

SOFT LAW AND ARBITRAL PROCEDURE: A CONDITIONED BUT INESCAPABLE COUPLE

*Diego P. Fernández Arroyo**

I. Introduction

Over time, the arbitral community has grown exponentially;¹ this can be seen in the proliferation of new arbitral institutions, professional associations, and study programs. In this vein, soft law making has grown exponentially as well. Definitions are always complicated, and the case of soft law is not different in this regard. It is hard to trace the origin of this term, let alone its current definition. However, it is easy to see how it is used today: the term soft law is in fact interpreted as a conglomerate that encompasses almost any non-binding group of rules.

As a general and undisputed principle, the arbitral procedure is governed by the rules selected by the parties. However, the parties rarely include more than a reference to the institutional rules, which in turn only have a few fundamental provisions. In this context, often the parties encounter procedural disagreements without a concrete solution at hand. This is when soft law is brought into the picture by counsel or even arbitrators. In these situations, many questions arise regarding the value, legitimacy, and impact of soft law.

While soft law may deal with procedural and substantive matters, this paper focuses on procedural soft law only. This paper does not analyze any particular instrument, but the general considerations of soft law in light of the current theory and practice of international arbitration. In order to do so, this paper is structured as follows. First, it tries to identify the (unclear) boundaries of soft law within this particular context. Second, it analyses the use of soft law, considering its current success and critics. Third, it proposes how to improve soft law making, in order to achieve *solid* soft law instruments. Fourth, it

* Diego P. Fernández Arroyo is Professor at Sciences Po Law School, Paris, and Director of its LLM in Transnational Arbitration & Dispute Settlement. He has been Scholar in Residence at the Center for Transnational Litigation, Arbitration and Commercial Law, New York University (2015, 2018). He is actively involved in the codification of arbitration law as a Member of Argentinian delegation before UNCITRAL, Working Groups II (Arbitration) and III (Reform of ISDS). The author wishes to thank Ezequiel H. Vetulli for his invaluable help in the edition of this article. My thanks also to the EW Barker Centre for Law and Business at the Faculty of Law of the National University of Singapore (NUS) for supporting my participation at the conference entitled “Soft Law in International Arbitration” which led to this article and this special issue.

¹ While there is no census of the size of the arbitral community, it is enough to consider the thousands of practitioners attending conferences, or the students attending study programs or participating in moot courts worldwide every year.

analyses whether arbitrators could rely on soft law in the absence of the parties' consent. Finally, it reaches some concluding remarks.

II. What Is Soft Law?

When analyzing any concept, it is important to identify the scope of such term. For instance, soft law should not be confused with commercial usages or custom. Some scholars object to the expression “soft law,”² arguing that an instrument is either law or it is not; the legal aspect is either switched on or switched off, but there is no dimmer to make the norms brighter or softer.³ But nowadays, the general acceptance of soft law –both as such and as a term of art– is undeniable; so, there is a dimmer. And there is not only a dimmer between hard law and soft law, but even the latter is blurred. It is hard to find a definition of soft law that circumscribes this term to a certain category of instruments. Not only there is no comprehensive definition of this term, but the number of alleged soft law instruments (in the form of rules, codes, guidelines, principles, protocols, etc.) is massive, covering a wide range of general topics (e.g. procedural management) to more specific topics (e.g. conflicts of interest and production of evidence).

With this incredible growth of soft law in the last decades, it is now necessary to identify the boundaries of such term, if any. But, despite the existence of numerous instruments that intent to qualify as soft law, most literature always refers to those prepared by renowned institutions or associations, such as the International Bar Association (IBA), Chartered Institute of Arbitrators (CIArb), United Nations Commission on International Trade Law (UNCITRAL), International Council for Commercial Arbitration (ICCA), International Law Association (ILA), or arbitral institutions like the International Court of Arbitration of the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA).⁴ Other institutions not so well known may issue instruments that become relevant when dealing with specific subject matters.⁵ Therefore, there are certainly different degrees of soft law, but nobody draw a dividing line.

² See W. Michael Reisman, *Soft Law and Law Jobs*, 2 J. INT'L DISP. SEP. 26 (2001).

³ See William W. Park, *Rules and Reliability; How Arbitrators Decide*, THE ROLES OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION 5 (Tony Cole, 2017).

⁴ Some examples among many others are the following: ICCA Rio Code; CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration; CIArb Practice Guideline on Applications for Security for Costs; IBA Guidelines on Conflict of Interests; IBA Guidelines on Party Representation; IBA Rules on the Taking of Evidence; UNCITRAL notes on arbitral procedure (like other notes and recommendation of other arbitral institutions); The Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals; CIArb Code of Ethics; ILA Final Report on Res Judicata in Arbitration.

