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## Soft Law in International Arbitration – Some Thoughts on Legitimacy

### Abstract

In this article, the authors examine the legitimacy of soft law instruments in international arbitration which have become more and more important in the last decades. After providing a more general introduction to the concept of soft law, the article discusses certain soft law instruments in more detail with respect to their aim and creation. Due to its more peculiar nature to international arbitration the emphasis is on procedural soft law such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration or the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration. Even though soft law rules as such are non-binding, prominent soft law instruments (such as the mentioned IBA Rules and Guidelines) can have an effect that can ultimately undermine the flexibility in arbitration and the ability of parties to decide whether they wish to be bound by those rules or not. For example, parties can find themselves exposed to the application of the IBA Guidelines even where not (expressly) agreed upon, and perhaps had never heard of them before. In the authors' view, the issue of legitimacy lies at the heart of the discussion. In their analysis, the authors distinguish between the legitimacy of soft law with regard to its creation on the one hand and its application on the other hand.

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## A. Introduction

The blossoming of soft law instruments in international arbitration has sparked a vivid discussion within the arbitration community. The problems frequently identified in this discussion are such as the “manner of soft law rules ‘codification’”<sup>1</sup> (in particular the factual normativity of some soft law instruments which is practically established throughout the arbitration community when considering that the creators of such soft laws often produce soft law on their own initiative without having been assigned this mission by anyone) or the “potentially solidifying effect” that soft law rules can have on arbitration (also referred to as the problem of “arbitration’s flexibility and party control v. its predictability”)<sup>2</sup> or the increasing “judicialisation” of arbitration through soft law (meaning the procedural transformation of arbitral proceedings to resemble court litigation more closely).<sup>3</sup> In addition, the abundance of soft law which embodies model laws, guidelines, best practices, etc. raises the question whether one is violating a best practice standard of the international arbitration community, if he or she does not consider such soft law norms and decides to make an independent evaluation and decision instead. These are all valid concerns and important topics for discussion. However, in the authors’ view they are primarily “symptoms” stemming from a much more general problem – the one of legitimacy of soft law in international arbitration. The decisive question in relation to legitimacy is whether soft law rules need a democratic decision making basis in the sense that all those to whom these rules may apply have had a fair chance to be – at least indirectly – involved in the making of these rules. Therefore, it is not only submitted that the discussion should first focus on the legitimacy of soft law in international arbitration before addressing particular “symptoms” which might originate from a lack thereof but that it is also the key to addressing said “symptoms”. As a consequence, this article will, after providing a more general introduction to soft law in international arbitration, attempt to shed some light on the issue of legitimacy of soft law in this field of law.

## B. Soft law

As in many other areas of the law,<sup>4</sup> soft law has become more and more important in international arbitration in the last decades, and has increasingly taken the form of a growing body of soft law rules which has been referred to as “soft codes”.<sup>5</sup>

1 See among others *Kaufmann-Kobler*, *Soft Law in International Arbitration: Codification and Normativity* *Journal of International Dispute Settlement* 2010, 1 (13–16 and 5–12).

2 *Ibid.*, 16.

3 See *Park*, *The Procedural Soft Law of International Arbitration: Non-governmental Instruments in* *Mistelis & Lew* (eds.), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006), pp. 143, 146 et seq.

4 Such areas include, inter alia, international investment law and European Union law. See *Bjorklund & Reinisch*, (eds.), *International Investment law and soft law* (Edward Elgar Publisher, 2012); *Senden*, *Soft Law in European Community Law* (Hart Publishing, 2004).

5 *Kaufmann-Kobler*, (Fn. 1), 1.

