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# *Soft law and the principle of fair and equitable decision making in international contract arbitration*

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## **Abstract**

*This article provides a survey of the special relationship between international commercial arbitration and soft law instruments. It briefly traces the historical roots of the lex mercatoria to its present enunciations in the Convention on Contracts for the International Sale of Goods (CISG) and the International Institute for the Unification of Private Law's Principles of International Commercial Contracts. It discusses the characteristic of the hardness and softness of laws in an international commercial law context. The CISG is studied not only as a hard law but also as an example of soft law. The affinity between soft law and international commercial arbitration is explored as well as the reasons why soft laws possess normative power. It also examines the importance of the use of multiple interpretive methodologies, including the use of soft law, by arbitrators in order to reach fair and reasonable decisions. Finally, it recognizes fair and equitable decision making as the unifying principle that binds international commercial arbitration and soft law.*

**Keywords:** *Arbitration; commercial contract interpretation; Convention on Contracts for the International Sale of Goods (CISG); global legal pluralism; interpretive methodologies; soft law*

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Any system of law at any time is the result of present needs and present notions of what is wise and right on the one hand, and, on the other, of rules handed down from earlier states of society and embodying needs and notions which more or less have passed away.<sup>1</sup>

Oliver Wendell Holmes, Jr

Merchant communities that operate across national borders make regulations that effectively binds them as law in their dealings with each other.<sup>2</sup>

Roger Cotterrell

## Introduction

This article investigates the notion of 'global pluralism' in the context of the use of soft law instruments in the venue of international commercial contract arbitration. The second section of this article asserts the natural affinity between international commercial arbitration and soft law. The third section examines the normative power of soft law in the area of international commercial transactions and dispute resolution. The fourth section 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.' The fifth section briefly examines the importance of interpretive methodologies in the application of soft law in international commercial arbitration.

The sixth section looks at the scenario where soft law can trump hard law. The seventh section looks more closely at the use of hard and soft laws by arbitral tribunals by focusing on two international contract law instruments—the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC).<sup>3</sup> This section also 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 Article 38 of the CISG. This part also looks at the role of cultural norms and the problem of interpreting multilingual conventions. The article 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

<sup>1</sup> Oliver Wendell Holmes, *Collected Legal Papers* (Forgotten Books 2012; original edition 1920) 156. For an interesting essay on the importance of Oliver Wendell Holmes Jr, see John CH Wu, 'The Mind of Mr. Justice Holmes' (1935) 8 *China L Rev* 77.

<sup>2</sup> Roger Cotterrell, 'What Is Transnational Law?' (2012) 37 *L & Social Inquiry* 500.

<sup>3</sup> Convention on the Law Applicable to Contracts for the International Sale of Goods, 24 *ILM* 1575 (1985) [CISG]; International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (3<sup>rd</sup> edn, Transnational 2010) [PICC].

international business transactions. As John Langbein explains, 'Alternative Dispute Resolution (ADR) represents another kind of contractual response to the defects of ordinary civil justice.'<sup>4</sup> First, civil procedure rules vary greatly among national legal systems.<sup>5</sup> 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.

It has been shown that '[r]ules 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.'<sup>6</sup> The first type is the domain of international hard law. The CISG is a form of international hard law, but it 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 type is seen in both international public and private law. In the area of international private law, a comparative analysis of national contract law regimes can uncover basic, core principles common to most private law systems, such as freedom of contract and the principle of good faith. The third type will be discussed further in this article in the area of interpretive methodologies. Often hard and soft laws are distinguished with the former being mandatory or binding law and the latter being considered to be voluntarily applied to support the application of hard law (or a given interpretation of a hard law) or to create a new rule or principle application when hard law fails to provide a solution. These ideas will be explored throughout the remainder of the article.

## Soft law and international commercial arbitration

Over the past thirty years, international arbitration has become by far the most popular mechanism for resolving international commercial disputes in the Asia-Pacific region and globally.<sup>7</sup> For example, about 150 countries from all areas of the world have approved the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>8</sup>

<sup>4</sup> John H Langbein, 'Comparative Civil Procedure and the Style of Complex Contracts' (1987) 35 *Am J Comp L* 381, 390. Langbein notes that it remains a 'puzzle is to understand why Americans do not make greater use of arbitration clauses than is now common' (*ibid*).

<sup>5</sup> See James R Maxeiner, *Failures of American Civil Justice in International Perspective* (Cambridge University Press 2011) (comparative analysis of American, German and South Korea civil justice systems).

<sup>6</sup> Michael John Garcia, 'International Law and Agreements: Their Effect upon U.S. Law,' Congressional Research Service (1 March 2013), Doc 7-5700 <<http://www.crs.gov>> accessed 21 April 2013.

<sup>7</sup> Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) 1.

<sup>8</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 ILM 1046 (1968) [New York Convention].

### Sources of law

One advantage of arbitration is that arbitral tribunals are not restricted by formal rules of civil procedure or restrictive rules of evidence. As such, commercial arbitrators often seek solutions from commercial practice and trade usage. In addition, they feel less restrictive in using other types of soft law in fabricating fair and reasonable awards. Before and subsequent to the 2008 world financial crisis, soft law played an important role in regulating financial institutions and their relationships. Eilis Ferran and Kern Alexander describe financial soft law as follows:

International financial regulation is mainly a system of 'soft law'—meaning standards, guidelines, interpretations and other statements that are not directly binding and enforceable in accordance with formal techniques of international law but nevertheless capable of exerting powerful influence over the behaviour of countries, public entities and private parties.<sup>9</sup>

In recent times, there has been a renewed interest by scholars, lending institutions, and regulators in Islamic financial law. It has been studied and utilized as an alternative source for resolving financial disputes. As Ahmad Alkhamees has noted, '[i]t is noteworthy that there is no rule in Islamic jurisprudence that precludes following international commercial arbitration procedures, as long as the selected procedure ensures justice for all parties and does not conflict with the basic principles of Islam.'<sup>10</sup> The notion of customary practice is strong in the Islamic legal system: '[S]ome Islamic jurisprudence schools consider *urf*, the Arabic for custom, and public interest, as sources for determining the Shari'a position on certain issues. This has resulted in the formation of many different schools of thought, or *madhabs* as are they known in Arabic.'<sup>11</sup> Islamic financial law as customary law and the Islamic dispute resolution system has a good amount of commonality with arbitration. The major difference between international arbitration and Shari'a is that the parties are not free to select their governing law through a choice-of-law clause. Muslims are obligated to apply Shari'a law to resolve all of their disputes.<sup>12</sup> And a limited judicial review is necessary to ensure that the award is consistent with the

<sup>9</sup> Eilis Ferran and Kern Alexander, 'Can Soft Law Bodies Be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Body,' University of Cambridge Faculty of Law Research Paper 36/2011, 4 <<http://ssrn.com/abstract=1676140>> accessed 28 March 2013. See also Jim Chen, 'Soft Law and the Global Financial System' (2011) 25 *Emory Int'l L Rev* 1651; Christopher J. Brummer, *Soft Law and the Global Financial System: Rule-Making in the Twenty-First Century* (Cambridge University Press 2012).

<sup>10</sup> Ahmad Alkhamees, 'International Arbitration and Shari'a Law: Context, Scope, and Intersections' (2011) 28 *J Int'l Arb* 255, 261.

<sup>11</sup> *Ibid* 256, citing, C Trumbull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' (2006) 59 *Vanderbilt L Rev* 609, 626; F Kutty, *The Shari'a Law Factor in International Commercial Arbitration* (2006) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=898704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704)> last accessed 21 April 2013.

<sup>12</sup> Alkhamees (n 10) 264.

principles of Islamic law.<sup>13</sup> In the end, it is plausible to state that in the area of financial arbitration the acceptance and the interpretation of arbitration agreements have been notably influenced by Shari'a law, as it is the primary source of law and public policy in many countries in the Islamic world. The growth in business relations between international companies and the Islamic world, mainly in the Middle East, in addition to the expansion of Islamic finance, highlight the importance of understanding the attitude of Shari'a law in international arbitration.<sup>14</sup>

The voluntary use of Islamic financial law is a recent example of how commercial contract law disputes are especially conducive and open to the application of soft law. Due to contract law's private nature, arbitrators and courts look to the parties' characteristics (diamond merchants, cotton exporters, and so forth), the totality of the circumstances surrounding their formation of a contract, including the trade usage and business customs found in a given trade, and business in general. Indeed, contract law—whether the Contract Law of the People's Republic of China (Contract Law),<sup>15</sup> the CISG, the US Uniform Commercial Code (UCC), or the German Civil Code (BGB)—acts much like soft laws due to the contracting parties' ability to derogate from the individual default rules of these supposedly hard laws. Lisa Spagnolo argues that the CISG although a mandatory law, unless there is a choice of law that states otherwise, should be viewed or applied as if it was a soft law.<sup>16</sup> Spagnolo reasons that in the interpretation of the CISG rules, the CISG would be better used by applying its underlying purposes in place of a purely doctrinal approach to interpretation. Instead, arbitrators should focus on reconstructed party intent, good faith, and trade usage in interpreting CISG rules. In other instances, domestic laws, such as the English Sale of Goods Act and the Swiss Civil Code, have been used as neutral 'soft' laws in seeking out a reasonable decision in an international dispute where the arbitrators are not restricted to a mandatory national law.

In many cases, arbitral panels will consider numerous sources of hard and soft laws in their attempts to render fair and equitable decisions. Unlike national courts, which are often bound by hard law, arbitrators are more willing to 'acknowledge factors which do not *have* to, but *may* be taken into account when framing a legal solution' and view soft law as a legitimate 'legal source.'<sup>17</sup> While most legal systems recognize a strict hierarchy of sources of law where the lower sources of the hierarchy are prohibited from conflicting with higher sources, arbitral panels may and should view sources of law in a less hierarchical way. In commercial contract law, customary law, including

<sup>13</sup> Ibid 262.

<sup>14</sup> Ibid 255.

<sup>15</sup> Contract Law of the People's Republic of China (1999).

<sup>16</sup> Lisa Spagnolo, 'CISG as Soft Law and Choice of Law' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press 2013), ch 11.

<sup>17</sup> Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 879.

business customs, trade usage, and commercial practice, should, in certain contexts, be given more weight than the default rule provided by a convention or code.