⁵ For example, the Code of Ethics of the Association of Litigation Funders.

If one thinks about the an instrument prepared by the IBA, such as its Rules on Taking of Evidence, a vast part of the arbitral community would agree that it constitutes soft law.⁶ Conversely, if a group of university students put together a list of rules with the word *principles* in its title, it may be too ambitious to call it soft law; yet once a set of *ideas* is printed in a booklet or uploaded to the internet it seems to enjoy a *de facto* authority.⁷ While the contrast between these two extremes is quite evident, there is a universe of proposals in-between which status is no so straightforward.

Given the current overreaching scope of soft law, its value has become weaker than its actual name, therefore affecting the use of really useful instruments. This paper intends to vindicate soft law by distinguishing the category of *solid* soft law; while the soft law universe is unlimited, only a few instruments will qualify as *solid* soft law, as explained in Sections III (*in fine*) and IV below.

III. To What Extent Does Soft Law Help the Procedure?

A. The success of soft law

Further to the question of which are the boundaries of soft law, there is a question as to whether it adds value in terms of procedural management. Arbitration used to be described as a procedure used by sophisticated, serious and loyal businesspersons that respected each other and abided by the same standards. While this was probably true for merchants based in the same town hundreds of years ago, and even thirty or forty years ago when arbitration was still rather an option for some particular, big cases, this is –regrettably– not the case today. The world has changed, business has changed, and so have arbitration and the players involved in this procedure. The inclusion of arbitration clauses in practically any kind of contracts has become the common feature and consequently the number of arbitrations has grown up exponentially. As a result, arbitration practice has evolved in various aspects that create more room for disagreement between the parties, from the page-limit for submissions to the extent of document production. In this context, modern arbitration does not always run as smoothly as expected, and some guidelines to help arbitral procedure run efficiently should be welcome.

The main reason why the parties submit their disputes to arbitration is that international contracting parties find litigation before state courts too

⁶ Enric Picanyol, *Due Process and Soft Law in International Arbitration*, 24 SPAIN ARBITRATION REVIEW, 54 (2015).

⁷ Toby Landau, *Codification, Harmonisation, and Other Misadventures*, MIDS (Sep. 29, 2018, 10:04 AM), <https://vimeo.com/107493952>.

foreign and unfamiliar, or at least more foreign and less familiar than international arbitration.⁸ Thus, 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 other than one's own.⁹ As it has been correctly explained, international arbitration is an environment where parties, counsel, arbitrators, institution officers, and other players, trained in different legal systems, interact, so there is no option but to find some common basis to arrange the process.¹⁰

In this regard, despite its incomparable formal binding effect, little can contribute national legislators to the wider world of arbitration because any arbitration act has a limited scope of application; it only applies when the arbitration is seated in such country and, in general, more by the local courts than by the arbitrators, unless the parties have agreed on its application (for some strange reason) or it contains mandatory provisions. In the case of treaties, they may apply to various countries, but it naturally requires much more preparation and high degree of consensus. It goes without saying that states have various more serious businesses to attend other than the procedural aspects of commercial arbitration, so the state law making process naturally cannot follow the pace of the development of modern commerce. In this sense, private actors form the global community may produce new legal norms much faster than national states.¹¹ Departing from the old-fashioned state monopoly on normative production, soft law helps overcoming the unjustified distinction between state law and non-State law, therefore helping harmonization and overall a better quality of justice.¹²

The IBA Rules on the Taking of Evidence are an example of the success of soft law in international arbitration¹³ across the world¹⁴, despite their

⁸ Paul D. Friedland, *Soft Law and Power*, in THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 343 (Stavros L. Brekoulakis, Julian D. M. Lew, et al. eds., 2016).

⁹ *Ibid.*

¹⁰ Gabrielle Kaufmann-Kohler, *Globalization of arbitral procedure*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW, XXXVI, 4, 1313 *et seq.* However, it is also true that, if both parties are from the same legal system, it may be not needed (or worth) applying an *international* standard that is different from that of their own system.

¹¹ Gabrielle Kauffman-Kohler, *Soft Law in International Arbitration*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, 1, 6 (2010). Well-prepared soft law instruments generally do not contradict arbitration statutes, but complement them.

