

## **DO WE NEED MORE SOFT LAW INSTRUMENTS TO GOVERN INTERNATIONAL ARBITRATION?**

### **Introduction: Why Is The Question Salient?**

The question of whether *soft law* instruments matter is deeper and more complex than it first appears in the title. Over the past few years, an increasing number of arbitral tribunals have resorted to *soft law instruments* to decide the merits of disputes, thereby raising important questions about the emergence of *soft codes*, the causes behind their codification, and the constraining power of the resulting “*soft normativity*”, particularly whether such *soft codes* lead to a loss of flexibility and a lack of democratic legitimacy.

These developments are also unique in the degree to which they foreground normative pluralism and institutional adaptability. In many of the -canonical- disputes over arbitral conduct, parties raised broader governance questions incidentally to their interest in remedying procedural or ethical inconsistencies. Tribunals reached those issues judiciously, invoking “discretionary standards” to avoid sweeping normative pronouncements when narrower, fact-bound adjudications would suffice. Consequently, arbitral bodies and practitioners are nowadays placing increasing emphasis on the guiding value of *soft law instruments* and are more frequently inclined to engage with broader questions of regulatory legitimacy and normative consistency.

However, just beyond procedural flexibility lies an opportunity: ensuring that even a non-binding normative phenomenon like *soft law* can have a lasting structural impact, particularly within the evolving framework of international arbitration. The question may appear paradoxical, as ethical standards, transparency, and procedural fairness -among many other core

elements typically associated with *soft law*- should not be optional variables in the architecture of international arbitration, rather, they are its irreducible foundations and key principles within this large body of *soft law*. In this sense, far from being a peripheral tool, *soft law* must remain at the heart of international arbitration, as it carries within it the essential commitment to truth and justice that no legal system -formal or informal- can afford to ignore.

Indeed, trust, fairness, and procedural honesty form the bedrock of this flexibility. Yet, of course, nothing is ever black or white, as *soft law* can also be used as a tool for the uniform interpretation of the rules of arbitral institutions, which are often drafted without direct reference to the legal order of the seat, since their character is intended to be international. Therefore, *soft law* deserves a “hard” look since the right to a fair trial in international arbitration and the importance of *soft law* are becoming increasingly intertwined. Also, the rise in international arbitrations, the value of disputes, and the costs involved have all intensified the pressure to succeed, especially since arbitral awards are not reviewable on the merits in most jurisdictions, the risk of annulment or non-recognition generally rests on procedural grounds. These include, on the one hand, jurisdictional defects such as the invalidity of the arbitration clause or the non-arbitrability of the dispute; and on the other hand, irregularities in the proceedings themselves. Among the most common procedural objections are deviations from the arbitration agreement and violations of the right to a fair trial.

### **But First: What Is *Soft Law*?**

The concept of “*soft law*” occupies a *green zone* between binding, enforceable law and merely moral obligations. It is based on a concept of *relative normativity*. The term is also considered by some scholar as an oxymoron, arguing that if it is “soft,” if it cannot “hurt” legally, it is not law! If it is law, it is not soft, as it can be enforced, and enforcement may hurt - legally, again. However, in practice, although soft law is not enforceable by states, it influences behavior

through merchant norms, reputation, and expectations of good faith, an influence rooted in the historical legacy of the *lex mercatoria*. This influence is further explained by the nature of soft law norms themselves. A norm is often considered soft if its substance is too vague for specific application, such as international treaties setting general goals, or if its instrument lacks binding character, like recommendations or codes of conduct. However, despite lacking enforceability by public authority, soft law may still be perceived as binding by its addressees, or voluntarily followed.

The concept of *soft law* originated in public international law to explain new and disruptive legal phenomena. And from there, it shifted into arbitration, evolving into something more amorphous and difficult to define. At times, reference to instruments like the International Bar Association (IBA) Guidelines carries significant importance and can be decisive for courts. For instance, in 2008, the Swiss Federal Tribunal recognized the normativity of the IBA Guidelines on Conflicts of Interest, even when the parties had not referred to them. These developments make it clear that *soft law* enjoys a certain degree of normativity: *soft normativity*. This normativity is called “soft” as *soft law* exerts influence and is regarded with respect, without being mandatory in the conventional legal sense. The question arises whether this normativity is stronger when *soft law* is embodied in a “soft code” rather than left uncodified. While the strength of a norm should not depend on its form, codification organizes norms into a logical and coherent structure, making them easier to identify, understand, and apply, especially given that human nature and business practices tend to favour simpler, more accessible solutions - which can increase the practical power of codified *soft law*.

