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CONCERNS OF LEGITIMACY IN THE APPLICATION OF SOFT LAW IN INTERNATIONAL ARBITRATION

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Abstract

The impartiality and independence of an arbitrator are of paramount significance in international arbitration. This hypothesis is reflected in almost all the arbitration laws. However, the procedure to be followed while dealing with this issue of conflict of interest has not been elaborated in any arbitration law. Hence, the arbitrators, parties, Courts and arbitral institutions often stuck in dilemma as to what information is required to be disclosed and what are the standards to be followed while doing so. In the wake of this, the IBA Guidelines on Conflict of Interest in International Arbitration serve the requirements. However, these IBA Guidelines are in nature of soft law and hence are non-binding in nature. Consequently, the issue of their legitimacy arises. In light of this, after giving the general introduction to soft laws and their importance in arbitration, the essay will maintain that IBA Guidelines on Conflict of Interest in International Arbitration has been instrumental in regulating issues concerning conflict of interest. It has increased transparency, leveled the playing field and protected the integrity of arbitral award against challenges. Further, these Guidelines have been widely accepted by Courts, arbitral institutions and among the rest of the arbitration community while dealing with the issues of impartiality and independence of the arbitrator. Lastly, the essay will establish that there is complete legitimacy in the codification and application of these Guidelines, in so far as they facilitate flexibility to complement predictability, enhances the efficiency of the arbitral proceeding, ensures fairness and hence aids in delivering justice to the parties.

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I. Introduction

In the modern era of globalization, arbitration has become a preferred tool for resolving international disputes. This is primarily due to four established principles that govern the arbitration proceeding: *first*, the neutrality of arbitrator(s) with respect to the parties,[1] *second*, the flexibility of procedure with respect to the applicable laws,[2] *third,* party autonomy,[3] and *fourth,* international mobility of the arbitral award i.e., almost universal recognition and enforcement of the arbitral award under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[4] However, often during the arbitration process, the parties, their counsels, and the arbitrator(s) are stuck with a question as to what rules should guide them through the arbitration process. The question is reasonable because the 'methods' of using the applicable procedural law are not set out in any code, law or guidance note.[5] The UNCITRAL Model Law on international arbitration,[6] which has been adopted by 80 countries,[7] directs the parties only to the basic doctrines of

[1] A REDFERN & J.M HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 31 (N. Blackaby & C. Partasides eds., 5 ed., Kluwer Law International 2009).

[2] J. LEW, L. MISTELIS & S. KRÖLL, COMPARATIVE COMMERCIAL ARBITRATION 5 (Kluwer Law International 2003).

[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 84 (2 ed. Kluwer Law International 2014).

[4] C. Liebscher, *Preliminary Remarks*, *in* C.H. BECK et al., NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS-COMMENTARY 1, 3 (R. Wolff ed., Hart Publishing 2009).

[5] 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, 205, (CHRISTIAN KLAUSEGGER, PETER KLEIN, et al., eds., Beck C. H. 2015).

[6] United Nations Commission on International Trade Law 1985, with amendments adopted in 2006.

[7] UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, (Oct. 1, 2019, 11: 09 A.M).
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

international arbitration and to its intended objectives. Nonetheless, the procedures adopted vary depending upon the applicable law of procedure, institutional rules, the appointed arbitrator(s), counsels, parties, and the nature of the dispute.[8] The absence of a 'unified universal code of procedure' facilitates flexibility, enabling the arbitrator(s) to exercise their wide discretion in carrying out the arbitration proceedings with due respect to the nature of the dispute and the interests of the parties.[9] However, this flexibility sometimes also give rise to 'uncertainty', as the arbitrators and counsels in the arbitration proceedings may hail from different jurisdictions and may have different expectations as to what the proceedings will necessitate. This may ultimately lead to procedural inequality and consequently to substantive bias.[10]

To rule out this procedural incongruity and to achieve a uniform standard of procedure in arbitration proceedings, soft law plays a substantial role. Soft laws are "quasi-legal" norms, which do not have any legal enforceability, or whose enforceability is somewhat "weaker" than the enforceability of traditional law which is in contrast often known as hard law.[11] These norms may emerge either from state actors- legislators, governments or international organizations, or they may emerge from non-state actors- private

[8] 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, 205, (CHRISTIAN KLAUSEGGER, PETER KLEIN, et al., eds., Beck C. H. 2015).

[9] For example, ICC Arbitration Rules art 20 allows the arbitrator to ascertain the facts by "all appropriate means"; LCIA Arbitration rules art 14.2 permits arbitrator to discharge their duties in "widest discretion"; UNCITRAL Model Law art 18, UNCITRAL Arbitration Rules art 17(1), American Arbitration Association (AAA) Rules of Arbitration art 16(1) and Australian Centre for International Commercial (ACICA) Rules of Arbitration art 17(1) in general allows the tribunal to carry out the arbitration proceedings in "whatever manner [they] considers appropriate."

[10] English Arbitration Act 1996, § 68, according to which, the procedural inequality may result in substantive unfairness and an unjust outcome.

