Proliferation of Soft Law Instruments in International Arbitration

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This essay examines the proliferation of soft law instruments in international arbitration, arguing for their continued but balanced expansion. While soft law serves essential functions by fostering consistent arbitral culture, empowering arbitrators with procedural authority, and educating newcomers, critics warn of overregulation risks that could undermine arbitration's flexibility and party autonomy. The analysis concludes with a qualified endorsement, advocating for thoughtful development of soft law that addresses genuine needs while preserving arbitration's fundamental promise as an efficient alternative to traditional litigation. The key lies in maintaining the balance between standardization and flexibility, ensuring soft law serves as a guardrail rather than a straitjacket.

Soft law's vast impact on international arbitration is undeniable. It is hard to imagine an arbitration course anywhere in the world that does not reference the UNCITRAL Model Law on International Commercial Arbitration alongside a selection of leading institutional rules, such as those of the ICC, LCIA, or HKIAC: quasi-legal instruments that lack legally binding force but nevertheless influence practice through their persuasive authority. In international arbitration, soft law exists on a "sliding scale" of normativity, ranging from purely aspirational guidelines to rules that, once adopted, become binding on parties. This proliferation reflects a historical evolution from largely uncodified, *ad hoc* practices to today's landscape of detailed guidelines and rules.

Nevertheless, the debate around the rightfulness of the (increasing) use of soft law within international arbitration has been everlasting. Critics argue that the proliferation of soft law risks overregulation and judicialization of arbitration, potentially undermining the very party autonomy that arbitration seeks to protect. Conversely, the proposition that well-crafted soft law serves as a form of self-regulation that may actually prevent more intrusive state intervention is convincing. Nevertheless, this question has gained increasing relevance as the international arbitration landscape has witnessed an undeniable increase of non-binding normative instruments over the past decades. This essay examines the current state of soft law in international arbitration and advocates for a steadily increasing, yet balanced use of soft law instruments. The analysis proceeds in three parts: first examining the case for expanding soft law (Section I), then presenting the case against proliferation (Section II), and concluding with recommendations for a balanced approach (Section III).

[1] Kaufmann-Kohler, G. (2010). Soft law in international arbitration: Codification and normativity. *Journal of International Dispute Settlement*, 1(2), 284.

[2] Dasser, F. (2021). *"Soft Law" in international commercial arbitration (p. 53)*. The Pocket Books of the Hague Academy of International Law. Brill Nijhoff.

[3] Park, W. W. (2006). The procedural soft law of international arbitration. In L. A. Mistelis & J. D. M. Lew (Eds.), *Pervasive problems in international arbitration* 142, 146.

[4] Dasser, F. (2021). *"Soft Law" in international commercial arbitration (p. 270-271)*. The Pocket Books of the Hague Academy of International Law. Brill Nijhoff.

I. THE CASE FOR EXPANDING SOFT LAW IN INTERNATIONAL ARBITRATION

This essay contends that the case for increasing the use of soft law instruments in international arbitration rests on three main arguments: they (*i*) serve as powerful tools for fostering a consistent arbitration culture; (*ii*) provide reliable support for arbitrators when faced with challenging decisions; and (*iii*) reduce the steepness of the learning curve for less experienced arbitrators.

1.1. SOFT LAW MOLDS CONSISTENT ARBITRATION CULTURE

Successful soft law instruments unite arbitral practice by their authoritative influence. Their distinction arises from the fact that they are intensely developed by leading organizational actors that have the required reach and expertise. Such instruments are not rushed, usually taking several years from the beginning of consultations to release. While some critics allege that soft law development is conducted by "closed elite circles" seeking to maintain control of the arbitration field, this critique is commonly held excessive and can be (and often is) remedied by large scope consultations of arbitration users conducted when developing soft law. The legitimacy of soft law instruments ultimately depends not only on their sponsoring institution but also on the reasonableness of their solutions and their acceptance by the arbitration community. Once a soft law instrument gains considerable acceptance, it may enjoy more legitimacy than state law, as its strength comes from both institutional authority and practical utility. The legitimacy of soft law in international arbitration differs fundamentally from general principles of legitimacy in law-making, since parties in arbitration deliberately submit to an alternative dispute resolution mechanism and "opt out" of the world of hard law. The decisive question is not whether soft law has democratic legitimacy in its creation, but whether there is legitimacy in its application. When parties expressly or impliedly agree to soft law application, it ceases to be soft and becomes hard law, providing "possibly the highest level of legitimacy because it is borne by the parties' will being the strongest pillar of arbitration." Moreover, it follows naturally that those that do participate in development of new soft law do not do so in a purely academic manner – arbitral institutions and prominent practitioners alike possess vast experience, the best of which is then "codified" into soft law instruments.

