DEVELOPMENTS

12th Annual Willem C. Vis International Commercial Arbitration Moot – Overview and Personal Reflection by Law Students of Johann Wolfgang Goethe University

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A. Introduction

The following essay has been written by team members of Johann Wolfgang Goethe University (Frankfurt/ Main, Germany) who participated in the 12th Vis Moot. Its purpose is to raise interest in the moot by means of combining a general descriptive overview with personal experiences.

From 18 to 24 March 2005 the University of Vienna hosted the 12th Annual Willem C. Vis International Commercial Arbitration Moot. During this time the brief sentence "The moot changed my life!" was probably the expression most often heard in the *Dachgeschoss* (top floor) of the Juridicum in Vienna. It was uttered by numerous former participants who are still affiliated with the Vis Moot as organizers, arbitrators or administrative supporters.

B. The Vis Moot – An Overview

What is the Vis Moot? Given its still growing popularity and importance, several essays on the Vis Moot have been published recently, including[1] an article from one of the Vis Moot's founders that introduces the moot in a plain and informative manner.[2] Therefore, there is no need to provide such a basic introduction here.

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[1] for example: Annemarie Großhans, *Tenth Annual Willem C. Vis International Commercial Arbitration Moot 2002/2003*, 2003/04 ZEITSCHRIFT FÜR SCHIEDSVERFAHREN (SchiedsVZ) 181 (2003)

[2] Eric E. Bergsten, *Teaching about International Commercial Law and Arbitration: the Eighth Annual Willem C. Vis International Commercial Arbitration Moot*, JOURNAL OF INTERNATIONAL ARBITRATION No. 4, p. 481 (18 August 2001) (this essay can be found online at: http://www.cisg.law.pace.edu/cisg/biblio/bergsten1.html).

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Hence, only a rather brief overview of the moot's history and structure will be given in the report at hand, while its focus will be on outlining the 12th moot's legal dispute and submitting personal experiences of the team from Frankfurt's Johann Wolfgang Goethe University. This perspective might help to explain why the moot has such a strong impact on former participants, why they still put so much time and effort into promoting this event and sometimes even say that it "changed their life."

I. Historical Background

The moot was first proposed at a Congress of the United Nations Commission on International Trade Law (UNCITRAL) in 1992. The idea to establish a student contest in international commercial law and arbitration was born out of the impression that these two fields of law were misrepresented in legal education. Two former UNCITRAL Secretaries, Prof. Willem Vis and Prof. Eric Bergsten, who were both teachers at the Institute of International Commercial Law at Pace Law School in White Plains, N.Y., took up this idea and decided that the moot would comprise both written memoranda and oral arguments. Since the death of Prof. Vis during the first moot in 1994, the competition is named in his honor. In the first moot, eleven law schools from nine countries came to Vienna. In the 12th moot, over 140 law schools from more than 30 different countries participated. The Vis Arbitral Moot is sponsored by UNCITRAL and a number of highly regarded arbitration associations.[3]

II. Course of Events

The moot's procedure is as follows. Each year in early October, a document called the "Problem" can be downloaded from the Vis Moot's homepage.[4] This Problem - approximately 50 pages long and consisting of contracts, letters or other documents - contains the relevant facts of a sales dispute between two parties from different countries. The dispute always encircles both substantive law issues and arbitral issues. While the Convention on Contracts for the International Sale of Goods (CISG) is the dispute's governing substantive law, the applicable laws with respect to the arbitral issues are the UNCITRAL Model Law on International Commercial

[3] American Arbitration Association, the International Arbitral Centre of the Austrian Federal Economic Chamber, the Chartered Institute of Arbitrators, Chicago International Dispute Resolution Association, Court of International Commercial Arbitration, Romania, German Institution of Arbitration (DIS), the International Chamber of Commerce, the London Court of International Arbitration, the Moot Alumni Association, the Singapore International Arbitration Centre, Swiss Arbitration Association (ASA), Swiss Chambers' Arbitration and the University of Vienna Faculty of Law.

[4] *See* http://www.cisg.law.pace.edu/vis.html.

Arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and further institutional or *ad hoc* arbitration rules which change from year to year.

After having identified the relevant legal issues, the team's assignment is to act as counsel for the claimant. Within two months, a memorandum in support of the claimant's position has to be prepared. It must not be longer than 35 pages and must contain convincing reasoning in support of the claimant's request for relief. After this phase, the participants have to switch sides. Each team is sent a memorandum for the claimant from another participating university that needs to be answered from respondent's point of view. With regard to the moot's international character, the organizers attempt to pair law schools from different legal backgrounds.