[11] Felix Lüth & Philipp K. Wagner, *Soft Law in International Arbitration - Some Thoughts on Legitimacy*, 9(3) STUDZR 409, 411 (2012).

institutions, professionals or trade unions; regardless, they do not have binding authority by the state.[12]

This brings out the issue of the legitimacy of soft laws. To think about the issue of the legitimacy of soft laws is natural. The complexity involved in explaining compliance of hard laws that have the binding authority of state intensifies the requirement of discussion on a number of discourses to establish the legitimacy of soft laws.

In the field of international arbitration particularly, these discourses can run into a number of discussions, such as: *first,* the mode of codification of these soft laws, which basically deliberates upon three interrogatories: who formulated these soft laws? How do they formulate it? Why it has been formulated?[13] *Second,* the loss of flexibility, which as discussed above, is the debate between 'arbitrator's wide discretion and party autonomy in arbitration' v/s predictability;[14] *third*, the over "judicialisation" of arbitration, which implies the close similarity of arbitration proceedings with that of court proceedings, in which the arbitrators generally face a "delicate counterpoise" between efficiency and fairness;[15] and *lastly*, given that soft laws include charters, declarations, recommendations, gentlemen's agreement,[16] rules, codes, notes,[17] model laws, guidelines and best

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[12] Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1(2) J. INT'L. DISP. SETTLEMENT 283, 284 (2010).
[13] *Id*.
[14] *Id*.
[15] William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments, in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141, 143-46 (LOUKAS A. MISTELIS & JULIAN D. M. LEW eds., Kluwer Law International 2006).
[16] Alexandre Flückiger, *Why Do We Obey Soft Law? in* REDISCOVERING PUBLIC LAW AND PUBLIC ADMINISTRATION IN COMPARATIVE POLICY ANALYSIS: A TRIBUTE TO PETER KNOEPFEL 45, 45 (STÉPHANE NAHRATH & FRÉDÉRIC VARONE eds., Presses polytechniques et universitaires romandes 2009).
[17] Alexis Mourre, *Soft law as a condition for the development of trust in international arbitration*, 13 REVISTA BRASILEIRA DE ARBITRAGEM 82, 83 (2016).

practices,[18] the dispute is, whether the arbitral tribunal is violating the best standard principles of procedures of the international arbitration community, if it is not abiding by the soft law norms, and instead making the individualistic analysis and hence the arbitral award?[19]

II. Importance of Soft Law in International Arbitration

The use of soft law instruments in international arbitration has increased significantly.[20] These instruments build the framework for the fundamental best practices in the realm of international arbitration.[21] There are two forms of soft law viz., substantive soft law and procedural soft law. Substantive soft laws are applied to the substance of the dispute. For example, the New Zealand Court of Appeal in *Hideo Yoshimoto* v. *Canterbury Gold International Ltd,*[22] when faced with a difficulty in interpreting the terms of the contract, referred to the UNIDROIT Principles on International Commercial Contracts.[23] Other examples of substantive soft law include the Principles on European Contract Law ["**PECL**"][24]

[18] Lüth/Wagner, *supra* note 11, at 410.
[19] *Id*, at 411.
[20] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1852 (2 ed., Kluwer Law International 2014).
[21] JAN PAULSSON, THE IDEA OF ARBITRATION 284 (Oxford University Press 2013).
[22] [2000] NZCA 350.
[23] 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), commented that these soft law principles are used in international businesses, mainly because they are neutral, economically efficient and are ready-to-use instruments.
[24] Hugh Beale, *The Development of European Private Law and the European Commission's Action Plan on Contract Law*, 10 JURIDICA INTERNATIONAL 4, 5 (2005), elucidates that PECL is a model law created by Lando Commission in an endeavor to explain the fundamental concepts of Contract law and obligations that are common to the legal system of all the member states of EU, with an objective to address the requisites of inter-European Trade.

and Incoterms Rules.[25] Yet, even though, these substantive soft laws are mostly applied to the substance of the dispute, their application is not limited to arbitration and they are tailored to be applied to international commercial transactions in general.[26]

Procedural soft laws, on the other hand, are peculiar to international arbitration,[27] and hence are able to unveil the characteristics of the application of soft laws in international arbitration. Quintessential examples of procedural soft law in the context of international arbitration include UNCITRAL Model Law,[28] the UNCITRAL Arbitration Rules,[29] the International Chamber of Commerce ["**ICC**"] Arbitration Rules[30] and the three International Bar Association ["**IBA**"] instruments viz., Guidelines on Conflict of Interest in International Arbitration,[31] Guidelines on Party Representation[32] and Rules on Taking of

[25] Enacted by ICC, these rules provide internationally recognized definitions and rules of interpretation for most common commercial terms used in contracts for the sale of goods, See, International Chamber of Commerce, *Incoterms® Rules*, ICC, (Dec. 1, 2018, 11:15 P.M), https://iccwbo.org/resources-for-business/incoterms-rules/.

[26] Lüth/Wagner, *supra* note 11, at 412.

[27] Kaufmann-Kohler, *supra* note 12, at 284.

