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COMMENTARY ON THE UNCITRAL ARBITRATION RULES

Prepared for ICCA
by
Pieter Sanders
Special Consultant to the
Secretariat of UNCITRAL

In consultation with the following members
of ICCA who participated in the Ninth Session
of UNCITRAL at which the Rules were adopted:

6 } Martin Domke (ICC), Howard M. Holtzmann (USA),
Sergei Lebedev (USSR), Werner Melis (Austria),
Donald B. Straus (ICCA and I-ACAC) and
Heinz Strohbach (G.D.R.)

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Holtzmann
in Brussels

Comment on Applicable Law Provision
of UNCITRAL Arbitral Rules

Article 33(4) provides that "In all cases the arbitral tribunal shall decide in accordance with the contract and take into account usages of the trade applicable to the transaction". This Rule must be read in conjunction with Article 1(2) which provides that "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail". Taken together, these two articles establish that arbitrators must apply the contract and trade usages unless they are restricted from doing so by provisions of law from which parties "cannot derogate" by agreement (e.g., mandatory rules of law). This principle governs "In all cases", including those in which the arbitral tribunal has been authorized to decide as amiabile compositeur or exaequo et bono.

It will be noted in Article 33(4) that the Rule provides that the arbitral tribunal shall decide "In accordance with the contract" and shall "take into account" applicable trade usages. Different operative phrases were chosen with respect to the contract and trade usages in recognition of certain distinctions

between the nature of contracts and trade usages. For example, evidentiary proof of the contract is often uncontested, while proof of trade usage may be more complex, particularly in international commerce where usages may vary in different parts of the world. Also, the legal effect of trade usages may vary under different systems of law. The use of the two different operative phrases is not intended to reduce the significance of trade usages in cases governed by a national law which gives contract and usage equal importance. Rather, the two different phrases were used because many delegates considered this to be the better approach in rules designed for worldwide use under many different legal systems in which principles relating to trade usages may vary.

Comment on Applicable Law Provision
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