Soft Law in International Commercial Arbitration – A Critical Approach

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1 This paper was delivered as the 6th Bergsten Lecture on the occasion of the Willem C. Vis International Commercial Arbitration Moot Competition finals in Vienna on March 25, 2018. The lecture style is retained, with a few footnotes added.
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A. Introduction

It is a great honor to be asked to deliver this 6th Bergsten Lecture. Professor Bergsten looms large in the pantheon of lawyers who made a difference to generations of young arbitration practitioners. The Vis Moot has educated, and continues to educate students in arbitration in a way no classroom experience ever could. It also made a difference to the dispute resolution practice of many law firms – students exposed to the Vis Moot discover the challenges and fun of arguing a case in arbitration proceedings. This gave hiring for dispute resolution teams an enormous boost. Having watched over the growth of my firm's arbitration team for several years, I would like to use this opportunity to thank you, Professor Bergsten. Whether or not that was your intention: You certainly made a difference also for us and many other law firms.

B. "Soft law"

1. The phenomenon of soft law

Today's topic also has something to do with education. Soft law is often said, amongst others, to serve the purpose of educating inexperienced arbitration practitioners. Well, maybe so. You, as today's audience, will not need to be educated on arbitration, so the topic risks getting rather boring for you. I will try to give it a twist, though. So please stay tuned.

There is a plethora of publications having "soft law" in the title. But there is not only an abundance of interest in soft law. Judging from these publications, there is also an abundance of soft law instruments: It is said that "numerous" guidelines and rules have been published in the context of international arbitration, that

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there is a "bewildering web of arbitral soft law norms", even "a thicket of continuously growing density", and in any case a "vast variety of [soft law] instruments".\(^4\)

On the procedural rules side, the choice of soft law instruments offered ranges from the UNCITRAL Model Arbitration Law and the various IBA rules and guidelines to the ICC Arbitration Rules, to the rules and emanations of any arbitration center of the world, or simply "best practice". These instruments typically address topics such as organization of proceedings, taking of evidence, appointment of arbitrators, ethics, or drafting of the award.

On the substantive rules side, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), the *lex mercatoria* and various standard conditions, including the Incoterms of the International Chamber of Commerce (ICC) and the General Conditions of the International Federation of Consulting Engineers (FIDIC Conditions of Contract) are often mentioned.

All of that somehow qualifies as soft law, or so it is argued.

Of course, soft law becomes hard law as soon as the parties agree on it: When the parties have agreed on arbitration under the ICC Arbitration Rules, any discussion about whether the ICC Arbitration Rules may qualify as soft law becomes moot as far as these parties are concerned. The same applies when the parties agree on a particular Incoterm or incorporate a specific FIDIC contract form into their agreement. By means of party autonomy, these instruments then become law between the parties: contractual law. There is no magic about that and it is not our topic. The question is whether such texts may have some normativity


outside of party autonomy – normativity that could justify the label of "law", although only soft law. Maybe there is some magic here.

We are all familiar with the saying "dura lex sed lex". Law is, by definition, hard. There might be more or less flexibility built into the law, but the ultimate test of law is its enforcement. Soft law, however, is characterized by its non-binding nature and hence the absence of enforcement. Therefore, soft law is in essence a contradiction in terms, or as Yale Professor Michael Reisman suggested, akin to being slightly pregnant. So why has the label as well as the concept become so popular, if not ubiquitous in the context of international arbitration?

For that we need to take a step back in time and inquire where the concept of soft law comes from.

2. The origins of the concept of soft law

In essence, the concept of soft law originated in public international law after the Second World War. In the face of the ideological battles of the Cold War and decolonization, the clear definition of public international law as established by Article 38 of the Statute of the International Court of Justice degenerated into what was described as a "crumbling of the columns of the temple". Swiftly changing needs of the modern world clashed with the political deadlock within the international community of states. The traditional primary sources of public international law, custom and treaties, could not keep up with the rapid developments. While it may still have been possible to agree on non-binding principles and declarations, states would too often balk at accepting binding treaties. By necessity, the global community of states had to make do with instruments that were less binding (if at all) than treaties.

