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OPEN

ICLR, 2016, Vol. 16, No. 1.

The Meaning of Soft Law in International Commercial Arbitration

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HRNČIŘÍKOVÁ, Miluše. The Meaning of Soft Law in International Commercial Arbitration. *International and Comparative Law Review*, 2016, vol. 16, no. 1, pp. 97–109. DOI: 10.1515/iclr-2016-0007.

Summary: The growth in the amount of international arbitrations, the value of the disputes and expenses invested into the arbitral proceedings have escalated the pressure to succeed in dispute. The arbitrators face to guerrilla tactics or threats of annulment of arbitral awards based on the violation of a right to a due process. Soft law regulating the arbitral procedure endowers the effectives of the arbitration, however, in the recent years the critical voices can be heart which warn against overregulation and its judicialization. On the following pages the impact of the soft rules prescribing the arbitral proceeding on the effectiveness of the international commercial arbitration is examined. Firstly the author deals with the right to a fair trial and the discretionary power of arbitrators in the framework of the notion of soft law and then the binding character of this soft law is determined. The aim of this article is to answer the question whether the regulation of the arbitral proceedings by soft law is still welcomed or if it represents a threat for the discretionary powers of the arbitrat**or and a**rbitration as such.

Keywords: Soft law, international commercial a**rbitration, judicializat**ion

1 Introductory remarks

The roots of arbitration can be found in depths of history. The first relevant evidence of the existence of arbitration appears in the ancient Rome and in ancient Greece. Even if this ancient kind of arbitration reflects a lot of differences to the recent attitude, the common featu[r]es can be still recognized.1 The most important ones are the less formal and flexible conduct of the proceedings and party autonomy, mainly vested in the arbitration agreement. An arbitration agreement usually in the form of an arbitration clause does not only constitute the power of the arbitrators to decide on the merits of the case, but the parties may either regulate several procedural questions by it. The arbitration agreement represents the hypothetical peak of the norms regulating the arbitral proceedings. In the case of ad hoc arbitration the arbitral proceedings are further regulated by lex loci arbitri and if institutional arbitration is chosen by the parties, the

1 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 10–11.

rules of the chosen institution are also relevant. Nevertheless, it is still the arbitral tribunal – mainly the presiding arbitrator – that has wide discretional power to manage and influence the arbitral proceeding.

The discretional power of the arbitrators it one the basic characteristics of arbitration. Commercial arbitration is a real alternative to court litigation for which the expeditious decision is a crucial task. At the same time the party autonomy and partial responsibility of the parties for the outcome of the arbitration are conditional for arbitration. Thus the arbitrator is, namely, chosen by the party or parties according to their needs, confidence and trust. It is also the reason why national laws state that only in exceptional situations any restrictions or conditions for the potential arbitrators can be applied, to allow the parties to select a person according to the present case. By this selection the parties express not only a trust that the chosen arbitrator is able to issue an appropriate decision but he or she will mange the arbitral proceedings in a just way and ensure that the right for a fair trial will be guaranteed. On the other hand these high requirements that are put on the parties are one of the reasons why arbitration is not recommended in the cases where the position of the parties in not in balance and one of the parties is considered to be the weaker party, e.g. consumer cases.

The expansion of arbitration is eminent if the judicial power is paralyzed and the court proceedings are not effective, e.g. they are expensive and lengthy. During the French Revolution arbitration was elevated to constitutional status in the Constitution of 1790 and the Constitution of 1795.[2] The development of commercial arbitration in the second half of the 20th century is influenced by the upturn in foreign trade. The businessmen are on one side seeking the opportunities how to eliminate the uncertainty connected with the different legal orders, the determination of jurisdiction of national courts and the impact of national procedural rules, but on the other they insist on a decision that would be recognized and enforceable not only in the state where it has been rendered, but also in the state where the assets of the debtor is located.

The expansion of arbitration and the necessity of the validity and enforceability of the awards lead to the growth of the norms regulating arbitral proceedings. Nowadays the term judicialization of arbitral proceeding is known both to the theory and arbitral practice.[3]

2 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 18.