## I. What is soft law? How does it come into existence?

To generally investigate into the development, definitions and remote origins of soft law would go far beyond the scope of this contribution, “for they call into question the very meaning of the law”.<sup>6</sup> Yet, without much risk of incorrectness it can be said that the term ‘soft law’ refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat “weaker” than the binding force of traditional law which is in contrast often referred to as “hard law”. Originally, the term ‘soft law’ is associated with (public) international law. Typical examples of soft law in international law are most resolutions and declarations of the United Nations General Assembly (for example, the Universal Declaration of Human Rights of 1948) or official statements, principles, codes of conduct, codes of practice, action plans made by states, international organizations or other (private) organizations.<sup>7</sup> Soft law relevant to international arbitration, however, is primarily made by non-state actors outside the scope of state sovereignty. In this context and for this purpose, soft law will be generally understood as norms that cannot be enforced through public force, independently of its creator, be it state actors such as legislators, governments or international organizations; non-state actors such as private institutions or professional trade associations.<sup>8</sup> Norms may be ‘soft’ in that sense because they are too unclear to be applied to specific facts or because they contain legal obligations which are not justiciable, i.e. which cannot form the basis for an action in court.<sup>9</sup> Furthermore, soft law norms may be soft because they lack binding character with respect to their consequences. This would be, for example, the case of recommendations or codes of conduct, such as the OECD Principles of Corporate Governance.<sup>10</sup>

Soft law in arbitration can be divided into procedural soft law on the one hand and substantive soft law on the other. Typical examples of substantive soft law are the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), the Lando Principles on European Contract Law (PECL),<sup>11</sup> codes of conduct and corporate governance (such as the already mentioned OECD Principles of Cor-

6 Ibid, 2. For an intellectual history of soft law, investigating its origins, see *Robilant*, *Genealogies of Soft Law* 54 Am. J. Comp. L. 2006, 499 (500).

7 For a discussion of the role of soft law in international law, see (among many others) *Chinkin*, *The Challenge of Soft Law: Development and Change in International Law* 38 Int'l. & Comp. L. Q. 1989, 850 et seq.; *Abi-Saab*, *Éloge du “droit assourdi”, : Quelques réflexions sur le rôle de la soft law en droit international contemporain*, in *Nouveaux itinéraires en droit*, *Hommage a François Rigaux* (Bruylant, 1993), 60 et seq.; *D'Amato*, *Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont* 20 (3) Eur. J. Int. L. 2009, 911 et seq.

8 See *Kaufmann-Kobler*, (Fn. 1), 2.

9 This holds true, for example, for debts arising from game or gamble, § 762 German Civil Code (BGB).

10 See also *Kaufmann-Kobler*, (Fn. 1), 2.

11 A soft tool developed by a group of self-appointed academics and tailored on the model of the American Restatements. See, *Robilant*, (Fn. 6), 500.

porate Governance) or trade customs (such as *lex mercatoria*).<sup>12</sup> Yet, even though, for example, the UNIDROIT Principles are said to be by far the most relied upon source when it comes to the substance of the dispute,<sup>13</sup> they are not exclusively applied in arbitration but are explicitly designed to apply to international commercial transactions in general.<sup>14</sup> As a consequence, they are less likely to reveal the specifics of soft law in the context of international arbitration. Considering that “procedural soft law is peculiar to international arbitration,”<sup>15</sup> some typical examples of procedural soft law are presented hereafter with respect to their creation and aim.

*Typical examples of procedural soft law in international arbitration:*

Within procedural soft law the focus will be in particular on two instruments developed by the International Bar Association (IBA), i.e. the Rules on the Taking of Evidence in International Commercial Arbitration (hereafter “IBA Rules”)<sup>16</sup> and the Guidelines on Conflicts of Interest in International Commercial Arbitration (hereafter “IBA Guidelines”).<sup>17</sup> Further consideration will be given to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (hereafter “UNCITRAL Model law”),<sup>18</sup> the UNCITRAL Arbitration Rules (hereafter “UNCITRAL Rules”)<sup>19</sup> and the International Chamber of Commerce Arbitration Rules (hereafter “ICC Rules”).<sup>20</sup> This, admittedly, somewhat sub-

12 *Lowenfeld*, *Lex Mercatoria: An Arbitrator’s View* Arb. Int’l. 1990, 133 et seq.

13 See in particular, *Mayer*, *The Principles in ICC arbitration practice*; UNIDROIT Principles: *New Developments and Applications*, ICC Int’l. Court Arb. Bull. 2005, Special Supplement, No. 662, 116 et seq. In general see also, *Bonell*, *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts* 3<sup>rd</sup> ed. (Transnational Publishers, 2005).

14 See second paragraph of the Preamble of the 2010 UNIDROIT Principles. Courts have referred to the UNIDROIT Principles on several occasions. An instructive case is *Hideo Yoshimoto v. Canterbury Gold International Ltd.*, where the New Zealand Court of Appeal found it necessary to refer to the UNIDROIT Principles to when having difficulties interpreting a contract (Court of Appeal Wellington, 27 November 2000, [2001] 1 N.Z.L.R. 523, 547 (C. A.), available at <http://cisgw3.law.pace.edu/cases/001127n6.html> (accessed June 21, 2012)).