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7 Ignoring here the leges imperfectae that cannot be enforced and, by their very name indicate that perfect laws need to be enforceable.
A prime example is the famous Universal Declaration of Human Rights adopted by the United Nations in 1948 and by now translated into more than 360 languages.\(^5\) It is not a treaty, it has no binding effect, but everybody would agree that it is an influential text and that you cannot really be against its content. Or the Final Act of Helsinki of 1975: It is a solemnly signed act that provided the foundation for the Organization for Security and Cooperation in Europe that helped steer Europe through the Cold War. The signatories felt somehow bound by it, although it was to a large extent not a binding treaty and was never intended to be binding. Or many programmatic principles of the General Agreement on Tariffs and Trade (GATT), the predecessor of the much more formal World Trade Organization (WTO). Or the Organisation for Economic Co-operation and Development (OECD) Codes of Conduct for Multinational Enterprises and other codes of conduct in the fields of international trade, health or environmental protection.\(^11\)

These are all instruments that had been extensively negotiated at conferences and formally agreed on by states or international organizations, but remained in an at least partly non-binding and often vague form in order to allow broad consensus and thereby facilitate international co-operation.

The renowned British jurist and former President of the International Court of Justice, Lord McNair, is credited with coining the term "soft law" to evoke "a transitional state in the development of norms where their content is vague and their scope imprecise".\(^12\) Early on soft law was deplored as a sign of impotency of the international community in the face of the ideological rifts of the time.\(^13\) Others pointed out the lack of meaning of the label.\(^14\) Prosper Weil dismissed the very idea of soft law as a "pathological phenomenon of international normativity".\(^15\)

\(^12\) Dupuy, supra note 9, at 252.
Soft law has, however, been credited with some political normativity due to the principle of good faith: States were expected to roughly abide by standards that they themselves set, even if they did so only in a non-binding manner. Soft law was characterized as extra-legal commitments by the states that are not legally but certainly politically binding, and that are expressions of a consensus on how public international law should develop in the future. In essence, states were expected to walk the talk – a political version of non venire contra verbum pro-prium. But it was not law.

It is therefore small wonder that the label "soft law" was increasingly criticized, particularly after the end of the Cold War. This notwithstanding, non-binding instruments became more and more popular in practice. As a result, the concept of relative normativity in public international law remains hotly disputed. Some of the criticisms are quite withering. Jan Klabbers suggested to dispense with the concept altogether. Similarly, UCLA Professor Kal Raustiala simply declared the nonexistence of soft law.

So, the idea of a soft law with relative normativity was never generally accepted in public international law and it may even be on its way out. It is all the more interesting that the concept somehow spilled over into international commercial arbitration and has since flourished in its new habitat.

3. Soft law as a topic in international commercial arbitration

It was only about 15 years ago that the notion of soft law crossed over into international commercial arbitration. Most authors do not define what they understand
by soft law. They simply use the term as a given. Those who try often end up with a negative definition: Gabrielle Kaufmann-Kohler uses the formula "norms that cannot be enforced through public force". According to Kaufmann-Kohler, soft law may still have normativity, because addressees perceive it as binding or, even if they do not, they may still choose to abide by it on their own accord for psychological rather than legal reasons.

Likewise, David Arias concludes that what ultimately characterizes a rule as soft law is that it cannot be enforced through the mechanisms offered by the State, typically due to its lack of concrete content (such as an international treaty that only sets objectives and principles) or its lack of mandatory effects (for instance, a code of conduct).

Such a definition still echoes the origin of the term in public international law, albeit minus a crucial element, i.e. the political expectation of participants walking their own talk. In arbitration, guidelines are drafted by some members of the community, but are supposed to be observed by all members.

Indeed, the transfer of the term from public international law into international commercial arbitration seems not to have occurred without loss – an acute case of "lost in translation". In public international law, the perceived normativity of soft law based on political good faith is a crucial requirement. In arbitration, normativity based on good faith seems to have withered to a marginal and dispensable characteristic.

"Soft law" has become a buzzword with very little, if any, meaning. Yet, the term soft law implies at least some normativity. If no normativity is involved, we should not talk of law, soft or otherwise.

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It is of little wonder then that not everybody supports the use of the term. In 2010, the Swiss Arbitration Association (ASA) held a conference on soft law, but consciously avoided the term. Instead, it talked of "para-regulatory texts". This is a mouthful. I understand why most people prefer "soft law". But ASA definitely deserves credit for better precision.