¹² Diego P. Fernández Arroyo, *The Growing Significance of Sets of Principles to Govern Transboundary Private Relationships*, in THE AGE OF UNIFORM LAW ESSAYS IN HONOUR OF MICHAEL JOACHIM BONELL 272 (2016).

¹³ Paula Hodges, *Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 611 (Andrea Menaker ed.).

provisions may be at odds with some legal regimes. The same holds true for the IBA Guidelines on Conflicts of Interest.¹⁵ Even experienced institutions as the ICC and LCIA sometimes use the IBA Guidelines on Conflicts of Interest when dealing with challenges to arbitrators.¹⁶ Likewise, US courts have occasionally relied on soft law to understand the *evident partiality* for purposes of the US Federal Arbitration Act.¹⁷ Not by chance an experienced arbitrator can note that “[p]ractitioners know equally well that no reasonable arbitrator would make a decision on a non-obvious disclosure issue without consulting the IBA Guidelines on Conflicts of Interest.”¹⁸ Similarly, despite not being binding, nobody could deny the relevance of the instruments published by the arbitral institutions, typically in the form of “practice notes,” which inform users about the right interpretation of the rules by such institution.

In sum, by relying on soft law, the parties may optimize the procedure in a predictable, and therefore, fair manner. Without soft law, the parties would count on less tools to tackle the numerous and unexpected issues that may arise throughout the proceedings. Normally the parties chose a set of rules elaborated by an institution (typical example of soft law), even in *ad hoc* arbitration. Also, at the very beginning of proceedings (by means of the so-called Procedural Order No.1), the arbitral tribunal may introduce by reference some additional soft law provisions or instruments, normally after consulting the parties. Of course, once selected by the parties or introduced by the arbitral tribunal, the rules become hard law. However, the particularity of this soft law is that it is not exhaustive and it is mainly composed by default rules. Therefore, even once hardened, it can be generally supplemented with and substituted by other soft law, with the limits established by (private) mandatory provisions contained in institutional arbitration rules. Thus, it can be said that there are at least two categories of soft law to govern arbitral procedure: soft law which is hardened by the parties or by the arbitral tribunal (*i.e.* it becomes hard law for all of them), and soft law which is neither selected by the parties nor introduced *ab initio* by the arbitral tribunal but remains available (as such) to deal with particular procedural issues.

¹⁴ Picanyol, *supra* n. 6, at 55; Elina Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, KLUWER ARBITRATION BLOG (Sep. 29, 2018, 10:05), <http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/>.

¹⁵ *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009, Report of the IBA Conflicts Committee, a Sub-committee of the IBA Arbitration Committee*, in DISPUTE RESOLUTION INTERNATIONAL, 4, 1 (2010).

¹⁶ Picanyol, *supra* n. 6, at 54; Hodges, *supra* n. 13, at 604.

¹⁷ Park, *supra* n. 3, at 6.

¹⁸ Kauffman-Kohler, *supra* n. 11, at 14.

B. Which are the concerns about the application of soft law?

Part of the arbitration community, including renowned authorities, has raised concerns about the excessive use of soft law. A prominent actor, for example, has shown his skepticism and considered that soft law instruments are just an “opportunity to waste time and money on procedural skirmishes.”¹⁹ The main critics are addressed in this section.

First, soft law is accused of jeopardizing two essential features of arbitration, procedural flexibility and freedom.²⁰ It is sometimes said that soft law may undermine the flexibility of arbitration or even hinder the evolution of future trends and practices.²¹ In the same vein, some consider that an excessive regulation of the procedure would lead to a *judicialization* of international arbitration, or as it has been put it, the creation of an arbitration *franchise*, by which the procedure operates the same way everywhere.²² Arguably, this standardization would not be positive because arbitration is just a framework of procedural rules and principles that allow customizing a dispute resolution procedure for matters as diverse as sports, commodities, inter-state interests, insurance, maritime transport, and probably none of these would require the same procedure;²³ not to mention other circumstances like the parties’ nationality.

Modestly, I think this is not a fair critic and the alleged jeopardy to flexibility and freedom is not real. To the contrary, soft law is needed to coordinate the flexibility leave granted to the parties.²⁴ “*The lack of a universal codified system brings with it flexibility and the chance to tailor a bespoke process that [which] also brings uncertainty, as practitioners and arbitrators from different jurisdictions may engage in the arbitral process with different expectations as to what that process will entail.*”²⁵ Thus, soft law can level the playing field. Soft law is not more than a tool that arbitrators and parties may decide to use or not, precisely by exercising their liberty. The existence of soft law rules actually enhances

¹⁹ Michael Schneider, *Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation*, 31 ASA BULLETIN, 497 (2013).