15 *Kaufmann-Kohler*, (Fn. 1), 4.

16 IBA Rules on the Taking of Evidence in International Commercial Arbitration (adopted in 1999). Both the 1999 and 2010 versions are available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed June 21, 2012).

17 IBA Guidelines on Conflicts of Interest in International Commercial Arbitration (adopted 2004). Available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed June 21, 2012).

18 UNCITRAL Model Law on International Commercial Arbitration (adopted 1985 with amendments as adopted in 2006). Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (accessed June 21, 2012).

19 UNCITRAL Arbitration Rules (adopted in 1976, revised in 2010). Available at [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html) (accessed June 21, 2012).

20 ICC Arbitration Rules (adopted in 1998). Both the 1998 and 2012 versions are available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> (accessed June 21, 2012).

jective selection was chosen because of its significant practical influence and also because it originates from different sources – a professional association, an international organization and an arbitral institution.

*IBA Rules on the Taking of Evidence in International Commercial Arbitration:*

The International Bar Association (IBA), created in 1947 by bar associations of 34 countries, is a private law entity with more than 45,000 individual lawyers and over 200 bar associations and law societies spanning all continents. The IBA's stated purpose is to promote an exchange of information between legal associations worldwide, support the independence of the judiciary and the right of lawyers to practice their profession without interference, and support human rights for lawyers worldwide through its Human Rights Institute.<sup>21</sup> It does so through different committees. The committee in charge of arbitration related issues is committee D, the Arbitration Committee of the Section on Business Law. Committee D adopted the IBA Rules in 1999. The IBA Rules contain a comprehensive set of provisions on evidentiary matters in arbitration, such as document production, witness and expert testimony or privileges.<sup>22</sup> Within the committee D the Rules were produced by a working group consisting of arbitration specialists. When drafting the Rules these specialists consulted the arbitration community, including arbitral institutions and organizations, but did not receive any government input.<sup>23</sup> The Rules were revised in 2010 again by the working party of committee D, mostly composed of many of the same specialists who had already been involved in the drafting of the 1999 Rules. The aim of these Rules is to remedy the uncertainty about how evidence is gathered in international arbitration primarily stemming from the wide discretion given to parties and arbitrators by most arbitration rules in matters of procedure and the significant differences in the procedural traditions of the various jurisdictions potentially involved in arbitration, especially as regards common law versus civil law jurisdictions.<sup>24</sup> Accordingly, the IBA Rules sought to fill the gaps in the existing national legislation and to harmonize diverging evidence concepts in common and civil law jurisdictions by identifying and reflecting a best practice.<sup>25</sup>

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21 See [http://www.ibanet.org/About\\_the\\_IBA/About\\_the\\_IBA.aspx](http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx) (accessed June 21, 2012).

22 IBA Working Party Commentary on the New IBA Rules of Evidence in International Commercial Arbitration 2 Bus Law Int'l. 14 (2000).

23 See *ibid.*

24 See for example, the different concepts of taking of evidence in common law and civil law traditions with regards to, *inter alia*, 'discover'Y and 'privilege'. See also *Park*, (Fn. 3), 143–146.

25 *Karrer*, Internationalization of Civil Procedure – Beyond the IBA Rules of Evidence, in Vogt (ed.), *Reflections on International Practice of Law: Liber Amicorum for the 35<sup>th</sup> Anniversary of Bär & Karrer* (Helbing & Lichtenhahn, 2004), p. 130; *von Segesser*, *The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010* 28(4) ASA Bulletin Volume 2010, 735 et seq.