[28] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 4, 2006).

[29] UNCITRAL Arbitration Rules, 1976 (with new article 1, paragraph 4, as adopted in 2013), UNCITRAL, (Oct. 01, 2019, 07:12 P.M), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[30] The ICC Arbitration Rules, 2012, as amended in 2017, ICC, (Sept. 11, 2019, 08:50 P.M), https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/.

[31] IBA Guidelines on Conflict of Interest in International Arbitration (adopted in 2004), IBA, (Sept. 11, 2019, 08: 40 P.M), the 2014 version is available on https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[32] The IBA Guidelines on Party Representation in International Arbitration (2013), IBA, (Sept. 18, 2019, 04: 30 A.M), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

Evidence in International Arbitration.[33] These IBA instruments codify the best procedural practices that attempt to fill the gaps left open by the national legislation and by the other soft law instruments used in international arbitration.

For example, the IBA rules on Taking of Evidence in International Arbitration have introduced the procedure for "document production" in this area.[34] Before this, a number of arbitral proceedings were been conducted without any known procedure for revealing or producing the documents which had become the cause of the increased cost of the proceedings and the sluggish pace of settling the dispute.[35] Hence, this adoption has not only cured the ailments vis-à-vis cost and time but has also set the framework apropos production of evidence in international arbitration.

Similarly, the Guidelines on Party Representation in International Arbitration provide the code of conduct for the counsel. These guidelines seek to achieve integrity and honesty by the party representatives, in order to ensure speedy resolution of the dispute, cost efficiency, and fair play.[36]

Likewise, the Guidelines on Conflict of Interest in International Arbitration endeavor to preserve the impartiality and independence of the arbitrator.[37] This is because the impartiality

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[33] The IBA Rules on Taking of Evidence in International Arbitration (adopted in 1999), IBA, (Oct. 13, 2019, 04: 55 A.M), the 2010 version is available on https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[34] Michael E. Schneider, *Yet another opportunity to waste time and money on procedural skirmishes: the IBA Guidelines on Party Representation*, 31(3) ASA BULL. 497, 497 (2013).

[35] *Id.*

[36] International Bar Association, *Practice Rules and Guidelines- Alternative Dispute Resolution: Arbitration, The IBA Guidelines on Party Representation in International Arbitration 2013*, IBA, (Oct. 12, 2019, 12: 05 P.M), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[37] *Id.*

and independence of the arbitrator with respect to the parties is one of the cornerstones of arbitration.[38] It is essential that the arbitrator and the parties should not be related to each other in any manner whatsoever, be it financially, professionally or personally, because any such relationship might influence the arbitrator to decide in favor of such party;[39] and even if there is no such favoritism on the part of the arbitrator, there might arise the apprehension of bias in the mind of the losing party.

Therefore, to save arbitration proceedings from getting vitiated due to bias and the apprehension of bias, most institutional rules,[40] the model law,[41] and national arbitration laws[42] require arbitrator(s) to disclose any connection they have with either of the parties. However, these rules do not lay down test/thresholds for the same which puts arbitrators into a dilemma as to what all information should they disclose and what are the standards that should apply on such disclosures?

In this regard, the IBA Guidelines on Conflict of Interest in International Arbitration stands out uniquely from all the other rules by providing *detailed* guidelines as to the procedure to be followed to determine the impartiality and independence of the arbitrator.[43]

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[38] A REDFERN & J.M HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 31 (N. Blackaby & C. Partasides eds., 5 ed., Kluwer Law International 2009).

[39] KAREL DAELE, *Chapter 6: Challenge and Disqualification on the Ground of Independence Issues*, *in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 269, 270-71 (Kluwer Law International 2012).

[40] 2012 ICC Rules art 11(1), 2014 LCIA Rules art 5.3, 2013 SIAC Rules rule 10.1 and 2013 HKIAC Rules art 11.1.

[41] UNCITRAL Model Law art 12(1).

[42] English Arbitration Act of 1996 § 24(1), Singapore Arbitration Act art 12(1), Federal Arbitration Act (FAA) § 10.

[43] KAREL DAELE, *Chapter 1: Disclosure*, *in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 1, 64 (Kluwer Law International 2012); See also, International Council for Commercial Arbitration, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English*', *in* YEARBOOK COMMERCIAL ARBITRATION 314, 314 (ALBERT JAN VAN

III. Role of the IBA Guidelines in Preserving the Impartiality and Independence of Arbitrator

The adoption of the IBA Guidelines on Conflict of Interest in International Arbitration (hereinafter 'IBA Guidelines') in 2004 and its subsequent revision in 2014 is the consequence of expediting challenges concerning the conflict of interest in international arbitration.[44] In 2004, the IBA set up a working group consisting of nineteen professionals from fourteen countries, who have studied national laws, institutional rules, practical experiences of experts in international arbitration, judicial precedents, and arbitral awards concerning the standards of impartiality and independence of arbitrator.[45] From this study, they have extracted the common features and codified them into comprehensive guidelines.[46] The purpose of these guidelines is to encourage and aid the arbitrator to disclose certain categories of information in order to level the playing field, to enhance the degree of transparency in international arbitration and to preserve the integrity of the arbitral award against unnecessary challenges.[47] Further, these Guidelines aim to aid the Courts, tribunals and

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DEN BERG ed., vol. XXIX, Kluwer Law International 2004), where the author confirms that there was uncertainty, lack of clear explanations and the requirement for in detail guidance and uniformity in then-existing impartiality norms.

