SOFT LAW RULES IN INTERNATIONAL ARBITRATION: POSITIVE EFFECTS AND LEGITIMATION OF THE IBA AS A RULE-MAKER

David Arias[*]

Abstract

Soft law has gained increasing importance in the context of international arbitration. This reality has not been devoid of detracting voices who stood against the development of soft law in this field. Although it is not denied that soft law may have brought about new challenges to the industry, the benefits enjoyed by international arbitration as a result of the creation and increasing utilization of soft law instruments, outweigh any potential drawback. In particular, this article shows that soft law has contributed to levelling the playing field, increasing certainty and codifying best practices, norms and intelligent guidance on how to tackle recent concerns. This article also shows that the International Bar Association, surely the most active institution when it comes to the creation of soft law at the international arbitration level, is entirely legitimized in its role. This legitimation is given by its experience, its inclusiveness when creating soft law instruments and its reflection of the cultural diversity in the arbitral community. Beyond that, IBA's soft law instruments have been eagerly welcomed by the arbitration community, which is another indicator of its legitimacy to produce them.

I. Introduction

The main purpose of this article is to show that soft law instruments create many positive effects for international arbitration, and that the International Bar Association ["**IBA**"] is a body with the legitimation to develop such instruments in that context. Before addressing those issues, it seems reasonable to analyse what is understood by soft law. For this purpose, the definition given by Professor Gabrielle Kaufmann-Kohler is quite accurate:

"'[*S*]*oft law' norms are generally understood to be those that cannot be enforced through public force. These norms can emanate from state actors, be they legislators, governments or international organizations. They can also emanate from non-state actors, such as private institutions and professionals or trade associations.*"[1]

Another enlightening definition of the concept of soft law can be found in the following passage:

"'*Soft law' refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat "weaker" than the binding force of traditional law which is in contrast often referred to as "hard law"*.'"[2]

---

[*] David Arias is partner in Arias SLP. He has served as an arbitrator and counsel in more than 100 cases in venues across Europe, America and Africa, and he regularly participates in proceedings administered by the main arbitration institutions. He also has extensive experience as counsel in complex commercial litigation. David was Chair of the IBA Arbitration Committee between 2016 and 2017. Previously, he also chaired its Subcommittee on Conflicts of Interest, which published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. Additionally, he helped draft the 2010 IBA Rules on the Taking of Evidence in International Arbitration. From 2013 to 2017, he was President of the *Club Español del Arbitraje*, of which he is currently Honorary President. He is regularly recognized as a Tier 1 litigation and arbitration lawyer and most in-demand arbitrator in leading international legal publications and directories.

[1] Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. INT'L. DISP. SETTLEMENT 283, 284 (2010).

[2] Felix Lüth & Philipp K. Wagner, *Soft Law in International Arbitration - Some Thoughts on Legitimacy*, STUDZR 409, 411 (2012).

It follows from the foregoing definitions that what ultimately characterises a rule of soft law is that it cannot be enforced through the mechanisms offered by the State, irrespective of the body from which it emanates (i.e. a State-related or a non-State-related entity). This may be 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).[3]

The objectives pursued when creating soft law instruments are essentially two. In some cases, this creation process simply seeks to collect or assemble norms or practices into a single existing, non-dispersed, normative body.[4] Other times, the objective of the process is more ambitious, because it seeks to create new norms (generally to encourage certain behaviours).[5] Nonetheless, the most recurrent scenario for soft law creation processes is to simultaneously pursue both objectives: to compile and to create new rules.[6]

Having explained how soft law instruments are defined and what objectives are generally pursued when creating them, it seems appropriate to now highlight that these instruments are most relevant at the international level. This is evidenced by the vast variety of instruments of that nature that can be found at that level, as well as by their importance. Worth citing, for example, are:

(i) The International Commercial Terms ["**Incoterms**"], which provide internationally accepted definitions and rules of interpretation for the most common commercial terms used in contracts for the sale of goods.[7]

(ii) The UN Global Compact Principles, which emphasize the importance of corporate sustainability by encouraging companies to uphold a series of basic responsibilities to the people and the planet.[8]

