HOLTZMANN, WISE & SHEPARD
COUNSELLORS AT LAW
30 BROAD STREET
NEW YORK, N. Y. 10004

JACOB L. HOLTZMANN (1909-1963)
WOOLSEY A. SHEPARD (1903-1960)

HOWARD M. HOLTZMANN
ELIOT BAILEN
WILLIAM B. SHEALY
JAMES W. DEER
BENJAMIN C. O'SULLIVAN
GEORGE M. DUFF, JR.
DAVID S. LINDAU
WILLIAM H. BRAYER, JR.
DANIEL V. GROSSMAN
ROBERT H. WERBEL
DAVID HAWKINS
NORMAN SOLOVAY
NEIL W. FLANZRAICH
S. H. HONIG
RICHARD D. JUDKINS

FRANK P. BROZ
COUNSEL

CABLE ADDRESS: LAWISE
INT'L TELEX: 422664

TELEPHONE:
(212) 747-5500
WRITER'S DIRECT
TELEPHONE NUMBER

(212) 747-5506

November 23, 1976

Professor Pieter Sanders
Burg. Knappertlaan, 134
Schiedam, The Netherlands

Dear Pieter:

Here are my remaining thoughts with respect to your excellent Commentary on the UNCITRAL Rules. Although I have made suggestions on a number of points, I hope that you will realize that I fully agree with a great many more. On the whole, I feel that the article will be extremely helpful.

My previous memorandum covered comments through Section 7.1. Here are the rest:

Footnote 2 When I wrote earlier I said that I would send you the names of the honorary members of the Consultative Group. As shown in Don's paper in Vienna, they are -- Jean Robert, Cedric Barclay, Howard M. Holtzmann, Jerzy Jakubowski and Sergei Lebedev.

7.3 For the reasons explained in my comment to 7.1, I would suggest not using the word "normal", but rather using a phrase such as "as will happen in most cases". This would stress a quantative likelihood rather than expressing a qualitative norm.

7.4 See comment to 7.3 re use of word "normal".

8.1 I have always assumed that withdrawal after challenge constitutes "resignation" for purposes of Art. 12. If that is so, resignation will not be "a great exception". Also, I wonder if it is wise to raise all the possible problems which might flow from including the sentence "An arbitrator who resigns might be held liable for damages ...." -- particularly in the context of the example that an event as serious as "a heart attack" is needed to justify resignation. I suggest deletion of the sentence, which, anyway, deals with national law, not a provision of the Rules.

9.1 I question the advisability of suggesting less time

for the claimant than for the defendant. There may be cases where that is good -- but in other situations -- particularly where the claimant has postponed preparing documents while he was attempting to reach a settlement, it may be unfair. The idea of allowing the claimant and the defendant different amounts of time to prepare pleadings was never discussed at ICCA and UNCITRAL and I therefore wonder if it belongs in the Commentary.

9.2 The comments on "first steps" are written in the line of certain types of arbitration procedures followed in Europe and some aspects are not applicable to arbitration as practiced elsewhere. Therefore, these suggestions, while helpful in some contexts, may be confusing in others. None of these points were discussed at UNCITRAL. I question if they are appropriate in a broad commentary on rules designed for universal application.

9.3 (last paragraph) I would not have thought that choice of language is merely a matter of procedure which is subject to Art. 31, par. 2. This, of course, underscores the difficulty with Art. 31, par. 2 -- because different readers may differently interpret whether a particular matter is procedural. My own view is that "procedural" was intended to refer to house-keeping details, such as the hour at which a hearing would convene, and not to major matters such as language, locale, etc.

10.1 See commentary to 9.3. In my view, a majority decision is required in order for the arbitrators to determine the place of arbitration. Your commentary seems to suggest that if Arbitrator A wants London, Arbitrator B wants Paris and the Presiding Arbitrator wants New York, he can "decide" on New York, subject only to being overruled if both of the others combine to vote against him. The debate at UNCITRAL made clear the consensus that on major decisions the Chairman cannot decide on his own -- he is not an umpire -- but must convince at least one other arbitrator to join him. That seems to me to be the most direct and workable relationship.

10.2 I have difficulty fully understanding the 3rd and 4th paragraphs. For example, the sentence which begins "failing such agreement" seems not to recognize that when parties agree to the UNCITRAL Rules they thereby do agree to the composition of the tribunal and the arbitral procedures which are set forth in the Rules. Also, I do not quite know what is meant by "gaps", as used here.

12.1 (4th paragraph, last sentence). It should be made clear that this is not in the Rules but represents an opinion of what national law would provide. (I happen to agree with you as to all national laws with which I am familiar; but I would personally hesitate to make such a flat statement.)

12.1 (6th paragraph) Inasmuch as we both favor admission of pleas to jurisdiction after the submission of the statement of defense when the circumstances justify -- would it not be better to indicate that the sentence which appeared in the earlier draft was left out of the final draft because during debate at UNCITRAL it was felt that the concept followed naturally from Art. 15 and that a precise provision to accomplish this obvious result was unnecessary. That is my recollection of the debate in New York.

