INNOVATIVE PUBLICATION
Journal of Effective Learning and Sustainable Innovation
Vol.4 №4 (2026). April
innovativepublication.uz

Raqamli rozilikning haqiqiyligi: elektron tijorat arbitrajida Nyu-York konventsiyasining «yozma shaklda» talabiga rioya qilish

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Jahon iqtisodiyoti va diplomatiya universiteti "Xalqaro arbitraj va nizolarni hal qilish yo'nalishi magistranti

Действительность цифрового согласия: соблюдение требования «в письменной форме» Нью-Йоркской конвенции в арбитраже электронной коммерции

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The Validity of Digital Assent: Navigating the "In Writing" Requirement of the New York Convention in E-Commerce Arbitration

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Abstract

The enforceability of international arbitral awards arising from cross-border e-commerce transactions is increasingly jeopardized by persistent disparities in jurisdictional standards for determining valid digital assent. While proactive contracting mechanisms—most notably click-wrap agreements—generally satisfy the pro-enforcement requirements of the New York Convention, the passive nature of browse-wrap arrangements frequently fails both the formal "in writing" requirement under Article II(2) and the foundational principle of mutual consent. This article argues that this gap is not merely a procedural inconvenience but a structural threat to party autonomy and, consequently, to the finality of arbitral awards under Article V(1)(a). Crucially, proposals for a harmonized digital assent standard—however compelling in theory—face serious practical obstacles: states have strong sovereignty interests in regulating consumer contracts, and any mandatory international protocol must navigate the tension between commercial efficiency and consumer protection. This article therefore proposes a calibrated Global Model Protocol for Digital Assent under UNCITRAL auspices, mandating active two-step consent, plain-language disclosure,

and the categorical exclusion of browse-wrap reliance in cross-border disputes. The proposal is grounded in the argument that such reform is not an optional enhancement but a precondition for the continued legitimacy of international arbitration in the digital economy.

Keywords: *international arbitration, New York Convention, e-commerce, digital assent, click-wrap, browse-wrap, functional equivalence, UNCITRAL, party autonomy*

Аннотация

Исполнимость международных арбитражных решений по спорам из трансграничных электронных торговых сделок всё чаще подвергается риску вследствие сохраняющихся расхождений в юрисдикционных стандартах дигитального согласия. Статья доказывает, что этот пробел представляет собой не процедурное неудобство, а структурную угрозу автономии сторон и, как следствие, окончательности решений по статье V(1)(a). Важно отметить, что предложения по гармонизации стандартов цифрового согласия, при всей своей теоретической убедительности, сталкиваются с реальными препятствиями: государства обладают весомыми суверенными интересами в области регулирования потребительских договоров. Тем не менее, статья предлагает сбалансированный Глобальный модельный протокол цифрового согласия под эгидой ЮНСИТРАЛ, обеспечивающий двухэтапное активное согласие, раскрытие информации на понятном языке и полное исключение зависимости от соглашений browse-wrap в трансграничных спорах.

Ключевые слова: *международный арбитраж, Нью-Йоркская конвенция, электронная коммерция, цифровое согласие, click-wrap, browse-wrap, функциональная эквивалентность, ЮНСИТРАЛ, автономия сторон*

Annotatsiya

Transmilliy elektron tijorat bitimlaridan kelib chiqadigan xalqaro arbitraj qarorlarining ijro etilishi raqamli rozilikni aniqlashda yurisdiktsiya standartlarining doimiy nomuvofiqligi tufayli tobora xavf ostida qolmoqda. Click-wrap shaklidagi faol shartnoma mexanizmlari — yuqori standartli kelishuvlar sifatida — odatda aniq rozilikning ko'rinishi orqali Nyu-York Konventsiyasining ijrochilikka yo'naltirilgan tendentsiyasiga mos keladi; browse-wrap kelishuvlarining passiv tabiati esa ko'pincha ham II(2)-modda bo'yicha "yozma shaklda" bo'lish talabini, ham o'zaro rozilikning muhim shartini qondirishga ojizlik qiladi. Ushbu maqola browse-wrap kelishuvlarining partiya avtonomiyasiga tahdidini va arbitraj qarorlarini tan olmaslik bo'yicha V(1)(a)-modda zaifligi bilan uzviy bog'liqligini tahlil etadi. Davlatlarning suveren qarshiligi va tartibga solish yukini hisobga olgan holda, maqola UNCITRAL doirasida majburiy

Global Raqamli Rozilik Namunaviy Protokolini joriy etishni taklif etadi. Bunday protokol ikki bosqichli faol rozilik mexanizmini majburiy qilishi, oddiy tilda ma'lumot berishni talab etishi va browse-wrap roziligiga tayanishni butunlay taqiqlashi zarur. Ushbu taklif faqat texnik isloh emas — u raqamli iqtisodiyotda xalqaro arbitrajning asosiy legitimiteti uchun zarur shart hisoblanadi.