²⁰ Statistics show that flexibility remains at the top of the preferences for international arbitration users. See the *Queen Mary International Arbitration Survey* 7 (2018).

²¹ Hodges, *supra* n. 13, at 633.

²² Landau, *supra* n. 7.

²³ *Ibid.*

²⁴ Statistics show that users of international arbitration appreciate the availability of soft law instruments. See the *Queen Mary International Arbitration Survey* 36 (2018).

²⁵ Paula Hodges, *The Arbitrator and the Arbitration Procedure, The Proliferation of ‘Soft Laws’ in International Arbitration: Time to Draw the Line?*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 205 (Christian Klausegger, Peter Klein, et al. eds. 2015).

flexibility and freedom by giving more options to their development in addition to providing for more predictability.

In line with this first critic, some authors proudly state that conducting an arbitration is an *art* and strict rules would limit the arbitrators' creativity. While this sounds romantic, arbitration is a much more serious business, a mechanism by which the parties deal with very sensitive issues that are relevant to them; mainly, although not only, in economic terms that can be in the billions of US dollars.²⁶ Thus, arbitration fulfills one of the most important functions in society, that of rendering justice. Therefore, the more tools to conduct the proceeding properly the better protected they feel. One of the main attractive features of arbitration is that there is no appeal, so the parties expect the arbitral tribunal to reach the right solution in one shot. The parties do not expect the arbitral tribunal to get inspired and show its creativity, as much as they want to resolve a dispute; and win. Professor Park explains that “*elements of legal process inevitably enter arbitration as soon as the litigants want a binding result. No one would much care about legal rights if either party could unilaterally elect to disregard the arbitrator's decision. [...] litigants expect ordered arbitral proceedings. Few business managers want a lottery of inconsistent results. When cases are won or lost, rather than negotiated away, procedural rights inevitably become an object of concern.*”²⁷

Second, it is often said that soft law creates a risk of establishing *bad* practices. This is because if soft law is marketed as a *standard* or *best* practice, then a flagged instrument might affect the general understanding of what is positive and negative to arbitration. The production of documents is often mentioned as an example. But, this alleged risk is not more than an unjustified paranoia. Soft law instruments are, by definition, optional for the parties, so the proposed solutions would hardly be accepted by the arbitration community if perceived as harmful to the stakeholders.

Third, soft law is criticized for the heavy influence of common law. This is because various practices established in arbitration through soft law are allegedly based on the common law tradition. An example is the use of cross-examination or, again, extensive document production, with which civil lawyers are not acquainted. It is undeniable that such an influence exists, but this is not necessarily negative. Those practices have gained great acceptance even from civil lawyers –particularly in a way which is quite far from the discovery *à l'américaine*– to the extent they are normally agreed

²⁶ Alexis Mourre, *About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration*, in THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 6 (Patricia Shaughnessy & Sherlin Tung, eds., 2017).

²⁷ William W. Park, *The Procedural Soft Law of International Arbitration: NonGovernmental Instruments*, in 15 PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, INTERNATIONAL ARBITRATION LAW LIBRARY, 147 (Loukas A. Mistelis & Julian D. M. Lew, eds.).

even in arbitrations with no connection whatsoever with the common law. In this sense, soft law instruments may help translating those common law practices into a comprehensible and easy booklet for other players. Still, some practices have been moderated; for instance, in common law jurisdictions direct examination of witnesses takes an important part of hearings, whereas in arbitration it is very limited.

Fourth and last, soft law is criticized for lack of legitimacy or democratic deficit. This is probably the most serious critic and it is based on the alleged existence of an elite of practitioners who impose their preferred rules to maintain power and control over the arbitration community.²⁸ This theory fails beforehand due to the fact that some of the most renowned practitioners are against the use and/or the expansion of soft law. In any case, it should be noted that the soft law making process is not light at all and most institutions take it very seriously. The process is similar to that of treaty making, with sophisticated working groups and good representation of various sectors. If there is one difference with law making, it is that in the soft law making process political considerations are reduced considerably.

