SOFT LAW INSTRUMENTS IN INTERNATIONAL ARBITRATION

1 INTRODUCTION

International arbitration operates within a unique legal framework. At its core lies the parties' arbitration agreement, which forms the foundation of the arbitral process. The arbitration agreement typically includes key elements selected by the parties, such as the governing law, the seat, and, where applicable, institutional rules. Together, these choices establish a defined and predictable legal and procedural structure for the arbitration.

Beyond these foundational elements, which define the arbitration and represent the parties' consent, arbitration is increasingly shaped by a category of non-binding instruments referred to as soft law. Soft law encompasses, *inter alia*, model law, guidelines, and principles. While not legally binding, such instruments often play a significant and formative role in an arbitration.

While some regard soft law as useful tools to manage the arbitration, others caution that their increasing influence may violate fundamental principles of arbitration, such as party autonomy and procedural flexibility. Against this backdrop, this essay will explore the following question: Is there a genuine need for *further* soft law developments within international arbitration?

This essay addresses this question by first exploring the concept of soft law in international arbitration to establish its role in international arbitration (section 2). Second, it examines the advantages of soft law in international arbitration (section 3). Third, it discusses the challenges associated with the use of soft law (section 4). Lastly,

a critical perspective is offered on whether there is a need for further development of soft law instruments in international arbitration (section 5).

2 THE CONCEPT OF SOFT LAW IN INTERNATIONAL ARBITRATION

As noted in section 1, soft law in international arbitration covers non-binding instruments such as model law, guidelines, and principles. Commonly used examples of soft law include, *inter alia*, the UNCITRAL Model Law, IBA Rules on the Taking of Evidence and Guidelines on Conflicts of Interest, and the UNIDROIT Principles.

Soft law aims to promote consistency and harmonization across international arbitration practices by offering widely accepted standards. As such, soft law instruments are often praised for contributing to greater uniformity and coherence.

As explained by Mr. Andrés Jana, soft law within UNCITRAL emerges through consultative processes initiated in response to the arbitration community's legal or practical needs. It is drafted by experts, representatives, and other stakeholders. The drafts undergo several rounds of discussion and revision before ultimately being adopted by consensus. Accordingly, soft law instruments often carry substantial authority and enjoy broad international recognition.

Arbitrators frequently rely on soft law instruments during arbitral proceedings. In some cases, arbitrators may refer to soft law *even* where the parties have made no explicit or implicit reference to such instruments in their arbitration agreement. As a result, the influence of soft law may extend beyond the boundaries traditionally set by party autonomy.

3 ADVANTAGES OF SOFT LAW IN INTERNATIONAL ARBITRATION

There are several arguments in favor of further development and use of soft law instruments. One advantage is the promotion of global harmonization. As Mrs. Aisha Abdallah has shown, international arbitration is marked by significant diversity. In this context, soft law serves as a bridging mechanism which can help create greater consistency across jurisdictions. As noted in section 2, much soft law is developed through an extensive process involving experts, representatives, and stakeholders. It therefore generally reflects standards upon which broad consensus can be reached.

Moreover, soft law serve as effective practical tools for both arbitrators and practitioners, and it is widely acknowledged that such instruments contribute to greater procedural efficiency and predictability in the arbitration.

Lastly, a key advantage of soft law lies in its adaptability to the constantly evolving world. During COVID-19, for example, soft law provided guidance on the conduct of remote hearings. More recently, as also explained by Mr. Andrés Jana, UNCITRAL have initiated work on addressing other emerging issues, including the role of artificial intelligence in arbitration. These developments illustrate how soft law enables the arbitration community to respond collectively and with reasonable promptness to new realities.

Taken together, these factors underscore soft law's value as flexible, consensus-driven tools that enhances both the consistency and responsiveness of international arbitration.

4 CHALLENGES OF SOFT LAW IN INTERNATIONAL ARBITRATION

While soft law instruments offer several advantages in international arbitration, they also give rise to certain challenges. As noted in the introduction (section 1), the issue that may be the most thought-provoking is whether the increasing development and use of soft law may result in violations of party autonomy (section 4.1). Beyond this, another challenge merits attention, namely that soft law may become so frequently relied upon that it acquires a *de facto* mandatory character, thus undermining its non-binding nature (section 4.2). Finally, the essay will consider the opposite scenario: where soft law is not consistently applied by arbitrators, and whether such inconsistent application creates uncertainty for the parties to arbitration (section 4.3).

4.1 Potential Conflict with Party Autonomy

Party autonomy is the cornerstone of arbitration. Contrary to domestic litigation, parties are largely free to tailor the arbitration to suit their needs. Yet, the increasing reliance on soft law instruments may paradoxically undermine that very autonomy.

If soft law instruments are expressly incorporated into the arbitration agreement, their application stems directly from party consent. In such cases, soft law reinforces party autonomy as the parties have effectively opted into a framework that *supports* rather than supplants their intentions.