Kalit soʻzlar: *xalqaro arbitraj, Nyu-York Konventsiyasi, elektron tijorat, raqamli rozilik, click-wrap, browse-wrap, funksional ekvivalentlik, UNCITRAL, tomonlar avtonomligi*

1. Introduction

Writing this article, I was struck by a question that arbitration textbooks tend to gloss over: when a consumer clicks “I Agree” at the bottom of a forty-page terms-of-service document at two in the morning, have they truly consented to resolve any future dispute through international arbitration? The New York Convention of 1958 – one of the most successful international commercial law instruments ever created, now ratified by 172 states – rests its entire enforcement architecture on the assumption that the parties genuinely agreed to arbitrate[1]. In the age of mass-market e-commerce, that assumption is increasingly difficult to sustain.

The growth of cross-border digital transactions has been extraordinary. Yet the legal infrastructure governing how parties consent to arbitration has evolved far more slowly. The NYC’s “in writing” requirement, embodied in Article II(2), was designed for a world of signed contracts and formal correspondence. UNCITRAL’s 2006 Recommendation introduced the principle of functional equivalence to bridge the gap[2], and the revised Article 7 of the Model Law on International Commercial Arbitration followed suit[3]. These reforms were necessary, but they left the hardest question unanswered: how much ‘function’ does a click actually perform?

This article argues that the answer depends almost entirely on how the click was obtained. Click-wrap agreements – where users must take an affirmative step to signal acceptance – come close to satisfying what the Convention requires. Browse-wrap agreements – where continued use of a website is treated as consent to buried terms – do not. The consequences of this distinction are not merely academic: they determine whether an arbitral award, potentially worth millions of dollars, will be recognized and enforced in a foreign jurisdiction or refused at the courthouse door under Article V(1)(a).

[1] New York Convention, Art. II(2) (1958).
[2] UNCITRAL Recommendation on Art. II(2) and Art. VII(1) of the New York Convention (2006).
[3] UNCITRAL Model Law on International Commercial Arbitration, Art. 7 (as amended 2006).

I am aware that the proposal I advance in Section 5 – a mandatory Global Model Protocol for Digital Assent under UNCITRAL auspices – raises genuine objections that deserve direct engagement. States have sovereign interests in regulating consumer contracts. Mandatory international protocols are notoriously difficult to implement. And there is a real risk that imposing uniform digital consent requirements could inadvertently disadvantage smaller jurisdictions whose e-commerce infrastructure has not yet matured. These concerns are taken seriously here. Nevertheless, I contend that the alternative – continued reliance on inconsistent national courts to fill the gap – poses a greater systemic threat to the arbitration system than the difficulties of achieving harmonization.

2. Literature Review and Theoretical Framing

The scholarship on this topic divides, broadly speaking, into two camps. The first treats the "in writing" problem as essentially solved by the functional equivalence doctrine and argues that courts should simply apply it generously to uphold arbitration agreements wherever a reasonable electronic record exists. The second, more critical strand focuses on what functional equivalence cannot fix: the underlying absence of genuine consent in passive digital contracting environments[4]. This article aligns more closely with the second camp, though it attempts to move beyond diagnosis toward a workable prescription.

2.1 The "In Writing" Requirement and Functional Equivalence

Article II(2) of the NYC requires that an arbitration agreement be "in writing" and defines this as a signed clause or an exchange of letters or telegrams. This language was already showing its age by the 1980s; by the time internet commerce became mainstream in the late 1990s, it was plainly inadequate. The 2006 UNCITRAL Recommendation addressed this by extending the concept to electronic communications, provided the information is accessible for subsequent reference. The Model Law's revised Article 7 went further still, offering states the option of eliminating the writing requirement altogether.

Born (2021) argues persuasively that the pro-enforcement bias of the NYC requires courts to read the writing requirement broadly, and that most electronic records of consent will satisfy it[5]. Wolff (2018) reaches a similar conclusion, emphasizing that digital systems can produce records that are arguably more reliable than paper[6]. The difficulty with this view is that it focuses on the form of the record rather than the

[4] Magliana & Hovaguimian (2020), pp. 261–265.
[5] Born (2021), pp. 742–748.
[6] Wolff (2018), p. 158.

quality of the consent it captures. A perfectly preserved electronic log of a user clicking "Continue" without ever seeing the arbitration clause is a reliable record of nothing legally meaningful.