[44] The main objective of the 2014 amendment was to clarify that the Guidelines are applicable to investment-treaty arbitrations as well as commercial arbitrations, and to both legal and non-legal professionals serving as arbitrators. *See*, Paula Hodges, *Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?*, *in*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 599, 603 (ANDREA MENAKER ed., ICCA Congress Series No. 19, Kluwer Law International 2017).

[45] International Council for Commercial Arbitration, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English*', *in* YEARBOOK COMMERCIAL ARBITRATION 314, 315 (ALBERT JAN VAN DEN BERG ed., Vol. XXIX, Kluwer Law International 2004).

[46] Hodges, *supra* note 44, at 602.

[47] *Id.*

institutions to formulate harmonious, rational and intelligible decisions on disqualification of arbitrators.[48]

The IBA Guidelines comprises of General Standards, Explanatory Notes and the Application Lists also known as the "traffic light system" which furnish substantial direction as to whether the specific situation would lead the potential arbitrator to reject his/her appointment, order a disclosure or do not engender any dispute at all.[49] Accordingly, the Non-Waivable Red List enumerates the situations in which the arbitrator should refuse his/her appointment notwithstanding the views of the parties on the issue.[50] The Waivable Red List highlights the circumstances which necessitate significant deliberation and warrant disclosure by the arbitrator, but are competent to be waived by the mutual consent of the parties so as to allow the arbitrator to assume his/her appointment.[51] Further, the Orange List enumerates a number of situations which may give rise to justifiable doubt in the mind of the parties regarding impartiality and independence of the arbitrator, and hence such situations must be disclosed by the arbitrator.[52] Finally, the Green List lays

[48] KAREL DAELE, *Chapter 1: Disclosure, in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 1, 27 (Kluwer Law International 2012).
[49] Hodges, *supra* note 44, at 602.
[50] Total four situations are enumerated in this list ranging from Section 1.1-Section 1.4 of Part II, IBA Guidelines on Conflict of Interest in International Arbitration. This List is based on the principle of Natural Justice *Nemo iudex in causa sua*, which means that 'no person can be a judge in his own cause'.
[51] This List contains 14 types of circumstances, divided into three categories; category one: § 2.1.1-§ 2.1.2, category two: § 2.2.1-§ 2.2.3, category three: § 2.3.1-§.3.9 of Part II, IBA Guidelines on Conflict of Interest in International Arbitration.
[52] This List contains 23 situations, divided into five categories; category one: § 3.1.1-§ 3.1.5, category two: § 3.2.1-§ 3.2.3, category three: § 3.3.1-§ 3.3.7, category four: § 3.4.1-§ 3.4.4, category five: § 3.5.1-§ 3.5.4 of Part II, IBA Guidelines on Conflict of Interest in International Arbitration.

down the circumstances which do not warrant disclosure for their inability to cause potential conflict.[53]

These Guidelines are in nature of soft law and hence are non-enforceable and do not override any national or applicable procedural law.[54] However, these guidelines have found general acceptance in the international arbitration community, and have helped Courts, practitioners, tribunals, institutions and parties in effective decision-making regarding impartiality, independence, disclosure, objections and challenges carried out in the situations of conflict.[55]

For example, from 2004-2009, the ICC Court referred to these Guidelines in 187 cases. Out of these 187 cases, in 106 cases, the Court has relied upon at least one of the enumerated conflicting situations in the IBA Guidelines while examining the circumstances alleged to cause potential conflict.[56] Here, it is interesting to note that despite the non-binding nature of these

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[53] *See* Hodges, *supra* note 44, at 602; *see also*, KAREL DAELE, *Chapter 1: Disclosure, in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 1, 28 (Kluwer Law International 2012), where the Working Group admitted that 'unnecessary disclosure' may escalate a false inference in the mind of the parties that the disclosed situations would impact the arbitrator's independence or impartiality. Unrestricted disclosures thus unnecessarily sabotage the parties' credence in the arbitral process; *See also*, M. Ball, *Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?*, 21(3) ARB. INT. 326, 326 (2005), where the author recognized that unnecessary disclosure also gives counsel a probable ground to challenge the arbitrator, and whether or not it succeeds, it facilitates complications and hindrances in arbitral proceedings.

[54] Introduction, *IBA Guidelines on Conflict of Interest in International Arbitration, supra* note 31; *see also*, W Limited v. M SDN BHD [2016] EWHC 422 where the Court held that the Guidelines cannot override the national laws and are only for reference to assist the Courts.