The problem with the concept of *soft law* lies in its very name, which can cause it to be underestimated. This is especially true in the competitive business world, where *soft law* sits between hard law and “non-law”. However, paradoxically, in certain fields, some experts see

*soft law* not just as an alternative or complement, but even as superior to hard law, for example in international finance or carbon reduction. In international commercial arbitration, *soft law* has become central to its quest for legitimacy, as some labels such as “professional standards”, “procedural frameworks”, and an evolving “ethical compass” illustrate just how influential *soft law* has become in shaping both the conduct and legitimacy of arbitration.

### ***Soft Law and International Arbitration: Between Challenges and Effectiveness***

Some critics of *soft law* in arbitral procedure warn of its potential overreach, cautioning that excessive reliance on guidelines and best practices may unduly restrict arbitrators’ discretion and stifle independent reasoning. In some cases, arbitrators might treat soft law instruments as if they were binding in order to safeguard the enforceability of awards. While *soft law* undeniably enhances procedural efficiency, its growing influence has also sparked concerns about overregulation, besides other -classical- challenges stemming from its non-enforceability.

However, the fact that *soft law* norms cannot be enforced by public authority does not mean they lack far-reaching effects. On the contrary, depending on the specific body of *soft law*, parties often perceive these norms as binding or choose to adhere to them voluntarily. This adherence can be motivated by various factors, including convenience, best practice considerations, social conformism, fear of reputational damage, and the desire for predictability and certainty. In practice, *soft law* may apply in arbitration through legislation, party agreement, or arbitral practice. A notable example in this sense is the UNCITRAL Model Law, which has been adopted by dozens of states worldwide. Put differently, when parties expressly agree that certain procedural *soft law* instruments, such as the IBA Guidelines, apply to their dispute, these instruments become part of their contract and effectively turn into hard law.

The interaction between *soft law* and arbitration through arbitral practice, however, is more complex. For example, in cases where parties have not expressly agreed on the application of *soft law*, arbitral tribunals might, at their discretion, take such norms into account. Most arbitration rules grant tribunals broad procedural discretion when there is no party agreement or mandatory applicable rules. In other words, legitimacy in applying *soft law* varies depending on whether parties have expressly or implicitly agreed to its use. This way, when parties consent, *soft law* ceases to be “soft” and gains legitimacy from being grounded in party autonomy: the strongest pillar of arbitration. Without such agreement, arbitral tribunals may apply *soft law* at their own initiative. Here, the challenge arises when tribunals do not explicitly state whether they have relied on *soft law* norms or conducted an independent assessment, which may cause uncertainty. Nevertheless, arbitral tribunals generally refer to *soft law* guidelines and rules, such as the IBA Rules, as valuable sources of inspiration in shaping the arbitral process.

### **Concluding Remarks: Yes! We Need More *Soft Law* Instruments To Govern International Arbitration**

Do we need more *soft law* instruments to govern international arbitration? The answer is definitely yes! The essence of *soft law* lies in universal values and principles well-known for promoting justice, truth, and fairness, and international arbitration is not merely an alternative or substitute for traditional adjudication, rather, like formal courts, it serves as an effective system for administering “justice” and maintaining “social pacification”.

In the end, one must acknowledge that the international arbitration system will never be perfect, and this imperfection also applies to its use of *soft law*. However, what matters is not perfection but “legitimacy” - a term frequently used by speakers at the 2025 session of Paris Arbitration:

referring to the ability to provide appropriate, fair solutions to disputes arising in international arbitration.

Therefore, the legitimacy of *soft law* in this context differs from that of hard law. It is established through the process of its application. Consequently, all parties involved must engage in ongoing dialogue to balance the various interests implicated in applying *soft law* within international arbitration. This is necessary to ensure appropriate dispute resolution and uphold the legitimacy of *soft law* itself. Ultimately, *soft law* functions as a crucial condition for building and sustaining “trust” in the international arbitration system.