

Soft Law in International Arbitration: Codification and Normativity[†]

GABRIELLE KAUFMANN-KOHLER*

In this article, the author examines the codification of soft law in arbitration and its consequences. In her analysis, the author discusses the identity of the actors creating such ‘soft codes’, the causes of this codification and the constraining power of the resulting ‘soft normativity’. She further entertains the questions whether soft codes lead to a loss of flexibility and a lack of democratic legitimacy. These themes are illustrated by reference to the International Bar Association (IBA) Rules on Evidence, the IBA Guidelines on Conflicts of Interest, the United Nations Commission on International Trade Law Model Law and the International Chamber of Commerce Arbitration Rules.

1. *The Issue: How is Soft Law Codified?*

As in many other areas of the law, soft law has gained increasing significance in international arbitration in the past decades, and has more and more taken the form of a collection of ‘rules’ which could be called ‘soft codes’. This article reviews the process by which these soft codes are created. How is soft law codified? Who are the actors of the codification? What are the reasons for the codification? What is the outcome of this process? Do arbitral tribunals apply soft law? Is soft law applied more frequently once it is codified? What is the normative weight of soft law? What are the strengths and drawbacks of soft law?

In order to answer these questions, this article starts by defining the relevant concepts of soft law, on the one hand, and of codification, on the other (Section 2). The ground being laid, it then examines the process of creation of a selected number of soft law instruments or codes, including an analysis of the actors and of the reasons for the codification (Section 3). On this basis, it goes

* Email: gabrielle.kaufmann-kohler@lk-k.com. The author thanks Dr Caroline Kleiner, then lecturer at the Geneva Master in International Dispute Settlement and Mathieu Granges, research assistant at Geneva Law School, for their valuable help in researching the topic. She also thanks Mr Gustavo Laborde, associate with Lévý Kaufmann-Kohler, for his assistance in editing the final text.

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on to discuss the normativity of codified soft law (Section 4) before addressing some criticisms and reaching a conclusion (Section 5).

2. *The Concepts: Soft Law and Codification*

A. *Soft Law*

It would go beyond the scope of this contribution to enquire into the origins, theories and definitions of soft law,¹ for they call into question the very meaning of law.² For purposes of this article, it is sufficient to bear in mind that ‘soft 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 professional or trade associations.

A norm may be soft if its content (*negotium*) is too vague to be applied to specific facts. This is for instance the case of an international treaty which only sets forth general goals and principles, such as the UNESCO Convention concerning the protection of the world cultural and natural heritage adopted in 1972. This is further so for legal obligations that are not justiciable, that is, which cannot form the basis of a cause of action in court.³ In addition, soft law norms may be soft because their support (*instrumentum*) lacks binding character. This would be the case of a recommendation or a code of conduct.⁴

The fact that soft law cannot be enforced by public force does not mean that it necessarily lacks normativity. In spite of the lack of enforceability, the addressees of soft law norms can perceive it as binding and, even if they do not, they may choose to abide by it on their own accord. A number of reasons, better articulated by psychologists than by lawyers, account for this behaviour. They include mainly such considerations as a sense of respect for the authority of the ‘soft lawmaker’, social conformism, convenience, the search for predictability and certainty, the desire to belong to a group, and the fear of

¹ On the origins and the definition of soft law, the following contributions, among many others, are worthy of mention: Georges Abi-Saab, ‘Cours général de droit international public’, 207 *Collected Courses* (1987); Georges Abi-Saab, ‘Éloge du “droit assourdi”’: Quelques réflexions sur le rôle de la soft law en droit international contemporain’ in *Nouveaux itinéraires en droit, Hommage à François Rigaux* (Bruylant, Brussels 1993) 60; Petar Šarecević, ‘Unification and “soft law”’ in Walter A Stoffel and Paul Volken (eds), *Conflicts and Harmonization: Mélanges en l’honneur d’Alfred E. von Overbeck à l’occasion de son 65ème anniversaire* (Ed. Universitaires, Fribourg 1990) 89ff.

² Ignaz Seidl-Hohenveldern, ‘International Economic “Soft Law”’, 163 *Collected Courses* (1979) 194; Alexandre Flückiger, ‘Régulation, dérégulation, autorégulation: l’émergence des actes étatiques non obligatoires’ (2004) 123 *Revue de droit suisse* 159–303; P Deumier, *Le droit spontané*, foreword by J-M Jacquet (Economica, Paris 2002).

³ Non-justiciable cause of actions are, eg cause of actions based on debts arising from a game or a gamble (art 513 §1 of the Swiss Code of Obligation), or ‘natural obligations’ (*obligations naturelles*) under French law.

⁴ Such as, for instance, the Swiss Code of Best Practices for Corporate Governance or the OECD Principles of Corporate Governance.

naming and shaming.⁵ Yet, soft law norms exhibit varying degrees of normativity. Some soft law norms are softer than others. This is no different from the situation with hard law rules. Some hard law rules are harder than others. In other words, there is a sliding scale of softness and hardness (or normativity) for all norms.

This article will concentrate primarily on soft law made by non-state actors outside the scope of state sovereignty. This is the relevant source of soft law for international arbitration. The increased use of soft law in such field is linked to globalization. Indeed, globalization has disempowered states and is increasingly less influential on the global scene. This disempowerment has weakened the functions traditionally fulfilled by states, including the operation of an adequate dispute resolution system.⁶ As a result, other actors have assumed these functions. In certain fields, they are taken over by regional organizations, such as the European Union or the North American Free Trade Agreement. In others, they are assumed by private actors. This is so in international commercial arbitration. Thanks to globalization, which has also transformed communication and the manner in which social networks are formed, these private actors now form a global community. This global community produces new legal norms at a much faster pace than national states, confined as they are within their national boundaries.⁷ It remains to be seen whether states will regain more control over arbitration in the aftermath of the financial crisis. It also remains to be seen what impact such revived state control might have on soft law.