(iii) The Draft Common Frame of Reference, aimed at promoting knowledge of private law in the jurisdictions of the European Union in an attempt to show how much national private laws resemble one another and ultimately encourage the unification of law within the European Union through a set of principles, definitions and model rules.[9]

(iv) The International Financial Accounting Standards, which provide a common global language for business affairs so that company accounts are made understandable and comparable.[10]

The relevance of soft law at the international level is partially explained by the fact that this concept originated in, and was formerly connected to the field of public international law.[11] The

3 Kaufmann-Kohler, *supra* note 1, at 284.
4 *Id.* at 286.
5 *Id.*
6 *Id.* at 287.
7 International Chamber of Commerce, Incoterms® Rules (Jan. 1, 2011), *available at* https://iccwbo.org/resources-for-business/incoterms-rules.
8 UN Global Compact, The Ten Principles of the UN Global Compact (June 24, 2004), *available at* https://www.unglobalcompact.org/what-is-gc/mission/principles.
9 Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *available at* http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.
10 International Financial Accounting Standards, *Why global accounting standards?*, *available at* http://www.ifrs.org/use-around-the-world/why-global-accounting-standards.
11 Lüth & Wagner, *supra* note 2, at 411.

resolutions and declarations of the United Nations General Assembly are typical examples of soft law in this field.[12]

In the present day, soft law, although no longer exclusive to it, is still a concept primarily associated with the international plane. The expansion of soft law to other fields may have been associated with globalization.[13] To some extent, globalization has disempowered States and, as a result, traditional services provided by them such as dispute resolution, have been taken over by private actors.[14] In that context, soft law becomes essential, because it is a key tool for those private actors to regulate the functioning of such services.

II. Soft Law in International 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. Additionally, the awards issued in the context of arbitration are more effective at the international level than national court judgments since the New York Convention, currently in force in 157 States, obliges these States to recognize and enforce awards issued in other contracting States, unless one of the (restrictive) circumstances stipulated therein has taken place.

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.[15] In this regard, Jan Paulsson goes as far as to contend that "*the future clearly lies in the emergence of fundamental best practices*".[16]

That role has also been corroborated by quantitative studies. By way of illustration, the Survey on the Use of Soft Law Instruments in International Arbitration conducted between February and March 2014, revealed the importance of soft law rules in that context: For instance, less than 5% of survey respondents answered that they had never used the IBA Rules on the Taking of Evidence in International Arbitration and around 65% replied that they had used the UNIDROIT Principles on International Commercial Contracts at least once.[17]

---

12 *Id.*

13 Kaufmann-Kohler, *supra* note 1, at 284.

14 *Id.*

15 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1852 (2d ed. 2014).

16 JAN PAULSSON, THE IDEA OF ARBITRATION 284 (2013).

17 Elina Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, KLUWER ARB. BLOG (June 6, 2014), *available at* http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration.

International arbitration soft law instruments mainly emanate from non-State-related bodies.[18] This has allowed the international arbitral community to evolve into a fast-paced community, in which new rules are shaped faster than they could be developed by national legislatures.[19]

Further, these soft law instruments can be both substantive and procedural.[20] An example of a substantive arbitration soft law instrument is the above-referred UNIDROIT Principles on International Commercial Contracts.[21] These principles have been used in the field of international business and as some have suggested, probably rightly so, that this is because they are a neutral, ready-to-use and economically efficient instrument.[22] Other examples of substantive soft law rules are the Principles of European Contract Law (a set of rules produced by a group of academics under the direction of the European Commission, meant to be a statement of the principles that underlie the private law of all the individual member states of the European Union)[23] and the Incoterms.

As far as the world of arbitration is concerned, procedural soft law instruments are probably more interesting. It is in the task of developing procedural soft law that the work of the IBA stands out. In particular, the institution has published guidelines and rules on evidence, conflicts of interest and party representation. Some of these norms are frequently used in international arbitration and have in fact driven particular practices. For example, the IBA Rules on the Taking of Evidence in International Arbitration have spread the practice of document production in that field.[24] The author will discuss the IBA soft law instruments subsequently.