3 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. [online]. Available at: <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Redfern-06-006> Accessed: 14.4.2016. PARK, William. The Procedural Soft Law of International Arbitration: Non-Governmental Instruments. In MISTELIS, Loukas, LEW, Julian D. M. *A Pervasive problems in international arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, 146. HORVATH, Günther J. The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures

On the following pages the impact of the soft rules prescribing the arbitral proceeding on the effectiveness of the international commercial arbitration is examined. Firstly the author deals with the right to a fair trial and the discretionary power of arbitrators in the framework of the notion of soft law and then the binding character of this soft law is determined. The aim of this article is to answer the question whether the regulation of the arbitral proceedings by soft law is still welcomed or if it represents a threat for the discretionary powers of the arbitrator and arbitration as such.

2 The right to a fair trial in international arbitration and the importance of soft law

The growth in the amount of international arbitrations, the value of the disputes and expenses invested into the arbitral proceedings have escalated the pressure to succeed in dispute. The arbitral awards are not reviewable on the merits by the court in most of the jurisdictions.[4] As regards to the invalidity of arbitral awards, based on the grounds concerning its merits in commercial disputes, the incompatibility with the public policy in the situs is usually the only reason for it being made invalid. The procedural reasons might be divided into two groups. The first group includes grounds concerning the lack of jurisdiction of the arbitrators, e.g. the invalidity of the arbitration clause or non-arbitrability of the dispute.[5] The irregularities of the arbitral proceedings then represent the second group of grounds justifying the annulment or unrecognition of the arbitral awards. The deviation from the arbitration agreement concluded by the parties and the breach of the right to a fair trial are one of the most common reasons.[6]

In the case of international arbitration the definition of a fair trial is provided by the national law of the situs of arbitration. Nowadays the seat theory is considered to be the leading theory governing the international arbitration and the delocalization or anacionalization of international arbitration takes a back seats.[7]

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into International Arbitration Risk a Denial of Justice in International Business Disputes? In KRÖLL, Stefan Michael, MISTELIS, Loukas A. et al. (eds.). *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*. Alphen aan den Rijn: Kluwer Law International, 2011, pp. 251–271.

4 One of the rare exemptions represents the English Arbitration Act of 1996 which in § 68(1) states that the party may appeal an arbitral award on a point of law, unless the parties have agreed otherwise.

5 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration*. New York: Cambrige University Press, 2012, p. 195.

6 There are essentially three broad areas in which an arbitral award is likely to be challenged – jurisdictional, procedural and substantive grounds. BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. [online]. Available at: <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Redfern-06-015> Accessed: 14.4.2016.

7 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. [online]. Available at:< http://www.klu-

The procedure of an arbitration may be, and generally is, regulated by the rules chosen by the parties; but the procedural law is that of the place of arbitration and, to the extent that it contains mandatory provisions, is binding on the parties whether they like it or not.[8]

Moreover the arbitral proceedings are governed by the lex arbitri even without the intention of the parties. Mandatory norms of lex arbitri are applicable automatically.[9] Similarly Lord Mustill in the Channel Tunnel decision explained that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.[10] Contrary to this approach the French courts adhere to the principle that the parties are allowed to choose the procedural rules of an arbitral institution and these rules represent a self-contained system of law.[11] These conclusions are deemed highly controversial since the difference between rules of law and lex arbitri must be recognized. Parties may chose the rules but the procedural law is that of the place of arbitration.[12]

However, the seat theory does not prescribe that the arbitrators strictly obey the procedural law of the situs. As has been already stated, the design of the arbitral proceedings is primarily in the hands of the parties and application of the lex arbitri is thus often restricted only to the mandatory provisions declaring the right to a fair trial. On the other hand there is no universal definition of the right to a fair trial and each state created its own definition by the judicature of its national court.

Given that, the content of right to a fair trial in the case of international arbitration is proclaimed in article 18 UNCITRAL Model law which states that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. This general clause is further explained by article 19 which provides the subject to the provisions of this Law,[13] the parties are free

werarbitration.com/CommonUI/document.aspx?id=KLI-KA-Redfern-06-008> Accessed: 14.4.2016.

8 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration. Fifth Edition.* New York: Oxford University Press, 2009, p. 180.

9 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration. Fifth Edition.* New York: Oxford University Press, 2009, p. 185.

10 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 234.

11 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 243.

12 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration. Fifth Edition.* New York: Oxford University Press, 2009, p. 180.