Having said this, this article will focus on procedural soft law that bears relevance to arbitration as a dispute resolution mechanism. Conversely, this article does not address substantive soft law, that is, soft law applied by arbitrators to the merits of the dispute. Accordingly, it will not address the UNIDROIT Principles of International Commercial Contracts (the 'UNIDROIT Principles'), by far the most relied-upon soft law instrument when it comes to the substance of the dispute.⁸ The scope of application of the UNIDROIT Principles is not limited to arbitration; therefore, they are less

⁵ Alexandre Flücker, 'Why Do We Obey Soft Law?' in Stéphane Nahrath and Frédéric Varone (eds), *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: A Tribute to Peter Knoepfel* (Presses polytechniques et universitaires romandes, Lausanne 2009) 45–62.

⁶ On globalization and the weakening of national sovereignty, see Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International, The Hague 2003) particularly Chapter II, at 37–75.

⁷ Gabrielle Kaufmann-Kohler, 'Global Implications of the FAA: The Role of Legislation in International Arbitration, American Arbitration Association, Federal Arbitration Act at 80, Anniversary Lecture Series' (2006) *ICSID Rev Foreign Invest LJ* 347–8.

⁸ See, in particular, Michael Joachim Bonell, *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts* (3rd edn Ardsley, NY, Transnational Publishers 2005); Lauro Gama Jr, *Contratos internacionais à luz dos princípios do UNIDROIT 2004: soft law, arbitragem e jurisdição* (Renovar, Rio de Janeiro 2006). See also: Michael Joachim Bonell, 'El Reglamento CE 593/2008 sobre la ley aplicable a las obligaciones contractuales ('Roma I') – Es decir, una ocasión perdida', in J Basedow, DP Fernández Arroyo and JA Moreno Rodríguez (eds), *Cómo se codifica hoy el derecho comercial internacional?*, Biblioteca de derecho global vol 1 (Thomson Reuters 2010) 209ff.

likely to reveal the specifics of rule creation particular to this dispute settlement method.⁹ By contrast, procedural soft law is peculiar to international arbitration and thus more likely to capture the essence of soft law codification in this field.

Finally, this article covers so-called international commercial arbitration as well as international investment arbitration other than International Centre for Settlement of Investment Disputes (ICSID) Convention arbitration, ie *ad hoc* or non-ICSID institutional investment arbitration.¹⁰

B. Codification

The second relevant concept is codification. Codification is a process by which a collection of norms are assembled into a logical, coherent structure.¹¹ Sometimes the term is limited to process carried out by the state. At other times it is extended to the process carried out by other actors: international organizations such as UNIDROIT or the Hague Conference on Private International Law, or private organizations such as the American Law Institute or the International Chamber of Commerce.¹²

There are different types of codification along a wide spectrum. At one end of the spectrum, codification merely aims to compile norms ('codification as compilation'). At the other end, codification seeks to innovate ('codification as innovation').¹³ The purpose of codification as compilation is to reflect the current state of the law by collecting and organizing existing rules.¹⁴ It was used in ancient times and in the Middle Ages. The best-known illustration is the Justinian Code, which sought to systematize Roman Law. The purpose of

⁹ On the application of the UNIDROIT Principles by international arbitral tribunals, see 'UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration' (2002) ICC Int'l Court Arbitr Bull, Special Supplement, No 642 and particularly Pierre Mayer, 'The Principles in ICC arbitration practice; UNIDROIT Principles: New Developments and Applications' (2005) ICC Int'l Court Arbitr Bull, Special Supplement, No 662, 116ff; F Dessemontet, 'L'utilisation des principes UNIDROIT dans le cadre de la pratique contractuelle et de l'activité arbitrale: l'exemple de la Suisse' in *The UNIDROIT Principles 2004* (Schulthess, Zürich 2007) 159–68; Christophe Seraglini, 'Du bon usage des Principes Unidroit dans l'arbitrage international' (2003) Rev Arb 1101.

¹⁰ Arbitration under the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States) is governed exclusively by the Convention and the ICSID Arbitration Rules. This does not rule out soft law in and of itself; yet, arbitration under the ICSID Convention raises different issues which exceed the scope of this contribution.

¹¹ Jean-Philippe Dunand, 'Entre tradition et innovation. Analyse historique du concept de code' in J-P Dunand and B Winiger (eds), *Le code civil français dans le droit européen* (Bruylant, Bruxelles 2005) 5.

¹² For the American Restatements, see Thomas Probst, 'Civil law et common law: code contre case?' in J-P Dunand and B Winiger (eds) *Le code civil français dans le droit européen* 222ff, n 11. For the UNIDROIT Principles, see: MJ Bonell, 'Unification of Law by Non-legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts' (1992) 40 Am J Comp Law 617; P Widmer, 'Les Principes UNIDROIT: une nouvelle forme de 'codification' au niveau transnational' in Dunand and Winiger (eds) 235–40 n 11; Diego Fernández Arroyo, 'La multifacética privatización de la codificación internacional del derecho comercial' in Basedow and others (eds) (n 8) XX.

¹³ Already in the 18th century, codification was not limited to the compilation of existing norms, but also introduced an element of innovation. Dunand (n 11) 7.

¹⁴ Katharzyna Sojka-Zielinska, 'Codification' in *Dictionnaire encyclopédique de théorie et de sociologie du droit* (L.G.D.J., E. Story-Scientia, Brussels 1988) 45.

codification as innovation is to create new rules. This type of codification was typically used in the wake of the French Revolution and by social reformers such as Bismarck in Prussia and Germany.¹⁵ More often than not, the two types of codification appear in combination.