In other respects, it is impossible to talk about procedural soft law without referring to the United Nations Commission on International Trade Law ["**UNCITRAL**"], which published its Model Law on International Commercial Arbitration in 1985 and, in 2006, modified it with the purpose of helping States reform and modernise their arbitration laws. These reforms were meant to include the peculiarities and necessities of international commercial arbitration, thus providing the means for States to more easily update their national laws. It is safe to say that the UNCITRAL Model Law, together with the New York Convention, are two of the most influential instruments in international arbitration.[25] Additionally, UNCITRAL published its Model Arbitration Rules in 1976, which are frequently used in *ad hoc* arbitration. These rules, which were last amended in 2010, as well as those of the various institutions and arbitration centres, are soft law rules, although they lose that nature and become binding rules of law once they are incorporated into a contract.

---

18 Kaufmann-Kohler, *supra* note 1, at 284 - 285.

19 *Id.* at 285.

20 *Id.*

21 It is important to note that the use of the UNIDROIT Principles on International Commercial Contracts and other substantive soft law instruments is not limited to international arbitration.

22 Eckart Brödermann, *The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal*, 11(4) UNIFORM L. REV. 749, 759 (2006).

23 Hugh Beale, *The Development of European Private Law and the European Commission's Action Plan on Contract Law,* JURIDICA INTERNATIONAL 4, 5 (2005).

24 Michael E. Schneider, *Yet another opportunity to waste time and money on procedural skirmishes: the IBA Guidelines on Party Representation*, ASA BULL. 497, 497 (2013).

25 Kaufmann-Kohler, *supra* note 1, at 291.

As explained above, some of the procedural soft law instruments developed by the IBA have driven particular practices. However, practices already in place have also been codified into soft law instruments by the IBA or other bodies. Hence, uses and practices tend to come together with the codification of norms of soft law. The perfect example of the described scenario is the *lex mercatoria*, which is often identified with the UNIDROIT Principles on International Commercial Contracts.

The process of codification of procedural practices into soft law instruments is a clear demonstration of the excellent capacity of international arbitration to adapt to new circumstances. A good example of this is the IBA Guidelines on Conflicts of Interest in International Arbitration, which was originally published in 2004 and updated ten years later with the objective, *inter alia*, of tackling new uses and practices developed in international arbitration during that time. The role of these guidelines in this regard can be illustrated by taking the example of third party funding. For those unfamiliar with the concept, third-party funding is a mechanism of procedural facilitation that allows the party who is part of certain proceedings to fund the costs associated with it through the financing of a third-party funder. The presence of a third-party with an economic interest in the arbitral award, however, may give rise to new conflicts of interest.

Consider a claimant who has such funding and who designates X as an arbitrator. Also, suppose that X participates as a lawyer in another arbitration and his client is funded by that same third-party. A decision by X in the first arbitration against the claimant's interests implies indirectly deciding against the interests of the third-party funder. In other words, it means deciding against the "*partner*" of his client in the second arbitration and, therefore, against the person who will most likely pay his counsel fees in that arbitration. Under those circumstances, the arbitrator's decision would be controversial, as many could wonder whether the arbitrator may be influenced by this ulterior motive, creating an appearance of bias.

In light of this, the new IBA Guidelines on Conflicts of Interest in International Arbitration establish that any party with third-party funding in an arbitration must report any direct or indirect relationship that exists between any of the arbitrators and the third-party funder.[26] This is thus a clear example of how new uses and practices of international arbitration result in codified soft law rules.

III. The Benefits of Soft Law for International Arbitration

The increasing creation and use of international arbitration soft law instruments have not come without criticism.[27] In spite of that, it is the author's opinion that international arbitration has greatly benefited from the existence of those instruments. The benefits provided by them are manifold,[28] although the author will focus only on three of them: (i) the levelling of the playing

[26] IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 7(a) & Explanation to General Standard 7(a) (2014).

[27] Schneider, *supra* note 24.

[28] Henry D. Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of Unidroit, Uncitral, and The Hague Conference*, 34(3) BROOK. J. INT'L L. 655 (2009); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94(3) MINN. L. REV. 706, 719 (2010).

field; (ii) the increase in certainty; and (iii) the codification of best practices, norms and intelligent guidance on how to tackle recent concerns.

