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The Legitimacy of Soft Law in International Disputes Settlement – A Practice in Vain or Resolute Obstinacy?

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Abstract

There has been a growth in Arbitration and other alternative dispute resolution mechanisms for the resolution of disputes on an International Level. The decisions by the arbitrators, tribunals and other dispute settlement bodies are often binding on the parties to the dispute but their authority does not extend beyond that. The paper will primarily focus on International Arbitration which has come under a lot of scrutiny in the recent times. The development of a soft law in such a case is pivotal as it will allow the existence of a legitimate source to resolve conflict. There is always a question about the legitimacy of the decisions and their impact. This paper evaluates the soft law and its legitimacy when it comes to the resolution of conflicts in a manner that is efficient and fair. It is essential to understand their impact since the area of dispute resolution has been a major one when it comes to International Disputes Settlement. This has been discussed in the article, "The Legitimacy of Soft Law in International Disputes Settlement." The current paper analyses the article and substantiates the research done by the author.

Key Words

Arbitration, Dispute(s), Conflict and Resolution.

Introduction

Conflict is an integral part of human nature. There is no existence of a human community or culture without the presence of conflict. Disagreements, different opinions and views are integral to the human evolution. It is the main driving force behind development and progress. It also helps in development of cognitive abilities and allows for the evolution of human as a race which leads to the building of a better society. However, there are situations in which conflicts tend to

go out of hand and escalate to the level where external intervention is needed in order to resolve the conflicts in an amiable manner. This led to the development of the courts system, which was earlier run by kings and their advisors. In the modern times, there is a development of proper legal system in the form of Courts. However, as time continued, even the courts became overburdened and people looked for ways to solve their issues in a more efficient manner without judicial intervention which led to the development of a new tool of conflict management, Alternate Dispute Resolution (ADR). It helps in reducing the amount of pending litigation before the courts and has proved to be a success in a number of jurisdictions. They are also a prerequisite before litigation in some cases.

The success has driven more people towards it. However, the method is not immune to failure and there is always a scope that certain grey areas in the process are debated upon and seen as potential hindrances. One of the primary criticisms of ADR methods has been the lack of transparency, codification and the impartiality and fairness of the arbitrators. The parties are agreeing to be bound by the soft law being developed in ADR, therefore, it is of great importance. The process suffers if one of the parties is not willing to be bound by soft law and then the process is heavily criticized. There, the development of an understanding about soft law and its application in International Disputes Settlements is quintessential to make any further discussion related to its legitimacy and acceptance.

Theme of the Article

The article illustrates upon the development of ADR as a mode of International Disputes Settlement. It delves upon the key challenges the field of ADR faces with regards to legitimacy and enforcement and evaluates the importance of the development of soft law. It uses the elucidation to examine its legitimacy and role in the dispute settlement process.

Arguments of the Article

Soft law are the instruments which are not binding upon the court and tribunals under International Law.[1] Their binding effect is weaker than the traditional law.[2]It is not present in a codified form like traditional law and can be found in guide, notes, rules, codes, protocols, techniques, guidelines, recommendations etc. They are of a general nature and are not considered to be positive sources of law, which leads to a considerably lesser binding effect. However, they still act as a guide to arbitration panel and are referred to by them in order to make a fair decision.[3] The panels may be willing to even consider them as legitimate sources of International Law.

[1] B.H. Druzin, Why does Soft Law have any Power anyway?, Asian Journal of International Law, 7, pp. 361-378 (2017).

[2] Anna Di Robilant, Genealogies of Soft Law, The American Journal of Comparative Law, Vol. 54, No. 3 pp. 499- 554. (Summer, 2006).

[3] G. Kauffman-Kohler, Soft Law in International Arbitration: Codification and Normativity, Journal of International Dispute Settlement, pp. 1-17 (2010); Available at https://lk-k.com/wp-content/uploads/Soft-Law-in-Intemational-Arbitration-Codification-and-Normativity.pdf (Last accessed: Aug 17, 2018).