3. *The Codification Process*

A. *The Soft Law Instruments Selected and the Reasons for their Selection*

This part selects certain soft law instruments and studies their elaboration and codification. It focuses in particular on two instruments developed by the International Bar Association (IBA), ie the Rules on the Taking of Evidence in International Commercial Arbitration¹⁶ and the Guidelines on Conflicts of Interest in International Arbitration.¹⁷ It further considers the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration¹⁸ and finally addresses the International Chamber of Commerce (ICC) Rules of Arbitration. For each of these instruments, the following three questions are asked: Who? Why? How? Or more explicitly: Who prepared these instruments? Why were they prepared? How were they prepared?

The selected sampling calls for some explanation. While it is deliberately limited and inevitably somewhat subjective, it concentrates on instruments of universal application, as opposed to others of more limited regional import. Among those, it centres on some of the most widely influential soft law instruments worldwide. Again among those, it selects instruments originating from different sources, specifically a professional association, an international organization and an arbitral institution.

The study could obviously be extended to other soft law codifications, in particular arbitration rules or other UNCITRAL texts. It is submitted, however, that even if those other codifications were included, the findings would not differ meaningfully. Nonetheless, two of the instruments excluded from the sampling must be mentioned: the UNCITRAL Arbitration Rules, and the current project of a third Restatement of the US Law of International Commercial Arbitration by the American Law Institute.¹⁹ The latter is still in

¹⁵ Ibid 45–6.

¹⁶ *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (adopted in 1999). Both the 1999 and the 2010 versions of the *IBA Rules on the Taking of Evidence* are available at <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 26 July 2010.

¹⁷ *IBA Guidelines on Conflicts of Interest in International Arbitration* (adopted 2004) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 26 July 2010.

¹⁸ *UNCITRAL Model Law on International Commercial Arbitration* (adopted 1985 with amendments as adopted in 2006) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 26 July 2010.

¹⁹ George Bermann, 'La codificación del derecho internacional en un sistema federal: el *Restatement* norteamericano sobre arbitraje comercial internacional' in Basedow and others (eds) (n 8) 181ff.

an early stage and thus cannot lend itself to conclusions. Moreover, even though it entails a major development in the law of arbitration which ought to command close attention in the years to come, it remains a national, not an international, initiative, and as such lies outside the purview of this article. Though considerably more advanced, the revision of the UNCITRAL Arbitration Rules is not entirely completed at the time of this writing.²⁰ Nevertheless, much of the analysis of the UNCITRAL Model Law undertaken below is also applicable to the UNCITRAL Arbitration Rules, because both instruments stem from the same forum.

The inclusion of institutional arbitration rules in the selected sample of soft law instruments similarly warrants an explanation. A distinction must be drawn between institutional rules as a set of norms elaborated by an arbitration body and institutional rules as part of the parties' contract. On the one hand, once the parties agree on a set of institutional arbitration rules, usually by including a reference to that set of rules in their arbitration agreement, the rules become part of their contract.²¹ In short, the rules become contractual in nature. As such, they are binding and enforceable at law. For this reason, they do not meet the definition of soft law previously articulated (cf Section 2). On the other hand, the rules exist irrespective of whether they are incorporated into a contract or not. As such, they express the choices made by an arbitration institution. Albeit unenforceable for as long as they are not incorporated into a contract, these rules may nonetheless have an impact on other players, including other institutions, legislators and courts. Therefore, institutional arbitration rules undoubtedly are soft law and as such ought to be addressed within the context of this article.

B. *The IBA Rules on Evidence*

Created in 1947 by bar associations of 34 countries, the IBA is a private law entity with approximately 35,000 members worldwide.²² Its primary purpose is to protect the interests of practicing lawyers, and it is organized along different sections and committees. Committee D, that is, the Arbitration Committee of the Section on Business Law, seeks to standardize practice in a manner acceptable in different legal cultures.²³

²⁰ See the last draft report of the Working Group on Arbitration and Conciliation on the work of its fifty-second session A/CN.9/WG.II/LII/CRP.1/Add.4 <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html>. For the latest draft see: <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V09/890/08/PDF/V0989008.pdf?OpenElement>> accessed 26 July 2010. After this writing, the final version was adopted on 25 June 2010.

²¹ See Paris Court of Appeal, decision of 22 January 2009, *Sté SNF SAS v Chambre de Commerce Internationale*, with comments by Laurence Kieffer (2009) 26 J Int'l Arb 579.

²² <<http://www.ibanet.org/>> accessed 26 July 2010.

²³ See Otto LO de Witt Wijnen, Nathalie Voser and Neomi Rao, 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' (2004) 5 Business L Int'l 433-4.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration ('the IBA Rules on Evidence' or the 'Rules') were originally adopted under the aegis of Committee D in 1999. The Rules contain a comprehensive set of provisions on evidentiary matters in arbitration, such as witness and expert testimony, privileges, or document production.²⁴ Committee D convened a working group of arbitration specialists. The working group consulted the arbitration community, including arbitral institutions and organizations.²⁵ Interestingly enough, there was no government input at all. The Rules were revised in 2010 by a working party of Committee D composed of many of the same specialists who had been in charge of drafting the 1999 IBA Rules on Evidence.²⁶

Initially, the Rules were produced to remedy the then existing uncertainty about how evidence is gathered in international arbitration. The uncertainty arose from two main causes. First, national arbitration laws grant the parties broad autonomy and, if the parties make no use of that autonomy, they grant sweeping powers to the arbitrators in matters of procedure. Second, there were significant differences in the procedural traditions of the various jurisdictions, mainly but not exclusively along the civil law versus common law divide. Accordingly, the IBA Rules sought to fill the gaps in existing national legislation and to harmonize divergent national traditions and practices.²⁷

In 2010, the Rules were revised to reflect the most current evidentiary practices with the ultimate goal of increasing certainty and predictability to an even greater extent than under the previous Rules. In addition, the revised version makes it clear that the Rules also apply to investment arbitration and are not confined to commercial arbitration.