13.3 Indicate here that the reference is to Art. 25, par. 3 -- otherwise readers will assume that the reference is to Art. 15 which is the article last mentioned in the text.

13.3 (last paragraph) I again question if this is a matter of procedure which the Presiding Arbitrator may decide on his own.

13.5 (3rd paragraph) Whether cross-examination is allowed or not will, I think, depend more on the practice and law at the locale of arbitration than upon whether "both parties and their lawyers are familiar with the system of cross-examination". A party who agrees to hold the arbitration at a place where cross-examination is usual, or is legally required, waives any right to argue that he or his lawyer is not familiar with cross-examination and that the system is unequal and barred by Art. 15. If a party is unfamiliar with cross-examination, there is always the possibility of retaining local counsel who is familar with cross-examination -- just as parties from common law countries who arbitrate in civil law jurisdiction often hire local counsel who are familiar with the typical methods of producing evidence at the place where the arbitration is held in Europe. The idea which you express in this paragraph was, I believe, never discussed at UNCITRAL. I strongly urge you to delete all but the first two sentences of this paragraph. Otherwise, your comment could provide a basis for Europeans to attempt to set aside awards made in common law countries on grounds which were never discussed and never intended when Art. 15 was written.

13.6 Whether arbitrators "can always order" witnesses to testify is a matter of national law. It is not a power given to arbitrators under the Rules.

15.4 The 2nd paragraph relates to the "freedom of parties to bring expert witnesses". This is a helpful system, but it should be made clear that it is not a provision of the

Rules. It also would be helpful to indicate that under some systems of law, a witness called by a party is not considered to be an "expert witness". (I seem to recall that under Zurich law testimony of experts is entitled to certain extra weight and that a witness is not considered an expert if called by a party -- only if called by an arbitrator.)

16.5 The last sentence of the 1st paragraph goes beyond what is stated in the Rules. The sentence might cause difficulty in the United States where the general rule is that arbitrators cannot base an award solely on default but must make sufficient inquiry and take sufficient evidence to satisfy themselves that there is some basis for the award.

17.2 Do you really feel it is advisable to recommend a dissenting award? I am not sure, because dissents often provide a basis for further disagreement. Inasmuch as the Rules are silent on this point, would it not be better to leave the Commentary also silent on what could be a highly controversial concept for some parts of the world?

18.1 The first paragraph should make clear that in many -- probably most -- parts of the world the procedural law governing the arbitration is the locale of the arbitration and this cannot be varied by the parties choosing a different law.

18.2 I admire very much your helpful clarification of the concept of amiable compositeur. However, the reference "if not by mandatory provision (ius cogens)" is not clear in English. Does it mean that amiables compositeurs are not bound by mandatory provisions, or does it mean that they should consider whether or not to honor mandatory provisions?

19.2 The second paragraph raises a highly controversial point. While we would all agree that arbitrators should welcome settlement, there is much difference in opinion concerning whether or not an arbitrator should initiate settlement discussions or participate in them -- and, if so, how? I wonder, therefore, if it is appropriate to include this in a commentary on Rules which have universal application -- particularly when there was no discussion on this subject at UNCITRAL.

19.3 (2nd paragraph). This point is not covered by the Rules. The statement that settlement normally involves dividing the arbitrator's cost is not necessarily true, nor do we have sufficient objective data to indicate that it is "normal". I personally know of several situations in which an important element of the settlement negotiation was resolving the question of which

party was to bear what costs.

23.2 The statement that the Presiding Arbitrator may receive a larger fee than the other arbitrators was not discussed at UNCITRAL. It really does not relate to the Rules. Your comment is true as to some systems of arbitration, but is inapplicable as to others. I therefore wonder whether the first sentence of 23.2 is appropriate in a general Commentary.

23.3 (2nd paragraph, 3rd line) The word "appropriation" should be "appropriateness".

23.3 (3rd paragraph) I would suggest deletion of modification of the sentence "The AA may even, in my opinion, request the arbitrators to submit to it the whole file of the case in order to enable the AA to make sensible comments". This, I think raises needless worries and suggests unnecessary procedures. The Rules here only contemplate the same kind of review of fees as the ICC regularly does in applying Article 20-3 of its Rules, and I do not understand that ICC requests "the whole file" or that the procedure is considered "cumbersome" or requires "a considerable loss of time" (see first sentence of next paragraph, which might also be somewhat softened).

23.4 In the third paragraph you say that "as a rule" the successful party will be entitled to recover his lawyer's fees from the loser. The Rules provide quite the opposite -- as you correctly say in the fourth paragraph when you note that "there is no presumption" that the loser pays the winner's legal costs.

23.4 (5th paragraph) You imply that apportionment of costs is only appropriate when "the claim is only partially awarded". There is no such provision in the Rules and one can envision other situations in which apportionment is just and proper.

With all good wishes,

Cordially,

Howard M. Holtzmann

HMH;jj