A. Levelling the Playing Field

For starters, soft law is a means to level the playing field. This levelling takes place in two different manners.

On the one hand, soft law acts as a half-way point between different legal approaches and traditions. As mentioned above, arbitration is the natural forum for international disputes, which explains the cultural and legal diversity of its stakeholders. This diversity, coupled with the absence of a civil procedural code applicable to all cases, often leads to legal loopholes that are difficult to cover without a risk (or at least an appearance) of bias.

For instance, what should be the criteria adopted by arbitrators when deciding whether a particular document should be produced or not? Should arbitrators authorize an American-style discovery procedure or is it preferable to order only the production of specific documents which have proven to be relevant to the disputed issue?

Can lawyers prepare witnesses? In the United States, lawyers may incur professional misconduct if they do not prepare their witnesses for a hearing before State courts.[29] On the contrary, in French court litigation, lawyers may incur such misconduct if they prepare them.[30] What criteria should be adopted in an international arbitration involving American and French counsel?

What should be the expected reaction of a lawyer in an arbitration hearing if he were to notice inconsistencies between the written witness statement and the oral witness statement? Should the lawyer point out the discrepancy in the hearing itself so the witness provides an explanation, as an English lawyer would do? Or should the lawyer do it in its written conclusions?

All these scenarios pose culturally diverse situations and it is here that soft law intervenes as a conciliatory instrument capable of creating half-way standards between different legal systems and approaches. Soft law not only creates those standards, but also serves to legitimize certain behaviours that perhaps could even be considered unacceptable in a domestic context by rules of professional conduct.[31]

On the other hand, soft law also levels the playing field by making arbitration more accessible, especially for those who lack experience. As put by one author, soft law has brought international arbitration to a new stage, replacing what was previously "*an era of a small mafia travelling the globe with unwritten rules in the back of their minds*".[32] In fact, soft law instruments allow lawyers who have no expertise in arbitration to counterbalance their disadvantages by translating

---

29 BORN, *supra* note 15, at 2860.

30 Ian Meredith & Hussain Khan, *Witness Preparation in International Arbitration – A Cross Cultural Minefield*, 26 MEALEY'S INT'L. ARB. REP. 1, 3 (2011).

31 As explained above, in French court litigation, lawyers may incur professional misconduct if they prepare witnesses. However, it may be argued that witness preparation is a legitimized behavior at the international arbitration level because it is permitted by the IBA Guidelines on Party Representation in International Arbitration.

32 Tom Jones, *"Killing me softly": is international arbitration being stifled by soft law?,* GLOBAL ARB. REV. (Mar. 1, 2016), *available at* http://globalarbitrationreview.com/article/1035346/"killing-me-softly"-is-international-arbitration-being-stifled-by-soft-law.

into paper the benefit of years of discussion and accumulated expertise.[33] This positive effect of soft law is of particular importance, especially when considering that levelling the playing field in this sense has become a real concern in international arbitration nowadays. This is evidenced for example by the recent tools developed to profile arbitrators, which effectively level the playing field by allowing arbitration users lacking experience to know in which fields potential arbitrators are specialized or what their inclinations are when it comes to delineating the process.[34]

B. Increase in certainty

Another positive effect of soft law instruments is the increase in certainty. This applies to both arbitration and arbitration-related proceedings.

When it comes to arbitration proceedings, it is self-evident that certainty increases if parties agree that a particular set of soft law rules will be applicable to their dispute. The arbitrators will resort to those rules whenever they are dealing with an issue regulated by them, so that it will be possible to know beforehand how those issues will be tackled if eventually they arise.

Further, the existence of soft law rules makes agreements more likely, especially when the dispute has already arisen. Once there is a dispute, chances are slim that the parties will cooperate to create from scratch the rules that will be applicable to their case. Such chances are surely greater if the rules are already created and it is only a matter for the parties to opt in.