C. Criteria for instruments aspiring to qualify as soft law (assuming there is such a thing)

Even accepting, for the sake of the argument, that guidelines, notes, protocols and so forth may have increased normativity, they cannot possibly enjoy such a status simply because it says "Guideline" on top and bears the letterhead of some institution. Any such document must at least meet minimum criteria.

Don't worry, I am not now proposing a guideline for the issuance of guidelines. A satirical version of such a guideline already exists in the form of an article by Michael Schneider in the Liber Amicorum for Serge Lazareff of 2011. You may or may not agree with Schneider's view, but it is essential reading for anybody who intends to venture into the business of drafting guidelines.

My message simply is: Take your time, lots of time. The careful drafting of laws by legislators takes years (we all know there is also careless drafting of laws that takes much less time). The careful drafting of guidelines also takes years, with several rounds of consultations among various groups and constituencies. Working groups have to be carefully composed. You will want to have very experienced practitioners from various backgrounds in a task force but you also need to make sure that they find the time to contribute, that they are granted the time they need, and that they are motivated to meaningfully contribute to the project. It is not uncommon to find names on a list of task force members who never ever

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contributed anything and may never have even read the instrument that was later issued in their names.

You also need to provide the wider community with ample opportunity to contribute. As an example of how not to do it: On 14 January 2013, the then leadership of the International Bar Association (IBA) Arbitration Committee sent an innocuous-looking email asking for comments on the draft Guidelines on Party Representation with a deadline "at your earliest convenience and in any event prior to 4 February 2013", in other words, within less than three weeks. Most of you will have received that email. Let us have a show of hands: Who among you opened the attachment and studied the draft before the deadline? – I’m hearing laughter, but do not seem to see any hands...

There must be a much longer window of opportunity for the community to participate and for the task force to consider any comments. Otherwise, a guideline cannot be promoted as reflecting the crowd wisdom of the whole organization. In fact, back in 2013 and 2014, I was astonished to learn that only very few people had ever read the IBA Guidelines on Party Representation and that many of those who did were left wondering.

Any guideline that is supposed to draw legitimacy from the issuing organization has to be transparent about the process that led to its adoption. The mere fact that a guideline was adopted by a large organization, even one as recognized as the IBA, cannot suffice to confer any legitimacy. If the process was flawed or just remains obscure, then the instrument can hardly claim institutional legitimacy.

So we need institutional legitimacy based on a transparent procedure.

We also need acceptance by the arbitration community. Acceptance is difficult to gauge. It has become popular to conduct surveys, but not all of such surveys are very helpful. Indeed, it depends on what the question was, who was surveyed, and who responded. Often surveys are less than transparent in this regard. Also, it is often the case that the manner in which a question is asked influences the

Cf. Reisman, supra note 8, at 29.
outcome. For example, when a survey, as was recently the case, inquires whether you have ever used the UNIDROIT Principles, there will be a very high percentage of positive answers, suggesting high acceptance and increased normativity, but merely because the word "use" has very broad meaning. I, for example, would tick the box "Yes". I actually use the UNIDROIT Principles quite often. Conversely, when the survey inquires whether you have ever had a case where the UNIDROIT Principles were the applicable law, there will likely be a very low percentage of positive answers. I, for one, would tick the box "No". So, surveys are important but have to be taken with a large pinch of salt.

An additional difficulty is that most practitioners will not be familiar with all the rules in a given instrument. I am not sure whether all of you would be able to instantly decide whether all of the provisions in the IBA Rules of Evidence are "best practice". I personally would have to read them first and then think about it for a while.

So we need at least (i) institutional legitimacy, (ii) a transparent procedure and (iii) acceptance. Applying this test, let us look at some prominent soft law instruments.

D. A closer look at purported soft law instruments

Let us take the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) for instance: It is often mentioned as a prime example of soft law. It ticks all the boxes: institutional legitimacy, proper procedure, and broad acceptance. But is it soft law? Consider that many traditional arbitration jurisdictions such as the U.S., England, France, and Switzerland did not bother to adopt the UNCITRAL Model Law. The arbitration laws of these countries even contain several substantial deviations from the principles of the UNCITRAL Model Law. Are these countries being criticized for being in breach of soft law? Or should they be? Of course not. The UNCITRAL Model Law is intended to provide guidance to legislators. It was, and still is, spectacularly successful at that. But there is no increased normativity. It is a model law and that's that. We do not need to call it by any other name.
The ICC Arbitration Rules is another document often referred to as a typical soft law codification. Does this mean that any arbitration proceeding without Terms of Reference, for instance, is not state-of-the-art? Again, of course not. The ICC Arbitration Rules are full of ICC peculiarities. As Gabrielle Kaufmann-Kohler noted, "they contain too many features that are ICC specific to qualify as a codification of soft law arbitral procedure." They may be an influential document but they do not enjoy any increased normativity. Either the parties adopted them or they did not. Of course, some of the provisions in the ICC Rules may be an expression of general arbitration practice, but that remains to be shown for each specific provision. The ICC Arbitration Rules as such are not soft law, they are potential law – a text that becomes law if the parties agree on it.

