RELEVANCE OF SOFT LAWS IN INTERNATIONAL ARBITRATION

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Introduction

Soft laws are those laws that do not have the binding effect on the parties. These constitute the general principles, or guidelines or the procedural methods for resolving the dispute or any other declaration of any nature. These are thus, those laws that can come to force or operation only by the voluntary act of the parties. The fact in question arises whether these general laws are relevant in the international arbitration regime if they, by their principle, are non-binding in their nature. For that purpose, it necessary to understand, that though they are not obligatory by their objective but they help in harmonising the legal traditions and reaching a uniform status that help in the reducing complication while contracting in the diverse and a complicated international forum. The increasing importance and significance to the concept of party autonomy has led to the expanding power and need of the soft laws in international arbitration.

Soft Laws in International Arbitration

An international arbitration is a method by which when an issue or conflict arises on a transnational matter, instead of going to the normal international courts (which at instances lead to higher cost and timely expense), the matter is resolved through the way of appointing an outside neutral person or institution for quick and easier response. International Arbitration is done primarily by inserting a clause in the agreement between the parties to settle the dispute through arbitration. The growing of international arbitration led to the UNCITRAL Arbitration Rules and other conventions to recognize and enforce international arbitration decisions and awards. Therefore, it becomes necessary to ponder on the issue where there exist the hard laws in the form of treaties and conventions, what is the effect of the prevalent soft laws.

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The soft laws are a set of guidelines or any procedure that is established to help and support the parties, arbitrators or interested persons in the smooth functioning of the international arbitration. These rules help when there is inadequacy in the ordinary established laws. Under international arbitration, the soft laws consist of the guidelines or principles that have been developed by the institution named International Bar Association (IBA). These soft laws are: the Rules on the Taking of Evidence in International Commercial Arbitration, the Guidelines on Conflicts of Interest in International Arbitration, Guidelines on Party Representation in International Arbitration and Guidelines for Drafting International Arbitration Clauses.

Though, there exist several other private arbitral institutions regulating the soft laws for better international arbitration adjudication and conduct.

**Need of Soft Laws**

With the ever-growing changes in the technology and the new scenarios emerging at every corner, it becomes necessary that international arbitration proceedings does not lack in any of those matters. The block chain mechanism and the crypto currency are some of the current developments that posses several issues as to how to handle such matters. The soft laws come into play when it creates an instrument of law that can be used by several communities and can adapt to new changes by modifying in the existing versions.

The diversity that exists, whether it is legal or cultural, can be somewhat lessened if there is a system of guidelines present that help in reforming that difference which persists between different States. To look after the diverse scenarios that might come into the picture, the soft laws act by creating simplified standards determined previously that are legitimate in nature and can be accepted by all.

**Are they Relevant?**

The way of conducting the international arbitration goes the path where the proceedings do not usually follow a prescribed or pre-decided or pre-dictated format. Because of this reason, several variations and approaches exist at every conduct. To formulize them, it is imperative to provide for a set of rules that will solve the matters related to administrative work. If these

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7 IBA Guidelines for Drafting International Arbitration Clauses (adopted in 2010), recent version: 2010.
regulations are already prescribed and uniformly followed, it will lead to the release of the burden acquired during the administrative proceedings of the international arbitration. It might be related to the setting of arbitrators’ fees or setting up of a forum or any other related matters.

One of the important lacunas that might arise when dealing the international arbitration is the method and procedure of taking of the evidence or witness\(^8\) or any procedural requirement. This problem arises because of different legal structures of various States whereby a civil country may have different civil procedure\(^9\) and a common-law country may have a varied. This causes problem when the arbitration institution which will adjudicate the matter take the procedure which might feel to one party as inferior because of it being favourable to the other party. For that purpose, providing for some of the civil procedural methods like the collection of evidences, testing for witnesses or presentation of document, etc. becomes all the more relevant. The soft laws are the guidelines that help in reforming and bridging that gap.

The soft laws become relevant in the matter when it describes the code of conduct for the arbitrators’ to follow and to aid them in decision making affair. These codes of conduct describe the prevalence of the rule of law that needs to be followed without any kind of biasness. Since the arbitration is not alternate dispute resolution, therefore, there might be chances of accusations of lack of fair trial during the arbitration proceeding. To provide to the arbitrators’ the set exemplified code of conduct helps in that area of international arbitration.

The complications may arise in regard to the drafting of the arbitration clause as well. The parties may not have appropriate knowledge or skills to draft a legitimate arbitration agreement that will further facilitate in future when a dispute comes forth. To assimilate the conflicts that generates and to provide a breathing ground for the two different State parties, these soft laws help in gaining a larger perspective over it by aiding in the applicable law to be applied, selection of the arbitrators and other specifications that might be required at the very formation of an international commercial contract between parties.

Furthermore, the rules of soft law, if agreed by both the parties concerned, will result in certainty in proceedings and will not lead to dilemma with respect to any situation. Because the rules are already present, it will not cause position to look for the answers or to create

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new proposition which can be irregular and unreliable. Even if the parties have not previously agreed to on a set of soft laws to be applied in proceedings, it still functions as relevant whereby arbitrators refer to these already established guidelines when a dilemma of a similar sort arises.

**Conclusion**

To sum up, it can definitely be presumed that soft laws in international arbitration are of as much importance. They bring about uniformity and harmonize the procedural parameters that act as a barrier and put unnecessary constraints and burdens on the arbitrators’ along with the proceedings. These guidelines, by means of adding to the already established principles assist in steadily working out the discourse persistent between the parties. Thus, their importance and position in international arbitration cannot be dispensed with.