*IBA Guidelines on Conflicts of Interest in International Commercial Arbitration:*

In 2004 the IBA issued the IBA Guidelines. After collecting reports on national standards of impartiality for arbitrators, a working group of 19 experts in international arbitration from 14 countries extracted their common features and codified them as general principles.<sup>26</sup> In order to illustrate the meaning and application of these general principles they created the well-known color list, that is, the green, orange and red lists. These lists detail specific examples of various situations, relationships and scenarios involving actual or potential conflict of interests grading them according to their sensitivity (from green to red). A “red list” describes situations that give rise to justifiable doubts about an arbitrator’s impartiality. Some are non-waivable (for example, the arbitrator has a significant financial interest in one of the parties or the outcome of the case)<sup>27</sup>, while others (for example, the arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties)<sup>28</sup> may be disregarded by mutual consent. An “orange list” describes scenarios which the parties are deemed to have accepted if no objection is made after timely disclosure (for example, the arbitrator has acted as counsel for a party in the past).<sup>29</sup> Finally, a “green list” enumerates cases that require no disclosure (for example, the arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization).<sup>30</sup>

*UNCITRAL Model Law on International Commercial Arbitration:*

In contrast to the discussed IBA instruments (the IBA being a private association of legal professionals), the UNCITRAL was established by the General Assembly of the United Nations (an international organization) in 1966 in order to “further the progressive harmonization and unification of the law in international trade”.<sup>31</sup> In short, UNCITRAL is supposed to reduce or remove obstacles to the international trade flow due to differences in national laws governing international trade. UNCITRAL is composed of 60 member states elected by the General Assembly representing the geographic distribution and main global economic and legal systems. It is subdivided in six working groups, with working group II in charge of arbitration and conciliation.<sup>32</sup> The UNCITRAL Model law was adopted in 1985 as a “contribu-

26 *Landolt*, *The IBA Guidelines on Conflicts of Interest in International Arbitration: An Overview* 22 J. Int’l. Arb. 2005, 409 et seq.; *van den Berg*, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English*, in van den Berg (ed.), *Yearbook Commercial Arbitration 2004 – Volume XXIX* (Kluwer Law International, 2004), 314 et seq.

27 *IBA Rules PART II: Practical Application of the General Standards 1.1.3.*, p. 20.

28 *Ibid.* 2.3.2., p. 20.

29 *Ibid.* 3.1., pp. 20–21.

30 *Ibid.* 4.4.1., p. 24.

31 General Assembly Resolution 2205 (XXI) of 17 December 1966, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement> (accessed June 21, 2012).

32 See [http://www.uncitral.org/uncitral/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/commission/working_groups/2Arbitration.html) (accessed June 21, 2012).

tion to the development of harmonious international economic relations,, and then amended in 2006 “to conform to current practices in international trade,,<sup>33</sup> As with all model laws, its aim is to assist states in reforming and modernizing their arbitration laws.<sup>34</sup> Accordingly, it is unenforceable, and thereby ‘soft’, until it is transformed into national arbitration laws. Even though UNCITRAL is part of an international organization, all major arbitral institutions and organizations not only participate as observers in the sessions of the working group but are also very active in the drafting process.<sup>35</sup>

#### *UNCITRAL Arbitration Rules:*

Probably one of the most popular rules for ad hoc arbitrations (i.e. the parties execute their own particular arrangement without reference to institutional rules on supervision) are the UNCITRAL Rules.<sup>36</sup> They were adopted in 1976 and revised in 2010 by UNCITRAL after extensive deliberations and consultations with various interested international organizations and leading arbitration experts.<sup>37</sup> Although developed under the auspices of the United Nations, the UNCITRAL Rules have a purely contractual status and are only applicable if the parties have agreed to them in writing.<sup>38</sup>

#### *ICC Arbitration Rules:*

In contrast to the UNCITRAL Rules, the ICC Rules as adopted in 1998 and revised in 2012 by the ICC in Paris are among the most used arbitration rules when it comes to so-called institutional arbitration. Here, a distinction has to be drawn between institutional rules as a set of norms elaborated by an arbitration institution and institutional rules as part of the/a parties’ contract. Once the parties agree on a set of arbitration rules and incorporate them into their contract (usually by way of reference to that set of rules in the arbitration agreement), the rules become part of their contract, which makes them binding and enforceable at law. Therefore, they do not meet the above-mentioned definition of soft law. However, the rules itself exist irrespective of

33 General Assembly Resolution 40/72 of 11 December 1985 and 61/33 of 18 December 2006, joined version available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (accessed June 21, 2012).

34 *Kaufmann-Kohler*, (Fn. 1), 9.

35 *Ibid.*, 10. The General Assembly encourages UNCITRAL to invite interest groups specialized in arbitration. See General Assembly Resolution 36/32 (1981) XII Yearbook for the United Nations Commission on International Trade Law 22, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb\\_1977\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf)(accessed June 21, 2012).