Finally, the moot culminates in the oral arguments. In late March or early April, all teams meet in Vienna (or Hong Kong)[5] for one week in order to plead their case against at least four other universities before an arbitral tribunal consisting of law professors or practitioners in the field of international arbitration. While each team may only send two of its members to each pleading, it must be mentioned that the tribunal has great discretion in the way it conducts the oral hearings. It does not only adjust time limits for presentation of arguments, it also decides whether there will be rebuttal or not. The tribunal can also be very active during a counsel's presentation or it may be passive, letting the parties present their position without interrupting them. Consequently, over the course of the six weeks the students have to prepare for the oral arguments, they will have to explore and prepare for a range of different advocacy styles and situations.

III. The 12th Moot's Legal Dispute

In the 12th Moot, the legal dispute arose out of two different sales contracts that had been concluded between the fictive parties Mediterraneo Confectionary Associates, Inc. as buyer (claimant) and Equatoriana Commodity Exporters, S.A. as seller (respondent). As counsel for claimant, the teams had to argue that Mediterraneo had a claim for damages because it was forced to conduct a cover purchase as a result of the respondent's failure to deliver the agreed upon amount of cocoa . However, respondent asserted that it was excused from delivery because there had been an impediment beyond its control: a storm had caused serious damage to the cocoa crop in respondent's home country Equatoriana and for this

[5] The so-called Vis Moot East was established in Hong Kong two years ago. *See* http://www.cityu.edu.hk/slw/cisgmoot.

reason, an export ban had been ordered by a governmental organization that hindered delivery. Since other cocoa exporting countries were not affected by the storm or the export ban, one of the key questions was whether the parties had agreed on cocoa coming only from Equatoriana or cocoa coming from any source.

With respect to procedural issues, it must be noted that both the just mentioned cocoa contract and a sugar contract (which allegedly gave respondent a "counter-claim"), contained arbitration clauses. However, the cocoa contract referred to the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva (Geneva Rules) while the sugar contract referred to the fictive arbitration rules of the Oceania Commodity Association.

The first disputed question was whether the arbitral tribunal which had been formed to rule upon the cocoa dispute had jurisdiction to hear the dispute arising out of the sugar contract as well. This question became especially interesting since the cocoa contract had been formed before the Geneva Rules had been replaced by the Swiss Rules of International Arbitration (Swiss Rules) on 1 January 2004. The arbitration procedure, however, had been commenced after the "change" of the rules. The new Swiss Rules – in contrast to the Geneva Rules – contain a provision that renders a tribunal jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is the object of another arbitration agreement (Art. 21 (5) of the Swiss Rules). That seems to be the case here. However, the originally agreed upon Geneva Rules did not contain a similar provision. Hence, claimant argued that since it had agreed to the Geneva Rules, Art. 21 (5) of the Swiss Rules could not be applied to the dispute at hand.

A second question arose out of respondent's allegation that its sugar "counter-claim" would exceed claimant's alleged cocoa claim. Since Art 21 (5) only talks about (limited) set-off defences and not about (unlimited) counter-claims, it was disputed between the parties whether Art. 21 (5) - if held applicable - might give the tribunal jurisdiction to grant respondent its full recovery requested or whether the recovery requested would be limited to any amount that claimant might obtain out of its cocoa claim.

C. Personal Reflections

I. Tasks Beforehand

Before the 12th moot started on 1 October 2004 with the distribution of the Problem, we had to take care of several administrative tasks, for example planning the journey to Vienna and collecting English-language literature on the CISG and arbitration law. Probably the most important issue during that time had to do with

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financing our project. The biggest expenses were the moot's participation fee (€ 500), costs for travel to and lodging in Vienna (one week) plus the costs for the production of the memoranda, which had to be submitted with a number of duplicates. Furthermore, we were solicited a number of law offices for help preparing for the oral arguments or for advice us on writing the memoranda.[6]

II. Writing the Memoranda

In our opinion, identifying the legal problems and finding solutions in favor of each client was an easy assignment compared to the task of putting these solutions down on paper. Writing the memoranda did not only take a lot of time because of computer problems (placing text parts written on different laptops into one unique format), but also because we were not used to two things: (1) writing in English and (2) writing a memoranda. While it didn't come as a surprise to us that language issues would slow us down, we didn't expect how hard it would be to not fall back on the style of writing that we had been taught as a German law student: the so-called *Gutachtenstil* (style of writing an expert opinion). While the *Gutachtenstil*'s structure is to analyze an issue followed by the outcome of that analysis, it is common practice that pleadings are written in the opposite way. The outcome stands at the beginning and is followed by the reasoning that establishes why that outcome is correct.