In the field of International Arbitration, they are classified as substantive and procedural soft laws. The procedural soft laws assist with the process and guide the arbitrators when they face difficulties. There are guidelines that have been developed by the "International Bar Association" (IBA) called "IBA Guidelines on Conflicts of Interest in International Commercial Arbitration" and "IBA Rules on the Taking of Evidence in International Commercial Arbitration". There are other rules as well developed by other International Institutions and Legal bodies like "ICC Arbitration Rules" and "UNCITRAL Arbitration Rules." The substantive soft laws include "Lando Principles on European Contract Law" (PECL), "OCED Principles of Corporate Governance" and the "UNIDROIT Principles of International Commercial Contracts." The procedural laws are more used; however, the substantive laws are also important. For example, the "UNIDRIOT Principles" are one of the most relied upon source while resolving the dispute.[4]

There has been a rise in the application of substantial and procedural soft law over the recent times. They have offered some sort of predictability and provided consistency to International Dispute Resolution. It is not developed like the traditional law sources and is developed mostly as an academic piece of work. However, it also gains in this manner as it does not need ratification and years of enforcement to be applied. It can be accepted on a voluntary basis and provides a platform for the parties to resolve their disputes through mutual agreement. It helps in promotion of justice and fairness while still ensuring a fair trial.

There are instances when soft law can also come into existence through codification and legislation such as the "UNCITRAL Model Law International Commercial Arbitration" which has a wide acceptance at the global level. The parties play a key role as they can mutually agree to the application of a soft law and be bound by it. They are also applied in arbitration practice. There arises a conflict between institutional and ad-hoc types of arbitration. Institutional form of arbitration usually provides for the broadest manner of discretion to the arbitral tribunal in adjudicating the matter. For example, Article 14.5 of the "London Court of International Arbitration Rules, 2014" states:

"The Arbitral Tribunal shall have the widest discretion to discharge thegeneral duties conferred upon them by the above said articles."[5]

On the contrary, Article 17.1 of "UNCITRAL Arbitration Rules, 2010" provides for limited discretion in comparison to institutional arbitration rules:

[4] Mayer, The Principles in ICC arbitration practice; UNIDROIT Principles: New Developments and Applications, ICC Int'l. Court Arb. Bull. 2005, Special Supplement, No. 662. For a generalized view, See. M.J. Bonell, An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts, Ed. 3, ISBN: 97890-04-19469-4.

[5] LCIA Rules, Art. 14.5 (2014).

"Subject to the Rules, the arbitral tribunal may conduct the arbitration in a fashion as it finds suitable, provided the parties are treated with equality and is given a reasonable opportunity of presenting its case."[6]

We can thus see, that despite some grey areas, soft laws still find application in various forms and ends up becoming positive law through continued application. There are cases where the conflict arises between impartiality and independence of arbitrator and not all rules demand that it be declared. However, there is still a need for justice and fairness in the field of dispute management.

Legitimacy in case of International Arbitration can have a number of meanings. There has been a lot of criticism regarding the legitimacy of soft law in arbitration. One of the main criticisms being that it creates a set of strict and duty-bound obligation.[7]There has been an increased involvement of governmental and sub-governmental bodies which has led to a decrease in the application of the soft law instrument. One of the key reasons behind the questions over the legitimacy of soft law is that, it is produced in an unplanned manner.

At the end of the day, the decision of the application of soft law rests with the parties. They must agree upon the use so that there is a fair and equitable decision. The arbitrators also face a dilemma between fairness and efficiency sometimes as the process of arbitration should be relatively quicker while the careful application of principles takes time which can lead to extra costs and delay in the award. A report published by a "120-member subcommittee" of the "IBA Arbitration Committee" in 2016 found that, "IBA Guidelines on Conflicts of Interest in International Commercial Arbitration and IBA Rules on the Taking of Evidence in International Commercial Arbitration are referred in 69-93% of the cases."[8]This shows that the usage has increased and there is an increased level of arbitration.