36 The Rules are particularly known due to their use by the Iran-US Claims Tribunal and by NAFTA Tribunals. In addition, even though the UNCITRAL Rules are aimed only at ad hoc arbitration, it should be noted that they also contain a mechanism for assistance in the nomination, challenging and replacement of arbitrators (see Arts. 6–13 UNCITRAL Rules).

37 See homepage of the Permanent Court of Arbitration, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1064](http://www.pca-cpa.org/showpage.asp?pag_id=1064) (accessed June 21, 2012).

38 Art. 1(1) UNCITRAL Rules.



whether they are incorporated into the parties' contract or not. As such, even though they provide for some specificities privy to ICC arbitration only (for example, terms of reference or scrutiny of the award by the ICC Court of Arbitration), they represent the "views and choices of the arbitral institution in matters of arbitral procedure" and could conceivably be a "soft code of arbitral procedure".<sup>39</sup>

## II. How does soft law interact with international arbitration?

The fact that soft law norms cannot be enforced by public authority does not necessarily mean that they do not have far-reaching effects.<sup>40</sup> On the contrary, depending on the respective body of soft law, addressees of soft law norms often either perceive them as binding or, if not so, decide to adhere to them or to be guided by them on their own initiative.<sup>41</sup> The following reasons, among others, have been identified in this context: convenience, best practice arguments, social conformism, the fear of the so-called 'naming and shaming' and the search for predictability and certainty.<sup>42</sup>

As regards the issue of how soft law may technically come into application in arbitration, it can be observed that this occurs through legislation, party agreement or arbitral practice. An illustrative example for the influence of soft law with regard to legislation affecting international arbitration is the UNCITRAL Model law. As of today 66 states have enacted legislation modeled after the UNCITRAL Model Law in some way.<sup>43</sup> Turning to the possibility to integrate soft law in arbitration by mutual consent, if parties expressly agree that procedural soft law (for example, the IBA Guidelines) is applicable, it becomes part of their contract and as such of contractual nature. Hence, soft law turns into hard law. More controversial is the interaction of soft law instruments with arbitration through arbitral practice, i.e. the application of soft law based on the submissions by the parties and, most importantly, based on the arbitral tribunal's discretion. Many major institutional arbitration rules provide the arbitral tribunal with a broad discretion in relation to procedural aspects of the proceedings. For example, Art. 25(1) of the ICC Rules states "[t]he arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means" [emphasis added]. Art. 14(2) of the London Court of Arbitration (LCIA) Rules of Arbitration provides as to the conduct of the proceedings that "[u]nless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable" [emphasis

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39 *Kaufmann-Kohler*, (Fn. 1), 11.

40 *Park*, (Fn. 3), 142.

41 *Kaufmann-Kohler*, (Fn. 1), 2.

42 *Flückiger*, *Why Do We Obey Soft Law?*, in: Nahrath & Varone (eds.), *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: A Tribute to Peter Knoepfl* (Presses polytechniques et universitaires romandes, 2009), 45–62.

43 See list on the UNCITRAL homepage, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (accessed June 21, 2012).



added].<sup>44</sup> Finally, Art. 17(1) of the UNCITRAL Rules, Art. 16(1) of the American Arbitration Association (AAA) Rules of Arbitration<sup>45</sup> and Art. 17(1) of the Australian Centre for International Commercial (ACICA) Rules of Arbitration<sup>46</sup> (among others)<sup>47</sup> provide in a sort of general provision that “[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate [...]” [emphasis added]. In addition, soft law does not only come into play because of the tribunal’s discretion but also as guidance when interpreting ambiguous or open terms in arbitration rules or national laws. For example in the context of conflicts of interest (which eventually might lead to the challenge of an arbitrator) the standards of what constitutes the required “independence” and “impartiality” is often fairly general and ambiguous, both in the applicable arbitration rules<sup>48</sup> and national laws.<sup>49</sup> Here, the IBA Guidelines may (referred to expressly or not) be used for clarification and confirmation.<sup>50</sup>

### C. The legitimacy discussion

Due to the far-reaching effects of soft law in international arbitration, especially with regard to the implementation of some sets of soft law rules in the sense of a best practice approach, the issue of the legitimacy of soft law arises. As already outlined above, in the authors’ view this issue lies at the heart of the discussion over soft law in international arbitration. However, as will be shown, the concept of legitimacy in ar-

44 LCIA Arbitration Rules (as adopted in 1981 and revised in 1985 and 1998). Available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx#article14](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article14) (accessed June 21, 2012).