[55] International Council for Commercial Arbitration, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English*', *in* YEARBOOK COMMERCIAL ARBITRATION 314, 316 (ALBERT JAN VAN DEN BERG ed., vol. XXIX, Kluwer Law International 2004).

[56] IBA Conflicts Committee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 DISP. RES. INT'L 5, 5 (2010).

Guidelines as well as the unwelcoming attitude towards these Guidelines by the leading arbitral institutes,[57] these Guidelines are been frequently relied upon by these institutions while deciding the cases concerning conflict.[58] In this regard, Prof. Gary B Born said that:

"A number of arbitral institutions initially greeted the IBA Guidelines with considerable coolness, principally because of concerns that they would become bases for seeking judicial review of institutional decisions on challenges or for annulment of awards. The ICC stated that it would not apply the IBA Guidelines (or other guidelines) in considering institutional challenge; the LCIA also indicated skepticism about the Guidelines' usefulness in institutional challenges. Notwithstanding these statements, the IBA Guidelines are frequently relied upon in submissions to the ICC Court and LCIA, and are apparently referred to in internal decision-making at both institutions."[59]

Thus, this shows the significant use of the IBA Guidelines by the institutions, although, the institutions remind the practitioners that they are not bound by these guidelines unless the parties consented to bound by it.[60]

Further, in US, in *Applied Industrial Materials Corp.* v. *Ovalar Makine Ticaret Ve Sanayi, A.S,*[61] the lower Court had vacated an arbitral award under Federal Arbitration Act,[62] because there was "evident partiality" on the part of the arbitrator. In this case, there existed a business relationship between the arbitrator's organization and one of the parties, which the arbitrator failed to disclose; subsequently, he had also failed to disclose the existence

[57] Hodges, *supra* note 44, at 604-5.
[58] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1850 (2 ed., Kluwer Law International 2014).
[59] *Id.*
[60] Hodges, *supra* note 44, at 604.
[61] No. 05 CV 10540, 2006 US Dist LEXIS 44789 (SDNY, 28 June 2006).
[62] 9 U.S.C. § 10(a).

of an information barrier to the parties.[63] Hence, to examine the required standards of disclosure for an arbitrator, the lower Court had relied upon the IBA Guidelines and the AAA Code of Ethics in Commercial Disputes. The Court quoted the relevant provisions of IBA Guidelines and held that:

"It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards"[64]

The Court of Appeal upheld the decision of the lower Court and, quoting the relevant provisions of IBA Guidelines, reaffirmed that the standards to be applied while warranting the arbitrator to disclose the potential conflict should be much higher than the mere "appearance of partiality".[65]

Subsequently, in *New Regency Productions* v. *Nippon Herald Films*[66], the Court relied upon the General Standard 7(c) of the IBA Guidelines which imposes a duty upon the arbitrator to investigate for any possible conflict of interest or any situation that might give rise to doubts as to his/her impartiality and independence.[67] The Court found these Guidelines to be applicable as far as they direct the arbitrator to their customary duty of avoiding conflict of interest; the Court further reinforced the applicability of these Guidelines by holding that inferences of partiality can be drawn if the arbitrator is aware of the conflicting situation but fails to disclose it; the excuse that he failed to run

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[63] Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, *A.S*, No. 05 CV 10540, 2006 US Dist LEXIS 44789 (SDNY, 28 June 2006).
[64] *Id.*
[65] *Id.*
[66] 501 F 3 d 1101; 2007 US App Lexis 21070.
[67] General Standard 7(c), *IBA Guidelines on Conflicts of Interest in International Arbitration (adopted in 2004),* IBA, (Sept. 11, 2019, 12:04 P.M), the 2014 version is available on https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

the conflict check is not an excuse.[68] Subsequently, in *SN Capital LLC (USA)* v. *Productora y Comercializador de Televisión SA de CV (Mexico),*[69] the Court recognized that the increasing use of IBA Guidelines in international arbitration reaffirms the generally accepted standards of impartiality and independence of arbitrator. However, in these cases, the US Courts have only used them as reference.

On the contrary, in certain ICSID cases, the judges have specifically relied upon the IBA Guidelines. For example, in *Perenco Ecuador Ltd* v. *Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,*[70] the parties agreed to resolve the challenge to an arbitrator's appointment in the Permanent Court of Arbitration (PCA), using the IBA Guidelines. The Court upheld the challenge to the arbitrator's appointment based on the General Standard 1 and General Standard 2 of the IBA Guidelines, which requires the arbitrator to remain impartial and independent throughout the arbitration proceedings.[71] In another ICSID case of *Alpha Projektholding GmbH* v. *Ukraine,*[72] the impartiality of one of the arbitrators was in question as he and the counsel of the claimant were schoolmates, and this relation was never disclosed before. The decision in this case was based extensively on the IBA Guidelines (although, the final judgment was passed under Article 57 of the ICSID Convention) and subsequently, the arbitrator was disqualified. Nevertheless, it is noteworthy that the reliance on the IBA Guidelines in this judgment was so extensive that it attracted severe criticism because it deemed the IBA Guidelines to be international standards for disclosure.[73] However, notably, several other ICSID

[68] New Regency Productions v. Nippon Herald Films, 501 F 3 d 1101; 2007 US App Lexis 21070.
[69] 2006 WL 1876941 (M D Fla) (5 July 2006).
[70] PCA Case No. IR-2009/1; ICSID Case (No ARB/08/16).
[71] Hodges, *supra* note 44, at 607.
[72] ICSID Case No. ARB/07/16.
[73] Hodges, *supra* note 44, at 607.

cases, for example, *Participaciones Inversiones Portuarias SARL* v. *Gabonais Republic,*[74] have pointed out that the IBA Guidelines only serve as directions.