### *Natural affinity between international arbitration and soft law*

Soft law comes in many different forms, from general, abstract principles to the minutiae of highly technical trade usages. In the European Union (EU), the European Court of Justice (ECJ) has observed general principles found in Member States in interpreting EU law. One of the oldest types of soft law is the *lex mercatoria*, which has been many centuries in development.<sup>18</sup> One scholar asserts that there have been three eras of the *lex mercatoria*. Soft law 'first appeared under the semblances of the Roman *ius gentium*, as the formally autonomous source of law regulating the economic relations between Roman citizens and foreigners.'<sup>19</sup> Soft law 'reappeared in the 11th century under the guise of the *lex mercatoria*,' which developed as a body of merchant customs and practices.<sup>20</sup> Highpoints include the development of international financial instruments and principles of trade by the Italian city-states of Venice, Florence, and Genoa. Eventually, there was the development of English merchant law and ad hoc merchant tribunals in Europe prior to the establishment of functioning court systems:

The *lex mercatoria* was self-enforced by the very merchant class that generated it, dispute settlement being organized through private merchant arbitration and enforcement. Guild courts, market courts and fair courts were non-professional tribunals consisting of merchants or guild members elected by their fellows and occasionally assisted by professional notaries. An efficient system of merchant consular courts originated in Italy around 1150 and spread all over Europe.<sup>21</sup>

It is easy to see here the analogy between these merchant courts and commercial arbitration as well as the analogy between the merchant law and modern soft law. Subsequently, merchant customs and practices were incorporated into the hard law by established court systems.

Towards the last part of the twentieth century, as a truly global market place developed, there was a development of a new *lex mercatoria*:

A society without a state, the global business community, taking over both the legislative function (*lex mercatoria*) and the adjudicative function (international commercial arbitration) coexists with a multitude of states, bearers of domestic interests and thus struggling to maintain their legislative and jurisdictional powers.<sup>22</sup>

<sup>18</sup> Harold J Berman and Colin Kaufman, 'The Law of International Commercial Transactions (*Lex Mercatoria*)' (1978) 19 *Harvard Int'l LJ* 221.

<sup>19</sup> Anna Di Robilant, 'Genealogies of Soft Law' (2006) 54 *Am J Comp L* 499, 518–19.

<sup>20</sup> *Ibid* 519.

<sup>21</sup> *Ibid* 520.

<sup>22</sup> *Ibid* 523–4. Advocates of soft law see 'a new soft *lex mercatoria* often rest on faith in the self-governance of economic actors and on the belief that "international trade and commerce

The new *lex mercatoria* is substantially different from the two earlier versions in that it is more cosmopolitan, more diverse, and created by a wide variety of entities, both private and public:

Soft law displays a peculiar mixture of spontaneous and organized processes; it is based less on the spontaneous coordination of conduct and more frequently created through highly organized hybrid private-public decision making processes. For instance, the 'new *lex mercatoria*' blurs the distinction between private and public as well as between spontaneous and organized processes, developing in the interstices of the relations between intergovernmental agencies and organizations (UNCITRAL, UNIDROIT, IMO) and private, highly organized, bodies (ICC, ILA).<sup>23</sup>

However, much of the *lex mercatoria* remains a matter of soft law. Arbitration panels are in many ways a close remnant of the merchant tribunals. The *lex mercatoria* is a source of law that fits well in the more informal rules of evidence and the varied expertise found in arbitration panels.<sup>24</sup> Commercial arbitrators are necessarily more informed on the *lex mercatoria* than are trial judges that must deal with a variety of subjects, both commercial and non-commercial. The more enlightened legal systems, such as Germany, recognized the special expertise needed to fairly judge commercial contract disputes and have established commercial courts. Karl Llewellyn, the reporter of the American UCC, envisioned the creation of merchant courts to decide commercial disputes, but the drafting committee rejected his idea of independent commercial courts.

The flexible use of different sources of law—hard and soft—by arbitrators is aided and protected by the narrow grounds for appealing an arbitration award. In 2013, the High Court of Australia was asked to overturn an arbitration award 'due to an error of law on the face of the award'. The court noted that '[n]either Article 28 of the Model Law [UNCITRAL Model Law on International Commercial Arbitration (Model Law) as adopted as the law of Australia] nor an implied term of an arbitration agreement requires an arbitral award to be correct in law.'<sup>25</sup> The court reasoned that the primary directive of the Model Law, as well as the New York Convention, is to enforce foreign arbitral awards and not to review such awards for errors in the application of law. Furthermore, the *Guide to the UNCITRAL Model Law on International Commercial Arbitration* notes that, under Article 28, an arbitral panel is not required to apply the law chosen by the parties in a manner that a competent

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constitutes the ideal climate for the free development of contractual structures" (ibid 510, quoting Klaus Peter Berger, 'The Principles of European Contract Law and the Concept of the Creeping Codification of Law' (2001) 9 ERPL 21, 28.

<sup>23</sup> Vogenauer (n 17) 524.

<sup>24</sup> Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 ICLQ 747.

<sup>25</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, para 4 (13 March 2013). UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

court would have applied the law.<sup>26</sup> Simply put, an arbitral tribunal may need to apply the parties' designated law, but it does not need to apply it correctly. The Model Law narrowly limits the reasons for judicial intervention or non-enforcement of arbitral awards. Article 36(1) lists the grounds for vacating an arbitral award as bias and partiality of the arbitrators, the unfairness of the process, and when enforcement of the award 'would be contrary to public policy'.<sup>27</sup>

## Normative power of soft law

Why has soft law, especially in the area of transborder business transaction, continued to reappear through the millennia? What does the rise of soft law and the idea of a new *lex mercatoria* mean for the role of soft law in commercial arbitration? The answer is that, although not as coercive as hard law, soft law possesses a strong normative power recognized by arbitration tribunals as describing how businesses actually construct deals and as evidence of bad faith conduct.

A question to be asked is what makes soft law a genus of law? Law is generally associated with the coercive power of the state. Soft law is not generally enforced by the coercive power of the state. In arbitration, the use of soft law is a voluntary act. Thus, what makes soft law such an influential part in the expanding scope of 'global law'?<sup>28</sup> Much like ethics, soft law possesses relative degrees of normative power. The normativity of soft law stems from a number of sources. First, merchants voluntarily develop ways of doing business—usage, practice, and norms. Mostly, this type of soft law is self-referential and self-enforcing. Failure to abide by merchant-created soft law results in relationship-destroying and negative reputational effects. The expansion of free trade and network transactions (supply chain) has prospered due to merchants' 'faith in the self-governance of economic actors and on the belief that "international trade and commerce constitutes the ideal climate for the free development of contractual structures."' <sup>29</sup> The idea that the normative power of soft law influences party conduct is alluded to by Gersen and Posner when they offer an effects-based definition of soft law, namely that 'norms affect the behavior of agents, even though the norms do not have the status of formal law.'<sup>30</sup>

Second, the recognition of trade usage is pivotal evidence in many court and arbitral decisions. Arbitral tribunals are users and developers of soft law. As

<sup>26</sup> Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Wolters Kluwer 1989) 764–807 [Model Law].

<sup>27</sup> *Ibid* para 53, quoting art 36(1)(b)(ii).

<sup>28</sup> One commentator notes 'the striking multiplication of producers of law and, in turn, of bodies of law and the privatization of legal regimes.' Vogenauer (n 17).

<sup>29</sup> *Ibid* 510, quoting Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1997) 28.

<sup>30</sup> J Gersen and E Posner, 'Soft Law: Lessons from Congressional Practice' (2008) 61 *Stanford L Rev* 573.

in all forms of interpretation, the use of soft law by arbitrators is both a descriptive and prescriptive undertaking. The more universally accepted a trade usage (*Incoterms 2010*, *Uniform Customs and Practices for Documentary Credit Transactions (UCP 600)*), the easier is the arbitrator's task of applying the usage to the case in hand. Stefan Vogenauer asserts that:

it seems like a wise decision to leave the drafting of templates for specific types of contracts to neutral business organisations like the ICC or the FIDIC. It is important to remember that the biggest success story in the harmonisation of international commercial law is the ICC's codification of the Uniform Customs and Practice for Documentary Credits, the UCP.

However, the more localized the usage, the greater the discretion the arbitrator has in interpreting and applying the usage. In the rare case of a bad faith trade usage, the arbitrator can help police its application in rendering a decision and, thus, encourage the development of good faith practice.

The idea that arbitral tribunals are generators of soft law is captured, at its broadest depiction, in the notion of an international common law. Andrew Guzman and Timothy Meyer define international common law as 'a nonbinding gloss that international institutions, such as international tribunals, put on binding legal rules.'<sup>31</sup> In this usage, soft law is seen as an interpretive methodology in the interpretation of hard laws: 'Nonbinding rules can have legal significance when they shape expectations as to what constitutes compliance with binding rules.'<sup>32</sup> In commercial transactions, such a proposition is at its strongest given the private nature of contracts and the substantial influence of trade usage.

## Types of soft law

The importance and predictor of the use of soft law in the arbitration context lies in its descriptive power. Even though certain instruments of international law can be seen as protecting power structures, such as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) (shipping industry) and the *UCP 600* (banking):

[M]uch of commercial transnational law is merely descriptive in that it provides power-neutral rules of the game needed for stable, transnational framework for conducting business. INCOTERMS is an example of such a descriptive, facilitative framework. It is left to the relative bargaining power of the contracting parties as to which term is incorporated into their contracts, which is within the domain of freedom of contract. Such instruments, practices, and usages allow for clearer communications of intent and assists in the building of inter-party or transactional trust.<sup>33</sup>

<sup>31</sup> Andrew Guzman and Timothy Meyer, 'International Sales Law' (2010) 2 J Legal Analysis 171, 171.

<sup>32</sup> Ibid 222.

<sup>33</sup> Cotterrell (n 2), citing Graf-Peter Calliess and Zeer Zumbansen, *Rough Consensus and Running Code: Theory of Transnational Private Law* (Hart Publishing 2010); Ross Cranston, 'Theorising Transnational Commercial Law' (2006) 42 Texas Int'l LJ 602.

The closer that soft law describes or informs real world transactions, the greater appeal it has to arbitral tribunals as a viable source of law.

### *Nature and context of soft law*

It is difficult to provide a clear typology of the types and roles of soft law in international commercial disputes. P.M. Dupuy argues that:

a new process of normative creation does exist and has been developing (for more than 20 years) which jurists feel uncomfortable to analyze; it certainly comprises part of the contemporary lawmaking process but, at the same time, being a social phenomenon, it evidently overflows the classical legal categories, familiar to scholars.<sup>34</sup>

This 'social phenomenon' is what was previously addressed as the new *lex mercatoria*. However, the difficulty jurists have in recognizing and categorizing the many laws and norms subsumed in the notion of 'global pluralism' can be traced to a more simple explanation—the difficulty in dealing with the international and complex nature of commercial transactions. The continued specialization of the world's market economy and the variety of producers of soft law instruments has led to a wealth of soft law sources:

On the one hand, the expansion of soft law signifies a drift towards global unification. Soft legal tools harmonize, unify and globalize law. On the other hand, the multiplication of soft legal regimes mirrors the complexity of global legal pluralism where multiple regional legal orders coexist with specialized legal regimes.<sup>35</sup>

The latter point is alluded to by the phrase 'soft law overkill,' which was coined by Stefan Vogenauer.<sup>36</sup>

At times, arbitral panels are confronted with a number of overlapping, and potentially conflicting, soft law instruments. This can be seen as the law (hard and soft) mimicking the complexity of the global market place. Paul Berman's view of global pluralism recognizes overlapping communities, laws, and norms based upon cosmopolitan and pluralist jurisprudence. He describes cosmopolitan as 'a framework recognizing that we are all fundamentally members of multiple communities, local and global, territorial and epistemic.'<sup>37</sup> The danger of such cosmopolitanism and overlapping legal regimes is that instead of providing simplification and certainty the multiplicity of hard-soft law sources place contracting parties on uncertain ground and may actually lead to more disputes as the parties use multiple sources of law to argue for their preferred contractual interpretations. Roger Cotterrell notes that 'many

<sup>34</sup> PM Dupuy, 'A Hard Look at Soft Law' (1988) 82 *Am Society Int'l L Proceedings* 371, 381.