45 AAA Arbitration Rules (as promulgated in 1991). The latest version is available at <http://www.adr.org> (accessed June 21, 2012).

46 ACICA Arbitration Rules (as adopted in 2005). Available at <http://acica.org.au/acica-services/acica-arbitration-rules> (accessed June 21, 2012).

47 See also Art. 19(2) UNCITRAL Model law.

48 For example, Art. 11 of the UNCITRAL Rules states that “[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence,” [emphasis added]. Art. 20(4) of the ICC Rules requires with regard to the conduct of the arbitration that “[i]n all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case,” [emphasis added]. What these justiciable doubts are or how to act fairly and impartially is not elaborated on.

49 See for example, the decision of the Swiss Federal Court of March 22, 2008 in a case in which the parties had not expressly referred to the IBA Guidelines (26 ASA Bull. 2008, 565-79). The court states that “[i]n order to verify the independence of the arbitrators, the parties may also refer to the IBA Guidelines [...]. Such guidelines do not have the force of law [...]; they are nonetheless a valuable tool, capable of contributing to harmonize and unify the standards applied in the field of international arbitration to conflict of interest issues, and one that will undoubtedly exert influence on the practice of arbitral institutions and courts. These guidelines state general principles,” [translation *Kaufmann-Kobler*, (Fn. 1), 15].

50 See for example, *Parle*, (Fn. 3), 142; *Kaufmann-Kobler*, (Fn. 1), 14.

bitration is different from general principles of legitimacy in law making since the focus of the discussion is on the legitimacy in the application of soft law rather than on its making. But first, it appears to be useful to define the term ‘legitimacy’ in the context of international arbitration.

### I. Defining legitimacy of soft law in the context of international arbitration

For the purpose of this article legitimacy will be understood as the popular acceptance of a governing law or regime as authority, and in a more narrow sense, as regards democratic legitimacy, that all those to whom a set of rules applies must be allowed to participate in their creation.

Soft law rules as such are, as shown above, not binding. Yet, prominent soft law documents can have an effect that can ultimately undermine the ability of parties to decide whether they wish to be bound by those rules. For example, the IBA Guidelines are routinely referred to within the field of arbitration whenever challenges are made to a nominated arbitrator, even if the parties never agreed to be bound by the Guidelines (for example, when arbitral tribunals apply soft law based on their wide discretion in procedural matters). Moreover, arbitrators themselves will usually be guided by the Guidelines in deciding what they must disclose prior to accepting an appointment, and even national courts now increasingly use the Guidelines in determining whether an arbitrator challenge should succeed.<sup>51</sup> As a result, parties can find themselves exposed to the application of the Guidelines even where not (expressly) agreed upon, and perhaps had never heard of them prior to the challenge being made. One may even go as far as saying that even though the documents in question may only be advanced as recommendations, the cohesive nature of the arbitral community, combined with the deference given to that community by traditional lawmakers, creates a situation in which those recommendations stand to function as a presumptive legal regime from which parties must opt out (for example, by way of expressly excluding what by now is a difficult to oversee mass of soft law instruments), rather than having the option of opting in.<sup>52</sup> In this context it is also sometimes said (which in substance is the same thing) that soft law is a tool by which the arbitration elite maintains its power and control over international arbitration.<sup>53</sup> Even though that criticism may appear to be excessive, it shows that a discussion over the legitimacy of existing (and potential future) soft law is needed.<sup>54</sup>

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51 see above, B. II

52 See also the post from *Cole*, (Senior Lecturer at Brunel Law School in London) *Soft Law in International Arbitration, A Canon for Arbitration and Investment Law* (posted July 7, 2011), available at <http://arbitrationandinvestmentlaw.wordpress.com/2011/07/08/soft-law-in-international-arbitration/> (accessed June 21, 2012).

53 *Kaufmann-Kobler*, (Fn. 1), 16, referring to *Robilant*, (Fn. 6), 549.

54 For a criticism of soft law’s lack of democratic legitimacy see for example, *Berger*, *The Creeping Codification of the lex mercatoria* (Kluwer International Law, 1999), p. 64.