By now you will probably want to shout, yes, maybe, but what about the IBA Rules on the Taking of Evidence or the IBA Guidelines on Conflicts of Interest? They are soft law under any definition, aren't they? I must concede that if any instruments deserve the label "soft law", then it is these two. They have become extremely successful, not as hard law – parties seldom declare them as binding – but as sources of inspiration and guidance. This does not mean, however, that every single sentence enjoys the same level of acceptance. Only few practitioners will actually have read them in full. Those who do will probably find one or the other rule they do not deem reasonable, let alone consider best practice. For example, according to section 3.3.7 of the IBA Guidelines on Conflicts, enmity between counsel and an arbitrator requires disclosure by the arbitrator and may give rise to a challenge. I am frankly not yet sure whether this provision, which was introduced in the revised 2014 version, is helpful or rather counterproductive.

So, yes, the IBA Rules on the Taking of Evidence and the IBA Conflict Guidelines are outstanding, but do they enjoy increased normativity? I suggest they do not as such, even though they contain many rules and guidelines that most practitioners would subscribe to.

Kaufmann-Kohler, supra note 24, at 293.
But let us assume, again, for the sake of the argument, that the IBA Evidence Rules and the IBA Conflict Guidelines are as such soft law instruments with some increased normativity, which other instruments would deserve that badge of honor?

I will now show a chart depicting numerous hypothetical soft law instruments, neatly arranged as columns in order of general acceptance on a scale from 0 to 10. The lower the column, the lower the acceptance.

The two on the left with the highest rating of about 7 could be the IBA Rules on the Taking of Evidence and the IBA Conflict Guidelines. To the right, where you see numerous low columns, below 1, you can imagine obscure texts few people have ever heard of and even fewer people care about – definitely not soft law under any measure. What about all those columns in between? Let us move down that scale, starting at 7, and please shout when you think the minimum level of acceptance for a soft law instrument is reached. Here? Now? Or down here now? (a shout) Thank you.

Here is the rub: There is no clear threshold for a soft law instrument, and practitioners will never be able to agree on one. You might ask whether there needs to be one. My answer is: It depends.
As long as we talk of soft law simply as a phenomenon in arbitration practice, we do not need to agree on a specific threshold. We will likely agree on the most typical cases, and the marginal ones are not relevant.

If we take a legalistic approach and want to attach some normativity to a concept of soft law – and, as a matter of intellectual honesty, we probably should – then inclusion or exclusion definitely matters.

In this chart, I made the decision where to draw the line particularly easy for you. I already ranked them according to a single criterion. But of course, this is a task that is all but impossible in practice.

With so many guidelines, most of which all of us are blissfully unaware of, we do not want to accord them any increased normativity. Let us not forget that in many jurisdictions the arbitrators have a duty to know and apply the law – *iura novit arbiter*. This adage relates to the substance of the dispute but, with regard to the minimal requirements of due process, also to the procedure. If soft law had any normativity that reaches the threshold of *iura novit arbiter*, all of us might all too often be in unconscious breach of our core duty – the duty to apply the law.

E. **Is there a need for further guidelines and rules?**

1. **The test is quality, not quantity**

Some deplore an oversupply of guidelines, notes and protocols. Toby Landau and Romesh Weeramantry famously diagnosed a "*pandemic spread of the [...] highly contagious condition 'Legislitis'*." Others diagnosed a state of irritating pruritus. Already in 1994, the late Pierre Lalive deplored what he referred to as a "*regulatory fury*".

What is the right number of regulations? It is difficult to define a limit. Not enough, just enough, more than enough? At the recent Freshfield's Arbitration Lecture in

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30 Landau & Weeramantry, *supra* note 4, at 497.
Frankfurt, the organizers asked the participants, after a panel discussion on ethics, whether they thought that we needed more guidelines on ethics. The overwhelming response was "No, thanks".