<sup>35</sup> Vogenauer (n 17) 533.

<sup>36</sup> Stefan Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?' (2010) 6 *European Rev Contract L*, 143–83.

<sup>37</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012) 11.

different kinds of transnational regulation which now exists, or are developing, relate to the interests, experiences, allegiances and values associated with transnational networks of community', especially in areas of business and finance.<sup>38</sup> For this reason, the onus is on arbitral tribunals to weed through the thicket to not only provide fair decisions but also to provide well-reasoned decisions in order to guide future arbitrators in using the multiplicity of laws at their disposal.

### *Hard-soft law continuum*

As discussed previously, soft law has an important normative component, even though it is considered as being created outside of formal law and being fact-based, flexible, and practice focused, evolving out of the needs of businesses party to international business transactions.<sup>39</sup> However, given arbitral tribunals penchant of holding international customary law in high regard, the non-bindingness of soft law is somewhat of a misnomer. In fact, as will be discussed later in this article, private international customary law has been used to preempt the application of mandatory or party-chosen hard laws. Alan Boyle notes that when soft law interacts with hard law the soft laws' 'non-binding character may be lost or altered.'<sup>40</sup> Cotterrell suggests that soft law can be seen as a transformative phase in the creation of hard law—'perhaps [it is] *on the way to becoming law* and acquiring some legal authority.'<sup>41</sup> He also questions the public-private distinction between hard law as public law and soft law as a purely private affair:

[A]nything that can be recognised as law, even if developed essentially by 'private' actors such as traders in transnational commercial networks (as *lex mercatoria*) or corporations and corporate groups (as transnationally operating norms of corporate social responsibility), will have important public aspects.<sup>42</sup>

The fact is that private customary international law, merchant law, or soft law preceded most forms of hard law. They have generated enough normative and coercive force outside of the need for the use of state enforcement or sanctions. The idea of coercive soft law has been discussed in the area of international financial regulation. Cally Jordon notes that the '*lex mercatoria* demonstrates persistence and continuity, stretching back centuries, and it is neither "hard" nor "soft" as is understood in the current discourse.'<sup>43</sup> Ralf Michael notes that the ancient *lex mercatoria* consisted of practices developed by and for

<sup>38</sup> Roger Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris* 1, 5.

<sup>39</sup> A Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *ICLQ* 901, 904.

<sup>40</sup> *Ibid.*

<sup>41</sup> Cotterrell (n 38) (emphasis added).

<sup>42</sup> *Ibid.*, citing Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing 2010).

<sup>43</sup> Cally Jordon, 'Transnational Law: Practice inspiring Practice,' Melbourne Legal Studies Research Paper 578 (19 December 2011).

merchants that were gradually incorporated into national laws. However, he notes that a ‘renaissance of the idea of a “new *lex mercatoria*” in the twentieth century, [is a more] informal and flexible set of rules and arbitrators establishing a private international commercial law.’<sup>44</sup>

It may be best to view hard and soft law as a continuum or what some have called hybridity,<sup>45</sup> ranging from very hard laws to very soft laws. Again Cotterrell asserts that ‘[r]egulation and widely accepted practices form a continuum [where] legal character is a matter of degree.’<sup>46</sup> The flexibility afforded arbitration panels to seek fair decisions and their protection by limited grounds of appeal results in international arbitrators not being overly concerned about making sharp distinctions between hard and soft law. At best, they see law as a continuum with various degrees or characteristics of hardness and softness.<sup>47</sup> This view is replicated in public law as regulatory authorities have used a number of regulatory devices ranging from hard to soft law. The public-private law and public customary law-*lex mercatoria* dichotomies can be best viewed as two (sometimes interlocking) types of customary international law: private customary international (private parties) and public customary international law.<sup>48</sup> However, the flow between hard and soft law runs in both directions. International soft lawmaking can serve a (public) regulatory purpose usually provided by domestic and international hard laws: ‘International [regulatory] rule makers proceed in three ways: though “hard” rules, harmonization principles, and best practices style guidance.’<sup>49</sup> The latter two types of regulatory methods are squarely in the arena of soft law. In a classic international best practices scheme, international regulatory bodies select and publicize certain approaches that are considered best practices.<sup>50</sup> However, the use of best practices is not mandatory in nature. Lisa Spagnolo suggests a ‘sliding scale’ approach in determining the hardness or softness of a law or instrument: ‘A far more accurate delineation between hard-soft law involves a sliding scale based on three characteristics: legally binding nature of obligations, precision, and delegation of authority for interpretation and implementation.’<sup>51</sup> Thus, the CISG, a supposedly hard law, ranks high on the characteristic of binding nature, but this bindingness is weakened by the fact that there is no centralized enforcement process.

<sup>44</sup> Ibid 20, quoting Ralf Michaels, ‘The True *Lex Mercatoria*: Law Beyond the State’ (2007) 14 *Indiana J Global Legal Studies* 447.

<sup>45</sup> ‘More tepid in praising the virtues of soft law, the champions of hybridity call for combinations of traditional hard law and soft law processes.’ Vogenauer (n 17) 507.

<sup>46</sup> Roger Cotterrell, ‘Spectres of Transnationalism: Changing Terrains of Sociology of Law’ (2009) 36 *J & Society* 485.

<sup>47</sup> DE Rupp and CA Williams, ‘The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum’ (2011) 12 *Theoretical Inquiries in L* 581.

<sup>48</sup> Restatement (Third) of Foreign Relations (American Law Institute 1987) para 102(2).

<sup>49</sup> David Zaring, ‘Rulemaking and Adjudication in International Law’ (2008) 46 *Columbia J Transnational L* 563, 572.

<sup>50</sup> David Zaring, ‘Best Practices’ (2006) 81 *NYU L Rev* 294.

<sup>51</sup> Spagnolo (n 16), citing Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *Int’l Org* 421, 426.

The recognition of the many types of hard and soft laws ranging upon a continuum can be used as a framework in dealing with the issue of overlapping legal regimes (hard and soft laws). The creation of overlapping legal regimes is the outcome of the recognition of multiple producers of law, including non-state actors. As Berman notes, '[g]iven increased migration and global communication, it is not surprising that people feel ties to, and act on the basis of affiliations with, multiple communities in addition to their territorial ones.'<sup>52</sup> He provides an example, noted previously, in the use of soft law in the regulation of financial institutions. It consists of a community of international banking and accounting firms and associations 'developing their own regulatory regimes governing trade finance or accounting standards, as well as the use of modern forms of *lex mercatoria* to govern business relations.'<sup>53</sup>

A relatively new term, 'transnational law' refers to private non-state law. It treats:

transnational law as conceptually distinct from national and international law because its primary sources and addressees are neither nation state agencies nor international institutions founded on treaties or conventions, but private (individual, corporate or collective) actors involved in transnational relations.<sup>54</sup>

Cotterrell notes that transnational law can be divided into procedural and substantive transnational law. Procedural transnational law aims to process the differences between national laws—a sort of 'transnational conflict-of-laws system.' Substantive transnational law looks to harmonize or supra-nationalize a given body of law—a harmonization of law in targeted areas.<sup>55</sup>

It must be stressed that hard and soft laws are often complimentary in nature. The overlapping of hard and soft laws does not necessarily result in needless complexity and confusion:

Non-binding soft-law instruments can lead to normative consensus which gives rise to new binding hard-law commitments. Soft law can be both 'elaborative' of hard law by providing guidance to the interpretation of existing hard law, and be subsequently accepted as 'emergent hard law,' facilitating the building of hard customary international law.<sup>56</sup>

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<sup>52</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012) 8.

<sup>53</sup> Berman (n 37) 8-9, citing Janet Koven Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30 *Yale J Int'l L* 125; Clayton P Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004) 5 *Chicago J Int'l L* 157, 159; Amitai Aviram, 'A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems' (2004) 22 *Yale L & Pol'y Rev* 1; Eric A Feldman, 'The Tuna Court: Law and Norms in the World's Premier Fish Market' (2006) 94 *California L Rev* 313.

<sup>54</sup> Cotterrell (n 2), citing Graf-Peter Callies, 'The Making of Transnational Contract Law' (2007) 14 *Indiana J Global Legal Studies* 469; Peer Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 *European LJ* 400.

<sup>55</sup> Cotterrell (n 2), citing Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California L Rev* 1155, 1189-91; Harold Berman, 'World Law' (1995) 18 *Fordham Int'l LJ* 1617.

<sup>56</sup> Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 30-1.

Thus, soft law can be used to fill in gaps in applicable hard law, police bad faith conduct, and be a step in the process for building universal consensus and eventually developing into its own recognition as hard law.

Berman concludes that the many sources of law reflected in phrases such as global pluralism, hybridity, and overlapping laws should be embraced and used in creative ways to deal with the complexity of international commercial disputes. He asserts that legal pluralism should not be eliminated but managed to make the existence of overlapping hard and soft laws as complimentary and not confrontational as possible.<sup>57</sup> Later in this article, the idea of ‘competing’ hard and soft laws in international sales transaction will be used as an example of how overlapping legal regimes can be viewed as complimentary.

## Interpretive methodologies

Given a world of legal globalism and overlapping legal regimes along the hard-soft law continuum, how arbitral tribunals use this menu of laws in the arena of legal interpretation (of legal rules and commercial contracts) becomes crucial in developing a coherent body of international commercial law. The interpretive methodologies used by courts and arbitral panels ultimately will determine how a dispute is resolved: ‘Questions as to sources of law are inextricably linked with questions of legal method.’<sup>58</sup> The list of interpretive methods available within the framework of legal reasoning is long and includes: textual meaning of the law or contract; contextual interpretation (characteristics of parties, trade usage for contracts, and legislative history for laws); purposive interpretation; analogical reasoning within a law; analogical reasoning within existing case law; comparative analysis of national laws; and economic analysis of law; among others.<sup>59</sup> The following sections will look at a few key methodologies for the interpretation of international private law—comparative and legislative history—as well as the crucial role that good faith and commercial reasonableness plays in international commercial arbitration. It is suggested that arbitral panels should always use multiple methodological approaches, including inter-conventional interpretation when applicable.

### *Comparative law analysis*

Comparative law analysis has a long history in legal scholarship. Comparativist scholars have analysed across national legal systems to determine the

<sup>57</sup> Berman (n 37) 10.