In recent years, some institutions have developed a trend of launching public consultations on their draft instruments (e.g. IBA, SIAC and ICSID). Arguably, this process welcomes even more inclusion than a state democracy because a national congress only represents the interests of that country and yet, by a small group of representatives, not always with the necessary technical knowledge. From this perspective, it has been even said that soft law making is “*democracy in action in its best sense, as the leaders of the global arbitration community come together to reach a consensus on how to resolve a complex issue of practice or procedure.*”²⁹ Of course, this is not to say that soft law making institutions do not have their own interests that influence the dynamics of the process,³⁰ but the non-binding effect of their instruments subjects them to a strong public scrutiny that can either kill its solutions or label them as *solid* soft law. In other words, as opposed to state law, the strength of soft law comes not only from the sponsoring institution but also from the reasonability of its solutions. Thus, once a soft law instrument gains considerable acceptance, it may enjoy more legitimacy than state law.

It is plausible to have institutions (including private institutions) willing to take up this role, as well as experts willing to devote time to work on this.

²⁸ Michael 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 LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 565 (Laurent Levy & Yves Derains, eds., 2011).

²⁹ Hodges, *supra* n. 25, at 207.

³⁰ Mourre, *supra* n. 26, at 2.

They are interested in finding a solution, so there are good chances that they do a good job, although exemptions are inevitable. But even in the case of grave exemptions, those will hardly pass the barrier of public acceptance and never become *solid* soft law. This is where the border between soft law and *solid* soft law stands; just like music, the author can love it, but only the approval of the audience turns it into a true *classic*.

IV. How to Achieve *Solid* Soft Law?

A. What aspects to address?

The first question regarding soft law making is whether there is an aspect of international arbitration that regularly causes problems which are serious enough to justify putting the soft law making machinery in motion (*what* to address). To be sure, arbitration does not need guidelines or principles for every possible procedural issue.

Usually, procedural issues can be handled in different manners, all of them equally good and efficient, depending on the circumstances and, essentially, on arbitrators' and arbitral institutions' qualities. Notably, the most experienced arbitral institutions deal with procedural issues in different manners, they even compete hard to attract users (e.g. regarding time and costs efficiency), and yet they all have a good share of the dispute resolution market. This existence of different accepted approaches confirms that most procedural aspects may be tackled in more than one way.³¹ To face this situation there are neither general accepted rules nor prevalent standards.³²

There are many examples of procedural aspects that should not be standardized: “[h]ow should the case in chief be presented: written statement? Oral testimony? Both written and oral? What objections justify excluding an exhibit? What degree of relevance justifies an order to produce documents? What sanctions should be imposed for refusal to comply with a discovery order?”³³ By the same token, “[i]ntelligent soft law can provide guidance on repeat-offender trouble spots (such as discovery and privilege) without imposing undue rigidity on all aspects of the arbitral process.”³⁴

In theory, the existence of different solutions in different jurisdictions requires the intervention of soft law. Similarly, oftentimes, those differences

³¹ Landau, *supra* n. 7.

³² In this vein, it has been said that “[m]odern arbitration is either blessed or plagued, depending on perspective, with a lack of fixed standards related to how arbitrators conduct proceedings. Little ‘hard law’ exists with respect to how the specifics of how an arbitral tribunal should gather evidence and bear argument.” Park, *supra* n. 27, at 143.

³³ *Ibid.*

³⁴ *Ibid.*, at 149.

are the justification for certain aspects not to be addressed by soft law; not because it is not desirable to have a uniform solution, but because such an attempt is likely to fail. For instance, the field of professional ethics has triggered a debate on whether standard rules are needed or not.³⁵ Among other proposals, LCIA took a step issuing counsel regulation in a schedule attached to its rules, and ASA (*Association Suisse de l'Arbitrage*) proposed the creation of an international body to rule on counsel conduct. But there are so many and different proposals, that it is hard to find a common ground, and any attempt to address this issue will force users into one solution which is not necessarily the best.³⁶

In-house lawyer's communications are privileged in the United States but in many European countries they are not.³⁷ Professor Park provides a good example of this: “[a] lawyer from New York might say that fundamental fairness requires the respondent to produce certain documents even if adverse to its defense, while a lawyer from Paris or Geneva, used to a quite different legal system, would reply that the claimant should have thought about its proof before filing the claim.”³⁸ Similarly, the standard of witness preparation has also been the subject of much heated debate: in countries like the United States, extensive witness preparation and coaching is not just acceptable, it is the norm, whereas in other jurisdictions like England, witness coaching may fall foul of the Solicitors Regulation Authority's Code of Conduct.