13 Besides article 18 of UNCITRAL Model law articles 23 (1), art. 24 (2) and (3), art. 27, art. 30 (2), art. 31 (1), (3) and (4), art. 32, art. 33 (1), (2), (4) are considered mandatory.

to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Article 19 UNCITRAL Model Law thus grants the parties the greatest possible discretional power.[14]

On the top of that neither the choice of foreign procedural law, allowed according to some jurisdictions,[15] may exclude the application of mandatory rules of lex arbitri.[16] However the theory recognized more than one definition of the right to a fair trial, the common ground is built on the right of the party to present its case,[17] the right of the parties to be threatened equally and the right to respond to the arguments presented.

Nonetheless, it is important to state, that the level of protection of the right to a fair trial in international commercial arbitration is different to court litigation. Court litigation is based on strict and formal rules vested into the obligatory norms regulating the behavior not only of the judge but also of the parties and third persons involved. This approach how to secure the right to a fair trial would not be in accordance with the informality of the arbitral proceeding and the expectations of the parties. As professor Bělohlávek has mentioned: "However, even principles incorporated in the so-called fair trial doctrine both under Article 6(1) of the ECHR and under the individual national laws need not necessarily apply to arbitration at all, or they may not apply to arbitration to a limited extent."[18] And further Born has expressed: "In theory, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[19] The difference is significantly vis-

BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition.* London: Sweet & Maxwell, 2010, p. 282.

14 BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition.* London: Sweet & Maxwell, 2010, p. 281.

15 For example under the article 182(1) of the Swiss Private International Law Act the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

16 BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition.* London: Sweet & Maxwell, 2010, p. 35. WAINCYMER, Jeff. *Procedure and Evidence in International Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2012, p. 189.

17 See art. V (1) (b) NY Convention states: (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

V (1) (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

18 BĚLOHLÁVEK, Alexander J. Arbitration from Perspective of Right to Legal Protection and Right to Court Proceedings (the Right to Have One´s Case Dealt with by a Court): Significance of Autonomy and Scope of Right to Fair Trial. In BĚLOHLÁVEK, Alexander J., ROZEHNALOVÁ, Naděžda (eds.). *Czech (& Central European) Yearbook of Arbitration.* The Relationship between Constitutional Values, Human Rights and Arbitration. New York: JurisNet, 2011, p. 58.

19 BORN, Gary B. *International Arbitration. Cases and Materials.* New York: Aspen Publish-

ible with the comparison of the content of the right to a fair train in litigation and in arbitration according to Czech law. The right to a fair trial in the litigation sense includes the principle of independence and the impartiality of the courts and judges, the principle of legal justice, the principle of equality, the principle of private nature, the principle of oral proceedings, the principle of a hearing with the parties, the right to be heard and the adversarial principle, the principle of negotiation without undue delay, the ne bis in idem, the prohibition denegatio iustitiae , the principle of foreseeability of judicial decisions, the right to a properly reasoned decision.[20] On the contrary the right to a fair trial in arbitration involves the principle of independence and impartiality of the arbitrators, the principle of the equality of the parties, the principle of private nature, the principle of oral proceedings, the right to decide on the basis of principles of justice and progress without unnecessary formalities.[21]

Dealing with international commercial arbitration the infringement of the right to a fair trial is even more an issue, since more jurisdictions are concerned and involved. Nevertheless it is the lex arbitri that should have attracted the prime attention of the parties and arbitral tribunal. On the other hand the seat of the arbitration is often chosen according to non-legal priorities and the main attention is paid to the neutrality of the forum. Thus some of the arbitration favorable locations attempt to diminish the influence of the local law to arbitral proceeding. French law, for instance, distinguishes the regulation applicable to domestic and international arbitration where only basic principles are stipulated.[22] According to some laws and based on the agreement of the parties the judicial review of the arbitral award by the local judicial bodies might be excluded.[23] An extraordinary solution has been incorporated into Belgian legislation when the Belgian courts lose its authority to review any arbitral awards rendered in international arbitration in any case. Surprisingly this attitude led to a decrease in the popularity of Belgium as a seat for international arbitration, since the parties lost its right to apply for the annulment of the arbitral award also if its right

ers, 2011, p. 726.

20 SVOBODA, Karel, ŠÍNOVÁ, Renáta, HAMUĽÁKOVÁ, Klára et al. *Civilní proces. Obecná část a sporné řízení*. Praha: C.H.Beck, 2014, p. 17.