<sup>58</sup> Vogenauer (n 17) 870. Ernst Rabel, once said that ‘every good jurist has a method; he just doesn’t talk about it.’ Reported in Wolfgang Fikentscher, *Methoden des Rechts in ver Gleichender Darstellung*, volume I (Mohr Siebeck 1975) 10.

<sup>59</sup> See L DiMatteo and A Janssen, ‘Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG’ (2012) 2 *Nederlands Tijdschrift Voor* 52 (review of different interpretive methods).

common core (commonalities) of national laws<sup>60</sup> or, alternatively, to assess the better rules in cases of conflicting national laws.<sup>61</sup> Stefan Vogenauer characterizes comparative law as both a source of law and an interpretive methodology: '[C]omparative law in itself constitutes a source of law and an important tool for legal methodology.'<sup>62</sup> Thus, comparative law analysis can be used as a tool for arbitral tribunals in finding a fair solution to the case in dispute and in positively impacting the development of private international customary law.<sup>63</sup>

The use of comparative analysis has a natural appeal in resolving international commercial disputes. The arbitrator's goal is to make informed and deliberative decisions with the aim of rendering fair and reasonable awards. Understanding business custom and trade usage helps guide them in determining the parties' intent and the meaning of their contracts. Reviewing a number of national laws or a variety of soft law instruments provides guidance as to the common principles and rules used in national private law systems and, as importantly, to measure whether a given legal rule is outside of the norm. Vogenauer notes that in 'the increasingly important supra-national context the normative appeal of comparative law is much stronger.'<sup>64</sup>

### *Legislative history*

The uncovering of the intent of the drafters or legislators of law is one method used to interpret a law or assess the meaning of the words found in the law. Oddly, such a commonsensical approach to finding intended meanings is used unevenly in different legal systems. Although legislative intent is most closely associated with the interpretation and application of hard law, the analysis of drafting history to determine the intended meaning of the drafters of soft law instruments should also be considered when applying such instruments. Holger Fleischer asserts that there are sufficient similarities across legal systems on the subject of statutory interpretation, and one of the similarities

<sup>60</sup> See Ugo Mattei and others, *Schlesinger's Comparative Law: Cases, Text, and Materials* (7th edn, Foundation Press 2009); Richard M Buxbaum and Ugo A Mattei, 'Rudolph B. Schlesinger 1909-1996' (1997) 45 *Am J Comp L* 1. See also Ole Lando, 'The Common Core of European Private Law and the Principles of European Contract Law' (1998) 21 *Hastings Int'l & Comp L Rev* 809; Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, parts 1 and 2 (Kluwer Law International 2000) [PECL].

<sup>61</sup> See eg Larry A DiMatteo and Daniel Ostas, 'Comparative Efficiency in International Sales Law' (2011) 26 *American U Int'l LJ* 102 (analyses the selection of conflicting civil and common law rules in the drafting of the CISG).

<sup>62</sup> Vogenauer (n 17) 871.

<sup>63</sup> International customary law refers to the widely accepted norms and practices of private individual groups (non-state actors, as opposed to 'customary international law' which refers to express or implicit agreements among nations. See eg John J Chung, 'Customary International Law as Explained by Status and Not Contract' (2012) 37 *North Carolina J Int'l L & Com Reg* 609 (discusses traditional contract-based model of customary international law and a 'status theory' of customary international law).

<sup>64</sup> Vogenauer (n 17) 876.

is the use of legislative history.<sup>65</sup> However, differences persist as to the weight given to legislative history. The USA and the United Kingdom have wavered on the role of legislative history in statutory interpretation. English statutory interpretation, as confirmed by the UK Supreme Court, precludes the use of legislative history as an aid to interpreting a statute.<sup>66</sup> In comparison, statutory interpretative methodology in the USA has employed the predominate methodology of literal or plain meaning interpretation of the words of a statute and the use of legislative history to determine legislative intent. However, no mainstream model of statutory interpretation has emerged, with various courts using or not using legislative history as an interpretive methodology.<sup>67</sup> Fleischer argues that there has been a worldwide convergence on the appropriateness of using legislative history as an interpretive method. The rationale given 'relates to what appears to be a wide-spread tendency for the judiciary to draw on every available piece of information when trying to settle a contentious legal point.'<sup>68</sup> Arbitral panels should recognize the importance of legislative history of hard and soft laws in resolving disputes over the meaning of legal rules.

### *Multiple methodological approach*

In international commercial law interpretation, the best approach is to use a myriad of interpretive methodologies. This idea of moving past a merely textual interpretation of the meaning of a law or contract has long been discussed in national and international private law scholarship. The debate in numerous national systems has been mostly between formalism and contextualism. Should courts be solely focused on directly interpreting the text of a rule or a contract or should they also look to contextual evidence to see if there is a reasonable alternative interpretation other than a plain meaning interpretation of the text. In commercial arbitration, the answer is towards the use of contextual evidence (customs, trade usage, practice, prior dealings) to better understand the transaction in dispute, the intent of the parties, and, at times, whether a party has acted in bad faith.

To be clear, the direct textual interpretation of law and contracts is the primary mode of dispute resolution. However, in cases of ambiguity or gaps in the contract or legal rules, the arbitrators will need to use other interpretive methods, such as soft law to develop the most reasonable interpretation. In the international context, the use of other methodologies can be used to confirm a textual interpretation and to prevent an interpretation that is biased towards a national law. The use of alternative interpretive methodologies varies among national legal systems, including between countries of the same

<sup>65</sup> Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 *Am J Comp L* 401, 402.

<sup>66</sup> Stefan Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2005) 25 *OJLS* 629.

<sup>67</sup> Fleischer (n 65) 421–8.

<sup>68</sup> *Ibid* 429.

legal tradition. For example, the common law recognizes an exclusionary rule (parol evidence rule) that precludes the use of contextual evidence when a written contract is intended to be the final agreement between the parties. However, a court can avoid the exclusionary rule by declaring the language in dispute as ambiguous and allowing the admission of contextual evidence in order to clarify the ambiguity.

In the end, there are numerous interpretive methodologies that can be used in interpreting hard and soft international commercial laws.<sup>69</sup> Some of these methodologies (textual, general principles, good faith, trade usage) are expressly recognized by the law being applied (as in the case of the CISG),<sup>70</sup> some of the methodologies are implicit (*travaux préparatoires*, reasoning by analogy within the provisions of the law, reasoning by analogy from existing case law, purposive or teleological interpretation), and still other methodologies (economic analysis of law, inter-conventional interpretation,<sup>71</sup> comparative law analysis, use of soft law and scholarly materials) may prove useful in certain cases to increase the level of acceptability of a decision and a higher degree of uniformity of application.

### *Duty of good faith and the reasonableness standard*

The duty of good faith has long been a central tenet of the civil law and epitomized in its predominate role in German jurisprudence. Beginning in the late twentieth century, inroads to recognizing a general duty of good faith began to evolve in the USA<sup>72</sup> and then in Australia.<sup>73</sup> However, its recognition has not been without resistance, and it is still being avoided in English law. The critics of implying a duty of good faith into contract law argue that:

the imposition of unexpressed good faith obligations include: the inconsistency of such obligations with long-recognised beliefs about the nature of contract, concerns that recognising such duties will introduce an unacceptable level of uncertainty into the law, and a belief that the imposition of such duties is unnecessary.<sup>74</sup>

<sup>69</sup> DiMatteo and Ostas (n 61). See also Larry A DiMatteo and André U Janssen, 'Interpretive Methodologies in the Interpretation of the CISG' in DiMatteo (n 16) (this is a shorter version of the earlier article).

<sup>70</sup> CISG (n 3) Articles 7–9.

<sup>71</sup> See discussion later in this article.

<sup>72</sup> The duty of good faith and fair dealing was initially recognized in the American Uniform Commercial Code in the area of sale of goods (Article 2) but has been applied to many other types of contracts by analogy. The result has been to change the American common law in that the duty of good faith is seen now as a general principle of contract law.

<sup>73</sup> See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 (implied obligation of good faith was recognized in a commercial contract).

<sup>74</sup> Arlen Duke, 'A Universal Duty of Good Faith: An Economic Perspective' (2007) 33 *Monash U L Rev* 176, 178; Adrian Baron, 'Good Faith' and Construction Contracts: From Small Acorns Large Oaks Grow' (2002) 22 *Australian Bar Rev* 54, 73 (implied good faith is inconsistent with the intent-based nature of contract); Cf Donald B King, 'Reshaping Contract Theory and Law: Death of Contracts II Part One: Generalised Consent with Law Made Obligations' (1994)

Arlen Duke, in the contrary, argues that the purely self-interested model of human behavior is flawed and that the duty of good faith is supported by the parties' preference for 'reciprocal fairness.'<sup>75</sup> Duke concludes that, given how people actually decide under behavioral decision theory,<sup>76</sup> bounded self-interest or preferences for reciprocal fairness show that 'rather than simply providing extrinsic incentives aimed at guiding self-interested individuals to reach efficient bargains, it is now recognised that legal rules also have an effect on intrinsic motivators, such as the desire to be reciprocally fair in contractual dealings.'<sup>77</sup> This is an alternative way of stating that context matters in determining the meaning of a contract and assessing the conduct of the parties to the contract. Good faith and commercial reasonableness are inherently contextual undertakings.

Karl Llewellyn, in drafting Article 1 (general provisions) and Article 2 (sale of goods) of the UCC, saw the importance of using open-textured rules.<sup>78</sup> The open-textured rule is most closely associated with the reasonableness standard. Where there is an ambiguity or gap in the contract, the rule directs the court or arbitral tribunal to consider real world practice to determine a reasonable term to imply into the contract. The reasonableness standard makes recourse to soft law—trade usage, business customs, and commercial practices—almost unavoidable. Commercial reasonableness is also reflected in the meta-principle of good faith. Although well entrenched in the civil law system, the duty of good faith and fair dealing between merchants was not recognized in the common law. Llewellyn rectified this missing element in American law by incorporating the duty into the law of sales. Over decades, the good faith duty has been applied by analogy to other types of contracts

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7 J Contract L 245; Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 J Contract L 197, 202; Charles Goetz and Robert E Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 89 Yale LJ 1261, 1261; Melvin A Eisenberg, 'Why There Is No Law of Relational Contracts' (2000) 94 Northwestern U L Rev 805, 810. For the argument that good faith introduces a greater deal of uncertainty into contract law, see Andrew Phang, 'Tenders, Implied Terms and Fairness in the Law of Contract' (1998) 13 J Contract L 126. For the argument that the duty of good faith is unnecessary due to existing policing doctrines and rules in contract law, see Elisabeth Peden, 'Cooperation' in English Contract Law: To Construe or to Imply' (2000) 16 J Contract L 56; JW Carter and MP Furmston, 'Good Faith and Fairness in the Negotiation of Contracts: Part I' (1994) 8 J Contract L 1, 5.

<sup>75</sup> Duke (n 74) 178–9.

<sup>76</sup> Behavioral decision theory is the psychological theory upon which behavioral law and economics is based. See Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124 (psychology); Gerd Gigerenzer and Christoph Engel (eds), *Heuristics and the Law* (The MIT Press 2006).