Therefore, there must be a good balance between aspects that require standard solutions to ensure that the playing field is sufficiently leveled to allow the procedure to run in a fair, smooth, efficient, and predictable manner, and others that are better off without one: “[a]rbitration is neither trial by combat nor a random process such as consulting the entrails of a chicken.”³⁹ There are growing interesting areas where soft law could provide good solutions that otherwise would not exist. For instance, in many international commercial arbitrations applies a confidentiality rule (either by application of the institutional rules or the agreement of the parties), but neither the arbitrators nor the parties really know how to protect confidential information and documents that form part of the record. There is any clear procedure to do it. Thus, creating protocols

³⁵ See *ASA President's Message, Counsel Ethics in International Arbitration—Could one Take Things a Step Further* (2014).

³⁶ UNCITRAL has evoked the possibility to deal with this topic but nothing has been so far developed. See the document *Possible future work in the field of dispute settlement: Ethics in international arbitration*, UNCITRAL, Fiftieth session, Vienna, 3-21 July 2017 (<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/23/PDF/V1702323.pdf?OpenElement>).

³⁷ Park, *supra* n. 27, at 151.

³⁸ *Ibid.*, at 145.

³⁹ *Ibid.*, at 144.

to achieve confidentiality could really contribute to international arbitration. The same would be the case regarding other cyber-security issues.

B. When is it time for soft law?

In addition to identifying *what* aspects of international arbitration are worth a soft law instrument, another important step is to determine *when* to do it. The fact that certain aspect is causing problems to international arbitration and clearly requires a solution does not mean that it is the right time to address it through soft law. In order to create an instrument that can add value it must be elaborated on the basis of relevant experience. When a novel issue arises, there may not be enough experience, precedents, information, to predict every possible scenario that such an issue may cause, and any proposal would be premature and will likely require further adjustments shortly thereafter.

For instance, third party funding created complications since its first appearances in international arbitration, and part of the arbitration community believed that it required a uniform solution.⁴⁰ However, given that at the beginning there were not enough cases, let alone consensus about the best approach (which greatly depends on the rules of each jurisdiction),⁴¹ it took some time before the first soft law instruments on the topic were published. In the meantime, the arbitration community commented on the funding-related problems and tribunals helped to shape the best practices which were eventually embodied in some soft law instruments.

C. How to prepare a soft law instrument?

Once we identify that there is an aspect of international arbitration that requires a solution, and there is enough experience to understand the issues involved and to propose a good approach, it is still important to decide *how* to prepare a good soft law instrument. This is probably the hardest task, and it does not refer to the content of the instrument, but the soft law making *process*.

Toby Landau, an active participant in the UNCITRAL Arbitration Working Group (and other institutions), expresses concerns, not about the institution (which is probably one of the most respected and authoritative in international law), but about the regulation-making process. For instance, he criticizes the long debates involving hundreds of representatives from states and institutions, some of who are diplomatic (or with similar backgrounds) and lack specific

⁴⁰ See Marie Stoyanov & Olga Owczarek, *Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?*, 2,1 BCDR INTERNATIONAL ARBITRATION REVIEW (2015).

⁴¹ John Fellas, *Can Arbitrators Award Third/Party Funding Costs?*, 257, 125 NEW YORK LAW JOURNAL (2017).

expertise in the topics on agenda.⁴² Likewise, another author strongly criticizes that “many, if not most, members of the Arbitration Committee at large realized what was cooking only after the IBA Guidelines had been published in their name,”⁴³ and that “the IBA Guidelines were drafted by a small circle within the IBA with the membership at large having no real say in the drafting.”⁴⁴

Irrespective of the merits of these critics, what they reveal is that there is room to improve the soft law making process. In order to achieve a successful product, a *solid* soft law instrument, the preparation process must be adequate, through the following steps (which will generally be standard for any area of the law):

- Avoid addressing the obvious.⁴⁵

In order to avoid displacing specific solutions, some instruments propose the common denominator between the existing rules (i.e. rules that are so neutral and obvious that everyone would agree), in which case, the contribution is futile. For instance, the requirements of the arbitrator being independent and impartial are equally found in most jurisdictions, but the parameters of that duty are rarely defined and are worth tackling.

- Respect to different approaches by different jurisdictions.⁴⁶

This does not mean that the instrument should be a blend of ideas coming in equal measure from the civil law and the common law; it means that the instrument should be useful for users coming from different systems.⁴⁷

- Coordination.

To the extent possible, an institution pertaining to address certain aspect should coordinate such endeavor with other institutions in order to avoid competing instruments. Otherwise, there is a risk of different solutions, with the consequence of more divergence instead of uniformity.

⁴² Landau, *supra* n. 7.

⁴³ Felix Dasser, *A Critical Analysis of the Guidelines on Party Representation*, THE SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION (ASA SPECIAL SERIES) 35-36 (Daniele Favalli, ed., 2015).

