CHAPTER 4

Using Soft Law in International Commercial Contract Arbitration

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Merchant communities that operate across national borders make regulation that effectively binds them as law in their dealings with each other.¹

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4.1 Introduction

This chapter investigates the notion of ‘global pluralism’ in the context of the use of soft law instruments in the venue of international commercial contract arbitration. Part II of the chapter asserts the natural affinity between international commercial arbitration and soft law. Part III examines the normative power of soft law in the area of international commercial transactions and dispute resolution. Part IV reviews different types of soft law available to arbitrators in rendering fair and reasonable decisions. It recognizes the notion of a hard-soft law continuum. The continuum asserts that some hard laws display degrees of ‘softness’ and that some soft laws demonstrate degrees of ‘hardness.’

Part V briefly examines the importance of interpretive methodologies in the application of soft law in international commercial arbitration.

Part VI looks at the scenario where soft law can trump hard law. Part VII looks more closely at the use of hard and soft laws by arbitral tribunals by focusing on two international contract law instruments—United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). This part examines the important part arbitration tribunals have played in applying the CISG including a review of four early China International Economic and Trade Arbitration Commission (CIETAC) decisions applying the buyer’s duty to inspect goods under CISG Article 38. The chapter finishes with a discussion of fair and equitable decision-making as the unifying principle behind international commercial arbitration. This principle also explains the close relationship between commercial arbitration and soft law.

The costs, inefficiency, and unpredictability of national court systems, has made international arbitration the preferred means of dispute resolution in international business transactions. “ADR represents another kind of contractual response to the defects of ordinary civil justice.”2 First, the civil procedure rules very greatly among national legal systems.3 A party may be comfortable when litigating within its domestic court system, but wary of having to sue in a foreign court system. Second, well-recognized national and international arbitration tribunals provide the aura of neutrality that parties seek in resolving their disputes.

“Rules of international law can be established in three main ways: (1) by international, formal agreement, usually between States, (2) in the form of international custom, and (3) by derivation of principles common to major world legal systems.”4 The first type is the domain of international hard law. The CISG is a form of international hard law, but will also be examined here as a source of soft law. The second type is the area of soft law, most commonly seen in the practices, usage, and customs of international merchants. The third

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2 John H. Langbein, ‘Comparative Civil Procedure and the Style of Complex Contracts’ *Am J Comp L* (1987): 381, 390.35 Langbein notes that it remains a ‘puzzle is understand why Americans do not make greater use of arbitration clauses than is now common.’ Ibid.