The applicability of IBA Guidelines has also been reinforced by the Swiss federal tribunal in March 2008,[75] where it held that:

"*In order to verify the independence of the arbitrators, the parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration [...] Such guidelines do not have the force of law [...]; they are nonetheless a valuable tool, capable of contributing to harmonize and unify the standards applied in the field of international arbitration to conflict of interest issues, and one that will undoubtedly exert influence on the practice of arbitral institutions and courts. These guidelines state general principles."*[76]

Progressively, in India, the principles enumerated in IBA Guidelines have been given the force of law. The Fifth, Sixth and Seventh Schedules added to the Arbitration and Conciliation Act, 1996 by the 2015 amendment are based on the IBA Guidelines.[77] It was held by the Supreme Court of India in *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd*,[78] that "*the Seventh Schedule is based on IBA Guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the Guidelines as well.*"[79] Further, this case was followed by the Supreme Court of India in *HRD Corpn.* v. *GAIL (India) Ltd.*,[80] and it was held that "*The enumeration of grounds given in the Fifth and*

[74] ICSID Case No ARB/08/17.
[75] Decision of the Swiss Federal Court of Mar. 22, 2008, 26 ASA BULL. 565 (2008).
[76] Decision of the Swiss Federal Court of Mar. 22, 2008, 26 ASA BULL. 565 (2008).
[77] HRD Corpn. v. GAIL (India) Ltd, (2018) 12 SCC 471.
[78] (2017) 4 SCC 665.
[79] Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd, (2017) 4 SCC 665, ¶ 23.
[80] (2018) 12 SCC 471.

Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof."[81]

It was further held by the Court that "*the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein – that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad common-sensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.*"[82]

However, it is worth noting that while making disclosures under Section 12 of the Arbitration and Conciliation Act, 1996, "*Unlike the scheme contained in the IBA Guidelines, where there is a Non-Waivable Red List, parties may, subsequent to disputes having arisen between them, waive the applicability of the items contained in the Seventh Schedule by an express agreement in writing.*"[83]

Such wide acceptance of IBA Guidelines is also evident from empirical data. According to a survey, the IBA Guidelines are the second most used soft law in international arbitration: 7.9% users always apply them, 36.5% apply them regularly and another 36.5% apply them occasionally with only 19% having never used them.[84] According to another report, the IBA Guidelines are the

[81] HRD Corpn. v. GAIL (India) Ltd, (2018) 12 SCC 471, ¶ 14.
[82] *Id,* at ¶ 20.
[83] *Id.*
[84] Elina Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, KLUWER ARB. BLOG (Feb. 5, 2020, 09: 10 P.M),

most widely applied soft law instrument. They are used in 57% of the arbitrations, in which issue of conflict arises with 67% of the lawyers and 61% of the arbitrators having referred to them while running the conflict check with respect to the appointment of the arbitrator. Further, the arbitral institutions and the Courts have referred to them in 67% of the cases concerning impartiality and independence of the arbitrator.[85]

Hence, from the above discussion, it is quite evident that IBA Guidelines have been widely accepted by the international arbitration community. Hence, these Guidelines are given some form of normativity, which Gabrielle Kaufmann-Kohler defined as "soft normativity".[86] They are soft in the sense that they hold only influential value and are not mandatory rules. Therefore, the issue of their legitimacy arises. Also, before moving ahead with discussing issues of legitimacy, it is to be noted that these issues do not arise when parties through their agreement consented to abide by the IBA Guidelines, because then, these soft laws assume the form of hard law through incorporation by reference.[87]

IV. Issues of Legitimacy

The first issue regarding the legitimacy of soft law is its mode of creation. The disapproval in this regard is that the soft laws are undemocratic in nature and incompatible in their application because all the people upon whom the soft laws apply weren't allowed to participate in its creation. Hence accordingly, this criticism falls within one of the two extreme hypotheses: that the rules of conduct in arbitration be either regulated by the statute

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http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/.

[85] The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the Reception of the IBA Arbitration Soft Law Products IBA Arbitration projects*, INTERNATIONAL BAR ASSOCIATION ¶¶ 108, 110, 111, 113 (2016).

[86] Kaufmann-Kohler, *supra* note 12, at 297.