21 ŠÍNOVÁ, Renáta, PETROV KŘIVÁČKOVÁ, Jana et al. *Civilní proces. Řízení nesporné, rozhodčí a s mezinárodním prvkem*. Praha: C.H.Beck, 2015, p. 260.

22 French Code of Civil Procedure, Book IV, Title V – International Arbitration, §§ 1504 et seq.

23 Article 192(1) of the Swiss PILA grants parties the right to waive, in advance, any challenge of an award rendered by an arbitral tribunal sitting in Switzerland before Swiss courts. Exclusion agreements are possible only if neither party had 'its domicile, its habitual residence or a business establishment in Switzerland' when the agreement was made. GEISINGER, Elliott, MAZURANIC, Alexandre. Challenge and Revision of the Award. In GEISINGER, Elliott, VOSER, Nathalie (eds). *International Arbitration in Switzerland: A Handbook for Practitioners. Second Edition*. Aphen aan den Rijn: Kluwer Law International, 2013, p. 255.

to a fair trial has been infringed.[24] Nowadays the review of the arbitral award by the Belgian courts may be excluded only by the agreement of the parties. As has been recently declared by the the European Court of Human Rights in a decision in the case of Tabbane v. Switzerland,[25] that such provisions are not, per se, incompatible with the article 6(1) of the European Convention on Human Rights. Additionally, concerning the right to a fair trial as a ground for annulment, other jurisdictions may prescribe application of transnational universal public policy principles[26] or special mandatory provisions, e.g. obligatory registration of the arbitral award.[27]

The further question is at hand: How to determine and identify the mandatory rules defining the right to a fair trial? The answer must be viewed by the lens made on the grounds for annulment and the restriction of the enforcement of arbitral awards. General regulations of the annulment of arbitral awards may be found in article 34 (2) (a) (IV) UNCITRAL Model Law and as the grounds for restriction of recognition or enforcement are concerned, article V (1) (b) and (d) and article V (2) (b) New York Convention, are relevant. The distinction between the mentioned articles of the New York Convention is in governing law and hence the applicable public policy. Section 1 of the article V of the New York Convention is based on the law of state where the arbitral award has been issued whereas section 2 of the article V New York Convention leads to application of the law of the state where the recognition and enforcement of the arbitral award is sought. Nevertheless, as the practice of application of article V New York Convention shows, these grounds are quite difficult to prove and defense of the losing party is rarely successful since judges only in limited number of cases admit its relevance due to its de minimis character.[28]

However, the described threat of annulment of the arbitral award or its potential unenforceability, combined with the duty of the arbitrators to render a valid and enforceable decision, invented a state sometimes entitled "due process paranoia".[29] The attention payed to the maintenance and protection of the right

24 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 251.

25 Decision of the European Court of Human Rights from 24 March 2016, Tabbane v. Switzerland, application no. 41069/12.

26 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 238.

27 WAINCYMER, Jeff. *Procedure and Evidence in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2012, p. 185.

28 Paulsson states :„if a violation of due process was minor and did not affect the outcome of the arbitration, such a violation may be characterized as *de minimis* and should not lead to refusal of enforcement of the award." PAULSSON Marike R. P. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 174.

29 E.g. see 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, conducted

to a fair trial on the one side and the necessity to keep the arbitral proceeding informal and flexible on the other, leads to the growth of the so called guerrilla tactics which aims at blocking and distracting the arbitration. The crucial issue is to find the appropriate balance, that will keep the arbitral proceedings effective and the decision of the arbitrators valid and enforceable. This situation opens the space for soft law regulations, since it is one of the features of soft law, i.e. be relevant in determining the content of the general principles of law; the right to a fair trial particularly.

3 The binding character of soft law in international commercial arbitration

As has already been mentioned the basic feature of arbitral proceedings is its flexibility. The sign of flexibility of the arbitral proceeding is expressed by the statements included in the status such as " the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate."[30] The legal regulation of arbitral proceedings is usually very fragmented and limited to establishing the obligation to observe the right to a fair trial.[31] However the arbitrators have to obey only the norms considered mandatory regardless of its substantive or procedural nature.

3.1 The meaning of soft law within the arbitration rules

The primary decision of the parties to seek a settlement of the dispute in an ad hoc arbitration or to go to an arbitral institution has had a significant impact on the design of the arbitral proceeding. In the case of ad hoc arbitration the contours of arbitral proceedings are designed only by mandatory norms of lex arbitri and by the arbitration agreement. When the decision of the parties to go to an arbitral institution is made, usually more procedural rules are involved.