Arguably, soft law rules also bring about more certainty to arbitration proceedings where the parties have not explicitly consented to their application. The reason is that, in many instances, those rules have significant persuasive value. Consequently, if an issue regulated by these rules arises, it is possible that the arbitrators resort to them to resolve it, despite the lack of an explicit agreement by the parties in that regard. For example, arbitrators normally consult the IBA Guidelines on Conflicts of Interest in International Arbitration for disclosure purposes.

The persuasive value of soft law rules has also been acknowledged in the context of arbitration-related proceedings. It is not in fact uncommon to see national courts applying those rules when dealing with issues regulated by them. This is so even though they are not obliged to do so. For instance, courts in the United States, Switzerland, Austria, Spain or Belgium have resorted to the IBA Guidelines on Conflicts of Interest in International Arbitration as a persuasive authority.[35] It can therefore be argued that soft law rules also increase predictability in arbitration-related proceedings.

The fact that soft law rules have this persuasive value and, therefore, may be resorted to by arbitral tribunals absent an express agreement by the parties or even by national courts has caused some commentators to raise legitimacy concerns in relation to their creation. Those concerns are specifically considered below.

---

33 *Id.*

34 An example of such tools is the Global Arbitration Review's Arbitrator Research Tool, *available at* https://globalarbitrationreview.com/arbitrator-research-tool.

35 The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the Reception of the IBA Arbitration Soft Law Products IBA Arbitration projects*, ¶¶ 164, 169 (2016).

Before concluding this section, it is fair to acknowledge that the increase in certainty brought about by soft law instrument may be accompanied by some degree of loss in flexibility. Whether this is good or bad is a matter of preference.[36] William Park, for example, believes that such a trade-off of flexibility for predictability is desirable, since "*few business managers want a lottery of inconsistent results.*"[37]

In any case, the loss in flexibility due to the existence of soft law instruments seems minor and there may be means to avoid it. For instance, the parties could explicitly state in their arbitration clause that they do not wish that certain rules of soft law be applied in the proceedings in which any eventual dispute between them will be settled.

C. Codification of Best Practices, Norms and Intelligent Guidance on Tackling Recent Concerns

As explained above, soft law creation processes are normally aimed at both compiling norms or practices *and* creating new rules. This also applies to international arbitration soft law instruments. One example in this regard is the creation process of the IBA Rules on the Taking of Evidence in International Arbitration, which pursued this dual objective. As Gabrielle Kaufmann-Kohler indicates:

"*When they were adopted, the Rules were not completely innovative. The transnational practice they codify had already begun to emerge and was in use among a number of specialists. At the same time, they were not merely a restatement of existing rules. Indeed, many users of arbitration, accustomed as they were to their national procedures, would not have recognized these rules at the time.*"[38]

Additionally, a common feature in at least most of the processes aimed at the creation of international soft law instruments is that agents from different "*groups*" of the arbitration community take part in them. In fact, it is frequent to see that the task forces generally created to carry out those processes are comprised of arbitration practitioners, investigators, arbitrators, representatives of arbitral institutions and arbitration users. Further, consultation processes amongst members of the arbitration community are rather frequent.

It is therefore the work of specialists that unsurprisingly results in soft law instruments that codify best existing norms, practices and intelligent guidance on how to tackle recent concerns or in other words, instruments that achieve the dual objective explained above in the best possible manner.

It is the author's understanding that the foregoing is achieved without creating normative confusion, although the contrary is argued by some commentators. In particular, it has been suggested that the IBA Guidelines on Party Representation in International Arbitration create an

---

36 Kaufmann-Kohler, *supra* note 1, at 298.

37 William Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141, 147 (Loukas Mistelis & Julian Lew ed., 2006).

38 Kaufmann-Kohler, *supra* note 1, at 290.

additional layer of rules and, as such, contribute to creating confusion in relation to the standard of conduct applicable to party representatives in international arbitrations.[39]

The issue of which rule of conduct applies to those representatives is undoubtedly an interesting one and there may be certain doubts in that regard. However, those doubts seemed to exist before the IBA Guidelines on Party Representation in International Arbitration were issued. In fact, a survey conducted in 2010 (prior to the publication of the IBA Guidelines on Party Representation in International Arbitration) revealed that more than 25% of the surveyed lawyers were unsure about the rules of conduct to which they were subject.[40]

