

Either something can be enforced regardless of parties' intentions; or it cannot. If it can, then consent does not matter, being the issue on the *if* traced back to a question of legitimacy of powers. If it cannot, then consent does matter, it being the source on the issue of *if*. Legitimacy and consent support any investigation on *what* can be enforced, as well. And it helps us differentiating between law and what is not law. To be crystal clear: my intentions here are neither to delve into a philosophical debate on the meaning of 'law', nor on a theoretical assessment of the latter. What leads me writing this brief paper is much more pragmatic and it hinges on the need (or not: that being the research question) of more 'soft law instruments'. However, to better handle it, I feel compelled to stress the fact that there is no such thing as 'soft law'. What is out there is a multitude of instruments, whose source cannot be traced back to the legitimate legislative power, and whose application (*rectius*: enforceability) rests entirely (because it could not be otherwise) on the consent of the parties.

That being the necessary preamble, let me introduce what I am going to address further: first, how and to what extent do such instruments find “direct application” within international arbitration proceedings? Second, how do the dynamics of the “arbitration market” drive demand for, and influence the supply of, such instruments?

On “direct application”, three points of a spectrum need to be addressed: (i) that of express acceptance; (ii) that of reliance; (iii) that of tribunal’s powers.

The first point is in my opinion the less problematic: when contracting parties expressly incorporate a code or a set of rules into their contract, arbitrators have no discretion but to apply it. However, such explicit references are rare and, for the purposes of this paper, do not raise issues worth further investigation.

As to the second point, things get blurrier. Even absent express incorporation in a contract, indeed, counsel may selectively invoke instruments as persuasive aids in the course of arbitration proceedings. For instance, they can rely on the IBA Rules on the Taking of Evidence in International Arbitration or the Inquisitorial Rules of Taking Evidence in International Arbitration (Prague Rules), should they deem them advantageous for a specific objective. Witnessing this, the question then insists on how these tactics contribute to influencing the arbitral tribunal’s decisions, be them interlocutory or final. Whilst one could raise concerns about the unfairness (or even illegitimacy) of applying a non-binding law instrument in the context of a *de jure* arbitration, others might counterargue that the nature itself of arbitration, as a flexible alternative system of ‘private’ dispute resolution, precisely allows - if not encourages - the use of different instruments than law to promote efficiency, neutrality, procedural balance; or, generally, to better manage the conduct of the proceedings. From this perspective, the use of such instruments constitute an

expression, albeit different than contractual autonomy, of the parties’ freedom to choose what suit best their objective. If such reliance meets the tribunal’s mandate to manage the proceedings in the manner they consider best to their objective of rendering an enforceable decision, then the use of such instruments may be helpful. Yet this view must be tempered with caution: absent clear reliance of *both parties*, any resort to such instruments clashes with a dramatic trade-off: persuasiveness over the letter of law.

This latest consideration leads me to the third – and most controversial – point, which I am going to introduce with a question: are arbitral tribunals entitled to look *proprio motu* beyond law towards other instruments as gap fillers or interpretative aids *even* when the contract is silent and no party has relied upon them at any moment during the proceedings? As it may appear reductive, it is nonetheless true that in international disputes, if the applicable legal framework shifts, the outcome of any dispute changes. Suppose multiple codes or rules are available; if an arbitrator is allowed to cherry-pick from all of them (or some of them, for what matters), serious concerns arise on the legitimacy of the system, which relies on consent (not only to arbitration to exclusion of litigation, but to *de jure* arbitration in accordance to one – or more – applicable law(s)).

Another concern might arise as well: just as parties may exclude certain international conventions (such as the CISG) from the applicable substantive law, one might ask whether they

should – or even can – preclude the application of certain instruments to favor others. I find myself defending the position of those who maintain that only law provisions should constitute the exclusive deck from which an arbitral tribunal may draw in resolving the dispute. According to this view, instruments should serve a valuable – but ultimately subsidiary – role, clarifying the meaning of applicable rules, but only where the parties have either contractually chosen them or relied on them during the proceedings, thereby consenting to their application. In other words, such instruments should not be treated as a default reservoir of procedural or substantive solutions. Its role must remain contingent – activated only when consistent with the parties’ autonomy and the applicable law.