<sup>77</sup> Duke (n 74) 196, citing Ernst Fehr and Simon Gächter, 'Fairness and Retaliation: The Economics of Reciprocity' (2000) 14 J Economic Perspectives 159; Ernst Fehr and Klaus Schmidt, 'A Theory of Fairness, Competition and Cooperation' (1999) 114 Q J Econ 817; Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioural Approach to Law and Economics' (1998) 50 Stanford L Rev 1471.

<sup>78</sup> Zipporah Batshaw Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules' (1987) 100 Harvard L Rev 465.

and can now be seen as a part of the American common law of contracts. Such has not been the case in English law.

### *Inter-conventional interpretation*

With the proliferation of hard and soft law instruments, there is a danger that identical or similar provisions will be given different meanings or interpretations. For example, subsequent soft law instruments, such as the PICC and the Principles of European Contract Law (PECL), have mimicked numerous provisions of the CISG, especially in the area of formation.<sup>79</sup> Some scholars, and arbitration panels, have used the PICC in interpreting the CISG.<sup>80</sup> However, even though the PICC has many similarities and provides some additional details not found in the CISG, the CISG calls for autonomous interpretations. Before recourse is made to soft law, arbitrators should first look at the deep case law and scholarly commentaries to guide them in the application of the CISG. Only after existing means within CISG interpretive methodology are exhausted should recourse to soft law be made. An issue presents itself whether resort to soft law is ever appropriate in applying the CISG. The CISG provides that if an interpretation cannot be determined using general principles, then recourse is to be made to private international law. This is where arbitrators have an advantage over judges. Instead of applying a single country's law in filling in an internal gap or ambiguity in the CISG,<sup>81</sup> use of another supranational instrument, such as the PICC, would provide better guidance given its international perspective. Arbitrators often have the flexibility to use alternative sources, while courts have to follow national law. This explains the fact that some arbitration tribunals have used the PICC in applying the CISG, while national courts have avoided such use.

Still, for the purposes of certainty and predictability, similar interpretations of similar provisions in different legal instruments best serves the international merchant community. This is especially the case when the similar language is found in different hard laws. Two examples come to mind. First, the CISG has influenced, in varying degrees, the revision of national contract laws, including the Chinese Contract Law, the Dutch Civil Code, the German Civil Code, the Latvian Civil Code, the Turkish Civil Code, and, potentially, the French and Japanese Civil Code revision processes. For the international merchant doing business within these countries, as well as those entering transborder transactions, the idea that a rule or a term could mean one thing under domestic law and another in international sales law causes a great deal of uncertainty. It is the hope that national courts applying domestic contract law will look to the

<sup>79</sup> PECL (n 60).

<sup>80</sup> Larry A DiMatteo, 'Case Law Precedent and Legal Writing' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier 2009) 113–32, 130. In a random sample of arbitral cases, it was found that one in three referred to the PICC (n 3).

<sup>81</sup> Larry A DiMatteo, 'CISG as a Basis for a Comprehensive International Sales Law' (2013) 54 *Villanova L Rev* [forthcoming] (discusses the concepts of internal and external gaps).

CISG, if it is part of their national law, when interpreting similar provisions in their revised codes. This should also be the case for arbitral panels when applying national laws that have been influenced by the CISG.

A second example of having multiple laws potentially applying to similarly situated cases is the proposed Common European Sales Law (CESL).<sup>82</sup> The law, as proposed in its initial publication in late 2011, which was subsequently revised and narrowed in 2013, borrowed heavily from the CISG.<sup>83</sup> The CESL would serve as an optional instrument that European merchants could opt into and preclude the application of the CISG. The problem presented by such a development is that both the CISG and the CESL call for the autonomous interpretation of their provisions. Thus, national courts could potentially interpret a provision in the CESL differently than this same provision in the CISG that had been previously interpreted. Ulrich Magnus argues that the court or arbitral tribunal should engage in inter-conventional interpretation.<sup>84</sup> Put simply, if a consensus exists over the meaning of a CISG provision, then this meaning should be carried over when interpreting a similar provision of the CESL. This methodology should also be used, as noted earlier, when interpreting provisions in new national laws in countries that have adopted the CISG.

## Soft law trumps hard law: private customary international law

One commentator notes that ‘formal, legally binding private law is supplemented, and sometimes even eclipsed, by what is referred to as “social norms.”’<sup>85</sup> Soft law, recognized as *lex mercatoria*,<sup>86</sup> can be used to trump choice-of-law selections and the applicable law determined by private international law (conflict-of-laws) rules. One case involved the sale of goods between a Danish seller and a German buyer. With no choice-of-law clause, the choice

<sup>82</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Doc COM(2011) 635 final [CESL].

<sup>83</sup> See Reiner Schulze (ed), *Common European Sales Law (CESL): Commentary* (CH Beck 2012).

<sup>84</sup> Ulrich Magnus (ed), *CISG vs. Regional Sales Unification: With a Focus in the New Common European Sales Law* (Sellier 2012).

<sup>85</sup> Joost Pauwelyn, ‘Is It International Law or Not, and Does It Even Matter?’ in J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) ch 6, citing Eric Posner, *Law and Social Norms* (Harvard University Press 2002). Cf ‘The tribunal should not be considered to have a general discretion to apply public policy or overriding mandatory provisions if it considers it appropriate to do so.’ Andrew Dickinson, ‘The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts—An Updating Note,’ Sydney Law School Legal Studies Research Paper 12/82 (October 2012) <<http://ssrn.com/abstract=2168057>> accessed 17 March 2013.

<sup>86</sup> The CISG (n 3) used as soft law would be part of the *lex mercatoria*. However, the CISG as hard law may be seen as part of customary (public) international law. See Brian D Lepad, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010).

was either application of Danish law (the Scandinavian Sale of Goods Act), which required the buyer to give 'immediate' notice on the non-delivery of the goods or German law, which had no such immediate notice requirement. The *lex mercatoria* would see the harsh Danish notice requirement as unreasonable and not within customary business practice. If private international law rules directed the arbitrators to Danish law, it should be in their power to ignore Danish law and, instead, to comply 'with the general commercial rule requiring notice within a reasonable period of time.'<sup>87</sup>

In another case, an arbitral panel, working under the International Chamber of Commerce (ICC) arbitration rules, used a provision of the CISG as evidence of international trade usage to preempt the mandatory law of the case. In ICC Arbitration Case no 5713 of 1989, the panel disregarded an unusually short limitation period for giving notice of a defect and recognized the two-year period found in Article 39(2) of the CISG. The arbitrators considered the strict notice period of the choice-of-law country to be unfair and unreasonable. It recognized the two-year period found in Article 39(2) of the CISG as a more customary and fair period of time to give notice. The panel noted that because of its international character the CISG represented international customary law.<sup>88</sup>

Another example involved a French buyer who allegedly entered into a long-term supply contract with an Austrian seller. The seller never delivered any goods, arguing that the perquisite formalities to form a binding contract had never occurred.<sup>89</sup> The alleged contract provided a choice-of-law clause selecting the law of New York as the law of the contract and the place for arbitration was stated as being Geneva, Switzerland. However, since the preliminary issue was whether there was a contract to begin with, the arbitral panel had the choice of selecting French, Austrian, Swiss, or New York law. To find the applicable law required an expert analysis of the comparative conflict-of-laws rules. One of the arbitrators noted the unique role of soft law in international commercial disputes as being more important at finding a fair resolution compared to the finding of the hard law applicable under conflict-of-laws rules:

My feeling is that wholly neutral principles of conflict of laws are an illusion, but that an understanding of reasonable behavior and expectations of major commercial enterprises can be defined with a fair degree of precision, focusing on such issues as the customs of the particular trade, justified expectations of the parties in the light of the prior and current communications between them, the obligation of good faith dealings, and evidence of reliance. Of course these concepts are not precise, but they are everywhere the stuff of contracts, the kinds of issues on which arbitrators are competent to pass. The suggestion is

<sup>87</sup> Andreas F Lowenfeld, 'Lex Mercatoria: An Arbitrator's View' (1990) 6 Arb Int'l 133, 137.

<sup>88</sup> Larry A DiMatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' (1997) 22 Yale J Int'l L 111, 134–5; Larry A DiMatteo, 'Resolving International Contract Disputes' [November 1998] Dispute Resolution J75, 77

<sup>89</sup> For an excellent comparative analysis of contract formalities in the civil and common laws, see Arthur von Mehren, Chapter 10, 'Formal Requirements' in Arthur von Mehren (ed), *Contracts in General*, volume 7 (JCB Mohr 1998), reprinted in (1998) 7 Int'l Encyclopedia Comparative L I.

that whether or not the two parties before the tribunal had concluded a contract could and probably should have been decided by reference to *lex mercatoria*, rather than by elaborate exercises in comparative conflict of laws.<sup>90</sup>

Of course, instead of choosing a hard law, the parties may instruct the arbitrators to act as *amiable compositeurs*, allowing the arbitrators to ignore law and render a decision based upon fairness and equitable principles. This type of dispute resolution is most appropriate when it concerns disputes involving long-term contracts, especially when the parties want to resolve a dispute ‘within’ the contractual framework—that is, they are asking the arbitrators not to void the contract and assess damages but, rather, to adjust the contract to preserve the contractual relationship.

## Hard and soft law in international commercial disputes

The future effectiveness of the harmonization of international contract and commercial law will depend on the adoption and use of a variety of hard and soft law instruments.<sup>91</sup> Each area of law has some blend of hard and soft laws that arbitrators refer to in rendering their decisions. However, some areas of law rely more heavily on soft law instruments than others, especially in international commercial dispute resolution. The transactional areas where soft laws are more widely used include contract and sales law, financial law, and banking law.<sup>92</sup> Some soft law instruments in these areas are so universally accepted that they take on the edge of hard law instruments. The two most common examples are provided by publications of the ICC—*Incoterms 2010*<sup>93</sup> and the *UCP 600*.<sup>94</sup> In sales law, *Incoterms 2010* provides a list and definitions of trade terms used to allocate the costs of freight and insurance, the risk of loss, the procurement of export licenses and import clearance, the costs of loading and unloading of goods, the payment of import duties and customs fees, and so forth. Outside of the payment, quantity, and quality (description or specifications of the goods), the trade term is the most important term in most sales contracts.

Again, in the sale of goods transactions, in which the seller requires a letter of credit from a bank to guarantee payment, the ICC’s *UCP 600* is the universally accepted body of regulations and rules governing international letter-of-credit transactions. Most letter-of-credit application forms provided by commercial banks will make reference to the *UCP 600* as governing law.

<sup>90</sup> Lowenfeld (n 87) 140.

<sup>91</sup> See Herbert Kronke, ‘International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice’ (2000) 5 *Uniform L Rev* 13, 20.

<sup>92</sup> Chris Brummer, ‘Why Soft Law Dominates International Finance—And Not Trade?’ (2011) 13 *J Int’l Econ L* 623, 623, 628; Janet Koven Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ (2005) 30 *Yale J Int’l L* 125, 190.