## II. The relevance of legitimacy in creation and application of soft law

In order to shed some light on the issue of legitimacy it is suggested that one has to distinguish between legitimacy of the norm as regards its creation as opposed to the legitimacy of the norm as regards its application.

### 1. “Irrelevance of the legitimacy of the norm as regards its creation” – argument

Legitimacy of the norm as regards its creation focuses on the question whether the soft law norm is supported by a democratic decision making process. In this respect, it is often argued that it is problematic to apply a soft law norm to “weaker parties” which have not been able to participate in the creation of said norm (for example, in arbitrations involving consumers, employees, athletes or other “weaker parties”<sup>55</sup>). Even though this might arguably be of some relevance to the discussion over legitimacy, it is not decisive. The fact that a party may be “weaker” than the other is generally taken into account at the very outset of the arbitration, meaning with respect to the arbitration clause. It is there that consideration is given to the fact that one party may be in need of protection, i.e. that she needs to be appropriately warned about the fact that she is entering the “arbitration zone”. When the arbitration agreement is made certain formal requirements are imposed upon the parties to make it clear that they are abrogating from the jurisdiction of national courts. In addition, the fact that a party may be so “weak” that she needs to be protected from arbitration is also taken into consideration when it comes to the subject matter arbitrability where certain disputes or fields of law are exempt from arbitration as a matter of principle and public policy.

It is equally irrelevant for the sake of the legitimacy discussion whether a soft law norm has been created by a group of law practitioners, an association or other non-governmental organizations or whether it would make a soft law norm more legitimate if it was created with governmental authority.<sup>56</sup> It appears contradictory to a certain degree to argue that in arbitration, which is a non-governmental dispute resolution mechanism, legitimacy is increased because of the involvement of a governmental body instead of an independent group or association specifically focused on the needs and challenges of arbitration.

Generally speaking, the legitimacy of law as regards its creation is important especially where laws are made and enforced by governmental authority. It is the concept of democratic law-making that hard law may not be imposed on its addressees through state powers without having been appropriately represented in the making

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55 Kaufmann-Kohler, (Fn. 1), 17.

56 For a critical view on who is entrusted with producing certain soft law instruments, see Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other Methods intended to help International Arbitration Practitioners to avoid the need for independent thinking and to promote the Transformation of Errors into “Best Practices”*, in Levy & Derains (eds.), *Liber Amicorum en l’honneur de Serge Lazareff* (Pedone, 2011), 563 (565).

of the law. This is different in arbitration, where the parties deliberately submit their dispute to an alternative dispute resolution mechanism and so to say, at least as regards the procedural side of arbitration, “opt out” of the world of hard law. Finally, as a remedy to reduce the lack of soft law legitimacy as regards its creation it has been suggested to integrate more users in the process of soft law creation and thereby extending the consultation beyond the service providers currently involved (arbitral institutions, arbitrators, counsel).<sup>57</sup> Considering the number of soft law instruments being created and the number of their potential users this suggestion seems to face considerable practical difficulties.

It is therefore submitted that the decisive discussion takes place around the question whether there is legitimacy in the application of the soft law norm and not its creation

## 2. Legitimacy through application

As regards the legitimacy in application, one must distinguish between situations where the parties have expressly or impliedly agreed to the application of a set of soft law norms or where there is no such agreement. In the event that the parties have reached an agreement the soft law instrument ceases to be soft and becomes hard law. In this respect one could say that embodying soft law by party agreement provides possibly the highest level of legitimacy because it is borne by the parties’ will being the strongest pillar of arbitration.

Failing an agreement between the parties, the arbitral tribunal may at its own initiative and discretion take into account one set or several sets of soft law rules. As shown above, in most arbitration rules the arbitral tribunal is granted wide discretion in relation to procedural aspects of the arbitration in the absence of an agreement between the parties or mandatory rules applicable for instance at a place for arbitration.