Furthermore, the possibility of conflict between the IBA Guidelines on Party Representation in International Arbitration and national laws seems unlikely. The former is an eminently contractual instrument and any discretionary application of it by arbitrators is subject to applicable mandatory rules, which are not displaced by these guidelines. This is clearly stated in its Preamble:

"*The use of the term guidelines rather than rules is intended to highlight their contractual nature. The parties may thus adopt the Guidelines or a portion thereof by agreement. Arbitral tribunals may also apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they determine that they have the authority to do so. […] the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation*."[41]

The IBA Guidelines on Party Representation in International Arbitration are therefore applicable when there are no mandatory rules in place or when they are not applicable to the arbitration in question. This may be the case when national rules of conduct establish exceptions in relation to arbitration. Take for example Article 7 of the Swiss Rules on Professional Conduct which generally prohibits contact with witnesses, but does not apply in case of arbitrations and proceedings before supranational tribunals.[42]

In light of the above, it is the author's opinion that soft law instruments (and, in particular, the IBA Guidelines on Party Representation in International Arbitration) may create an additional layer of rules, but do not create confusion as to which of those rules is applicable. Mandatory rules will always prevail, and when such mandatory rules do not exist or are not applicable, soft law instruments become an option to which parties may submit or which arbitrators may apply discretionarily due to their persuasive value.

IV. The IBA as a Legitimate Soft Law Maker in International Arbitration

As anticipated above, one of the criticisms raised against soft law rules is the lack of legitimacy in their creation. These legitimacy concerns only arise when they are applied without prior express agreement by the parties. If that express agreement exists, there does not seem to be any good reason to question their legitimacy.

39 Schneider, *supra* note 24, at 499.
40 BORN, *supra* note 15, at 2873-2875.
41 IBA Guidelines on Party Representation in International Arbitration, pmbl.. (2013).
42 BORN, *supra* note 15, at 2853.

The IBA, the world's leading association of law professionals and bar associations, is surely the most active institution when it comes to the creation of international arbitration soft law instruments. In fact, the IBA, through its Arbitration Committee, has created over the past years, various instruments of that kind that are frequently used in arbitration practice. We have already referred to the main ones above, which are: (i) the IBA Rules on the Taking of Evidence in International Arbitration; (ii) the IBA Guidelines on Conflicts of Interest in International Arbitration; and (iii) the IBA Guidelines on Party Representation in International Arbitration.[43]

In view of this, one may wonder whether the IBA has the necessary legitimacy to develop these soft law rules. To respond to this, it seems appropriate to resort to Alexis Mourre's description of legitimacy. According to him, legitimacy relies essentially on three factors: experience, inclusion and internationality.[44] As we will see now, the IBA complies with all three requirements.

First, soft law instruments need to be developed by an organization with sufficient representation and experience in the rulemaking process. Certainly, the IBA, established in 1947, has the necessary representation and experience, as it counts with over 80,000 lawyers and more than 190 bar associations as members.[45] Further, the Arbitration Committee, the branch of the IBA through which soft law instruments have been created, has more than 2,500 members from over 90 countries.[46]

Second, the process must be inclusive, in the sense that the arbitral community has to be consulted as much as possible. As explained above, international arbitration soft law instruments are generally the result of a process carried out by representative task forces (in which different "*groups*" of the arbitration community take part) and in which consultations are frequent. The creation processes of the new IBA Guidelines on Conflicts of Interest in International Arbitration or the IBA Guidelines on Party Representation in International Arbitration exemplify that inclusion is a main concern for the IBA when developing soft law instruments.

The process that led to the creation of the new IBA Guidelines on Conflicts of Interest in International Arbitration was set in motion in 2012 with the creation of a subcommittee on conflicts of interest. This subcommittee was entrusted with the task of reviewing the previous version of these guidelines. Its composition made evident the plurality of agents, including arbitration professionals, arbitrators and users of the institution from eighteen countries representing diverse legal cultures. Further, the intervention of various members of the arbitral community did not end there. The subcommittee also circulated questionnaires and surveys amongst arbitration practitioners and institutions who gave their opinion on a number of issues.