An additional difficulty we encountered in writing the memoranda can be summarized in the following punch line, "Not everything that sounds convincing in your head sounds convincing when you write it down." And sometimes the persuasiveness of an argument even depends on how you write it down, meaning that it might prove useful to try a lot of different approaches.

However, with time and first and second drafts of our memoranda passing by, we felt that we were getting better. Not only did we develop a kind of sense for which argument might work that helped us to get along faster, the improvement also worked as a further motivational tool giving us energy to not stop working on the memoranda after usual working hours were over. The writing was hard work, but it was rewarding and a lot of fun as well.

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[6] In this regard, we must acknowledge with deep thanks: the association *Alumni und Freunde des Fachbereichs Rechtswissenschaften der Johann Wolfgang Goethe-Universität* (Alumni and Friends of Johann Wolfgang Goethe University's Faculty of Law), the International Chamber of Commerce in Paris as well as the law offices of CMS Hasche Sigle, Ey Law Luther Menold, Freshfields Bruckhaus Deringer, Hengeler Mueller, Linklaters Oppenhoff & Rädler, Lovells, Salger Rechtsanwälte, Schiedermair Rechtsanwälte, Shearman & Sterling and Willkie Farr & Gallagher.

III. The oral arguments

After finishing the memorandum for respondent shortly before the deadline on 27 January 2005, we started preparing for the oral arguments, the moot's climax. During our practice pleadings (against law schools from Germany, France, Australia and America), we made a couple of surprising experiences as how to conduct a good (moot court) pleading. Listed up in summarized "Dos and Don'ts," these are some of the guidelines we developed during our preparation:

- The human capacity to reason and understand while listening is very limited. Therefore, it is very important to "step on the brakes." Short sentences, speaking slowly, focusing on the main issues and making breaks from time to time to let the arguments sink in are key elements in conducting a good argument.

- A pleading that sounds as if it has been learned by heart is almost as bad as a pleading that is read.

- The impact of body language, gestures and facial expressions cannot be overestimated. Tensed postures, an anxious or grim look can do a lot of harm to an otherwise good pleading.

- Team work (for example passing over sheets from counsel to co-counsel) is highly acknowledged.

- If you are asked a question by the tribunal, answer it. Don't try to run away from it. However, if the tribunal caught you on a weak point, think of whether it might not be better to concede. There is the danger that the tribunal might nail you down on an issue where you can't win anything. A good bridge formulation that leads you back to safe waters is likely to help you in such a case.

- Be flexible. It is highly welcomed if you do not stick to your prepared pleading, but are able to pick up points raised by your opponent or the tribunal. Whenever the tribunal gives a hint (makes a statement or asks your opponent a question) that indicates that it has doubts as to your opponent's arguments, try to use that in your argument. For example, you could start with, "As the tribunal already indicated..." Such a formulation is likely to prevent the tribunal from returning to that issue.

- At the end of the day, successful pleading in a moot is not necessarily about having better arguments. It's about being persuasive. Put all your personality into your presentation, be passionate. Not loud, not too aggressive, but passionate. Even if you have to present arguments that you don't believe in yourself, don't let anyone know that. Be yourself, but be an actor as well.

D. Endnote – "Don't Forget to Mingle!"

Next to the language, juridical and soft skills that can be improved via a participation in the Vis moot, participation also offers an attractive social program that goes beyond pure educational matters. Of course, the moot is a platform for establishing contacts with law firms and other institutions that can be very useful with regard to planning a career in the field of international commercial law and arbitration. But it is not limited to these rather professional matters. The moot also serves as a platform for building friendships with people from all over the world. It is evident that taking part in the moot is not the right thing to do for the kind of "party student" who is not willing to give more than what's necessary in order to succeed in his/her studies. But the reverse conclusion that mooties don't party would be absolutely wrong. Some participants even created the motto, "Work hard, party hard!" thereby indicating that the moot is much more than "merely" a highly regarded educational program.

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