Produced by the IBA working group with the benefit of the input from the arbitration community at large, the Rules reflect a consensus on best practices as they were then understood by specialists. They borrow from different procedural traditions and merge them into generally acceptable norms. The provisions on document production are a good illustration of such merger. The Rules adopt a middle ground between, on the one hand, US pre-trial discovery and English document disclosure and, on the other hand, court

²⁴ IBA Working Party, 'Commentary on the New IBA Rules of Evidence' (2000) 14 *Business L Int'l* 2; Van Vechten Veeder, 'Evidentiary Rules in International Commercial Arbitration: From the Tower of London to the new IBA Rules' (1999) 65 *Arbitration* 291; Alexis Mourre, 'Differenze e convergenze tra common law e civil law nell'amministrazione della prova: spunti di riflessione sulle IBA Rules on Taking of Evidence' (2007) *Rivista dell'arbitrato* 179–98; VV Veeder, 'Are the IBA Rules on the Taking of Evidence Perfectible?' in *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, ICC Publication No 698 (ICC, Paris 2009) 321ff.

²⁵ IBA Working Party (n 24) 17.

²⁶ The revised IBA Rules were adopted on 29 May 2010.

²⁷ Pierre A Karrer, 'Internationalization of Civil Procedure – Beyond the IBA Rules of Evidence' in Nedin Peter Vogt (ed), *Reflections on the International Practice of Law: Liber Amicorum for the 35th Anniversary of Bär & Karrer* (Helbing & Lichtenhahn, Basle Geneva 2004) 130.

procedures in civil law jurisdictions where, while not entirely unknown, document production is very restricted.²⁸ Another example is the use of experts. In common law jurisdictions, parties present their own experts, the court hears them, and ultimately relies on what appears to be the most credible expert evidence. By contrast, in civil law courts, the judge appoints an independent expert, who is credible by the very source of his appointment. The Rules do not choose one approach over the other; rather, they allow for both.²⁹

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.

C. IBA Guidelines on Conflicts of Interest

The IBA Guidelines on Conflicts of Interest in International Arbitration were produced by a working group that resulted from two parallel initiatives. One of these initiatives was propelled by Arthur Marriott's presentation at the annual conference of the Swiss Arbitration Association in 2001,³⁰ whereas the other one was launched by Committee D of the IBA. The two groups were merged into one at an early stage of the initiatives, continuing their task under the aegis of the IBA.³¹

How were the Guidelines prepared? The working group collected reports on national standards of impartiality for arbitrators.³² It then extracted their common features and codified them as general principles. Having done so, it set out to illustrate the meaning of these general principles by drawing up the well-known colour lists, that is, the green, orange and red lists. These lists enumerate a large number of concrete situations involving actual or potential

²⁸ In civil law jurisdictions, document production is allowed but must refer to specific documents which appear to be relevant to the outcome of the dispute. See art 3 of the Rules and Hilmar Raeschke-Kessler, 'The Production of Documents in International Arbitration – a Commentary on Art.3 of the New IBA-Rules of Evidence' in R Briner and others (eds), *Law of International Business and Dispute Settlement in the 21 Century – Liber Amicorum for Karl-Heinz Boeckstiegel* (Heymann, Cologne 2001) 641; Klaus M Sachs, 'Use of Documents and Document Discovery: 'Fishing Expeditions' Versus Transparency and Burden of Proof' (2003) 5 *SchiedsVZ* 193; Gabrielle Kaufmann-Kohler and Philippe Bärtsch, 'Discovery in International Arbitration: How Much is Too Much?' (2004) 1 *SchiedsVZ* 13; Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 *Vand J Transnat'l L* 1313.

²⁹ Art 5 of the Rules deals with party-appointed expert, whereas art 6 deals with arbitrator-appointed expert.

³⁰ Arthur Marriott, 'Conflicts of interest' (2001) 19 *ASA Bull* 246.

³¹ The Guidelines are available on the IBA website <<http://www.int-bar.org/images/downloads/guidelines%20text.pdf>> accessed 26 July 2010.

³² Witt Wijnen and others (n 23) 16; Phillip Landolt, 'The IBA Guidelines on Conflicts of Interest in International Arbitration: An Overview' (2005) 22 *J Int'l Arb* 409; Anne K Hoffmann, 'Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach' (2005) 21 *Arb Int'l* 427; David A Lawson, 'Impartiality and Independence of International Arbitrators – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration' (2005) 23 *ASA Bull* 22.

conflicts of interest, grading them according to their sensitivity. Although the lists merely intend to implement the general principles, their specification involves a creative element that goes beyond the general principles originally laid down. In other words, the formulation of the general principles constitutes codification as compilation, whereas the drawing up of the colour lists introduces an element of innovation.

D. UNCITRAL Model Law

Together with the New York Convention on the enforcement of foreign arbitral awards, the UNCITRAL Model Law on international commercial arbitration is one of the most influential instruments in this field of the law.

Established in 1966 by the General Assembly of the United Nations, the UNCITRAL has the mandate to 'further the progressive harmonization and unification of the law in international trade'.³³ The General Assembly took the initiative of creating UNCITRAL recognizing that disparities in national laws governing international trade created obstacles to the flow of trade.³⁴ It viewed the Commission as 'the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles'.³⁵

UNCITRAL is composed of sixty member states elected by the General Assembly and representing the geographic distribution and main economic and legal systems of the world. It is subdivided in six working groups, with Working Group II being devoted to international arbitration and conciliation.