<sup>93</sup> *Incoterms 2010* (International Chamber of Commerce (ICC) 2010).

<sup>94</sup> ICC, *Uniform Customs and Practice for Documentary Credits (UCP) 600* (ICC 2007).

However, in cases where there is no express reference, courts and arbitral tribunals will recognize the *UCP 600* as a binding international business custom or trade usage. It should be noted that the statement of the year 2010 in the *Incoterms* and a number in the *UCP* illustrates that these instruments are constantly updated generally in ten-year intervals. This constant updating has enconced the importance of these soft law instruments because they are viewed as providing modern sets of rules that reflect commercial reality. This illustrates that a major advantage of soft law is the ease in which it can be revised and modernized. The trade terms found in the US UCC were drafted in the 1950s and adopted in the 1960s and have remained the same to the present. The failed 2003 attempt to revise Article 2 (sale of goods) would have eliminated the trade term provisions of the UCC in favour of the more functional *Incoterms*.

International financial law is controlled largely by a number of widely recognized soft laws. Financial rules are constantly created and published by the Financial Stability Board, the Basel Committee on Banking Supervision, and the International Organization of Securities Commissions.<sup>95</sup> Failure to adhere to these rules is likely to have strong negative reputational effects. The hardness of these financial rules can be attributed to the recognition and expertise of the institutions issuing them.<sup>96</sup>

There are numerous international examples of soft law in the area of contracts, such as the PECL and the PICC.<sup>97</sup> However, the next section of this article will focus on the CISG as the hard law of some seventy-nine countries for the international sale of goods transactions.<sup>98</sup> However, as discussed earlier, the CISG can also be seen as a body of customary law rules (trade usage).

## CISG

The CISG is a hard law in disputes between parties from contracting States<sup>99</sup> as well as in disputes where only one of the parties is from a contracting State

<sup>95</sup> For Systemic Risk Review Board see 'Can Soft Law Bodies Be Effective? The Special Case of the European Systemic Risk Review Board' [December 2010] EL Rev 751. The purpose of the Basel Committee on Banking Supervision is stated as providing 'a forum for regular cooperation on banking supervisory matters. Over recent years, it has developed increasingly into a standard-setting body on all aspects of banking supervision.' See 'Fact Sheet—Basel Committee on Banking Supervision' at <<http://www.bis.org/about/factbcbcs.htm>> accessed 14 May 2013. The International Organization of Securities Commissions (IOSCO), established in 1983, is the acknowledged international body that brings together the world's securities regulators and is recognized as the global standard setter for the securities sector. See IOSCO at <<http://www.iosco.org>>.

<sup>96</sup> Spagnolo (n 16).

<sup>97</sup> PECL (n 60); PICC (n 3). The Draft Common Frame of Reference could also be utilized in this manner. See Christian von Bar and Eric Clive (eds), *Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law* (Oxford University Press 2010) [DCFR].

<sup>98</sup> As of 5 March 2013, UNCITRAL reports that 79 States have adopted the CISG. An unofficial table of Contracting States is available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> accessed 2 May 2013.

when conflict-of-law rules direct the court to the CISG signatory state.<sup>100</sup> However, unless restricted by the arbitration agreement or procedural rules, arbitral panels are free to use the CISG as soft law.<sup>101</sup> As an instrument drafted by representatives of all of the world's major legal systems, an arbitral panel can see it as a source of customary law. Therefore, in cases where a mandatory default rule is not available or the tribunal is deciding *amiable compositeurs*, the arbitrator can use the CISG rules to support its decision or to fill in a gap in the disputed contract.

The use of the CISG as soft law has been seen more recently in a number of cases,<sup>102</sup> particularly in China where arbitral panels have increasingly seen the CISG as a reasonable source for commercial contract rules.<sup>103</sup> Like the *lex mercatoria*, the CISG's value is as a persuasive authority and not as a binding law.<sup>104</sup> Parties can also use the CISG as a compromise choice of law where the CISG would not be applicable—that is, as a freely chosen soft law.<sup>105</sup> The next few sections provide a brief review of the CISG and its importance to the harmonization of international sales law, whether as a hard or soft law instrument.

### *Adoption and acceptance*

The CISG has been a rousing success given the number of country adoptions, with the rate of adoptions likely to reach in excess of 100 countries in the near future. Only the New York Convention is more widely accepted in the

<sup>99</sup> CISG (n 3) Article 1(1)(a).

<sup>100</sup> CISG (n 3) Article 1(1)(b).

<sup>101</sup> See Lisa Spagnolo, 'Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole' in I Schwenzer and L Spagnolo (eds), *Towards Uniformity: The 2<sup>nd</sup> Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2011) 199–203.

<sup>102</sup> The CISG (n 3) was referred to as evidencing international commercial practices and usages in the following cases: *Watkins-Johnson Co v Islamic Republic of Iran*, *Iran-US Claims Tribunal* (28 July 1989) at 95, 99 <<http://cisgw3.law.pace.edu/cases/890728i2.html>> accessed 14 April 2013; ICC Award no 7331/1994 <<http://cisgw3.law.pace.edu/cases/947331i1.html>> accessed 14 April 2013; ICC Award no 8502/1996 <<http://cisgw3.law.pace.edu/cases/968502i1.html>> accessed 14 April 2013; ICC Award no 8817/1997 <<http://cisgw3.law.pace.edu/cases/978817i1.html>> accessed 14 April 2013; ICC Award no 8908/1998 <<http://cisgw3.law.pace.edu/cases/988908i1.html>> accessed 14 April 2013 (normative text); ICC Award no 9474/1999 <<http://cisgw3.law.pace.edu/cases/999474i1.html>> accessed 14 April 2013; *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 (Federal Court of Australia) <<http://cisgw3.law.pace.edu/cases/001103a3.html>> accessed 14 April 2013; *Audiencia Provincial de Barcelona, Spain* (4 February 1997) <<http://cisgw3.law.pace.edu/cases/970204s4.html>> accessed 14 April 2013.

<sup>103</sup> See eg China International Economic and Trade Arbitration Commission (CIETAC) (30 June 1999) <<http://cisgw3.law.pace.edu/cases/990630c1.html>> accessed 14 April 2013.

<sup>104</sup> Spagnolo (n 16), citing Ole Lando, 'The Lex Mercatoria and International Commercial Arbitration' (1985) 34 *ICLQ* 747, 754 (*lex mercatoria* generally); Peter J Mazzacano, 'Harmonizing Values, Not Laws: 1. of the CISG and the Benefits of a Neo-Realist Perspective' (2008) *Nordic J Commercial L* 1, 17.

<sup>105</sup> Larry A DiMatteo and others, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge University Press 2005) 13–14.

area of commercial law. However, the rate of acceptance by legal practitioners and judges has been modest. Many legal practitioners use choice-of-law clauses to opt out of the application of the CISG. This is unfortunate since many of these opt-outs are elected not based on the lawyer's knowledge of the CISG but, rather, on the fact that the lawyer does not care to learn the rules of the CISG. A case for professional liability or malpractice can be made for such uninformed opt-outs. Nonetheless, the rate of use of the CISG in commercial arbitration is likely to be much higher than reported because only a small number of arbitral decisions are published or reported. Exceptions have been the large number of reported CISG-related decisions of the CIETAC and the Tribunal of International Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC). The total number of reported arbitral decisions, according to the Pace Law School CISG database, includes about 335 CIETAC decisions (updated only to early 2008) and 236 MKAC decisions (up to 2008).

A review of the hundreds of CIETAC and MKAC decisions as well as the approximately 83 reported ICC decisions is beyond the reach of this article. However, four early CIETAC decisions are reviewed here to show the compatibility of the arbitrator's mission to render fair decisions and the CISG as a neutral, balanced international sales law. In a 1988 decision, the importance of the buyer's duty to inspect was emphasized. If the contract fails to stipulate otherwise, then the panel shall affix a 'reasonable time construed by recourse to the relevant law or practice.'<sup>106</sup> In a subsequent decision, a CIETAC panel demonstrated the ability to understand the nuance of the inspection duty within the framework of Article 38 of the CISG.<sup>107</sup> In a decision that reflects the primary goal of arbitration to reach a fair and equitable decision, the panel allocated damages for defective goods between the seller and buyer based upon a delayed inspection due to the transshipment of the goods. The buyer received shipment at the point of destination and immediately transshipped the goods to another destination, where an inspection revealed defects in the packaging and damage to the goods. The arbitral court noted that the buyer had not notified the seller of the transshipment and, therefore, was required to make the inspection at the first destination. Instead of denying the buyer all claims because of its delayed inspection, the panel held that the seller was liable for the defects and the damages to the goods to the first place of destination and that the buyer was liable for the further damages to the goods incurred due to the transshipment.

The duty of good faith is implied in another CIETAC decision in which the seller did not assist the buyer in obtaining access to inspect the goods.<sup>108</sup>

<sup>106</sup> CIETAC Arbitration Proceeding (*Calculator Assembly Parts* case) (4 August 1988) <<http://cisgw3.law.pace.edu/cases/880804cl.html>> accessed 21 April 2013.

<sup>107</sup> CIETAC Arbitration Proceeding (*Cold-Rolled Steel Plates* case) (16 December 1991) <<http://cisgw3.law.pace.edu/cases/911216cl.html>> accessed 21 April 2013.

<sup>108</sup> CIETAC Arbitration Proceeding (*Cow's Liver Fungus* case) (30 March 1994) <<http://cisgw3.law.pace.edu/cases/940330cl.html>> accessed 21 April 2013.

In this case, the issuing bank on a documentary letter of credit failed to approve the documents. The documents were returned and held in the possession of the seller's bank. Nonetheless, the seller demanded payment. The CIETAC panel held that payment was not due under Article 58(3) of the CISG, which states that 'the buyer is not bound to pay the price until he has had an opportunity to examine the goods.' The buyer was seemingly still willing to go forward with the transaction upon inspecting the goods. The buyer asked that the seller request that the seller's bank allow for an inspection. The seller made no such request. Eventually, the buyer was able to inspect the goods, but in the time between when it initially requested access for inspection and the actual inspection of the goods the market price of the goods had decreased by a substantial amount. The panel noted that:

persons familiar with international trade know that it is not difficult to deal with the non-conformity pointed out by [the issuing bank], when both the issuing bank and Buyer have right to dishonor. However, [Seller] did not carefully take proper measures, and instructed [Buyer] to ask the issuing bank to take a sample for inspection and requested [Buyer] to make the payment at once instead of settling with the bank directly.

The panel held that the buyer was owed a price reduction due to the decrease in the market price of the goods that would have been avoided had the seller cooperated in obtaining an earlier inspection.