Then again, 20, 30 years ago, there were already voices decrying the excessive drafting of guidelines and notes, such as Pierre Lalive in 1994. In the meantime, the IBA Rules on the Taking of Evidence have been vastly expanded, the IBA Conflict Guidelines were drafted mostly from scratch and nobody really complains about these instruments. So, it is not about the quantity as such, it is about the quality. There is room for new rules and guidelines, but the topics need to be wisely chosen and the guidelines carefully drafted.

This takes time and here is where quantity does play a role: With too many task forces and working groups toiling away at too many projects the outcomes are bound to be of uneven quality, thus undermining the trust in the process as a whole. The IBA will feel the backlash caused by the hasty adoption of the IBA Guidelines on Party Representation for quite a while.

The Inter-Pacific Bar Association (IPBA) is currently drafting an instrument on attorney secrecy and privilege, and it is taking pains to avoid making the same mistakes.

If soft law is the answer, what is the question? Let us have a closer look at the arguments usually raised in favor of more soft law:

2. **Is there a need to fill gaps?**

It is often claimed that soft law instruments are aimed at filling perceived gaps. This argument raises two questions:

First, did we look close enough? It is said that arbitration is an "ethical no-man's land" utterly devoid of ethical rules. Gary Born countered by describing the ethical landscape as a cluttered teenager's bedroom. There may actually be too

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22 Catherine Rogers, Ethics in International Arbitration (Oxford Press, 2014), at 18, paras 1.03-1.04.
23 Quoted in "From a no man's land to a teenager's bedroom", GAR News, 17 September 2014.
many rules and simply not sufficient clarity as to which ones apply, when and where.

Secondly, are we not just being condescending? Simply because we do not find our own traditions in another culture does not mean that there are gaps that urgently need to be filled. How much time have we spent analyzing new arbitration jurisdictions and their dispute resolution traditions before we decided that their laws and traditions have gaps that needed to be filled? Do we not risk equating gap-filling with levelling the global playing field in favor of the Western global players?

3. **Is there a need to level the playing field?**

   Indeed, levelling the playing field is an argument often heard in favor of global soft law. Nothing against a level playing field, of course. I played team sports for decades and I do appreciate the benefits of a level playing field. But the argument is crucially flawed: What proponents of a global soft law try to achieve is not to level the playing field, but to level the world. The same rules for everybody on this planet. The Earth be flat.

   This proposition is fundamentally different from the need to create equal opportunity for the parties in any given arbitration. Why should a German and a Polish party in an arbitration seated in Vienna have to follow the rules that stem from witness preparation common in the U.S.? Counsel from Europe could even be in breach of their local bar rules by doing so. And vice-versa: Why should parties and counsel from Toronto and Los Angeles in an arbitration with its seat in New York be prevented from preparing witnesses with extensive mock sessions?

   There is merit in different traditions. Let there be a marketplace of arbitration styles and let users decide what they like best! Some users like extensive document production and are willing to pay for it, others have other priorities. The arbitration community needs to be able to offer choice, not a standard luxury product.
A disadvantage of diversity is that arbitration practitioners – I mean you, myself, all of us – have to acquaint ourselves with local traditions instead of simply practicing global law regardless of the venue. But without competition of ideas arbitration practice risks becoming first boring, then obsolete.

4. **Is there a need to harmonize, to create certainty, and to educate?**

This argument surely has some merit. The IBA Rules of Evidence and the IBA Conflicts Guidelines are extremely helpful in practice. However, they are the rare exceptions rather than the rule. The more instruments there are, the more confusing and cryptic a body of soft laws becomes. Assuming, as some argue, that arbitration rules indeed qualify as soft law, which one of the probably hundreds of arbitration rules in the world is the relevant one, the gold standard? It is obvious that not all rules can enjoy equal normativity. How can we have certainty here, and which one should be used as blueprint for a new arbitration center?

And what exactly is the opinion of those to be educated? In preparation for guidelines on counsel ethics, the task force of the IBA asked the IBA arbitration community about the need for rules on ethics. A main response was that practitioners were unsure about what ethical rules apply and wished some guidance. The problem is that the IBA Guidelines on Party Representation, the end product of the task force’s work, did not clarify what ethical rules apply. They simply added a layer of new rules on top of the existing national mandatory rules, thereby increasing, instead of reducing, complexity. The educative effect was rather limited.