[87] David Arias, *Soft Law Rules In International Arbitration: Positive Effects And Legitimation Of The IBA As A Rule-Maker*, 6(2) INDIAN J. ARB. L 29, 37 (2018).

sanctioned by democratically elected parliament or remain completely unregulated.[88] This criticism essentially indicates issues with the process of drafting these arbitration soft laws rather than their application in general. Hence, the criticism follows that the soft laws are drafted by the individuals behind closed doors without them having any legitimacy to act as legislators for the complete arbitration community.[89] In furtherance thereof, Felix Dasser comments that the IBA soft law norms are not welcomed essentially because "*the IBA Guidelines were drafted by a small circle within the IBA with the membership at large having no real say in the drafting*"[90]

These arguments purporting illegitimacy of IBA soft law norms are completely inaccurate. According to Alexis Mourre, legitimacy has three constituents: experience, internationality and inclusiveness.[91] IBA confirms with all the three constituents.

First, that the IBA has experience and representation, which are confirmed by the fact that IBA Council comprises more than 80,000 lawyers as authorized representatives of more than 190 bar associations encompassing 170 jurisdictions.[92] Additionally, the Arbitration Committee of IBA who had appointed the working

[88] Alexis Mourre, *Chapter 25: About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration*, *in* LIBER AMICORUM PIERRE A. KARRER, THE POWERS AND DUTIES OF AN ARBITRATOR 239, 241 (PATRICIA SHAUGHNESSY AND SHERLIN TUNG eds., Kluwer Law International 2017).
[89] *Id. At 242.*
[90] Felix Dasser, *A Critical Analysis of the Guidelines on Party Representation*, *in* THE SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION 33, 35-6 (D. FAVALLI ed., ASA Special Series 37, Juris Publishing LLC 2015).
[91] Mourre, *supra* note 88, at 242.
[92] IBA Arbitration Committee, Committee Home, *About the Committee*, IBA, (Sept. 11, 2018, 08: 13 P.M), https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx.

group to draft IBA Guidelines instruments comprises more than 2500 members from more than 90 countries.[93]

Second, these figures also confirm the IBA's adherence with the second constituent of legitimacy i.e., internationality. Internationality means that any rulemaking operation should consider the cultural diversity of all the stakeholders so that the eventual outcome should not be perceived as a pronouncement of a specific legal culture.[94] As above data suggests, the IBA as rulemaking body comprises representatives from over 170 jurisdictions, it clearly stands in conformity with the requirement of internationality. However, here it is worth clarifying that the cultural diversity doesn't mean the conglomeration of procedures both from civil law and common law cultures; it only means that the rulemaking operation should be equitable, inclusive and open so that the ultimate work product is acceptable to the lawyers from both civil law and common law countries, even if that includes more cultural traits of one side than of the other.[95]

Third, IBA rulemaking process is inclusive in the sense that it considers the views of the arbitration community while drafting its instruments.[96] For example, the subcommittee set up by IBA in 2012 to review and amend the initial version of IBA Guidelines (2004) took into consideration the views of arbitration practitioners, institutions and arbitrators through various surveys and questionnaires.[97] Examining these views, the subcommittee prepared various drafts that were deliberated upon by arbitration committee members and then were circulated to arbitration

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[93] IBA Arbitration Committee, *Overview, Membership*, IBA, (Sept. 15, 2019, 09: 56 P.M), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Overview.aspx.
[94] Mourre, *supra note* 88, at 242.
[95] *Id*. at 243.
[96] David Arias, *Soft Law Rules In International Arbitration: Positive Effects And Legitimation Of The IBA As A Rule-Maker*, 6(2) INDIAN J. ARB. L 29, 38 (2018).
[97] *Id*.

practitioners, arbitrators and institutions for their feedback and comments.[98] The final IBA Guidelines (2014) reflects the inclusion of most of these remarks by the arbitration community.[99] The similar inclusiveness was followed by the task force set up for drafting IBA Guidelines on Party Representation in International Arbitration.[100]

Hence, from the above discussion, it is quite clear that the IBA conforms to all the constituents of legitimacy and hence, is a legitimate professional rulemaking body. Lastly, as far as democratic legitimacy of IBA soft law norms is concerned, the argument that there is no role of a public body in rulemaking stands negated. The reason being, in arbitration, which is non-government dispute settlement technique, it seems antithetical to argue that the legitimacy of rulemaking will increase if such rule is been tailored by the government body rather than by the IBA, which is a professional organization dedicated to the improvement of international arbitration practices.[101] The argument of enhanced legitimacy of the statutory laws stands justified when parties settle their disputes in national Courts, but when the parties choose arbitration, they expressly "opt-out" of the procedural hard law of their respective nation, and become flexible to resort to best procedural practices. Here, a counter-argument may be raised that since all arbitrations must be anchored to some municipal system, the parties are bound by the procedural law of that country. However, this argument does not hold ground because the party autonomy in arbitration enables the parties to tailor the applicable procedure law according to their requirements, by virtue of which they can agree to use soft law instruments for those purposes upon which the law of the

[98] *Id.*
[99] *Id.*
[100] IBA Guidelines on Party Representation in International Arbitration, pmbl. (2013).
[101] Lüth/Wagner, *supra* note 11, at 419.

seat might be silent; (of course, the soft laws can be used only as far as they complement the applicable procedural law and do not conflict with the same). Therefore, the use of soft law instruments in complement to the applicable procedural law enables the parties to avail an all-round procedure for their dispute settlement - a feature that is absent while resolving disputes in national Courts because parties in Courts, unlike in arbitrations, do not have the autonomy to select and tailor the applicable law.