Finally, in another decision, a CIETAC panel applied Article 38 of the CISG to 10 shipments of gloves in a precise and well-reasoned award.<sup>109</sup> Again, the issue was the timeliness of the buyer's inspection. In a few early installments (contracts), the gloves were of sufficient quality. However, in 10 subsequent deliveries, the gloves were deemed to be defective due to water content and shortage of quantity. The gloves were sold under Cost, Insurance & Freight (CIF) contracts meaning that the risk of loss (damages) passed to the buyer at the port of shipment. Citing Article 38(1)—'[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'—the CIETAC panel made multiple determinations that some of the inspections were timely, some untimely, and some insufficient. The buyer used a third-party inspection company but did not have some of the installments inspected until one-to-two months had passed from the delivery of the goods. The panel determined that the delay in inspection was unreasonable pursuant to Article 38(1). The buyer also based claims for small shortages and defects to a minor number of shipments without submitting or conducting reasonable inspections. The basis of the claims seemed to be that since the other contract shipments were inspected and all showed defects or shortages the tribunal should imply that all of the shipments included defective goods. The panel rejected the claims without the attendant inspection reports. With respect to two of the contracts, the goods were inspected three and four days after arrival, and the claims for defective goods were sustained.

<sup>109</sup> CIETAC Arbitration Proceeding (*Gloves case*) (28 September 1996) <<http://cisgw3.law.pace.edu/cases/960928c1.html>> accessed 21 April 2013.

Two of the inspection reports, done on time, stated that ‘it is certain that the gloves were contaminated before or during the loading process.’ The panel upheld these claims. Two other inspection reports noted that ‘container sweat caused wet gloves.’ The panel held that this description was insufficient to prove the defects were caused prior to the loading of the goods and, thereby, could not sustain the buyer’s claims.

In sum, these four early CIETAC decisions, relating to the CISG’s duty to inspect, demonstrate the expertise of commercial arbitral panels to properly interpret and implement the CISG. Even though these decisions used the CISG as hard law (law of China), they showed that the CISG can be used as soft law in the rendering of detailed and fair arbitral awards. The next section reviews the important issue of the use of soft law to interpret and apply the CISG.

### *Use of soft law to interpret the CISG*

The problems of homeward trend or national law bias have been persistent in the judicial interpretation of the CISG.<sup>110</sup> This has not been as much of the case in the application of the CISG by arbitral tribunals, especially in the decisions of the major international arbitration courts, such as CIETAC, which is likely due to the fact that arbitral tribunals possess a more international perspective and are not as encumbered by national laws. However, there has been a substantial use of soft law instruments, especially the PICC, by arbitral panels in applying the CISG.<sup>111</sup>

The use of the PICC by arbitral panels as well as by courts was the subject of a recent empirical analysis, which found that the UNILEX database showed 266 cases, including 159 arbitral awards, referencing the PICC.<sup>112</sup> In about one-third of these cases, the PICC was applied ‘because they were expressly chosen by the parties, because they were applied by the arbitral tribunal *ex officio*, when the contract generically referred to the “general principles of law”, the *lex mercatoria*, and the like, in the absence of a valid choice-of-law clause, or in arbitrations *ex aequo et bono*.’ In about one-third of the decisions, the PICC was used to support the application of domestic law rules under the rationale that the domestic law was in conformity with internationally accepted standards. Another batch of cases used the PICC in interpreting domestic law in its application to an international transaction. Finally, in about 15 per cent of the decisions, the PICC was referenced in interpreting an international uniform law, such as the CISG.

<sup>110</sup> See Franco Ferrari, ‘Homeward Trend: What, Why and Why Not?’ in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier 2009) 171–206.

<sup>111</sup> See Bojidara Borisova, ‘Remarks on the Manner in Which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG’ (2005) 9 *Vindobona J Int’l Commercial L & Arb* 153. See also Andrew T Guzman and Timothy L Meyer, ‘International Common Law: The Soft Law of International Tribunals’ (2009) 9 *Chicago J Int’l L* 515.

<sup>112</sup> Eleonora Finazzi Agrò, ‘The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures’ (2011) 16 *Uniform L Rev* 719.

Eleonora Finazzi Agrò's survey shows that the PICC was mostly used in the sale of goods contracts but were also used in cases involving service, distribution, and licensing contract disputes. A decision of the Xiamen Intermediate People's Court of 2006 used the PICC to enforce a choice-of-law clause referring to the CISG and for disputed issues not covered by the CISG. The PICC have been applied *ex officio* by a number of Chinese arbitral tribunals, including to confirm the 'correctness of national law.'<sup>113</sup>

In the scenario where the PICC is used to interpret the CISG, as noted previously, the CISG interpretive methodology does not recognize the use of soft law in its interpretation, other than of trade usages such as *Incoterms 2010*. Autonomous interpretation of the CISG is the accepted means of avoiding national legal bias and ensuring the uniform application of the CISG. The danger of using the PICC is that it may inappropriately support an interpretation that is at odds with the consensus interpretation found in the CISG's case law. The next section examines how the PICC and other hard-soft law instruments can be used to compliment the CISG.

### *CISG as a basis for comprehensive international sales law*

The CISG has proven its worth as a unifying document, both in its direct application as hard law and as a template in the revision of national contract and sales law. It has already exerted its influence in the revisions of the civil and contract codes of Germany, the Peoples' Republic of China, and the Netherlands as well as in the national laws in southeastern Europe and the Baltic countries. As noted previously, the CISG is a natural source of law for international commercial contract arbitration whether used as hard law or soft law. Its greatest shortcoming, however, is its narrowness of scope.<sup>114</sup> Therefore, often when applied to complex contract disputes, it provides answers to only some of the issues in dispute. The arbitral tribunal is thus placed in a position of seeking answers in national laws or in soft law instruments. The ideal supranational sales law would be one with wide scope and acceptance. Nonetheless, the CISG is a valuable instrument upon which a more comprehensive global sales law can be developed. The most likely venue for such a development is the arena of international arbitration.

The CISG should be used as the core instrument, liberally construed to make it as comprehensive as its language allows.<sup>115</sup> A body of mostly soft law should be built around the core to make a more comprehensive sales law. The benefit of using the CISG as the core international sales law instrument in

<sup>113</sup> See eg Henan Luoyang Jianxi District People's Court (China); Shenzhen Intermediate People's Court and Guangdong High People's Court (China); Shaoguan Intermediate People's Court (China).

<sup>114</sup> The CISG's coverage is limited to contract formation, breach and performance, buyer and seller obligations, and remedies.

<sup>115</sup> The general principles (international character and good faith) should be used to expansively extend CISG provisions. See CISG Article 7(1).

international commercial arbitration (even when it does not directly apply) is that it is the type of law that arbitration panels inherently favour. First, its drafters represented all of the world's major legal systems, including civil, common, socialist market, and Islamic. This is why some courts and arbitral panels see it as a source of customary law or trade usage. Second, the CISG rules provide a fair balance between seller and buyer rights as well as providing a coherent remedial scheme. Ultimately, the goal of arbitrators is to render fair and reasonable awards. The CISG provides a source—outside the nuances and idiosyncrasies of national law and the uncertainty of conflict-of-law rules—of neutral, non-national rules.

The key issue for arbitrators is how to overcome the CISG's lack of comprehensive coverage. The best solution would be to wait for a revision of the CISG or the creation of an international contract code. However, such a revision or code is not politically feasible in the short term, and it would be a long time in coming even if such an idea was pursued. In the end, a consensus over developing a single hard-soft law instrument would be the most appealing and feasible solution. However, this is unlikely to occur at the organizational level, but it can be done at the grassroots level of commercial arbitration. This process has long been underway with the universal acceptance of soft law instruments such as the ICC's *Incoterms 2010* and *UCP 600*. It can also be seen in the use of the PICC by some arbitration tribunals. All that is intimated in this article is that a more concerted and purposive effort should be made by arbitrators and scholars to build a consistent body of soft law around the CISG.

Such an endeavour would consist of a number of steps: (i) determining the scope or comprehensiveness needed to deal with most issues that are subject to international commercial contract disputes and (ii) developing an approach to create a uniform hard-soft law instrument that would provide the expanded coverage missing in the CISG. The CISG would continue to act as the core instrument to resolve any disputes within its scope. The key is that arbitral tribunals would have to apply the CISG in a consistent way and, when possible, provide well-reasoned decisions that could be used to build a strong body of precedent.

The expansion of scope beyond the CISG is the most challenging part of the project. The most reliable and efficient path would be the development of a comprehensive document by a body of scholars and practitioners. One means would be to mimic the restatement of law approach found in the USA. The instrument or text would combine both descriptive and prescriptive elements. It would provide the CISG rules and their meaning based upon a review of the jurisprudence. It would note whether there is a consensus in the case law on a particular meaning. If not, it would describe the majority and minority views or the multiple minority views. The restatement approach is often seen as a prescriptive project. It takes a position on the best of the existing rules or offers a new rule interpretation. The choice of a best rule helps simplify chaotic bodies of rules that are often in conflict. The restatement approach is also forward-looking by suggesting what the law 'should' be.

Michael Joachim Bonell's statement on soft law offers encouragement:

[P]rinciples and restatements have been widely used by courts and arbitrations as a basis for forging new legal rules as well as interpreting existing ones. In the common law world, particularly the United States, courts have long relied upon the various Restatements of the Law produced by the American Law Institute as a source of law. Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles of International Commercial Law, because of the neutrality of the rules. This flexible use, which allows dynamic growth of the law, is not possible through a fixed adopted text such as a convention.<sup>116</sup>

In the end, the best outcome would be a 'manual' that could be used by arbitrators and practitioners to increase the certainty and clarity of international contracts and provide greater consistency and predictability in arbitral awards.

Alternatively, the manual could be implicitly constructed by arbitrators by compiling and recognizing a comprehensive body of sales rules distilled from hard and soft law instruments. International tribunals, in conjunction with each other and practitioners, have already showed their ability to develop soft law regimes. Arbitration law has developed its own procedural *lex mercatoria* by recognizing:

clear norms regulating the conduct of arbitration through constant arbitration practices, and with the simultaneous contribution of a variety of national and transnational sources. These sources include arbitration institutions, associations and councils, arbitration specialised departments of law firms, commercial organisations and chambers.<sup>117</sup>

The result is that those professionals involved with arbitration will speak the same language—'a procedural Esperanto comprises of a-national rules and practices, which exhibit considerable convergence on many aspects of the arbitration process.'<sup>118</sup>

### ***International commercial arbitration in East Asia***

The recent growth of major arbitral associations in East Asia is borne by a statistical analysis:

In 2005, the total number of arbitration cases received by major international arbitration institutions in Western nations—the American Arbitration Association (AAA), the International Chamber of Commerce's (ICC) International Court of Arbitration, the London Court of International Arbitration (LCIA), and the international arbitration centers in Stockholm, Vienna, and Vancouver—was 1,407. This figure was surpassed by the combined total number of cases received by prominent international arbitration institutions located in East Asia—the China International Economic and Trade Arbitration Commission

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<sup>116</sup> Michael Joachim Bonell, 'Do We Need a Global Commercial Code?' (2001) 106 Dickinson L Rev 87, 89.