⁴⁴ *Ibid.*, at 37, 38.

⁴⁵ Landau, *supra* n. 7.

⁴⁶ For example, the IBA Guidelines on Conflict of Interests prohibit party contact with arbitrator (except for the constitution of the tribunal), and this is against the law of some Asian jurisdictions (China, Hong Kong, India, and Singapore) on MedArb, which require contact unilateral contact with the arbitrator. See Toby Landau, *supra* n. 7.

⁴⁷ Mourre, *supra* n. 26, at 2.

- Inclusion.

The institution in question shall consult representatives at all levels;⁴⁸ this includes practitioners, companies, other institutions, as well as the greater arbitral community through public consultations. With the evolution of international arbitration, this representation may evolve as well depending on the subject matter of the instrument under preparation, for instance, to include third-party funders, insurers, or technology experts.

V. Can the Arbitrators Apply Soft Law without the Consent of the Parties?

The parties' choice of law or rules is binding on them and the arbitral tribunal, with the limit of any overriding mandatory law.⁴⁹ In this sense, when the parties agree on the application of a soft law instrument, the discussion about its relevance becomes moot as it is *hardened* by the will of the parties. The parties can include express their preference in the arbitration agreement, or the first procedural order, at the outset of the proceedings. Even when the parties do not agree on the application of a set of soft law rules *ab initio*, the panoply of tools to deal with different procedural issues remains available throughout the procedure.

Normally, the parties do not spend much time establishing their own rules, but even if they did, they could hardly envisage every potential procedural situation. And once certain procedural issue arises, the parties are not likely to agree on how to address it due to their conflicting interests. Here, a challenging question is whether the arbitrators may apply soft law despite the parties' disagreement,⁵⁰ an issue about which arbitration statutes and rules are silent. In this kind of situations, beyond theoretical doubts and practical risks, available soft law is likely to be regarded by the arbitrators as a useful support for their decision.⁵¹ During heated procedural debates soft law provisions will be cited *faute de mieux*, even for lack of anything better.⁵²

⁴⁸ *Ibid.*

⁴⁹ In fact, there may even be private mandatory rules, as those that arbitral institutions include in their set of rules and do not allow the parties to modify or waive. Andrea Carlevaris, *Limits to Party Autonomy and Institutional Rules* in *LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION*, 1 (Franco Ferrari, ed., 2016)

⁵⁰ Daily procedural issues are rarely solved by the *lex arbitri*, which is rather intended to govern questions like the intervention of local authorities in the arbitration.

⁵¹ “When a key procedural question eludes the parties’ agreement, either expressly or by reference to rules, arbitrators called to decide the quarrel often look to international standards as one analytic tool to balance efficiency and fairness”. Park, *supra* n. 3, at 5.

⁵² Park, *supra* n. 27, at 142.

It is in fact extremely difficult for an arbitral tribunal, in front of a disagreement between parties from different legal cultures to *invent* a solution.⁵³ In absence of uniform rules, any procedural disagreement will inevitably be resolved by a decision that is closer to one party, to the dissatisfaction of the other, what can be avoid if the tribunal places both parties on the same ground by referring to an accepted common set of rules.⁵⁴ Moreover, the conduct of arbitral proceedings is focused on the fidelity to specific established norms,⁵⁵ so when properly used, soft law may provide a useful benchmark to stakeholders in arbitration proceedings as to what they should expect.⁵⁶ Actually, if the parties and the arbitrators were to discuss these solutions, more often than not, they will reach the same solution as provided by soft law; the only problem being that once the issue arises, their conflicting interest will impair any agreement.

In order to avoid potential challenges, wise arbitrators should suggest the parties to include a provision in the first procedural order granting them the power to rely on specific soft law instruments, or even apply soft law in general. But this is not always the case, sometimes because the parties or one of them reject giving this power to the arbitral tribunal. Nevertheless, arbitrators, like other adjudicative bodies, enjoy *implied, inherent* and *discretionary* powers. Their implied powers stem from the parties' agreement, as well as from the applicable arbitration rules and laws.⁵⁷ Their discretionary powers allow the arbitrators to determine the arbitral procedure upon their discretion.⁵⁸ While the implied and discretionary powers are typically subordinated to the parties' agreement,⁵⁹ inherent powers are in the very nature of arbitrators as adjudicators entrusted with the task of resolving a dispute producing an internationally enforceable award, so the parties cannot restrict these powers,⁶⁰ which are mainly relevant to protect the arbitral process from unexpected and unusual situations that could undermine it.⁶¹

⁵³ Mourre, *supra* n. 26, at 4.