---

43 IBA Arbitration Committee, Rules and Guidelines, *available at* https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.

44 Alexis Mourre, *Soft law as a condition for the development of trust in international arbitration*, 13 REVISTA BRASILEIRA DE ARBITRAGEM 82, 89 (2016).

45 IBA Arbitration Committee, Committee Home, About the Committee, *available at* https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx.

46 IBA Arbitration Committee, Overview, Membership, *available at* https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Overview.aspx.

Taking into account this information, the subcommittee prepared various drafts which were discussed with members of the Arbitration Committee and circulated to practitioners and institutions for remarks. The final version of the new IBA Guidelines on Conflicts of Interest in International Arbitration incorporated many of these comments.

The process leading to the creation of the IBA Guidelines on Party Representation was similarly inclusive. In this case, a task force was created in 2008 with the mandate of analysing issues of counsel conduct and party representation in international arbitration that were subject to, or informed by, diverse and potentially conflicting rules and norms.[47]

This task force commissioned a survey in 2010, in which respondents expressed support to the idea of developing international guidelines for party representation.[48] It was on the basis of this support that the task force prepared a draft of the IBA Guidelines on Party Representation in International Arbitration to be reviewed by the Arbitration Committee.[49] Arbitration practitioners, arbitrators and arbitral institution were consulted in this process and all the members of the Arbitration Committee were also given an opportunity to comment.[50]

Another argument that could be raised in relation to this inclusion factor is that legitimacy increases when a public body intervenes in the rulemaking process, and the IBA is not such a body. However, there does not seem to be any good reason to support the idea that the legitimacy of soft law rules intended to be used in the context of a private dispute resolution mechanism (arbitration) may be greater when a public body intervenes in the process.[51] Consequently, the legitimacy of the soft law rules created by the IBA (aimed to be used in the context of international arbitration) cannot be diminished in any manner by the fact that the IBA is not a public body.

Third, any rulemaking process in the context of international arbitration must reflect the broad cultural diversity of the arbitral community, so that the final product is not seen as an expression of a specific legal culture. As indicated above, the IBA counts over 80,000 lawyers and more than 190 bar associations as its members and its Arbitration Committee has more than 2,500 members from over 90 countries. It clearly follows from this data that the IBA (and the Arbitration Committee) has a high regard for multiculturalism, which leads to the conclusion that the IBA's soft law rulemaking process is sufficiently international to comply with this requirement.

Beyond these three factors, experience shows that the international arbitration soft law instruments produced by the IBA have been eagerly welcomed by the arbitration community. This is also a good measure of the legitimacy of those instruments because legitimacy is also a matter of public acceptance. If non-mandatory rules are applied by a majority of the public to which they are addressed, it can only mean that they have widespread acceptance and their legitimacy should therefore not be put to question.

---

[47] IBA Guidelines on Party Representation in International Arbitration, pmbl. (2013).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Lüth & Wagner, *supra* note 2, at 419.

The acceptance of these soft law rules by the arbitral community is also supported by empirical surveys. The Survey on the Use of Soft Law Instruments in International Arbitration referenced above shows that the international arbitration soft law instruments produced by the IBA are frequently used in international arbitration.

In particular, the survey indicates that the IBA Rules on the Taking of Evidence in International Arbitration were the most frequently used soft law rules: (i) 12.7% of the respondents always used them; (ii) 60.3% used them on a regular basis; (iii) 22.2% did it from time to time; and (iv) only 4.8% had never used them.[52]

The IBA Guidelines on Conflicts of Interest in International Arbitration were the second most widely used soft law rules in international arbitration practice: (i) 7.9% always used them; (ii) 36.5% did it on a regular basis; (iii) 36.5% used them from time to time; and (iv) 19% had never used them.[53]

In relation to the IBA Guidelines on Party Representation in International Arbitration, survey respondents declared that: (i) 3.2% of them always used them; (ii) 11.1% used them on a regular basis; (iii) 36.5% did it from time to time; and (iv) 49.2% had never used them.[54] It is important to note in this regard that the survey was conducted only one year after the publication of the IBA Guidelines on Party Representation in International Arbitration, so this data does not reflect its full potential.