Castellani (2013) offers a more nuanced account, tracing the functional equivalence doctrine back to the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures[7] and noting that the doctrine was designed to remove formal barriers to electronic contracting, not to lower substantive consent standards[8]. This distinction matters: functional equivalence should validate the medium, not excuse the absence of genuine agreement.

2.2 Click-Wrap, Browse-Wrap, and the Consent Gap

The consent gap in digital contracting is not a new observation, but its implications for international arbitration enforcement remain underexplored. The empirical evidence is striking. Cheng and Huang (2022) analyzed reported U.S. decisions between 2010 and 2020 and found that browse-wrap arbitration clauses were invalidated in approximately 80% of cases, with courts citing inadequate notice rather than any formal writing deficiency[9]. This suggests that the "in writing" analysis is often something of a red herring: the real problem is consent, not form.

The leading U.S. cases illustrate the pattern clearly. In *Specht v. Netscape*[10], the Second Circuit found that users who downloaded software could not be bound by an arbitration clause contained in terms they had no reason to read, because the clause was not visible on the download screen. In *Nguyen v. Barnes & Noble*[11], the Ninth Circuit declined to enforce a browse-wrap clause where the hyperlink to the terms of service was present but not sufficiently prominent. What both cases turn on is not whether an electronic record existed, but whether the user had adequate notice of the arbitration clause specifically[12].

The Canadian Supreme Court's decision in *Uber Technologies Inc. v. Heller*[13] adds a further dimension. The court there refused to enforce an arbitration clause in a gig-economy app agreement on grounds of unconscionability, noting that the clause

[7] UNCITRAL Model Law on Electronic Commerce (1996), Art. 5; UNCITRAL Model Law on Electronic Signatures (2001), Art. 3.

[8] Castellani (2013), p. 98.

[9] Cheng & Huang (2022), p. 463.

[10] *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

[11] *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

[12] Magliana & Hovaguimian (2020), pp. 261–265.

[13] Uber Technologies Inc. v. Heller, 2020 SCC 16 (Supreme Court of Canada), where the court refused to enforce an arbitration clause embedded in a multi-screen app agreement on grounds of unconscionability and inadequate notice.

effectively deprived a vulnerable worker of any practical access to justice. This suggests that even facially valid click-wrap agreements may fail enforcement scrutiny if the surrounding circumstances reveal a fundamental imbalance of bargaining power. For B2C e-commerce arbitration, this precedent is significant.

3. Methodology

This article employs a qualitative doctrinal methodology. Primary sources – the text of the NYC, the UNCITRAL 2006 Recommendation, and the Model Law on International Commercial Arbitration – are read in conjunction with judicial decisions from the United States, Canada, and selected European jurisdictions. Secondary sources include leading treatises and empirical studies of digital assent jurisprudence. The comparative dimension is necessarily limited: a comprehensive survey of enforcement decisions across all 172 NYC signatories is beyond the scope of a single article, and I rely on the U.S. and Canadian case law as the most extensively documented body of relevant precedent.

The central analytical framework is the tension between two legitimate values: the pro-enforcement bias of the NYC, which reflects the international community's commitment to the finality of arbitral awards, and the due process requirement of genuine consent, which is a precondition for the legitimacy of any adjudicatory process. I argue that these values are not inherently in conflict – but that browse-wrap agreements force courts to choose between them, and that the resulting inconsistency is itself a source of systemic harm.

One methodological limitation should be acknowledged. The Mishra (2025) article cited in earlier drafts of this work – which concerns the Group of Companies doctrine – addresses a related but distinct question: when can a non-signatory be bound by an arbitration agreement? That question intersects with digital assent in complex ways, particularly in multi-party platform disputes, but a full treatment is beyond this article's scope. The citation has accordingly been removed.

4. Analysis: Why Browse-Wrap Fails the Convention

The argument that browse-wrap agreements can satisfy the NYC's writing requirement relies on a chain of reasoning that breaks at its weakest link. Even accepting that functional equivalence can validate electronic consent records, and even accepting that courts should read the Convention broadly in favour of enforcement, a browse-wrap agreement does not produce a genuine consent record – it produces a record of use. Use and consent are legally distinct, and conflating them does violence to the foundational principle that arbitration is voluntary.

