Journal of Civil & Legal Sciences
ISSN: 2169-0170
Research Article Open Access

Soft Law in International Arbitration

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Abstract

Soft law has gained increasing importance in the context of international arbitration. Soft law regulating the arbitral procedure endowers the effectives of the arbitration. Firstly, the author deals with the right to a fair trial and the discretionary power of arbitrators in the framework of the notion of soft law and then the binding character of this soft law is determined. The aim of this article is to answer the question whether the regulation of the arbitral proceedings by soft law is still welcomed or if it represents a threat for the discretionary powers of the arbitrator and arbitration as such. Given the limited financial and human resources available to UNCITRAL, UNIDROIT, and The Hague Conference, should these organizations be in the business of producing soft law? This Article argues that they should. Given the increased globalization of the world economy, the development of international commercial law has had an exponential growth. In this article, the author examines the codification of soft law in arbitration and its consequences. The main purpose of this article is to show that soft law instruments create many positive effects for international arbitration.

Keywords: Soft law; Arbitration; Commercial law

Introduction

The roots of arbitration can be found in depths of history. The first relevant evidence of the existence of arbitration appears in the ancient Rome and in ancient Greece. Even if this ancient kind of arbitration reflects a lot of differences to the recent attitude, the common features can be still recognized. The most important ones are the less formal and flexible conduct of the proceedings and party autonomy, mainly vested in the arbitration agreement. An arbitration agreement usually in the form of an arbitration clause does not only constitute the power of the arbitrators to decide on the merits of the case, but the parties may either regulate several procedural questions by it. The arbitration agreement represents the hypothetical peak of the norms regulating the arbitral proceedings. In the case of ad hoc arbitration, the arbitral proceedings are further regulated by lex loci arbitri and if institutional arbitration is chosen by the parties, the rules of the chosen institution are also relevant. Nevertheless, it is still the arbitral tribunal mainly the presiding arbitrator that has wide discretional power to manage and influence the arbitral proceeding. On the following pages the impact of the soft rules prescribing the arbitral proceeding on the effectiveness of the international commercial arbitration is examined [1]. As in many other areas of the law, soft law has gained increasing significance in international arbitration in the past decades, and has more and more taken the form of a collection of 'rules' which could be called 'soft codes'. This article reviews the process by which these soft codes are created. How is soft law codified? Who are the actors of the codification? What are the reasons for the codification? What is the outcome of this process? Do arbitral tribunals apply soft law? Is soft law applied more frequently once it is codified? What is the normative weight of soft law? What are the strengths and drawbacks of soft law?

In order to answers these questions, this article starts by defining the relevant concepts of soft law, on the one hand, and of codification, on the other (Section 2). The ground being laid, it then examines the process of creation of a selected number of soft law instruments or codes, including an analysis of the actors and of the reasons for the codification [2].

The Meaning Soft Law

The concept of soft law finds application in particular in international law, environmental law, and constitutional law and in contemporary laws [3]. As in many other areas of the law, 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". Nonbinding legal principles are often referred to as "soft law." Defined by one commentator, "'soft law' is understood as referring in general to instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance." Soft law is generally established legal rules that are not positive and therefore not judicially binding.

The various soft law instruments in international commercial law include model laws, a codification of custom and usage promulgated by an international nongovernmental organization, the promulgation of international trade terms, model forms, contracts, restatements by leading scholars and experts, or international conventions. Although soft law principles do not begin as positive law, they can of course become positive law either by courts, arbitral tribunals, or legislatures adopting them, or by transactional parties adopting them in their agreements. Often they are drafted with the intent of becoming positive law in the future [4]. Positivist legal scholars tend to deny the very concept of "soft law," since law by definition, for them, is "binding" [5]. Constructivist scholars, in contrast, focus less on the binding nature of law at the enactment stage, and more on the effectiveness of law at the implementation stage, addressing the gap between the law-in-the-books and the law-in-action; they note how even domestic law varies in terms of its impact on behavior, so that binary distinctions between binding "hard law" and nonbinding "soft law" are illusory [6].