However, problems may arise when arbitrators invoke soft law *absent* any explicit or implicit agreement. Specifically, it raises a fundamental question: Does the arbitrator's unilateral application of soft law undermine party autonomy?

Arbitrators do, inevitably, enjoy broad discretion in conducting the arbitration. But applying soft law not contemplated by the parties may risk overstepping that discretion by imposing standards which the parties never accepted, thereby expanding the scope of the arbitration beyond what was contractually agreed to.

Consequently, when grounded in the arbitration agreement, soft law *strengthens* autonomy. However, when introduced unilaterally by the arbitrator, it risks *displacing* it. The real challenge thus lies in preventing the arbitrator's pursuit of procedural efficiency from quietly eroding the foundation on which the arbitration rests.

4.2 Risk of Soft Law Acquiring a De Facto Mandatory Character

While soft law is non-binding in principle, it can create normative pressure. Arbitrators may feel compelled to adhere to such instruments out of concern for perceptions of procedural propriety or impartiality. This dynamic raises another interesting question: Does soft law risk constraining arbitrators unnecessarily?

If widely accepted soft law is treated as having a *de facto* mandatory character, the procedural flexibility of the arbitration becomes limited, and it risks transforming the arbitration into a rigid process akin to domestic litigation.

Accordingly, one could argue that the core issue lies not in the existence of soft law but in the potential overuse or misuse, particularly when soft law instruments are used in a mandatory manner or without sufficient justification. If soft law instruments begin to function as mandatory standards, the arbitrator's ability to use their discretion to tailor the arbitration to specific circumstances will inevitably be curtailed.

The challenge, then, is for the arbitrator to strike an appropriate balance between using soft law as helpful instruments, not as mandatory rules.

4.3 Uncertainty Arising from Arbitrators' Inconsistent Use of Soft Law

Nevertheless, the (still) non-binding nature of soft law instruments naturally lead to divergent approaches in their application by arbitrators. Some treat soft law as persuasive authority, others disregard it entirely. For parties to international arbitration, this inconsistency can generate uncertainty regarding procedural expectations and conduct of the arbitration, which could potentially affect their trust in arbitration.

Furthermore, as noted by Ana Lombardia about the International Centre for Dispute Resolution's practices, arbitral institutions frequently maintain their procedural frameworks, which may address the same issues as covered by soft law instruments. This coexistence adds a further layer of complexity and inconsistency.

This raises another question: Is this inconsistency problematic? In some respects, one could argue that it is. Where soft law instruments overlap or conflict, arbitrators are faced with competing sources of guidance. This may create *more* uncertainty and ultimately undermine the very purpose of soft law.

5 IS THERE A NEED FOR FURTHER SOFT LAW DEVELOPMENT?

As previously noted, diversity is a defining characteristic of international arbitration. This diversity underscores the utility of soft law as a means of promoting consistency by establishing common ground upon which most stakeholders can agree.

However, as discussed, the use of soft law is not without challenges. The core purpose of arbitration remains to be a fair and efficient resolution of the parties' dispute in accordance with the parties' intentions. Soft law should *facilitate* that objective, not *obstruct* it. Thus, the question is not simply whether we need more soft law, but rather how it should be developed and applied to support said objective.

In practice, the most appropriate approach would likely be for parties to address soft law directly in their arbitration agreements. This responsibility lies not only with the parties themselves but also with the counsel who draft the arbitration agreements. When explicitly incorporated, concerns related to party autonomy are eliminated.

Alternatively, arbitrators may ask the parties during the proceedings whether they agree to apply a particular soft law instrument to resolve a specific issue. If both parties consent, its use is once again unproblematic. If they disagree, the arbitrator must assess the appropriate course based on the circumstances, ideally by relying on a legal basis that aligns with the parties' agreement, such as the *lex arbitri*.

Furthermore, it is essential that soft law instruments are not accorded mandatory status, *particularly* where the parties have neither explicitly nor implicitly agreed to their application. This would undermine the flexibility of arbitration and compromise the arbitrator's discretion. Soft law should be treated as it was intended: as guidelines rather than binding rules.

As also highlighted in the discussion between Mr. Michael Schneider and Professor Luca Radicati di Brozolo on arbitral precedent, precedent must never undermine the discretion of the arbitrator in the respective cases. The same principle applies to soft law.

Arbitration is inherently context-driven, and as such, a certain degree of inconsistency in the application of soft law is both expected and acceptable. However, this inconsistency must not reach a point where parties are left with significant uncertainty as this could ultimately undermine their confidence in arbitration. Striking this balance is undoubtedly a complex task, yet it remains the most effective means of preserving the integrity of international arbitration.

In conclusion, the development of soft law instruments in international arbitration should be met with *cautious enthusiasm.* While there may be room for targeted development, particularly in response to technological innovation, the priority should be to ensure that existing soft law instruments are applied with due regard for the fundamental principles of arbitration. Only then can soft law fulfill the intended role: supporting arbitration without compromising the fundamental principles that arbitration is meant to preserve.