In its four and a half decades of existence, UNCITRAL has elaborated numerous international instruments in various areas of the law of international economic relations, including international arbitration. These instruments include both hard law, in the form of treaties, and soft law, in the form of model laws, rules, recommendations or legislative and practical guides.

The Model Law on International Commercial Arbitration was adopted in 1985 as a 'contribution to the development of harmonious international economic relations'.³⁶ As with all model laws, it was meant to assist states in reforming and modernizing their arbitration laws.³⁷ The Model Law was amended in 2006 'to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration

³³ General Assembly Resolution 2205 (XXI) of 17 December 1966 <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement>> accessed 26 July 2010.

³⁴ General Assembly Resolution 2205 (XXI) of 17 December 1966; Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publ/TMC Asser Instituut, Deventer/Boston/The Hague 1989) 10.

³⁵ See UNCITRAL website at <<http://www.uncitral.org/uncitral/en/about/origin.html>> accessed 26 July 2010.

³⁶ General Assembly Resolution 40/72 of 11 December 1985 <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement>> accessed 26 July 2010.

³⁷ Holtzmann and Neuhaus (n 34).

agreement and the granting of interim measures'.³⁸ In order to concentrate on a more contemporary example of the creation of soft law, the analysis will focus on the amendment rather than on the initial adoption of the Model Law. In so doing, the attention will be specifically devoted to the process leading to the amendment of Article 17 dealing with interim measures.

Looking at the 'legislators' of soft law in this context yields a very different picture than the one with respect to the IBA texts. UNCITRAL is part of an international organization composed of member states, while the IBA is a private association of professionals. Yet, the difference is in part one of form rather than of substance. Indeed, an increasing number of state delegates are recruited within the arbitral community, and all major arbitral institutions and organizations not only participate as observers in the sessions of the working group on arbitration,³⁹ but are also very active in the drafting process. Moreover, debates over work in progress at the UNCITRAL Working Group take place in different fora within the arbitral community.⁴⁰

One of the most controversial aspects of the revision of Article 17 revolved around *ex parte* provisional measures. The elaboration of the provision on *ex parte* measures illustrates how non-state actors participate in the creation of soft law content. The debate indeed vastly exceeded the UNCITRAL forum.

³⁸ General Assembly Resolution 61/33 of 18 December 2006 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/496/41/PDF/N0649641.pdf?OpenElement>>.

³⁹ The General Assembly encourages the Commission to invite interest groups specialized in this area, see: General Assembly Resolution 31/99 (1977) VIII Yearbook for the United Nations Commission on International Trade Law 8 <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf> and General Assembly Resolution 36/32 (1981) XII Yearbook for the United Nations Commission on International Trade Law 22 <http://www.uncitral.org/pdf/english/yearbooks/yb-1981-e/yb_1981_e.pdf>.

It should be noted that the Commission often invited non-governmental organizations specialized in the topic, eg see the number of non-governmental organizations present at the session when the Working Group adopted the revised version of UNCITRAL Model Law in the *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-fourth Session*, A/CN.9/592, New York, January 2006, 4. At the last session, these observers, in addition to the non-member states, were the following: the ICSID, the World Bank, the Asian-African Legal Consultative Organization (AALCO), the International Cotton Advisory Committee (ICAC), the Permanent Court of Arbitration (PCA), the Alumni Association of the Willem C. Vis international Commercial Arbitration Moot (MAA), the American Arbitration Association (AAA), the American Bar Association (ABA), the Arab Association for International Arbitration (AAIA) the Asia Pacific Regional Arbitration Group (APRAG), the Asociación Americana de Derecho Internacional Privado (ASADIP), the Association for the Promotion of Arbitration in Africa (APAA), the Association of the Bar of the City of New York (APAA), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Center for International Environmental Law (CIEL), the Centre pour l'étude et la pratique de l'arbitrage national et international (CEPANI), the Centro de Estudios de Derecho, Economía y Política (CEDEP), the Chartered Institute of Arbitrators (CIARB), The Comité Français de l'Arbitrage (CFA), the Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), the Council of Bars and Law Societies of Europe (CCBE), the Forum for International Commercial Arbitration C.I.C. (FICACIC), the Gulf Cooperation Council (GCC) Commercial Arbitration Centre, the International Court of Arbitration (ICC), the Institute of International Commercial Law, the Inter-American Bar Association (IABA), the Inter-American Commercial Arbitration Commission (IACAC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), the International Arbitration Institute (IAI), the International Bar Association (IBA), the International Insolvency Institute (III), the International Institute for Sustainable Development (IISD), the International Swaps and Derivatives Association (ISDA), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the London Court of International Arbitration (LCIA), the Milan Club of Arbitrators, the Queen Mary University of London School of International Arbitration (QMUL), the Regional Centre for international Commercial Arbitration – Lagos (RCICAL), the Swiss Arbitration Association (ASA).

⁴⁰ Yves Derains, 'The View Against Arbitral *ex parte* Interim Relief' (2003) 58 *Dispute Resol J* 61–3.

One example being the discussions within the Milan Club of Arbitrators, which led to a resolution advocating a position opposed to *ex parte* measures.⁴¹ Similarly, the basis for the compromise that allowed to break the deadlock on *ex parte* measures—a compromise that is still much visible in the language of the relevant provision—came from a proposal made by the Swiss Arbitration Association, which took the initiative and then teamed up with the Swiss Government.⁴²

The aim of model laws is to harmonize the law mainly by using comparative law methods. It is often regretted that the UNCITRAL Model Law is more reflective of a compilation of the lowest common denominator than of contemporary best practices.⁴³ The revision of Article 17 tends to remedy this criticism.⁴⁴ It embodies a number of innovative features, not only on *ex parte* measures, but more importantly on the cooperation of courts in the enforcement of arbitral interim relief.