⁵⁴ *Ibid.*

⁵⁵ Park, *supra* n. 27, at 149.

⁵⁶ Hodges, *supra* n. 13, at 630.

⁵⁷ International Law Association, *Committee on International Arbitration, Report for the Biennial Conference in Washington D.C.* 20 (2014).

⁵⁸ GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, 148-49 (2012).

⁵⁹ International Law Association, *Committee on International Arbitration, Report for the Biennial Conference in Washington D.C.* 20 (2014).

⁶⁰ *Ibid.* See also Inka Hanefeld & Aaron de Jong, *Inherent Powers to Streamline Proceedings*, in INHERENT POWERS OF ARBITRATORS 213 (Franco Ferrari & Friedrich Rosenfeld, eds., 2018).

⁶¹ Margaret L. Moses, *Inherent and implied powers of arbitrators*, LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW, 3 (2014).

In this vein, most arbitration rules include a similar provision to article 22(2) of the ICC Rules which states that “[i]n order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.” Another possible avenue for arbitrators to justify their inherent powers may be the typical rule that allows them to conduct the arbitration in an expeditious and cost-effective manner.⁶² Overall, if the parties have granted the arbitrators the power to finally settle the whole dispute, it goes without saying that they can manage the procedure to reach their final decision - *qui potest plus, potest minus*.⁶³

While the parties *own* the proceedings, the arbitrators are in charge of *conducting* such proceedings: “[a]n arbitration may say to be “owned” by the parties, just as a ship is owned by ship-owners. But the ship is under the day-to-day command of the captain, to whom the owner hands control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone who is in command; and, behind the captain, there will always be someone with ultimate control.”⁶⁴

On the above basis, arbitrators may apply soft law, even when the parties have not agreed to it, relying on their broad powers.⁶⁵ Actually, there are not many reported cases where courts have set aside an award because the arbitral tribunal failed to properly apply soft law;⁶⁶ probably because issues typically addressed by soft law would otherwise fall within the sphere of discretion of the arbitral tribunal. Still, arbitrators should be cautious when exercising its powers. It is strongly recommended that the arbitrators consult the parties about the application of any rule possibly not envisaged by them. Likewise, the arbitrators should suggest the use of instruments that are at least known by the parties (even if they do not fully agree with their application), in order to avoid surprising them with an instrument with which they are not acquainted. Finally, in order to be on the safe side, in these circumstances arbitrators should only apply *solid* soft law.

⁶² 2017 ICC Rules, article 22(1). See also 2013 UNCITRAL Rules, article 17(1); 2014 LCIA Rules, article 14.4(ii); Swiss Rules, article 15(7).

⁶³ Diego P. Fernández Arroyo, *Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?*, in LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION, 207 (Franco Ferrari, ed., 2016).

⁶⁴ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 6.03 (2015).

⁶⁵ Mourre, *supra* n. 26, at 3; Hrvatska Elektroprivreda DD v. The Republic of Slovenia (ICSID Case No. ARB/05/24), Order Concerning the Participation of Counsel of May 6, 2008.

⁶⁶ Mourre, *supra* n. 26, at 4.

VI. Concluding Remarks

As many other aspects of international arbitration, soft law has grown exponentially. Soft law may help parties and arbitrators to optimize arbitral proceedings. But it has grown to the point where almost anything outside the realm of *hard law* is labelled as *soft law*, often without any regard of its origin or content, and therefore mixing very good instruments with others that are not so good, or good at all. Therefore, it is important to revisit the definition of soft law, or distinguish different categories. Only those instruments which have gain the public acceptance should qualify as *solid* soft law.

In general terms, soft law has gained great acceptance from the arbitration community and some instruments are doubtlessly successful. While there are some concerns about its extensive application, most of them are not justified. However, these critics show that there is still room for improvement regarding the soft law making process. In this regards, this paper proposes that soft law instruments should be prepared following a three-step criteria: (i) *what* to address with a soft law instrument, (ii) *when* to do it, and (iii) *how* to do it. With this, the process is improved to achieve *solid* soft law instruments.

Given the benefits of soft law and the broad powers of arbitrators, they should be able to apply soft law, even when there is no agreement of the parties. However, the arbitrators should be cautious not to take the parties by surprise with random instruments that they completely ignore. Arbitrators will make good use of their powers only when applying *solid* soft law. Hopefully, the next generation of practitioners will follow these ideas and enhance the soft law making process, with the virtual effect of contributing to procedural efficiency.