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with the support of White & Case. [online]. Available at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> Accessed: 18.4.2016.

30 See article 17 (1) Uncitral Model Rules.

31 For example Act No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards (The Arbitration Act) states in Section 19 that
(1) The parties may agree as to the manner in which the proceedings shall be conducted. Procedural issues may be decided by the presiding arbitrator, if the presiding arbitrator was so authorized by the parties or by all of the arbitrators.
(2) If there is no agreement according to Sub-section (1), or a procedure according to Sub-section (4) is not determined, the arbitrators shall conduct the proceedings in an appropriate way. The proceedings shall be conducted with no unnecessary formalities while providing the parties with an equal opportunity to exercise their rights in order to reveal factual issues pertinent to deciding the case.
(3) Unless otherwise agreed by the parties, the proceedings shall be oral. The proceedings shall never be public.
(4) The parties may also determine the procedure in the rules for the arbitration proceedings, if these rules are attached to the arbitration agreement. The application of the rules of the permanent arbitration court remains thereupon unaffected.

Besides the arbitration agreement and mandatory norms of lex arbitri,[32] or eventually the law chosen by the parties, the procedure is governed by the institutional rules invented by the relevant arbitral institution or arbitral court.[33] Previously, most of the provisions of the rules were dispositive; however, in recent years the attempts to limit party autonomy in favor of specious and cost effective arbitral proceedings are more common. Some of the institutional rules expressly determine which rules are considered mandatory and may not be excluded even by an agreement concluded by the parties.[34] Moreover the recent LCIA Rules empowers the arbitrators to disobey the agreement concluded by the parties if it may endanger the efficiency of the procedure.[35] This development strengthens the position of the arbitral tribunal, especially the presiding arbitrator, who is responsible for the conduct of the procedure.

However, the general approach of the arbitral institution on the regulation of arbitral proceedings is letting the arbitral tribunal and mainly the presiding arbitrators to fit the conduction of the procedure to a concreate need of the present case. Since usually the duty to apply the appropriate soft law is not prescribed by the rules, the arbitrators may decide upon its application within its discretional powers.[36] Soft law are considered to be part of the procedural measures that the arbitrators consider appropriate.[37] Nevertheless ICC Rules allow its application

32 Article 21. 1. DIS Arbitration Rules provides:" …statutory provisions of arbitral procedure in force at the place of arbitration from which the parties may not derogate, the Arbitration Rules set forth herein, and, if any, additional rules agreed upon by the parties shall apply to the arbitral proceedings. Otherwise, the arbitral tribunal shall have complete discretion to determine the procedure."

33 Article 4 (3) CIETAC Arbitration Rules states:"…where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such an agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties."

34 Article 2 (2) CAM Arbitration Rules 2010 states:"…In any case, mandatory provisions that are applicable to the arbitral proceedings shall apply."

35 See article 14 LCIA Rules and commentary to this provision which states that:"…this change can be understood to promote a time and cost efficient procedure and to support the Tribunal in making decisions – even potentially against the parties' agreement – where such agreements might endanger a timely (and cost-efficient) resolution of the dispute." SCHERER, Maxi, RICHMAN, Lisa et al. *Arbitrating under the 2014 LCIA Rules: A User's Guide*. Alphen aan den Rijn: Kluwer Law International, 2015, p. 206.

36 For example Article 19 (1) ICC Rules provides: The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

37 See VIAC Arbitration Rules article 28 (1) The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties but otherwise in the manner it deems appropriate. The arbitral tribunal shall treat the parties fairly and shall grant the parties the right to be heard at every stage of the proceedings.

only after consultation with the parties and if they are not contrary to any agreement of the parties.[38] As has been stated it is the presiding arbitrator who has the power to manage the procedure but the approval of the co-arbitrators may be required.[39] In the situation when the issue is not regulated by the agreement of the parties or by the rules of the institutions, the solution should be sought in the international arbitration practice rather than in lex arbitri. As has been stated in the Secretariat´s Analytical Commentary:

"…where the parties are form different legal systems, the arbitral tribunal may use a liberal ´mixed´ procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice."[40]