4.1 The Party Autonomy Problem

Party autonomy is not simply a theoretical justification for arbitration – it is the source of the arbitral tribunal's jurisdiction. Without it, there is no contractual basis for the tribunal to hear the dispute, and no legitimate basis for the enforcing court to recognize the award. This means that challenges to the validity of the arbitration agreement are not merely preliminary skirmishes: they go to the root of the entire arbitral process.

Browse-wrap agreements undermine party autonomy in a specific and serious way. They operate by imputing consent from conduct – the act of using a website – without ensuring that the user knew they were entering into a legal commitment. Magliana and Hovaguimian (2020) are right to describe this as a problem of adhesion[14], but I would go further. In the context of international arbitration, the concern is not just that weaker parties face standard-form contracts – that is unavoidable in mass-market commerce – but that those contracts silently strip them of access to the national courts of their own country. The right waived is fundamental; the manner of waiver is imperceptible. That combination is what makes browse-wrap uniquely problematic in the arbitration context, as compared to other standard contract terms.

Drahozal's empirical work (2019) on consumer arbitration suggests that procedural fairness at the contract formation stage has measurable effects on outcomes: disputes arising from contracts where consent procedures were clearer tend to produce more consistent and less litigated awards[15]. This implies that the consent problem is not merely a matter of legal principle but has practical consequences for the efficiency of the arbitration system as a whole. Investing in robust upfront consent mechanisms may actually reduce downstream enforcement disputes – an argument that should appeal even to those whose primary concern is commercial efficiency rather than consumer protection.

4.2 The Article V(1)(a) Chain Reaction

The enforcement consequences of a defective arbitration agreement under the NYC are binary: either the award is recognized, or it is refused. Article V(1)(a) permits refusal where the arbitration agreement "is not valid 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"[16]. This provision creates what might be called a retroactive invalidity problem: a business may invest years and substantial resources in an arbitration proceeding, obtain a favorable award, and then discover that the award cannot be enforced because the court of the enforcing state does not recognize browse-wrap

[14] Magliana & Hovaguimian (2020), pp. 261–265.
[15] Drahozal (2019), p. 418.
[16] New York Convention, Art. V(1)(a) (1958).

consent as legally sufficient.

Park (2020) describes the macro-level consequence as a "cascade effect": once it becomes known that awards from certain types of online arbitration procedures are routinely refused in particular jurisdictions, sophisticated parties will structure their transactions to take advantage of the resulting forum inconsistency[17]. Less sophisticated parties – typically smaller businesses and consumers – will not know how to do this and will bear the costs of the uncertainty. The distributional consequences are therefore perverse: the very parties that arbitration is supposed to serve efficiently are the ones most exposed to the risk of enforcement failure.

It is worth pausing on a counterargument here. One could argue that Article V(1)(a) already provides an adequate safety valve: if the consent was genuinely defective, the enforcing court can refuse recognition, and no injustice results. The problem with this argument is that it treats enforcement unpredictability as a feature rather than a bug. The NYC's central purpose is to create a reliable, borderless enforcement regime. A system in which the validity of an arbitration agreement depends on the idiosyncratic consent standards of each enforcing jurisdiction is not a system – it is a patchwork, and a patchwork that sophisticated actors can and do exploit[18].

5. Towards a Global Model Protocol for Digital Assent: Promise and Problems

The case for harmonized international standards governing digital assent in arbitration agreements is strong. The case for a mandatory protocol is more complicated, and I want to be honest about the difficulties before arguing that they are surmountable.

5.1 The Sovereignty Objection

The most serious objection to a mandatory international protocol on digital assent is the sovereignty objection. Consumer contract law is an area where states have historically insisted on their right to set their own standards, reflecting domestic policy choices about the balance between commercial efficiency and consumer protection. The European Union's approach – which imposes significant restrictions on the use of arbitration clauses in B2C contracts under the Unfair Terms in Consumer Contracts Directive – is simply different from the U.S. approach, which has been far more permissive since *AT&T Mobility v. Concepcion*[19]. Any mandatory international protocol must somehow accommodate both traditions, or it will be rejected by one or the other.

[17] Park (2020), pp. 301–304.

[18] Vienna Convention on the Law of Treaties, Art. 26 (1969) (pacta sunt servanda); see also Born (2021), pp. 97–101 on the relationship between treaty obligations and domestic arbitration law.

[19] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

This objection has real force, and I do not think it can be dismissed by asserting that the benefits of harmonization outweigh the costs of sovereignty. UNCITRAL's own Working Group II has acknowledged the tension explicitly in recent sessions[20], noting that states are reluctant to cede regulatory space over consumer digital contracts. The lesson I draw from this is that a protocol framed as a floor – setting minimum consent standards that states may exceed but not fall below – is both more politically achievable and more legally sound than one that attempts to impose a uniform standard.