E. ICC Arbitration Rules

As we have seen earlier, when the parties incorporate institutional arbitration rules into their arbitration agreement, these rules become part of their contract. The ICC Arbitration Rules are deemed an offer to contract extended by the ICC,⁴⁵ which the parties accept when they agree on ICC arbitration, not when they initiate arbitration proceedings. Being part of a contract, the Rules become hard law and are thus outside the scope of the present inquiry.

Irrespective of the parties' agreement on the application of the Rules, the latter may be pertinent for our purposes as they convey the views and choices of the arbitral institution in matters of arbitral procedure. As such, they could conceivably be a soft code of arbitral procedure. In reality, they contain too many features that are ICC specific to qualify as a codification of soft law on arbitral procedure. For instance, the drafting of terms of reference, which must be signed by all participants, arbitrators and parties, and transmitted to or approved by the ICC Court,⁴⁶ is not a common characteristic of institutional arbitration. Most other institutions only require an order issued by the tribunal. The same is true of the scrutiny of the award by the Court, which reviews

⁴¹ Ibid.

⁴² For a more detailed discussion, see Derains, *ibid*; James Castello, 'Arbitral Ex Parte Interim Relief: the View In Favor' (2003) 58 *Dispute Res J* 60; Hans van Houtte, 'Ten Reasons Against A Proposal for Ex Parte Interim Measures of Protection in Arbitration' (2004) 20 *Arb Int'l* 85; Gabrielle Kaufmann-Kohler, 'Mesures *ex parte* et injonctions préliminaires' in J-M Jacquet and E Jolivet (eds), *Les mesures provisoires dans l'arbitrage commercial international: Évolutions et innovations* (Colloques & Débats, LexisNexis Litec, Paris 2008) 100.

⁴³ For example, Lynch (n 6) 223.

⁴⁴ The goal of the Model Law's revision is not simply to harmonise or unify the law but to genuinely modernise the text; see General Assembly Resolution 61/33, (A/61/453), December 2006 <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf>> accessed 26 July 2010.

⁴⁵ Paris Court of Appeal 22 January 2009, *Sté SNF SAS v Chambre de Commerce Internationale*, Kieffer (n 21).

⁴⁶ Art 18 ICC Rules.

the award and may make changes of form and raise issues of substance with the arbitral tribunal.⁴⁷ Most other institutions provide no equivalent control mechanism. These features are deemed so important in ICC arbitration that parties may not contract around them.⁴⁸

This does not mean, however, that the ICC as an institution plays no role in the evolution of arbitration law.⁴⁹ Headquartered in Paris, the ICC was founded in 1919 with the aim of serving the needs of the international business community. Among those needs, the new organization soon identified the resolution of commercial disputes, for which it created the International Court of Arbitration in 1923. Two years later, it convinced the French legislator to abandon the prohibition of pre-dispute arbitration agreements or *clauses compromissoires*. Decades later, still at the national level, the ICC probably influenced Article 15 of the French Decree on Arbitration of 1980, that would later become Article 1451 of the New French Civil Procedure Code, which for the very first time makes mention of institutional arbitration.⁵⁰ In the international arena, the ICC played an important role in the negotiation of the Geneva Convention of 1927 on the enforcement of foreign arbitral awards.⁵¹ It also contributed to the reform of this convention and to the drafting of the New York Convention.⁵² All these instruments belong to the category of hard law. In other words, while its Arbitration Rules cannot qualify as a soft code, the ICC provides the perfect illustration of the influence of non-state actors on the evolution of arbitration law.

4. *Epistemic Community and Soft Normativity*

A. *A Mix of Compilation and Innovation*

The foregoing analysis of the codification of four different soft law instruments calls for a number of observations in answer to the questions raised at the outset of this contribution (Section 4A–C). It also calls for a review of certain criticisms often voiced against soft law (Sections 4D and E).

First, do codifications discussed above compile existing rules or new rules? Not surprisingly, both elements are present in varying proportions in all four

⁴⁷ Art 27 ICC Rules.

⁴⁸ Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn Kluwer Law International, The Hague 2005) 7–8.

⁴⁹ Frédéric Eisemann, 'La Cour d'Arbitrage: esquisse de ses mutations depuis l'origine' (1984) 60 ans après. Regards sur l'avenir, Bull CCI 407.

⁵⁰ P Paclot, 'L'arbitrage institutionnel dans le décret du 14 mai 1980 relatif à l'arbitrage' (1980) Rev Arb 299.

⁵¹ Ottoarndt Glossner, 'Influence exercée par la Chambre de Commerce International sur l'arbitrage international' (1984) 60 ans après. Regards sur l'avenir: Arb Int'l n° 412, 415.

⁵² Philippe Fouchard, Emmanuel Gaillard and Bernard Goldman, in E Gaillard and J Savage (eds), *International Commercial Arbitration* (Kluwer Law International, The Hague/Boston 1999) n° 247.

samples. A well-measured proportion of the two ingredients is probably one of the primary reasons for the remarkable success of these instruments.

B. The Driving Role of the Epistemic Community

Second, the examples of soft law instruments just reviewed evidence that the global arbitration community is the driving force in international arbitration. Legal theorists would call the global arbitration community an epistemic community, a community that shares a particular interest and expertise.⁵³ The actors within this community are well-known: arbitral institutions and organizations, the legal profession, and academia.⁵⁴ Through a process of intellectual cross-fertilization, these actors play a dominant role in shaping the transnational consensus on arbitration law and practice.⁵⁵

C. Soft Normativity

Having established that the codification of soft law implies compilation as well as innovation, and that this process is driven by the epistemic arbitration community, the question then arises whether soft law is applied at all, and whether it is applied more frequently and more easily when it is codified. To answer this question, one must distinguish between the situation where the parties incorporate soft law into their contract from the situation where they do not do so. In the first situation, the law ceases to be soft and becomes hard law. That situation is consequently of no assistance for purposes of this inquiry. In the second situation, the law is not part of the parties' contract. Do arbitrators nevertheless still apply it? Do legislators implement it? Do courts refer to it or even enforce it?