<sup>117</sup> Stavros L Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) Fordham Int'l LJ [forthcoming].

<sup>118</sup> Ibid.

(CIETAC), Japan Commercial Arbitration Association (JCAA), Hong Kong International Arbitration Centre (HKIAC), Kuala Lumpur Regional Center for Arbitration (KLRCA), Singapore International Arbitration Centre (SIAC), and the Korean Commercial Arbitration Board (KCAB) collectively received 1,433 cases.<sup>119</sup>

CIETAC has become one of the busiest arbitration venues for international commercial contract disputes (approximately 700 cases per year).<sup>120</sup> The rise of China as a major arbitration venue is understandable due to its rise as an economic power. However, its seemingly smooth transition to being a major player in international commercial arbitration has been traced to Eastern philosophy and tradition. China's Confucian tradition places a premium on non-formal, conciliatory (*tiao jie*) methods of business dispute resolution.<sup>121</sup> Based upon its history, despite East-West cultural differences, CIETAC has proven its ability to reach fair and reasonable outcomes using Western-style hard and soft commercial laws. In fact, it has proven itself to be a model arbitral forum. Shahla Ali notes that 'East Asian international arbitration proceedings exhibited a greater regard for the amicability, confidentiality, voluntary compliance, and efficiency of international arbitration proceedings than their North American and European counterparts.'<sup>122</sup> Kun Fan has captured the synergy between Eastern cultural norms and arbitration through the term 'glocalisation': '[T]he development of transnational arbitration is a process of "glocalisation", which reflects combined impacts of globalisation of law and local culture and traditions.'<sup>123</sup>

### *Interpretation of multiple language versions of supranational laws*

The CISG is published in multiple official language versions and has been translated into many more. The problem of translation becomes important as different meanings are affixed to translated words and phrases. Thus, a CISG rule could mean something different in different language versions. The divergent meanings are more likely in law since the meaning of the words are further translated by a given legal tradition. In addition, the legal meaning of a word may vary from its common meaning in the same language. The EU offers an example of laws published in multiple language versions—currently there are twenty-three official EU languages. The language diversity of the EU

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<sup>119</sup> Shahla F Ali, 'Approaching the Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28 *Rev Litigation* 735, 741–2.

<sup>120</sup> *Ibid* 759.

<sup>121</sup> See Robert F Utter, 'Dispute Resolution in China' (1987) 62 *Washington L Rev* 383 (describing China's history of using informal dispute resolution mechanisms rather than the courts).

<sup>122</sup> Ali (n 119) 746.

<sup>123</sup> Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Hart Publishing 2013) preface. See also C Leong and Q Zhiqian, 'The Rise of Arbitration in Asia' (2010), <<http://www.globalarbitrationre-view.com/reviews/23/sections/84/chapters/853/the-rise-arbitration-asia>> accessed 29 April 2013.

countries is insured since EU law states that there is no authoritative or preferred language version of EU law.<sup>124</sup>

At first blush, it would seem that translation problems present an insurmountable obstacle for courts and arbitral tribunals to provide uniform interpretations given the inconsistencies produced by translations into so many languages. In the EU, this is somewhat mollified due to the existence of a single high court—the ECJ. Lawrence Solon argues counter-intuitively that the multiple language versions actually results in more consistent interpretations from the ECJ: '[T]he Babel of Europe facilitates communication' to work out any inconsistencies produced by language translations.<sup>125</sup> This working out of inconsistencies, however, comes at a great deal of cost as the European Commission employs some 1,750 full-time translators.<sup>126</sup>

Solon's thesis is that the need for courts or arbitral tribunals to interpret the law in multiple language versions leads to a deeper understanding of the law and how it should be applied. He reasons that the court is forced to move from a purely textual analysis because the literal meaning of the text may vary among the different languages. Therefore, interpreting the literal meaning would lead to a lack of consensus of the meaning of EU law. The solution, for Solon, is that the ECJ is left with the use of legislative intent and purposive methods of interpretation in place of a literal interpretation of the text in a search for the 'essential meaning' of the text.<sup>127</sup> This may be a best practice solution for EU hard law interpretation, but it is less than ideal for instruments such as the CISG, the Draft Common Frame of Reference,<sup>128</sup> the CESL, the PICC,<sup>129</sup> the PECL, *Incoterms 2010*, *UCP 600*, and so forth. One cannot assume that courts and arbitral tribunals, in applying such supranational hard and soft laws, will not attempt to undertake a textual interpretation or utilize other interpretive methodologies discussed elsewhere in this article. The thesis of this article is that numerous interpretive methodologies should be used in the interpretation of supranational laws in order to build a consensus meaning of the text.

Claire Germain notes that the drafters of the CISG specifically chose words that were not specific to any legal system (avoidance, fundamental breach, and so forth) so that the terms could be more easily subject to autonomous interpretations.<sup>130</sup> However due to the nuances of languages, translations among the official languages (Arabic, Chinese, English, French, Russian, and Spanish) and from official to non-official languages have resulted in divergent

<sup>124</sup> See Theodor Schilling, 'Language Rights in the European Union' (2008) 9 *German LJ* 1219, 1232–4.

<sup>125</sup> Lawrence Solon, 'Interpretation of Multilingual Statutes: by the European Court of Justice' (2009) 34 *Brooklyn J Int'l L* 277, 279.

<sup>126</sup> Directorate General for Translation, European Community, 'Translating for a Multilingual Community' (2009) 5 <<http://ec.europa.eu/dgs/translation/bookshelf/brochureen.pdf>> accessed 28 March 2013.

<sup>127</sup> Solon (n 125) 301.

<sup>128</sup> DCFR (n 97).

<sup>129</sup> For an excellent comparison of the European DCFR and the PICC, see Vogenauer (n 36).

<sup>130</sup> Claire Germain, 'Reducing Legal Babelism: CISG Translation Issues' in DiMatteo (n 16) ch 5.

meanings. Germain notes, correctly, that translation problems are more severe in the area of private international law (meaning of national laws). In the case of the CISG, at least the translations are of the same text. The fact that foreign case law and translations (mostly into English) are readily available online has diminished the problems of differing interpretations due to translation problems. Furthermore, scholarly commentary on the CISG is available in many national languages.

### *Fair and equitable decision as unifying principle*

The primary principle that guides most commercial arbitrators is the need to render fair and just decisions. The strong appeal of soft law to arbitral panels is due to the fact that the practices, customs, and trade usage of businesses and industries provide evidence of what is considered to be fair and equitable to a reasonable commercial party. Such outcomes are guided by an amplification of what is considered to be good faith business dealings, based upon principles of commercial reasonableness. This quintessential model of transactional business dealings is captured by the term *guanxi*, which 'suggests relationships that include mutual obligation, reciprocity, goodwill and personal affection.'<sup>131</sup> Arbitral panels, although obligated to adhere to the principle of freedom of contract represented by an arbitration agreement, are less hemmed in than courts in balancing freedom of contract with fairness principles.

The model of the individual transaction, not only based upon freedom of contract but also informed by merchant usage and customs that are anchored in fairness, is a microcosm for what arbitrators attempt to do in constructing a 'hypothetical contract' in order to resolve the dispute before them. The hypothetical bargain is the bargain the parties would have reached if they knew of the missing term or ambiguity in their contract at the time of contract formation.<sup>132</sup> In constructing this hypothetical intent, arbitrators use the reasonable commercial person as a prism to guide them in filling in the gap or clarifying a term in the contract. Soft law is recognized as a normative device used in rendering fair and equitable arbitral awards. The arbitrator's recognition of *lex mercatoria*-like soft law is primarily a descriptive, inductive undertaking. However, by recognizing *lex mercatoria* principles, arbitrators also help to create and mould their development.

JW Carter notes that the interpreter (arbitrator) is not entitled to use creative interpretation of clear contract language merely to avoid an unjust result.<sup>133</sup> Party intent and the application of this intent should always rule in the interpretation of contracts. However, the language of the contract and the evidence of the parties' intent are not always so clear. Or, alternatively, a literal

<sup>131</sup> Patricia Pattison and Daniel Herron, 'The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China' (2003) 40 Am Bus LJ 459, 484.

<sup>132</sup> See David Charny, 'Hypothetical Bargains: The Normative Structure of Contract Interpretation' (1991) 89 Michigan L Rev 1815.

<sup>133</sup> JW Carter, *The Construction of Commercial Contracts* (Hart Publishing 2013) 538–62.

interpretation of the contract leads to a ludicrous result. In such cases, the arbitrator must do her best to uncover such intent but, ultimately, will look to contextual evidence to frame a reasonably fair decision. In essence, the arbitrator presumes that despite the contract language the parties did not intend such a ludicrous outcome. Carter lists a number of preferences that are used to obtain a commercially reasonable construction of a contract.

Carter's list of preferences are akin to canons of statutory interpretation, general maxims that help guide the interpreter to the best results or interpretation of an ambiguity or gap in a statute or contract. These preferences can be applied to flesh out the goal of most commercial arbitrators to reach a fair and reasonable result. Carter's preferences include: (i) preference for reasonable results or to the least unreasonable result; (ii) presumption in favour of intention to contract; (iii) preference to encourage contract performance; (iv) party should not benefit from its own wrongs; (v) preference to give effect to the purpose or aim of the contract; and (vi) preference of upholding agreements as contracts (how parties applied agreement, implication of terms). These preferences help explain the symbiotic relationship between international commercial arbitration and soft law.

These preferences or 'rules of thumb' in the interpretation of commercial contracts act as interpretive heuristics or guides to reach a reasonable result. All things being equal, a court or arbitral panel would prefer an interpretation that results in a fair, reasonable, commonsensical outcome. In the end, these preferences can be distilled down to one guiding principle: when 'the words or the context of a contract lends to more than single reasonable interpretations, then the interpreters prefer the interpretation that leads to 'a practical and reasonable application of the contract.'<sup>134</sup> Instead of focusing on a purely legal interpretation, commercial arbitrators often seek a 'balanced and business interpretation.'<sup>135</sup> Carter argues that such a vague objective is actually a part of a coherent whole of different 'rules of law, presumptions, preferences, guidelines, and objectives' to avoid irrational interpretations.<sup>136</sup> It is in this space provided by the preference for a balanced, business interpretation (and not a strictly legal one) that soft law offers the arbitrator the tools to reach that end.

## Conclusion

This article provides a survey of the special relationship between international commercial arbitration and soft law instruments. It briefly traces the historical roots of the *lex mercatoria* to its present enunciations in the CISG and the PICC. It discusses the characteristic of the hardness and softness of laws in an international commercial law context. The CISG is studied not only as a hard law but also as an example of soft law. The affinity between soft law and

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<sup>134</sup> Ibid 532.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

international commercial arbitration is explored as well as the reasons why soft laws possess normative power. It also examines the importance of the use of multiple interpretive methodologies, including the use of soft law, by arbitrators in order to reach fair and reasonable decisions. Finally, it recognizes fair and equitable decision making as the unifying principle that binds international commercial arbitration and soft law.