5. **Or is there a need to self-regulate?**

Some of you will remember the then Attorney General of Singapore and now Chief Justice of Singapore, Sundaresh Menon, delivering a wake-up call at the 2012 ICCA Conference in Singapore. In no unclear terms did he call upon the arbitration community to clean up its act or else.

34 Cf. IBA Guidelines on Party Representation in International Arbitration, Preamble, at 1 et seq.
This call to order caused a flurry of activities. The ICC International Court of Arbitration President, Alexis Mourre, went as far as comparing arbitration to the banking system after the 2008 financial crisis, namely the precipitous loss of trust in the banks and the ensuing issuance of countless new state regulations. In a speech at an international arbitration conference in Rio de Janeiro in 2016, he evoked the banking system regulation as a writing on the wall to exhort the arbitration community that "if arbitration does not adopt meaningful self-regulation, in particular for what regards counsel conduct, States will step in […]".


But is self-regulation through soft law even a realistic proposition? Can we rein in the arbitration guerrillas with guidelines? Bad apples do not care about guidelines and they will even prevent them from being agreed on. Michael Hwang once dismissed the IBA Guidelines on Party Representation with the dry comment that "turkeys don't vote for Thanksgiving". Hitting arbitration guerrillas with soft law does not hurt them. And if you, as an arbitrator, try to hit them with semi-hard law, such as by applying the IBA Guidelines of Party Representation without clear legal basis, you risk derailing the arbitration completely.

Interestingly, the most often discussed recent case as regards the need for self-regulation concerns an award rendered in a SIAC arbitration, wherein the respondent’s counsel was severely criticized for allegedly committing fraud on the tribunal. No soft law was involved nor needed. Nor would it have contributed much: The IBA Guidelines on Party Representation at best only mirrored the national deontological rules to which the counsel in question was subject anyway.

What is needed is a strong and decisive management of proceedings by the tribunal. Strong arbitrators do not need additional rules to sanction or admonish counsel in cases of improper behavior, and weak arbitrators would not dare to use such rules against counsel, even if they were at their disposal.

In addition, self-regulation should not be confounded with global harmonization. Governments are not calling for the adoption of the same procedural rules for all arbitration proceedings. Governments may care about impartiality and independence of arbitrators, about minimal ethical standards, about due process, and about justice within their respective jurisdictions. They do not care about the drafting of witness statements and the numbering of exhibits; and they do not care about the flatness of the Earth.

F. The case for a toolkit

Discussions about soft law tend to become emotional. Many among us have strong opinions one way or the other. I was once called a polemist because I pointed out certain deficiencies in the preparation of the IBA Guidelines on Party Representation. But it is a somewhat fruitless exercise to discuss on this level.

We ought to take a step back from the emotional brink. A good start would be to avoid the label of "soft law". The label carries with it connotations of right and wrong: Soft law is right, whatever is not in line with soft law is wrong. The proponents of a soft law instrument are the good guys, the sceptics are just being polemic.

I suggest that we desist from clinging on to the term "soft law" and instead refer to these instruments simply as "tools". Guidelines, rules, standard conditions, best practice, they all are tools in the hands of the practitioners. This is not a new idea nor is it in any way pejorative.

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1. The idea is not new

Proponents of soft law often point to the Swiss Federal (Supreme) Court. Indeed, the Federal Court has repeatedly relied on the IBA Conflicts Guidelines when deciding on challenges of an arbitrator. But let us take a closer look at what the Court actually said in 2008:

“These guidelines have certainly not force of law (...). They nonetheless constitute a valuable working tool ["instrument de travail"], susceptible at contributing to harmonization and unification of standards that are applicable in the area of international arbitration for the regulation of conflicts of interest, which tool will not fail to exert an influence on the practice of arbitration institutions and courts (...).”

Not law, but a tool. Tool is good enough, there is no need of particular normativity.

2. The term is not pejorative

Tools are neither good nor bad, neither right nor wrong. They are more or less useful for a particular purpose. Some are evidently more useful in practice than others. You can do a lot with a hammer or a screwdriver. Everybody is expected to be familiar with a hammer and to use is when a nail sticks out too far. But there is no ethical or moral or sanctionable duty to use a hammer. If you want to use a stone or even your fist to tackle that nail, fine. That should be our approach to instruments offered by the IBA, the Chartered Institute of Arbitrators, the ICC, and others.