The Advantages of Soft Law

Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own:

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Received September 01, 2021; **Accepted** September 15, 2021; **Published** September 22, 2021

Citation: Mohiqi M, Mohiqi MM (2021) Soft Law in International Arbitration. J Civil Legal Sci 10: 292.

Reducing Transactions Costs

A major advantage of softer forms of legalization is their lower contracting costs. Hard legalization reduces the post-agreement costs of managing and enforcing commitments, but adoption of a highly legalized agreement entails significant contracting costs. Any agreement entails some negotiating costs-coming together, learning about the issue, bargaining, and so forth-especially when issues are unfamiliar or complex. But these costs are greater for legalized agreements. States normally exercise special care in negotiating and drafting legal agreements, since the costs of violation are higher. Legal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements [7].

The Lack of a Need for Ratification

Once completed, a soft law instrument is ready for adoption by the parties as part of their agreement or ready for use as an interpretive document by courts and arbitrators. Soft law instruments, unlike treaties and conventions, are not subject to the lengthy process of ratification that can delay enforcement for years. For example, one of the most successful international conventions in recent times, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), was completed in 1958, but not ratified by the United States until 1970.30 Moreover, although the New York Convention has been very successful, this has not been the case with many recent international commercial law conventions.

Uncertainty

Many international issues are new and complex. The underlying problems may not be well understood, so states cannot anticipate all possible consequences of a legalized arrangement. One way to deal with such problems is to delegate authority to a central party (for example, a court or international organization) to implement, interpret, and adapt the agreement as circumstances unfold. This approach avoids the costs of having no agreement, or of having to (re)negotiate continuously, but it typically entails unacceptably high sovereignty costs. Soft legalization provides a number of more attractive alternatives for dealing with uncertainty.

The Basis for Further Work

Some soft laws, such as model laws, are specifically intended to be the basis for adoption by individual jurisdictions, and many have been most successful in setting international and domestic standards for legislation. Nonetheless, model laws intended to be adopted as drafted or with minor revisions are often subject to the same political pressures of harmonization and the same need to conform to specific legal traditions as a treaty or a convention. Because the drafters of model law have the same concerns of ratification and coordination as drafters of domestic law, many model laws determined to be well drafted, such as the Model Law on Electronic Commerce, have been used for domestic legislation. Moreover, model laws can be used as a template for related legislation. Thus, for example, the Model Law of Electronic Commerce was a source for the American Uniform Electronic Transactions Act, the Canadian Uniform Electronic Commerce Act, and the Australian Electronic Transactions Act.

Guidance to Tribunals

Soft law instruments, such as principles and restatements, have been widely used by courts and arbitrations as a basis for forging new legal rules as well as interpreting existing ones. In the common law world, particularly the United States, courts have long relied upon as a source of law the various Restatements of the Law produced by the American Law Institute. Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles of International Commercial Law, because of the presumed neutrality of these rules.

Party Autonomy and Neutrality

Within the limits provided by choice of law rules and party autonomy, parties may choose to adopt specific rules embodied in nonbinding instruments. Some instruments, such as the Uniform Customs and Practice for Documentary Credits or the INCOTERMS, are so commonly used and accepted that they often govern by default absent a contrary party agreement. Most soft law instruments, however, become a part of the parties' agreement by express or implicit adoption

Flexibility

Soft law can ease bargaining problems among states even as it opens up opportunities for achieving mutually preferred compromises. Negotiating a hard, highly elaborated agreement among heterogeneous states is a costly and protracted process. It is often more practical to negotiate a softer agreement that establishes general goals but with less precision and perhaps with limited delegation.