The analysis starts with the legislators. Either without changes, or with slight nuances, or with substantial deviations, numerous states have enacted legislation based on the UNCITRAL Model Law.⁵⁶ It is the very essence of a model law to serve as a standard, to provide guidance for legislators. The Model Law on Arbitration has been rather successful in fulfilling this role. In other words, it has exerted its influence as soft law, with the result that it has become hard law.

And what about the arbitrators? Do they apply soft law? The influence of soft law may be less visible than the one just mentioned in connection with the Model Law. Indeed, for procedural issues such as the production of evidence,

⁵³ Lynch (n 6) 94–5.

⁵⁴ *Ibid* 96–97, 100.

⁵⁵ *Ibid* 98–100.

⁵⁶ As of today, sixty-two states have adopted the Model Law. See the list on the UNCITRAL website: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 26 July 2010.

the influence of soft law will generally be reflected in procedural orders or other rulings of the tribunal, which as a rule are not public. The application is even more obscure when it comes to the disclosure of conflict of interests. How could it be shown that an arbitrator has or has not made a disclosure because he or she consulted the IBA Guidelines on Conflicts of Interest? Yet, practitioners know how influential the IBA Rules on the Taking of Evidence are. Even if the parties do not refer to them, the Rules have become standard practice and arbitrators routinely seek guidance from them, whether they state so or not.⁵⁷ Many procedural orders either give arbitrators the power to seek guidance from the Rules,⁵⁸ or simply restate their main rules in similar terms. Even when the applicable rules are silent, the arbitrators tend to refer consistently to the IBA Rules.⁵⁹ Practitioners know equally well that no reasonable arbitrator would make a decision on a non-obvious disclosure issue without consulting the IBA Guidelines on Conflicts of Interest.

The ultimate test about the normativity of soft law relates to court practice. Do courts refer to soft law instruments? Do they pay deference to or enforce them? These questions are asked under the assumption that the parties did not agree to apply soft law. Not surprisingly, the IBA Rules of Evidence do not appear to play a major role in domestic courts. This can be explained because arbitral evidentiary matters are usually submitted to courts in the context of annulment proceedings based on a violation of due process, and the manner in which arbitrators apply or do not apply the IBA Rules of Evidence can hardly amount to a breach of fundamental principles of procedure.⁶⁰

By contrast, courts do defer to the IBA Guidelines on Conflicts of Interest. Indeed, challenges to arbitrators for alleged lack of independence or impartiality are frequently raised in court. The standards applicable under national arbitration laws are often general and vague. Without contradicting those national standards, the IBA Guidelines provide helpful confirmation or clarification. Sometimes courts refer to the IBA Guidelines to reinforce the solution already reached in application of the relevant national rules.⁶¹ On other

⁵⁷ WW Park, 'The Procedural Soft Law of International Arbitration: Non-governmental Instruments' in LA Mistelis and JDM Lew (eds), *Pervasive Problems in International Arbitration* (Alphen aan den Rijn, Kluwer Law International 2006) 142; P-Y Gunter, 'Transnational Rules on the Taking of Evidence' in A-V Schlaepfer, Ph Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* IAI Series in International Arbitration, No 3 (Juris Publishing, Staempfli Publishers, New York 2005) 129.

⁵⁸ For an example, see art 2.5 of the order reproduced in G Kaufmann-Kohler and A Rigozzi, *Arbitrage international - Droit et pratique à la lumière de la LDIP* (Schulthess, Bern 2006) 223.

⁵⁹ For an illustration, see DF Donovan, 'Introducing the Fifteenth Annual International Commercial Arbitration Workshop. Arbitral Advocacy' (2005) 21 *Arb Int* 537 at 567-8.

⁶⁰ See the decisions of the Swiss Federal Court (1st Civil Court) of 7 January 2004 (4P.196/2003), (2004) 22 *ASA Bull* 605 and of 28 March 2007 (4A_2/2007) (2007) 25 *ASA Bull* 610.

⁶¹ US CA 9th Cir *New Regency Productions, Inc, v Nippon Herald Films, Inc*, 501 F 3d 1101; 2007 US App Lexis 21070: 'General Standard 7(c) of the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (2004) states that '[a]n arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned.' The standard continues: 'Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.' [...] Although these sources are not binding authority and do not have the force of law, when considered along with an

occasions, the reference to the IBA Guidelines appears to carry greater weight and to be dispositive of the issues before the court.⁶² In March 2008, the Swiss Federal Tribunal recognized the normativity of the IBA Guidelines in no uncertain terms in a case in which the parties, in spite of the somewhat confusing wording, had not referred to them:

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 approved on May 22, 2004 [...] 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.⁶³