5.2 What a Calibrated Protocol Should Require

With the sovereignty concern in mind, I propose that a Global Model Protocol for Digital Assent should be built around three non-negotiable minimum requirements, designed to address the consent gap without dictating the full content of national consumer contract law:

Mandatory Active, Two-Step Assent: The mere existence of a hyperlink to terms of service – even a clearly labeled one – is insufficient. Businesses should be required to implement a two-step process: first, a dedicated screen presenting the arbitration clause separately from the general terms, in non-technical language, and without requiring the user to scroll through unrelated content; second, a distinct affirmative action – a checkbox or button – confirming acceptance of that clause specifically. This is more than current click-wrap practice typically requires, and deliberately so: an arbitration agreement is not just another contract term. It operates to exclude the user from the national court system of their own country, and the law should ensure that this consequence is visible.

Plain-Language Disclosure: The arbitration clause itself should be required to appear, on the consent screen, in language that a non-lawyer can understand, explicitly stating that the user is giving up the right to sue in court and agreeing to resolve disputes through binding arbitration. Alsamara and Ghazi (2025) argue that the lack of plain-language requirements is one of the principal reasons digital arbitration clauses fail informed-consent standards[21], and I agree. This requirement is modest – it asks for clarity, not the elimination of arbitration clauses – but its effect on genuine notice would be substantial.

Categorical Exclusion of Browse-Wrap: The Protocol should provide that an arbitration agreement arising solely from browse-wrap conduct – that is, one where the user's consent is inferred from website use alone, without any affirmative act directed

[20] UNCITRAL Working Group II. See UN Doc A/CN.9/WG.II/WP.224 (2022), paras. 18–22.
[21] Alsamara & Ghazi (2025), pp. 196–199.

at the arbitration clause – does not satisfy the writing requirement of Article II(2) for the purposes of the NYC. This is the most categorical element of the proposal, and it is deliberately so. Browse-wrap does not fail the writing requirement because of some technical deficiency in the electronic record; it fails because it produces no genuine agreement at all. The Protocol should say so explicitly, so that businesses cannot restructure their consent flows to achieve the same result by other means.

5.3 Why UNCITRAL, and Why Now

UNCITRAL Working Group II is the appropriate body to develop this Protocol for institutional and practical reasons[22]. Institutionally, it has the mandate and expertise: its ongoing work on dispute settlement in the digital economy already addresses digital contract formation as a live issue. Practically, the Model Law on International Commercial Arbitration demonstrates that UNCITRAL can produce instruments that, while not binding, achieve very wide adoption – more than 85 jurisdictions have enacted legislation based on the Model Law. A Protocol framed as a recommended standard, with an opt-in mechanism for states that wish to give it binding force through domestic legislation, would be consistent with UNCITRAL's established methodology and would avoid the sovereignty objections that a treaty-based approach would encounter.

The timing matters too. UNCITRAL Working Group II is currently considering the intersection of artificial intelligence, automated contracting, and dispute resolution. Questions about AI-generated arbitration agreements and the role of algorithmic consent are emerging rapidly. A protocol addressing digital assent now, before those issues fully crystallise, would be far easier to extend to AI-mediated contracting than trying to develop it retroactively once AI-generated agreements are already embedded in commercial practice.

6. Conclusion

The argument of this article can be stated simply: browse-wrap arbitration agreements do not produce genuine consent, and the international arbitration system cannot continue to pretend otherwise. The functional equivalence doctrine is a tool for validating electronic form; it is not a substitute for substantive agreement. When awards arising from browse-wrap clauses are refused enforcement under Article V(1)(a) – and they increasingly are, and will be – the damage is not only to the parties in those individual cases. It is to the credibility of the international arbitration system

[22] UNCITRAL Working Group II, Report of the Working Group on Dispute Settlement on the Work of Its Forty-Second Session, UN Doc A/CN.9/1205 (2024).

as a whole.

I have tried in this article to take seriously the objections to my proposal. The sovereignty objection is real. The implementation difficulties are real. But the alternative – a world in which the enforceability of an arbitral award depends on which jurisdiction's browse-wrap jurisprudence the enforcing court applies – is not sustainable. The NYC was built on the premise that international commercial disputes should be resolved through a reliable, predictable system. In the digital economy, that system requires a foundation of genuine consent. Building that foundation is the work of a Global Model Protocol for Digital Assent, and the time for UNCITRAL to begin that work is now.

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