A more recent report produced by one of the subcommittees of the Arbitration Committee shows data slightly different to that provided in the above-referenced survey. Nonetheless, the conclusions do not change: international arbitration soft law rules are widely used by the arbitration community.

According to this report, the IBA Guidelines on Conflicts of Interest in International Arbitration is the most used soft law instrument. They are resorted to in 57% of the arbitrations in which a conflict of interest issue arises. Also, they are taken into account by lawyers to appoint arbitrators in 67% of the cases and by arbitrators in 61% of the cases to decide whether or not to accept an appointment. Most interestingly, they are frequently cited by arbitral institutions and courts when deciding on conflicts of interest (67% of decisions).[55]

The report also shows that the IBA Rules on the Taking of Evidence in International Arbitration are used in almost 48% of arbitrations. Additionally, they have been considered as non-binding guidelines by arbitral tribunals in approximately 80% of these arbitrations and followed by those tribunals in more than 90% of the arbitrations in which they were considered as such (non-binding guidelines).[56]

---

52 Mereminskaya, *supra* note 17.

53 *Id.*

54 *Id.*

55 The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the Reception of the IBA Arbitration Soft Law Products IBA Arbitration projects*, ¶¶ 108, 110, 111, 113 (2016).

56 *Id.* ¶¶ 13, 16 (2016).

Further, as per the report, the IBA Guidelines on Party Representation in International Arbitration are the least used. They are resorted to in 16% of the arbitrations in which an issue arises in relation to the professional conduct of the representative of one of the parties, and in those arbitrations, they are generally consulted as non-binding (almost 81% of cases).[57]

Thus, we see that both the survey and report show that the soft law instruments produced by the IBA are successful and their use is to a certain extent common in international arbitration. Let us insist on the idea that this is another indicator that the creation of those instruments is legitimate.

V. 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.

Although it is not denied that soft law may have brought about new challenges to the industry, it is the author's opinion that the benefits enjoyed by international arbitration as a result of the creation and increasing utilization of soft law instruments are manifold and outweigh any potential drawback. In particular, this article shows that soft law has contributed to levelling the playing field, increasing certainty and codifying best practices, norms and intelligent guidance on how to tackle recent concerns.

The playing field has been levelled in two different manners by soft law. On the one hand, it has provided conciliatory instruments capable of creating half-way standards between different legal systems and approaches, while at the same time legitimizing the behaviours associated with those standards. On the other hand, it has contributed to making arbitration more accessible, especially for those who lack experience, which is of particular importance at a time when levelling the playing field in this sense seems to have become a real concern.

Certainty in relation to both arbitration and arbitration-related proceedings is another positive outcome of soft law. Regarding arbitration proceedings, it is now more likely to know beforehand how the issues regulated by soft law instruments will be handled if they eventually arise in such proceedings: very likely in the manner proposed by these instruments, either because the parties voluntarily submit to them or because the arbitrators apply them due to their persuasive value. What is more, it will not come as a surprise (in fact, quite the opposite) if those issues are handled in the exact same way when they arise in arbitration-related proceedings, which explains why soft law also increases predictability in that context.

The third benefit brought about by soft law is that it has paved the way for the creation of instruments that codify best existing norms, practices and intelligent guidance on how to tackle recent concerns. This has turned out to be extremely helpful for the arbitration community in its entirety.

---

[57] *Id.* ¶¶ 206, 208 (2016).

The IBA is surely the most active institution when it comes to the creation soft law at the international arbitration level. The role of the IBA in that regard is entirely legitimated because it has sufficient experience, its soft law creation processes are inclusive and it reflects the cultural diversity of the arbitral community. Beyond that, international arbitration soft law instruments produced by the IBA have been eagerly welcomed by the arbitration community, another indicator of the IBA's legitimacy to produce them.

The field of international arbitration will surely keep evolving at a fast pace in the future. This quick evolution demands quick answers to the new challenges brought about as a result of it. The author is certain that, even though criticism will not cease, soft law produced by institutions such as the IBA will continue to be able to meet such demands by providing the needed answers to the aforesaid challenges and, therefore, will continue to contribute to keeping international arbitration in good shape.