Presuming the aforementioned competence of those involved in the drafting procedure, two advantages of soft law can be drawn. First, the existence and application of soft law instruments fosters positive arbitration culture, by gradually molding it to be more and more similar to the best practices provided in the rules or guidelines applied by arbitrators. Second, this molding not only *improves* arbitral practice, but also makes it more *consistent*. It is not accidental that one of the cornerstones of the Western legal system is the maxim of *ubi eadem ratio, ibi eadem legis disposition* – similar legal situations shall be treated similarly. In modern times, predictability and consistency

[5] Kaufmann-Kohler, G. (2010). Soft law in international arbitration: Codification and normativity. *Journal of International Dispute Settlement*, 1(2), 298.

[6] Arroyo, D. P. F. (2018). Soft law and arbitral procedure: A conditioned but inescapable couple. *European International Arbitration Review*, 7(2), 78. Dasser, F. (2021). *"Soft Law" in international commercial arbitration (p. 234)*. The Pocket Books of the Hague Academy of International Law. Brill Nijhoff.

[7] Lüth, F., & Wagner, P. K. (2012). Soft law in international arbitration – Some thoughts on legitimacy. *StudZR*, 3, 420.

[8] The codification process of soft law itself deserves careful consideration. Kaufmann-Kohler distinguishes between soft law instruments that primarily compile existing best practices and those that innovate by introducing new standards. The IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest exemplify successful soft law codification that balances compilation and innovation. Kaufmann-Kohler, G. (2010). Soft law in international arbitration: Codification and normativity. *Journal of International Dispute Settlement*, 1(2), 286.

are among the most prominent concerns that arbitration users express. By universalizing arbitration in a way that makes the process less foreign than any court system, soft law enhances a core virtue of arbitration: its relative familiarity as compared to national court litigation. Increasing prominence of soft law instruments, which themselves codify best practices, provides exactly the predictability and consistency that users seek.

1.2. SOFT LAW HELPS ARBITRATORS TAKE CONTROL

On the other hand, procedural soft law instruments, including institutional arbitration rules, can be drafted to provide arbitrators with a stronger foothold in managing proceedings in an efficient manner. Arbitration has been long likened to an art, where the arbitrators must skillfully apply substantive legal norms to resolve the parties' dispute whilst authoritatively controlling the proceedings. However, only the most skilled arbitrators are able to do so without help. Consider, for instance, a rarely occurring, but simple example – establishing page limits for parties' submissions. Art. 17(1) of the UNCITRAL Arbitration Rules 2010 provides that "[*t*]*he arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*". Could it be argued that this discretion of the tribunal includes potentially setting a page limit? Absolutely. Would it be practicable in real proceedings? Likely not. Empirical studies have demonstrated that *due process paranoia* – the reluctance of arbitrators to act decisively for fear of award challenges – has become a significant impediment to arbitral efficiency. In the era of due process paranoia, arbitrators' authority to manage proceedings is absorbed by a cloud of doubt, which can be dispelled by increasing precision of the arbitrators' procedural instruments. To this end, some arbitration rules, such as Art. 32.6 of the SIAC Rules 2025 gives the tribunal explicit authority to order page limits on submissions. Ideally, this rule would be applied appropriately and result little due process discussion to be had. This example applies to many procedural situations – excluding irrelevant testimony, handling the procedural timetable, etc. In this respect, having more (and more detailed) soft law instruments does not constrain, but rather empower skilled arbitrators to make arbitration both qualitative and efficient.

1.3. STRONG SOFT LAW EMPOWERS THE NEW GENERATION OF ARBITRATORS

Finally, soft law instruments serve an important educational function, providing guidance for newcomers and helping to level the playing field between experienced and less experienced practitioners. They contribute significantly to the global harmonization of arbitral practice by establishing common standards and expectations across different legal cultures and traditions. The increasing use of these instruments is necessary to sustain and develop a new generation of arbitrators, who will be tasked with sustaining the astronomic height that international arbitration finds itself at today. Therefore, the international arbitration community – now enjoying unprecedented recognition – must come together to share its experience, and to develop and maintain soft law instruments that help ease the steep learning curve facing the many newcomers entering the field today. However, it is not only a charitable mission in helping fresh starts. It is also an essential effort to preserve the stature of the field in the eyes of those without whom it

[9] United Nations Commission on International Trade Law (UNCITRAL). (2018). Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018). United Nations.