Given that, it must be firstly proven that the relevant soft law regulation represent the recognized international practice. However, the research provided by Queen Mary shows that doubts about international practice should evoke only IBA Rules on the Taking of Evidence.[41]

Soft law can also be used as a tool for uniform interpretation of the rules of arbitral institution, that are often drafted without any connection to the seat of the institution, because their character should be international since the seat of arbitration is usually determined by the parties. The interpretation of the rules should be based on the international practice, particularly vested into the soft law. Furthermore, it is common that the rules of the arbitral institutions contain references to the right to a fair trial without any determination of the governing law.[42] Accordingly to some authorities recommend interpreting New York Convention along with the international procedural standards rather than by the national law.[43]

38 See Article 22 (2) ICC Rules.

39 Article 35 section 5 CIETAC states:"Unless otherwise agreed by the parties, the arbitral tribunal may, if it considers it necessary, issue procedural orders or question lists, produce terms of reference, or hold pre-hearing conferences, etc. With the authorization of the other members of the arbitral tribunal, the presiding arbitrator may decide on the procedural arrangements for the arbitral proceedings at his/her own discretion."

40 BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition.* London: Sweet & Maxwell, 2010, p. 285.

41 See 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, conducted with the support of White & Case. [online]. Available at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> Accessed: 18.4.2016.

42 Article 23 (5) CEPANI Arbitration Rules states that in any event, the Award shall be deemed to conform to rules of due process.

43 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3504.

3.2 Soft law and arbitration agreement

Sometimes the parties find it necessary or helpful to mention some rules of soft law in their arbitration agreement. For instance when the parties come from different legal backgrounds and they want to narrow some problematic procedural issues, such as document production. The question is then obvious – is this contractual provision binding for the arbitrators and what if they decide to disregard this stipulation and invent a different solution that might be even more appropriate due to the specific circumstances. Will the arbitral award be set aside or unenforceable? Arbitration agreement are regularly drafted prior to any dispute and the procedural rules agreed on may not fit to the legal issues that will have occurred during the arbitral proceeding, or the regulation drafted by the parties might be impractical.[44]

Ostensibly a simple solution might be seen in a case when the agreed provision in the arbitration agreement would contradict the right to a fair trial, e.g. a provision that would allow nomination of an arbitrator only by the claimant. Some authorities, however, surprisingly conclude that arbitrators are bound by any agreement of the parties concerning the conduct of the proceedings, even if it might be in contradiction to the mandatory norms of the lex arbitri, i.e. the stipulation would have violated the right to a fair trial and it is very likely that the arbitral award would be annulled or unenforceable.[45] The arbitrators would have only one option to get rid of this obligation that is to refuse his or her nomination.[46] This conclusion is however very controversial. These provisions of the arbitral agreement would be void according to many national laws, because even party autonomy is restricted by the mandatory norms of lex arbitri and must be in accordance with the right to a fair trial. This finding clearly flows from article 34 Uncitral Model Law that as one of the grounds for annulment of arbitral awards states that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law. Thus, the arbitrators have primary discretionary power to decide on the procedure to follow and mandatory norms of lex arbitri should be applicable prior to agreement of the parties. On the contrary, Born having provided an analyses of New York Convention comes to a different conclusion and states that where a conflict is unavoidable (between the mandatory rules of lex arbitri and arbitration

44 For example, the arbitration clause states that the disputes are to be settled by the Court of Arbitration of Budapest Hungary in accordance with the Rules of the International Chamber of Commerce. Hungarian Chamber of Commerce and Industry Award Vb/99130/2000/2002 Rev Arb 1019. PETROCHILOS, Georgios. *Procedural Law in International Arbitration*. New York: Oxford University Press, 2004, pp. 173–174.

45 PETROCHILOS, Georgios. *Procedural Law in International Arbitration*. New York: Oxford University Press, 2004, p. 173.