If it is accepted that arbitral tribunals should operate strictly within the boundaries of the law chosen by the parties and the mandatory rules of the seat, then any resort to other instruments must be justified not by convenience or habit, but by consent. This demands a stricter methodological posture from arbitrators, one that distinguishes between persuasive authority and normative bindingness. Arbitrators in commercial arbitration derive their mandate from the agreement of the parties. They are not legislators, nor are they tasked with improving transnational legal discourse, nor are they discharging a judicial function. Their legitimacy is grounded into what the parties agreed upon, not into the discretionary invocation of “best practices” that remain outside the legal order properly so-called.

This does not imply that such instruments have no role to play. Quite the opposite. In certain contexts – such as evidentiary procedures, professional ethics or the conduct of counsel – they may offer coherence and efficiency, especially where national laws are silent or diverge among them. The IBA Rules on the Taking of Evidence, for instance, have emerged as a ‘quasi-standard’ in international arbitration, not because of their legal force, or their nature as ‘soft law’, but because of their convergence they foster across legal cultures. Still, a tribunal applying these rules in the absence of party consent must do so with caution, clearly identifying the legal justification for treating them as interpretive aids rather than autonomous sources of law, which, of course, cannot be.

Coming, then, once again to the research question: “do we need more soft law instruments in international arbitration?” And, if so, what kind of soft law instruments?

The answer is we don’t *need* more ‘soft law’ instruments; but we may benefit from *better* ones. In a system that draws parties, arbitrators and counsel from multiple legal backgrounds, the availability of transnational benchmarks – such as the IBA Guidelines on Conflicts of Interest or the UNCITRAL Notes on Organizing Arbitral Proceedings – can significantly reduce friction and increase procedural legitimacy. These instruments contribute to a shared professional culture, one that transcends domestic legal systems and fosters a sense of coherence within an otherwise decentralized regime. However, more soft law is

not necessarily better soft law. The uncontrolled publication of non-binding instruments – especially when they overlap, contradict or compete with one another – can result in the kind of uncertainty they are meant to improve. This problem is particularly evident when arbitrators are presented with divergent guidelines such as the IBA Rules and the Prague Rules, which embody fundamentally different procedural philosophies. Another recent and telling example of this problem is found in the AI arbitration guidelines issued between 2024 and 2025 by several institutions. Intended to address the use of artificial intelligence in arbitration, these instruments exemplify premature soft law. Indeed, they were not developed in response to an established body of practice but rather in anticipation of hypothetical scenarios. These guidelines claim consensus on principles such as transparency and control, yet diverge markedly on key issues like disclosure, party consultation and even the definition of “AI” itself. What emerges is not a unified standard, but rather the illusion of clarity built on a foundation of inconsistent and unproven guidance.

This illustrates a deeper methodological problem: soft instruments must emerge from experience. The IBA Guidelines on Conflicts of Interest, for instance, were built over years of comparative analysis, actual cases and public debate. They codify experienced professional consensus. By contrast, the AI guidelines invert that logic, as they attempt to pre-emptively govern a reality that has yet to take shape. The lesson, to me, is quite instructive: the strength of such instruments lies in

codifying what already exists, not in speculating about what might be. The goal should not be to expand the landscape of such instruments indiscriminately, but rather to develop it organically, through the consolidation of what already exists.

In conclusion, we may say that soft law proves most valuable not when it proliferates, but when it clarifies, when it brings coherence to an evolving system without claiming to overreaching into governance. We do not need more soft law instruments simply because we can draft them. We need better ones – carefully tailored, procedurally restrained, and preserving the systemic value of arbitration, tied down to the primacy of party autonomy and applicable law. Only then can soft law enhance, rather than dilute, harmonisation of international arbitration practice – by offering guidance that supports, rather than overrides, the legal frameworks chosen by the parties.