The second issue concerning the legitimacy of soft law is that it has traded flexibility for predictability.[102] However, this is not true because soft laws provide additional flexibility in the arbitration process.[103] Soft laws provide "equality of arms" to the parties to ensure "due process"[104] which ultimately complements predictability. Consider a situation of disagreement on particular question of procedure between the parties from two different cultures; now if the arbitrator formulate some solution to this issue on his own accord, there will arise the risk of seeming arbitrariness on his part.[105] Or else, without soft laws, the parties will either try to argue on the basis of the law of the seat, which ultimately might not fetch solution on the existing procedural disagreement, or they may resort to their national procedural laws which will again give rise to cultural dissent. In this matter, Rusty Park noted that "*the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good, and arbitration malleability often comes at an unjustifiable cost*".[106] Therefore, to level the playing field, to bring fairness in the proceedings and to ensure that the arbitrator does not apply rules on his own accord, the reliance on different soft law instruments by the parties as well as by the tribunal from

[102] Kaufmann-Kohler, *supra* note 12, at 298.
[103] Mourre, *supra* note 88, at 245.
[104] Park, *supra* note 15, at 146.
[105] Mourre, *supra* note 88, at 245.
[106] William W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 Arb. Int'l 279, 283 (2003).

case to case basis is the most satisfactory solution. Nevertheless, the tribunal cannot impose the norms of soft laws without the prior consent of the parties or without the backing of the soft law's provision in the law of the seat, and hence, the argument that the use of soft law instruments results in loss of flexibility stands negated. In fact, the soft law instruments are the tools of facilitating flexibility in order to achieve the procedure that is "regular" and is in accordance with the principle of "rule of law".[107]

The third issue that concerns the legitimacy of soft laws is that they lead to "judicialisation" of arbitration proceedings i.e., the arbitration proceedings resembling more closely to the Court proceedings.[108] However, is it really bad? This does not seem to be a criticism. In fact, although the "judicialisation of arbitration" may seem contradictory phrase, the characteristics of legal process unfailingly enters arbitration as soon as the parties desire for binding result. The significant respect to the legal rights of the litigants is given because of the fact that one party cannot on its own accord disregard the arbitrator's decision. Arbitration proceeds in the shadow of judicial power, in as much as it extends to the seizure of assets or granting of *res judicata* to the arbitrator's decision.[109] Hence, the soft laws helps in maintaining the procedural stability during arbitration proceedings which ultimately ensures fairness and protects the legal right of the parties at all stages.

In this regard, the soft law instruments aid the universal justice system by improving the efficiency of system of arbitration in its pursuit of delivering justice at the stages where national courts fail to outreach.

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[107] Park, *supra* note 15, at 146.
[108] *Id.*
[109] *Id*, at 146-7.

Hence, from the above discussion on legitimacy of soft law, it is quite evident that the IBA instruments are not only legitimate in its application but are also successful and are widely accepted by the international arbitration community.

V. Conclusion

Arbitration is an institution of justice. Where national Courts fall short to deliver justice, arbitration extends its arms to it. In the era of globalization, arbitration plays the major role in settling multinational trade and party disputes, cross-border funding disputes and inter-state investment disputes, covering the claims running into billions of dollars and the interest of different states and state bodies. In wake of such high significance of arbitration, it is incomprehensible that the crucial facets of procedure-evidence taking, counsel conduct and disclosure are among some of those facets that call for regulation. The globalization has weakened the functionaries of state to fill this vacuum on the global level and hence the professional organizations such as IBA steps in to fulfill the vital needs of procedure in international arbitration through its three instruments concerning counsel conduct guidelines, disclosure guidelines and rules on taking evidence. Here, the IBA as a rulemaking body is completely legitimized as it is an experienced body whose rulemaking operation is inclusive as much as it considers the views of stakeholders in arbitration community, and reflects the wide cultural diversity. Further, these IBA instruments especially the IBA Guidelines on Conflict of Interest in International Arbitration as seen above have been widely accepted by the Courts, institutions, arbitration practitioners and professionals, because these Guidelines serves the vital requirement of arbitral procedure i.e., ensuring impartiality and independence of arbitrator, and protects the integrity of arbitral award against frivolous challenges.

The complaints by the critics that the soft laws are overregulated are also unsustainable. In fact, soft laws are the exponents of regulations. These soft laws are the requisites for ensuring certainty, fairness and level play in the arbitration proceedings. With the speedy evolution of arbitration as an effective mode of dispute settlement, new challenges in future are inevitable. However, with the existence of soft laws like IBA instruments and the dedication of professional bodies like IBA to continue improving the institution of arbitration, the author is sure that these new challenges will be overcome in most efficient manner and therefore the mechanism of arbitration will run with expediting pace.