[10] Queen Mary University of London, School of International Arbitration. (2018). *2018 International Arbitration Survey: The evolution of international arbitration*. Queen Mary University of London, School of International Arbitration. (2015). *2015 International Arbitration Survey: Improvements and innovations in international arbitration*.

would not exist – the businesses and individuals resolving their disputes in arbitration, trusting its efficiency and expert nature. The success of instruments like the IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest demonstrates how well-crafted soft law can achieve global acceptance across diverse legal systems. Even experienced institutions such as the ICC and LCIA occasionally rely on the IBA Guidelines on Conflicts of Interest when dealing with challenges to arbitrators, illustrating how solid soft law instruments become integral to arbitral practice worldwide.

Nevertheless, the arbitration community must be thoughtful in this endeavor. Soft law should continue to be grounded in real-world experience, rather than emerging from theoretical anxieties. Moreover, in a completely globalized (arbitration) world today, more thought than ever has to be given to not only legal, but also cultural legitimacy, a topic that is still sprouting within the arbitration field. This requires meaningful participation from practitioners across different legal traditions and geographical regions to ensure that soft law instruments reflect diverse perspectives and can function effectively across cultural boundaries.

II. GUARDRAIL OR STRAITJACKET? A CASE AGAINST PROLIFERATION OF SOFT LAW IN INTERNATIONAL ARBITRATION

While soft law is often lauded for its flexibility and capacity to fill regulatory gaps, critics warn that unchecked expansion risks undermining arbitration's foundations as an alternative to litigation. As one commentator observes, there is a danger that soft law in arbitral practice may combine "the rigidity of hard law with the legal uncertainty of a non-binding instrument". The case against unchecked expansion presented in this essay rests on two pairs of principal concerns: (***i***) the danger of overregulation leading to the judicialization of arbitration and the disappearance of its flexibility; and (***ii***) questions of legitimacy and maintaining relevance.

2.1. PROLIFERATION OF SOFT LAW INSTRUMENTS LEADS TO OVERREGULATION AND LOSS OF FLEXIBILITY IN INTERNATIONAL ARBITRATION

One of the most persistent critiques of soft law in international arbitration is the risk of overregulation, once described as *regulatory pruritus* – an excessive urge to regulate every aspect of arbitral procedure through guidelines, protocols, and best practice notes. Diagnosed initially by Serge Lazareff and echoed by Felix Dasser, this phenomenon refers to the arbitration community's presumed tendency to respond to perceived gaps or inefficiencies with new rules or recommendations, often without sufficient reflection on necessity or long-term impact. Likewise, Greineder identifies three principal risks that soft law runs in practice: it may be "excessively academic and utopian, impractical or even unworkable, or unnecessary". Such overregulation risks cluttering the arbitration landscape, complicating rather than clarifying arbitral procedures and potentially deterring parties from choosing arbitration altogether.

The consequence is the *creeping judicialization* of arbitration, wherein the process increasingly mirrors litigation in state courts with detailed procedural requirements. As arbitration becomes increasingly regulated through soft law, there is a risk that the flexibility and efficiency

[11] Arroyo, D. P. F. (2018). Soft law and arbitral procedure: A conditioned but inescapable couple. *European International Arbitration Review*, 7(2), 75.

[12] Greineder, D. (2018). The limitations of soft law instruments and good practice protocols in international commercial arbitration. *ASA Bulletin*, 36(4), 908.

[13] Dasser, F. (2021). *"Soft Law" in international commercial arbitration (p. 270)*. The Pocket Books of the Hague Academy of International Law. Brill Nijhoff.

[14] Greineder, D. (2018). The limitations of soft law instruments and good practice protocols in international commercial arbitration. *ASA Bulletin*, 36(4), 908.

that initially made arbitration attractive may be compromised. Simply put: if parties had wanted to litigate before a court, they would not have signed an arbitration agreement for this purpose. Nevertheless, Arbitrators may be inclined to follow soft law standards blindly, reducing tailored solutions to specific disputes. Moreover, parties and counsel may begin expecting arbitrators to follow these guidelines rigidly too, further undermining arbitration's intended flexibility. This reduces arbitration's adaptability and discourages procedural innovation. The risk is particularly acute when soft law instruments become perceived as *de facto* mandatory, creating expectations that arbitrators adhere strictly to them. When arbitrators or institutions apply soft law absent explicit party agreement, or when parties feel compelled to adopt guidelines considered industry standards, the parties' procedural autonomy subtly erodes. Moreover, soft law's incorporation into institutional rules or national legislation blurs the distinction between soft and hard law, questioning the voluntariness of party consent and arbitration's distinctive advantage over litigation. Parties may find themselves effectively bound by rules they did not expressly choose, undermining arbitration's foundational principle of consent. In an ideal world, soft law "would provide the authoritative direction and clarity of hard law, while leaving the procedural flexibility of the parties and arbitrators intact," but instead risks offering neither the certainty of hard law nor the flexibility of truly voluntary guidance.

