. The New York Convention is one such treaty identified under Article 20.
- In broad terms, the ECC applies to all communications exchanged in relation to the formation or performance of a contract by using all media that are not written or oral. The ECC therefore covers **arbitration agreements** under the New York Convention but **not arbitral awards**.

# THE ECC AND THE NEW YORK CONVENTION II

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## New York Convention

**Article II(1):** *“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship”*

## The ECC

**Article 9(2):** *“Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.”*



# THE ECC AND THE NEW YORK CONVENTION III

## New York Convention

**Article II (2):** *“The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, **signed by the parties** or contained in an exchange of letters or telegrams.”*

## The ECC

**Article 9(3):** Signature requirement is satisfied where *“(a) A method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication;”* and *“(b) The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated ... or (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence”*

# THE ECC AND THE NEW YORK CONVENTION IV

- **Article 9(4)** and **9(5)** of the ECC sets out the conditions where an electronic communication will satisfy a requirement to be in its “**original**” form.
- This covers **Article IV(1)(b)** of the New York Convention which requires the original or duly certified copy of the arbitration agreement to be submitted for enforcement purposes.
- Where the ECC applies, it would therefore suffice to submit a printout of the electronic communication establishing the arbitral agreement for the purposes of enforcing an arbitral award under the New York Convention



# CONCLUSION: WHY ADOPT THE ECC?

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- Brings the formal requirements under the New York Convention to recognize and enforce arbitral awards and agreements in line with modern practice at the treaty level
- If widely adopted, provides for greater harmonization without facing the impracticalities of amending the New York Convention: avoids disharmonious interpretation of the Convention by Domestic Courts
- Creates greater legal certainty with specific rules to address situations faced in present-day commercial arrangements and disputes
- Facilitates the development of electronic commerce on an international scale

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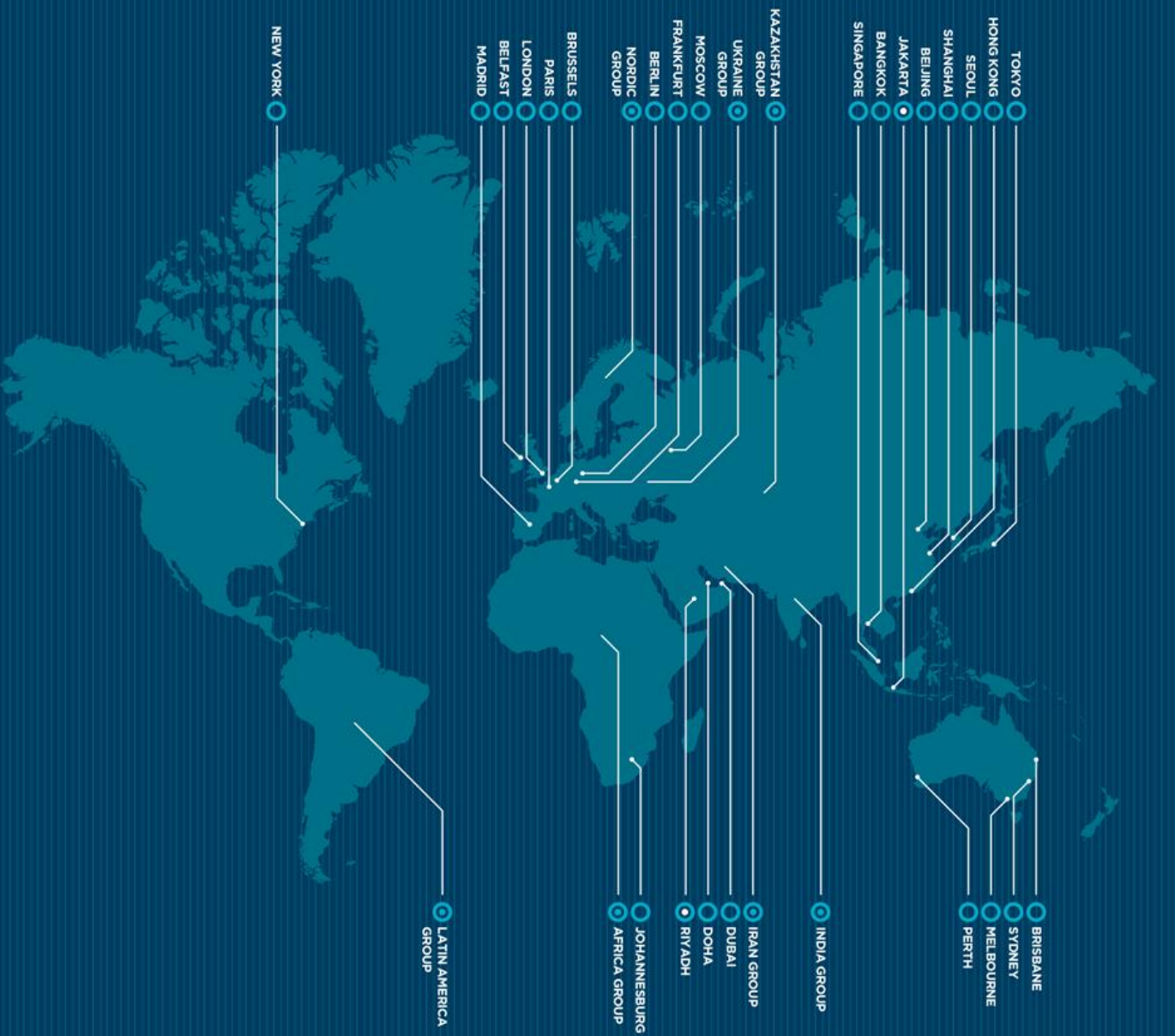
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Vanina specializes in international commercial arbitration and has experience advising local and international clients on a diverse range of litigation and cross-border disputes involving commercial contracts, investigations and anti-corruption, joint ventures, construction and infrastructure projects, environmental contamination and employment issues in Paris and Bangkok. Vanina has experience acting as counsel and advocate in arbitrations across multiple jurisdictions under the auspices of institutions including, amongst others, ICC, HKIAC, SIAC, AAA, and TAI.

## Credentials highlights

- a **British multinational food processing and retailing company** in internal investigations concerning alleged bribery and fraud.
- a **Japanese multinational manufacturer** on an internal investigation into allegations of fraudulent misconduct by senior sales staff in Thailand
- a **US Contractor** in a US\$400 million Thai Arbitration Institute arbitration against a Thai public agency relating to the design and construction of a nuclear facility
- an **international tobacco company** on regulatory and compliance issues arising from restrictive Thai laws applicable to cigarette marketing, advertising, labelling and display, as well as Thai Administrative Court challenges to the new product labelling laws
- a **major Japanese insurance company** in arbitration against six reinsurance companies under the Thai Arbitration Institute (TAI) for indemnity over the floods in 2011
- a **mining company** in a potential investment dispute over mining rights granted by an African government
- **European clients** involved in investigations by the Assets Scrutiny Committee
- the **world's largest aircraft landing gear manufacturer** in a potential arbitration arising out of an agreement to perform repair, maintenance and overhaul services of major aircrafts



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