46 Ibid.

agreement), it is the parties' agreed arbitral procedure that prevails over local mandatory law for purposes of Article V(1)(d).[47] And further adds that there is no basis for concluding that the parties' agreement on arbitral procedures is void because it violates the mandatory requirements of the arbitral seat.[48]

Nonetheless, whether the failure to comply with the agreement of the parties having been expressed in the arbitration agreement may result in the annulment or unenforceability of the arbitral award is not clear. The legal practice in some jurisdictions is to set aside an arbitral award only if the breach of the arbitration agreement would result in the violation of the fair trial simultaneously.[49] As it is explicitly stated in article V (1) (d) of the New York Convention the arbitral award may be unenforceable if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. It is the common position of legal practice and as well as doctrine that the New York Convention and particularly article V should not be applicable too formalistically. The Spanish Supreme Court recognized an arbitral award rendered by a sole arbitrator, even if it should have been decided by two arbitrators nominated by each party. Since the defendant has refused to nominate its arbitrator, the arbitrator nominated by claimant was, in accordance with the English Arbitration Act, established as the sole arbitrator. The failure of the respondent to participate in the arbitration led the Spanish court to the conclusion that the procedural rights of respondent should not have been violated.[50] Similarly, merely the fact that the arbitral award has been rendered after the expiration of the time allocated in the arbitration agreement or that the hearings took place in a different place than stipulated by the parties could not be accepted as grounds for unenforceability of the arbitral award.[51] On the other hand, the party autonomy must not be underestimated, since it is one of the significant features of the arbitration and arbitrators should have conduct the proceedings according to the procedural rules designated by the parties. However, the arbitral award would have been unenforceable only when the award debtor proves that deviation from the agreement of the parties materially affected the party's rights.[52]

47 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3574.

48 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 2185.

49 DRLIČKOVÁ, Klára. *Vliv legis arbitri na uznání a výkon cizího rozhodčího nálezu*. Brno: Masarykova univerzita, 2013, p. 61.

50 PAULSSON Marike R. P. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 191. Decision of Supreme Court of Spain from 3rd June 1982, X v. Naviera Y S.A., no. 8.

51 Decision of the High Court of Justice, England and Wales from 19 January 2001, Tongyuan International trading Group v. Uni-Clam Limited, no 1143. See also BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3567.

52 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3564. Decision of United States District Court, Southern District of New York from 21 December 1992, P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co., no. WL

As it flows from the previous lines even if the parties assert application of particular soft law rules, the arbitrators still have discretionary power that is limited by the right of the parties to a fair trial which must not be infringed.

4 Conclusion

Soft law regulating the arbitral procedure endowers the effectives of the arbitration, however, in recent years the critical voices can be heard which warn against overregulation, the risk of restricting independent thinking and the limitation of discretional powers of the arbitrators.[53] Firmly, some arbitrators may tend to apply the guidelines and other instruments of best practice as hard law, since they want to ensure the validity and enforceability of the arbitral awards. Nevertheless, according to a 2015 survey provided by the Queen Mary University of London a clear majority (70%) or respondents expressed that international arbitration currently enjoys an adequate amount of regulation, thereby indicating a preference for the status quo.[54] It may be concluded with the words of Guiditta Codero-Moss: "The theory of a harmonized transnational law seems to be based on the misconception that commercial parties desire a flexible system that the interpreter (judge or arbitrator) can adapt to their needs. Practitioners, however, emphasize that they desire a predictable legal system that can be objectively applied by the interpreter.[55]

Moreover as it flows from the previous lines the national courts are very cautious and conscientious while deciding on the annulment or the unenforceability of arbitral awards. They usually interpret the right to a fair trial narrowly allowing the arbitrators to tailor the rules of the proceeding according to the specific needs of the present case. Thus the soft law should be used mainly as a tool for the predictability of a decision in international commercial arbitration on the one side and on the other arbitral tribunals should have maintained the courage to accommodate the procedure and also invent rules that would satisfy the needs of each case.

400733 (S.D.N.Y.) (failure to follow AAA Rules, as incorporated by arbitration agreement, not grounds for denying recognition of award).

53 See DRAETTA, Ugo. The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization. *ASA Bulletin*, 2015, vol. 33, issue 2, pp. 327–342. PARK, William. The Procedural Soft Law of International Arbitration: Non-Governmental Instruments. In MISTELIS, Loukas, LEW, Julian D. M. *A Pervasive problems in international arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, pp. 141–154.

54 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, conducted with the support of White & Case. [online]. Available at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> Accessed: 18.4.2016.

55 CORDERO-MOSS, Giuditta. Limitation on Party Autonomy in International Commercial Arbitration. In Hague Academy of International Law. *Recueil des Cours 372 (2014)*. Leiden/Boston: Martinus Nijhoff Publishers, 2015, p. 262.