On another level, one needs to take into consideration whether the arbitral tribunal expressly addresses the soft law norm it wishes to apply or, which may be even more problematic and possibly harmful, whether it does so silently and, therefore, leaving it open whether it has in fact relied on a soft law norm or made an independent assessment of the situation. In this respect, however, one must say that arbitral tribunals will mostly revert to guidelines or rules that they find to be helpful as a source of inspiration in designing the arbitral process, such as the IBA Rules. It is very difficult to imagine that the application of the IBA Rules would lead to a major dispute between the parties or the parties and the arbitral tribunal because they are designed to structure and clarify certain aspects of the taking of evidence and, therefore, can be considered as a tool box rather than anything else. In fact, they borrow from different procedural traditions and merge them into generally acceptable norms. Good examples for such merger are the provisions on document production. Here, the IBA Rules contain a compromise between, on the one hand, US pre-trial discovery and English document disclosure and, on the other hand, court procedures in civil law

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<sup>57</sup> Kaufmann-Kohler, (Fn. 1), 17.

jurisdictions where document production is very restricted.<sup>58</sup> However, such compromises which carry a certain risk of surprises for the affected parties, have to be applied with caution.

Also, the legitimacy of applying a set of soft law rules is questionable where it is in conflict with other rules, in particular rules which the parties have expressly chosen (such as the rules of an arbitral institution). For instance, there is a clear conflict between the IBA Guidelines and the ICC Rules which provide that an arbitrator must disclose any circumstance which can give doubt to his impartiality and independence, regardless of whether the impact is serious enough to put into jeopardy the arbitrator's independence and impartiality.<sup>59</sup> This decision is made by the ICC which is why the ICC argues that in case of doubt all circumstances must be disclosed by the arbitrator. This, however, is in conflict with the green list in the IBA Guidelines which, as already explained above, contains several circumstances that are considered uncritical and, as a consequence, do not need to be disclosed by the arbitrator.<sup>60</sup> The ICC, however, claims that this would lead arbitrators not to disclose certain circumstances which under the ICC Rules as a matter of principle should be disclosed.

Then again, procedural soft law may also contribute to the well functioning of arbitration. In fact, it might support a sense of equal treatment by promoting the perception that the arbitration is "regular" and rooted in the "rule of law principle"<sup>61</sup> (here it is submitted that equal treatment is also part of legitimacy in law in the sense that similar cases should be treated similarly). This seems to be particularly true when an arbitration takes place among lawyers who share little common legal culture. Park argues in this context that flexibility to overcome these differences is not always the right tool due to a lack of common "cross-cultural baselines".<sup>62</sup> By contrast, when arbitrators invent procedural norms as the arbitration unfolds, choosing their procedural standards after having an idea of which party has the stronger case, one side may perceive this as illegitimate.

In conclusion, it is suggested that the legitimacy of soft law in international arbitration creates itself through the application process. If it is applied responsibly and in accordance with the underlying agreement of the parties, meaning in accordance with the arbitration agreement, it will be sufficiently legitimized. In addition, there may even be a system of 'checks and balances' of the other kind: 'The customer is king'. Arbitration is supposed to serve its users who may have manifold backgrounds and interests. It is a dispute resolution product with individual characteristics and as

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58 See Art. 3 of the IBA Rules. See also *Kaufmann-Kohler*, (Fn. 1), 7–8; *Raeschke-Kessler*, *The Production of Documents in International Arbitration – a Commentary on Art. 3 of the new IBA Rules of Evidence*, in Briner and others (eds.), *Liber Amicorum for Karl-Heinz Böckstiegel* (Heymann, 2001), 641 et seq.

59 Art. 11(2) of the ICC Rules.

60 *Fry & Greenberg*, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20(2) *ICC Int. Court of Arb. Bull* 2009, 12.

61 *Park*, (Fn. 3), 146.

62 *Ibid.*, 150.

such subject to demand. If soft law rules promote a better product, they will succeed. If they do not, they will disappear, or even worse arbitration as a dispute resolution mechanism is jeopardized. It is therefore in the best interest of the arbitration community to rely on soft law rules with prudence.

## **D. Conclusion**

In the end, one can say that the international arbitration system will never be perfect, also not with regard to its usage of soft law. However, what we need to look out for is not perfection but legitimate since appropriate solutions to disputes arising in the context of international arbitration. The legitimacy of soft law in arbitration defines itself differently than legitimacy of law in general. It is legitimized through the process of its application. Consequently, all involved parties must by way of discussion continuously seek to balance the different interests involved in the application of soft law in international arbitration in order to warrant appropriate solutions to disputes in this field, thereby insuring its legitimacy. This article is aimed at contributing to this discussion.