New Soft Law to Counter Existing Hard Law

For the reasons we just outlined, we maintain that this pattern of hard-soft law interaction is to be found most frequently. We have encountered it in a number of examples in which states adopted new soft-law instruments to counter existing hard-law agreements, frequently involving response to obligations under WTO law. In the GMO case, the EU and other countries pressed, with mixed success, for new soft-law provisions under the Codex that would support their positions on the use of the precautionary principle and "other legitimate factors" besides scientific risk assessment in the regulation of GM foods.320 In this way, they hoped to affect the application by panels and the Appellate Body of WTO law. The EU acted similarly in the cultural diversity case, responding to potential WTO-related litigation by adopting first a regional Council of Europe declaration, followed in 2001 by a nonbinding Universal Declaration on Cultural Diversity adopted under the auspices of UNESCO.321 We have also seen weaker and less-developed countries employ similar strategies, promoting soft-law counter norms with respect to various aspects of international intellectual property law.

Soft law and international commercial arbitration

Arbitration is an example of a field outside of public international law to which soft law has expanded over the last decades. This is not surprising when one considers that soft law instruments are most relevant at the international level and that arbitration is the natural forum to resolve disputes at that level. In fact, there is no reasonable alternative to arbitration when it comes to international disputes: when entering into contracts, companies from different States will generally be reluctant to submit the disputes that may arise between them to the national courts of their counterparties [8]. The eminent role of soft law instruments in arbitration has been pointed out by various authors, who have confirmed that those instruments are being increasingly used by arbitrators and arbitral institutions. In this regard, Jan Paulson goes as far as to contend that "the future clearly lies in the emergence of fundamental best practices".

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.8 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.9 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 [9]. The fact that soft law norms cannot be enforced by public authority does not necessarily mean that they do not have far-reaching effects.40 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.

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. 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. 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 [10].

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.

Soft Law Codes and Democratic Safeguards the preceding analysis shows that there is indeed a soft law codification process in the field of arbitral procedure which combines compilation with innovation. This process is driven by the epistemic global arbitration community and is facilitated by globalization, which leaves ample room for action to non-state actors. In this context, one may wonder how the transnational consensus on international arbitration would be affected if the present political consensus which underpins globalization were to disintegrate. This is a question that only time will answer.

This study has also shown that soft law carries a certain normative weight and that normativity is enhanced when soft law rules are codified. While soft codification serves a useful purpose in increasing certainty and predictability, it cannot be ignored that the prevalent influence of the epistemic community carries the inherent risk of lack of democratic legitimacy. The interests of the categories of users which are not adequately represented in the epistemic community may be left without protection. It is thus incumbent upon the state to provide appropriate safeguards for those users through legislation as part of its residual power in arbitration.

In summary it can be said defenders of soft law argue that soft-law instruments offer significant offsetting advantages over hard law. They find, in particular, that:

- Soft-law instruments are easier and less costly to negotiate.
- Soft-law instruments impose lower "sovereignty costs" on states in sensitive areas.
- Soft-law instruments provide greater flexibility for states to cope with uncertainty and learn over time.
- Soft-law instruments allow states to be more ambitious and engage in "deeper" cooperation than they would if they had to worry about enforcement.
- Soft-law instruments cope better with diversity.
- Soft-law instruments are directly available to non-state actors, including international secretariats, state administrative agencies, sub-state public officials, and business associations and nongovernmental organizations (NGOs).

Conclusion

Over the years, soft law has gained increasing importance in the context of international arbitration, as acknowledged by commentators and evidenced by quantitative studies. This reality has not been absent of detracting voices who stood against the development of soft law in this field for various reasons. 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.

The fact that soft law cannot be enforced by public force does not mean that it necessarily lacks normativity. In spite of the lack of enforceability, the addressees of soft law norms can perceive it as binding and, even if they do not, they may choose to abide by it on their own accord. A number of reasons, better articulated by psychologists than by lawyers, account for this behavior. They include mainly such considerations as a sense of respect for the authority of the 'soft lawmaker', social conformism, convenience, the search for predictability and certainty, the desire to belong to a group, and the fear of naming and shaming. Yet, soft law norms exhibit varying degrees of normativity. Some soft law norms are softer than others. This is no different from the situation with hard law rules. Some hard law rules are harder than others. In other words, there is a sliding scale of softness and hardness (or normativity) for all norms.

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