What I posit was also the view expressed in an ICSID decision as recently reported by GAR:

Federal Court decision 4A, 506/2007, 20.3.2008, cons. 3.3.2.2. "Ces lignes directrices n'ont certes pas valeur de loi (Peter/Besson, ibid.); elles n'en constituent pas moins un instrument de travail précieux, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le règlement des conflits d'intérêts (Berger/Kellerhals, op. cit., n. 734 in fine), lequel instrument ne devrait pas manquer d'avoir une influence sur la pratique des institutions d'arbitrage et des tribunaux (Kaufmann-Kohler/Rigozzi, op. cit., n. 374).” See also Federal Court Reporter 142 (2016) III 521, cons. 3.1.2.
"The IBA Guidelines on Conflicts of Interest in International Arbitration "are helpful to consider and apply to analyse particular situations, but they are not binding generally and not specifically in ICSID arbitration," they said."

That is the key: guidelines are helpful, but not binding.

So what is usually described as a body of soft law should more appropriately be described as a toolkit.

G. Where does this lead us?

There is growing concern about the creeping, seemingly unstoppable judicialization of arbitration. What was once a simple, flexible, and efficient alternative to the cumbersome process of adjudication by state courts is increasingly mimicking the state court bogeyman. We will not be able to stop this trend; it is just a consequence of the creeping legalization of society in general. Arbitration will further go down that path, possibly to new successes, possibly to obsolescence, possibly to something in-between. We are already hearing the bells toll in investment treaty arbitration, while mediation is snapping at the heels of commercial arbitration.

I think we can take a lot of the sting out of this judicialization once we demystify soft law. Soft law instruments are arbitration’s equivalent of the Emperor’s new clothing in Hans Christian Andersen’s fairy tale. Let us expose them as what they really are: tools, not laws. By so doing we may be able to break the spell over the whole debate.

What soft law instruments all have in common is that they try to cover all kinds of cases, with standard solutions that meet the most stringent tests of due process and the right to be heard. They tend to be Rolls Royce solutions where a FIAT Cinquecento might do as well. There is a price to be paid for perfection.

We should not forget the 80:20 Rule or Pareto Principle: For many events, roughly 80% of the effects come from 20% of the effort. Loosely translated into

arbitration proceedings it suggests that 80% of the issues that arise can be dealt with by 20% of possible rules. For an average arbitration we do not need a 30-page Procedural Order No. 1 which takes into account all the up-to-date soft law on procedure. It might be nice to have, but it will probably result in counsel for the parties spending quite a few additional hours checking and rechecking the draft and haggling with opposing counsel over this or that revision that will likely never become relevant anyway.

And let us discuss the pros and cons of each individual tool.

We have seen it at the outset: different commentators have different notions of what may qualify as soft law. Today, soft law is very much in the eye of the beholder. At best, it is supposed to be soft law if it is presented as such, very much like ready-made art. In 1917, Marcel Duchamp famously exhibited a urinal and art was never again the same. Bruce Nauman, following the tradition of Duchamp, decided that since he was an artist, whatever he did in his studio was, by definition, art. So he simply took pictures of himself cutting faces and had them exhibited. We are not in the art world, we do not have to accept everything some arbitration institution somewhere puts on the internet as soft law.

Let us not spend too much energy on whether or not a certain instrument qualifies as soft law. This would be the wrong fight. It does not advance arbitration. Let us instead continue to think about potentially helpful texts, records of useful practices, repositories of case law and practical examples. Do we need a new one for a specific task? Is a new tool well designed? Is it suitable in all circumstances or only in some? Is an arbitrator unfit because of alleged enmity with one of the counsel? Does it make sense for a tribunal to sanction counsel and, if so, does it have jurisdiction and a mandate to do so? Do we want ready-made rules to level the playing field with regard to attorney secrecy and privilege? Do we want guidance on how to draft witness statements? And, if so, do we want it by global standards or hear it from the tribunal that picks one of several well-tested options?

Once we have adopted an instrument, let us release it to the community at large, defend it, discuss it, and see how well it fares. But let us not oversell it as "soft law". Any instrument has to stand its own ground, not perched on the shoulder of an imagined big friendly giant called "soft law".