However, the conflict still lies in the bias of the arbitrators where they may be used to apply different domestic and institutional laws while carrying out the proceedings and are reluctant to abide by the soft law instruments. This too is countered as arbitration is not a process where over-regulation is needed as it will result in its judicialization which will leave little difference between it and traditional courts. Moreover, the confidentiality of arbitration proceedings leads to further disputes over the issue.

Analysis of the Article

It can be understood that ADR is still under development and finds a wide application in modern days. Countries have even chosen to negotiate through ADR in Bilateral Investment Treaties (BITs). There have been some awards like the *Cairns* case where India felt that the process was

[6] UNCITRAL Arbitration Rules, Art. 17.1 (2010).

[7] P..M. Dupuy, Soft Law and the International Law of the Environment, 12 Mich. J. Int'l L. 420 (1991).

[8] A. Ross, How are IBA soft law instruments received worldwide?, Global Arb Rev, Sept 22, 2016, www.globalarbitrationreview.com; Retrieved from https://www.lw.com/thoughtLeadership/how-are-soft-lawinstruments-recieved-worldwide (Last accessed: Aug 18, 2018).

unfair and also pointed out the grey areas. The questions about the impartiality of arbitrators still withstanding. However, despite all of those, ADR has emerged as an effective alternative to the traditional judicial system. The primary question that is discussed is the legitimacy of the soft law that develops as a result of the ADR processes. The development of soft law has been discussed in an elaborate manner and the limitations as well as the benefits have been portrayed. The development of soft law has given a major boost to ADR processes and has helped in legitimizing the process and ensuring justice and fairness. It has also made sure that there is a choice before the parties and the arbitrators and the efficiency of the process is not compromised. The work that still needs to be done has also been highlighted.

Concluding Remarks

Soft law in the field on ICA has been a force to reckon with despite its formation arising primarily out of non-state entities. It has been successful in providing guiding principles related to procedure as well as substance and has contributed greatly to a number of fields of ICA.[9]The soft law has also been used in national legislation which puts a greater responsibility over the drafters to ensure that the focus stays away from their generalization since they are made to be applicable to specific circumstances.[10]They should also ensure that the law is actually able to achieve its objective and have a "fair" impact upon the parties. However, it still must be noted that all the debate around its application is dependent mainly upon the ethics of the creators, arbitral panels, practitioners, the parties and the dependence of it is upon these parties in a more formal way of "veil of ignorance". If the soft laws are channelized in a proper manner it can lead to the harmonization of trade and commerce at an International Level. This can be traced back to the time of *lex mercatoria*and can prove to be pivotal in the future particularly in the context of increased interaction between different states and corporations across the globe. There are instances where state interference may not even be required, as has been the case, and the dispute gets settled at the organizational level itself saving time and costs. It must be ensured that in the quest for legitimacy or harmonization we do not end up jeopardizing International Arbitration.[11]There needs to be a balance between both to ensure that the process stays effective.

[9] L. Parsons, Independent, Impartiality and Conflicts of Interest in Arbitration, 2 IPBA ASIA-PAC Arbitration Day Conference, 8 Sept. 2016. https://www.quadrantchambers.com/images/uploads/documents/Luke Parsons QC-IPBA paper.pdf (Last accessed: Aug 18, 2018).

[10] M. Sharmila, Translating Legal Norms into Quantitative Indicators: Lessons from the Global Water, Sanitation, and Hygiene Sectory, William & Mary Environmental Law and Policy Review, Vol. 42, No. 2, 2018. https://ssrn.com/abstract=3148130 (Last accessed: Aug 18, 2018).

[11] F. Luth, Dr. P.K. Wagner, supra 9. See also. M. Erdem, Soft Law in International Arbitration, http://www.mondaa.com/turkev/x/575696/Arbitration+Dispute+Resolution/Soft+Law+in+International+Arbitration (Last accessed: Aug 18, 2018).