2.2. SOFT LAW INSTRUMENTS LACK LEGISLATIVE LEGITIMACY AND ARE CHALLENGING TO MAINTAIN

Another historical critique of soft law instruments in international arbitration is related to the proposition that the authority of soft law relies on community acceptance, yet many instruments emerge from closed circles, raising concerns about whose interests they represent. In other words, while good practice guidelines may help overcome uncertainty and manage parties' expectations, they face the fundamental challenge that "*the various committees of stakeholders that compile them are not legislators, nor do the instruments codify any form of customary or transnational law*". A lack of transparent drafting processes risks disconnecting guidelines from arbitral practice realities, especially in regions or sectors underrepresented in the drafting. Additionally, the resulting guidelines may inadvertently prioritize certain legal cultures or economic interests, marginalizing others and undermining the global inclusiveness arbitration strives to promote. Nevertheless, this proposition may be considered merely historical, given the widespread use of soft law instruments in international arbitration today.

However, maintaining the relevance of soft law is another significant challenge, especially given their present quantity. Soft law instruments risk obsolescence if they fail to adapt to evolving commercial realities and technological innovations. Regular review and timely updates are essential to preserving soft law's utility and relevance. Without such mechanisms, outdated soft

[15] Dasser, F. (2021). *"Soft Law" in international commercial arbitration (p. 458)*. The Pocket Books of the Hague Academy of International Law. Brill Nijhoff.

[16] Bazánth, B. (2023). Legitimacy concerns regarding the application of soft law in international arbitration in connection with the independence and impartiality of arbitrators. *ELTE Law Journal*, 2, 69.

[17] Greineder, D. (2018). The limitations of soft law instruments and good practice protocols in international commercial arbitration. *ASA Bulletin*, 36(4), 908.

[18] Kaufmann-Kohler, G. (2010). Soft law in international arbitration: Codification and normativity. *Journal of International Dispute Settlement*, 1(2), 298.

[19] Greineder, D. (2018). The limitations of soft law instruments and good practice protocols in international commercial arbitration. *ASA Bulletin*, 36(4), 907.

[20] Dasser, F. (2021). *"Soft Law" in international commercial arbitration (p. 256-259)*. The Pocket Books of the Hague Academy of International Law. Brill Nijhoff.

law can inadvertently hinder rather than facilitate arbitral proceedings, creating confusion and inefficiencies. The debate around the IBA Rules on Evidence and the Prague Rules illustrates this tension – while intended as optional guidance, their existence alone can pressure parties and arbitrators into conformity, thereby limiting procedural innovation. Such pressures, if unchecked, threaten arbitration's unique capability to adapt to diverse circumstances and needs.

In conclusion, critiques of soft law proliferation point the spotlight at the need for caution, transparency, and ongoing reflection. Soft law can significantly promote consistency, efficiency, and fairness but risks undermining arbitration's appeal if unchecked. For soft law to be helpful, "all those involved in arbitration should see it as a point of reference and not legislation by other means" and that it should be "confined to those areas where rules are genuinely helpful, if not necessary". The arbitration community must therefore carefully balance guidance with flexibility, ensuring soft law serves as a guardrail, not a straitjacket, with party autonomy firmly at its core. As Greineder concludes, "arbitrators and counsel should embrace rather than fear their relative procedural freedom".

CONCLUSION – A QUALIFIED ENDORSEMENT

In conclusion, the question posed at the outset – whether we need more soft law instruments to govern international arbitration – can be answered with a qualified affirmative. Soft law instruments serve essential functions in modern international arbitration: they mold consistent arbitral culture, provide arbitrators with necessary procedural authority to manage proceedings efficiently, and offer crucial educational guidance for newcomers to the field.

However, this endorsement comes with important caveats. The development of soft law must be approached thoughtfully, with careful attention to procedural legitimacy, cultural diversity, and the balance between standardization and flexibility. The arbitration community must resist both the temptation of premature regulation and the risk of quasi-judicialization that could transform arbitration into the rigid, formalistic process it was designed to escape. The focus should remain on addressing genuine needs rather than regulating for regulation's sake. This means developing instruments that provide clear procedural authority while maintaining areas of flexibility for arbitrators and parties. It requires inclusive drafting processes that reflect diverse legal traditions and cultural perspectives. Most importantly, it demands ongoing vigilance to ensure that soft law continues to serve arbitration's fundamental promise: providing an efficient, expert, and autonomous alternative to traditional litigation. In this balanced approach lies the path to sustaining international arbitration's continued growth and excellence in the decades to come.

[21] Greineder, D. (2018). The limitations of soft law instruments and good practice protocols in international commercial arbitration. *ASA Bulletin*, 36(4), 911.

[22] ibid.