It is clear from these developments that soft law enjoys some degree of normativity, which could be called soft normativity. This normativity may be considered soft because soft law exercises a certain influence and is regarded with deference without being perceived as mandatory in the classic sense of the word.⁶⁴ Is such normativity stronger when the soft law is embodied in a soft code as opposed to being left uncodified? At first sight, the strength of a norm should not depend on the form it adopts, whether codified or uncodified. Upon a closer look, however, this may not be as obvious. We defined codification at the outset as a process whereby norms are organized into a logical and coherent structure. By virtue of this organization, norms are more readily identified and apprehended. Because the rules are easier to locate and to understand, they are ultimately also easier to apply. Because human nature has a natural tendency to favour easier solutions, and because business transactions

attorney's traditional duty to avoid conflicts of interest, they reinforce the holding in *Schmitz* to the effect that 'a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it. That the lawyer forgot to run a conflict check... is not an excuse'. See also the judgment of the US Court of Southern District of New York of 28 June 2006 (*Applied Industrial Materials Corp v Ovalar Makine Ticaret Ve Sanayi*, 05 CV 10540, 2006 US Dist LEXIS 44789 (SDNY, 28 June 2006): 'In light of the broad standards for disclosure that the parties outlined in their Submission Agreement, Fabrikant's continued understanding, as evidenced by his letters to the parties, that his full disclosure regarding his relationship to Aimcor/Oxbow was called for under the Submission Agreement, and the standards for arbitrators set forth by the American Arbitration Association in the Code of Ethics for Arbitrators in Commercial Disputes, as well as the IBA Guidelines on Conflicts of Interest in International Arbitration, Fabrikant's nondisclosure of SCF's contracts with Oxbow for over \$ 274,770 in revenue requires that the arbitral award be vacated.'

⁶² See the decisions of the Swiss Federal Court of 22 March 2008 (2008) 26 ASA Bull 565 and of the Brussels Court of Appeals of 29 October 2007, *La République de la Pologne* (Poland) v *Eureka BV*: 'A juste titre EUREKO BV souligne que les instructions de l'IBA (International Bar Association) indiquent que si des liens tels qu'invoqués par la République de Pologne existent mais ne sont pas divulgués, cette circonstance comme telle ne doit pas conduire automatiquement à une récusation. Seuls les faits ou circonstances en soi qui n'ont pas été divulgués peuvent avoir cette conséquence (voir: Directives de l'IBA sur les conflits d'intérêts dans l'arbitrage international, annexe 12, pp 367-8) ce qui n'est pas le cas en l'espèce comme il a été exposé ci-devant'. (§8.5).

⁶³ Decision of the Swiss Federal Court of 22 March 2008 (2008) 26 ASA Bull 565-79 (author's translation).

⁶⁴ On the question whether and when soft law may develop into customary international law, see Ignaz Seidl-Hohenveldern (n 2) 212. Because we are dealing here with practices adopted primarily by private parties, and only as a second step by states through their judicial and legislative bodies, it would seem implausible to refer to the formation of rules of customary international law.

benefit from a predictable legal framework, it comes as no surprise that codified rules carry greater normativity than uncoded ones.

D. *Loss of Flexibility?*

One could close with this observation and rejoice over the soft normativity of codified soft law in arbitration. However, some of the criticism which has been voiced against soft law cannot be ignored.

The first criticism is one often heard in connection with the explosion of soft law. Under the label of party autonomy, states have left wide areas of arbitration law unregulated. Paradoxically, this lack of regulation has not resulted in fewer rules. To the contrary, private actors have occupied the space left by states with often dense and highly detailed soft law rules.⁶⁵

Some view this as a loss, not as a gain. It is a loss of flexibility that was one of the beauties of arbitration.⁶⁶ Even though the law may be soft, even though it need not be incorporated into the parties' contract, soft law exercises a significant influence over the way arbitration proceedings are conducted. The IBA Rules of Evidence, for instance, have become standard practice, whether they are referred to expressly or not. Similarly, in all likelihood no arbitrator would make a decision on a delicate disclosure issue without consulting the IBA Guidelines on Conflicts of Interest. In other words, even though the law may be soft, flexibility is traded for predictability.⁶⁷ Whether that is a positive or a negative development may in the end be a question of preference.

E. *Lack of Democratic Legitimacy?*

The loss of flexibility due to the creation of soft law leads to a second criticism. Soft law is often criticized because of its lack of democratic legitimacy,⁶⁸ or in the terminology of legal theorists, for reasons of social reflexivity. Social reflexivity, a concept which lies at the root of the very notion of democracy, means that all those to whom a set of rules applies must be allowed to participate in the creation of those rules. It is also sometimes said, which in substance is the same thing, that soft law is a tool by which the arbitration elite maintains its power and control over international arbitration.⁶⁹ That criticism is undoubtedly excessive, but cannot be discarded completely. There is certainly an exercise of power outside the bounds of state authority that eludes the safeguards developed by national laws in terms of transparency, participation, control and review mechanisms, and accountability.

⁶⁵ Park discusses the problem under the name of 'judicialisation' of international arbitration (n 57) 146–7.

⁶⁶ Ibid 141.

⁶⁷ Ibid 149.

⁶⁸ Klaus Peter Berger, *The Creeping Codification of the lex mercatoria* (Kluwer Law International, The Hague/Boston 1999) 64.

⁶⁹ Anna Di Robilant, 'Genealogies of Soft Law' (2006) 54 *Am J Comp L* 549. Anthony D'Amato and Kirsten Engel, *International Environmental Law Anthology* (Anderson Publishing Co, Cincinnati 1995) 59.

To remedy this democratic deficiency, there are mainly two possibilities. The first is to integrate users in the process of soft law creation, thereby extending the consultation beyond the service providers (arbitral institutions, counsel, arbitrators) presently involved. Some institutions and organizations tend to do so, others do not. The second means to respond to the democratic deficit of soft law is to resort to hard law. In an era of globalization and prevalence of soft law, national legislation still serves an important residual purpose. That purpose consists in the protection of certain categories of users of arbitration, generally weaker parties that are not commercial or business players, but rather consumers, athletes, employees and the like. These users have no access to the epistemic community that makes soft law, and hence they must be protected by other means.⁷⁰

5. Soft Law Codes and Democratic Safeguards

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

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

⁷⁰ For more details on the residual function of national legislation in international arbitration, see Kaufmann-Kohler (n 7) 353.