The Complete (but unofficial) Guide to the Willem C. Vis International Commercial Arbitration Moot

Risse

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Foreword

This book has been prepared for the use of student participants in the Willem C. Vis International Commercial Arbitration Moot. I will assume that the reader of this foreword is, therefore, one of those students or is an advisor to a team of students.

The book, sponsored by Baker & McKenzie, on preparing for participation in the Vis Moot, is a welcome addition to the literature on mooting. There are a number of books on the general subject, but only a handful that are particularly useful in regard to the Vis Moot. The Vis Moot is different from almost all other moots in a number of ways, which make the insights of former participants particularly useful.

A major reason why most of the existing literature on mooting is not very helpful in preparing for the Vis Moot is that the Vis Moot is international. To be sure, there are other international moots, the Jessup in public international law being the most prominent. The Vis Moot shares a number of characteristics with them, but there are a number of features that make it unique.

The Vis Moot attempts to replicate an international commercial arbitration. It was the first international moot on a private law subject. In the case of the Vis Moot, the underlying dispute is always in regard to an international sale of goods subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Until about twenty years ago, an international sale of goods or other private law dispute (with the exception of maritime disputes) were almost automatically litigated in national courts. It would have been unthinkable to have an international moot in which the forum for settlement of the dispute was a national court. It required the development of international commercial arbitration as the preferred forum for settling commercial disputes before an international moot such as the Vis Moot was feasible, and that is a surprisingly recent development.

To be sure, it is not possible to replicate an arbitration completely. To start with, there is no client interview in which the lawyer first learns of the dispute when a client tells him its side of the story. That introduces us to one of the two fundamental differences between the study of law and the practice of law. The first is that the lawyer, and the students fulfilling the role of lawyers in the Moot, represents a client. It is the lawyer's task to present the client's side of the story

before a court or an arbitral tribunal. The student in the Moot is not attempting to learn the law but to apply the law. Naturally, one must learn the law before attempting to apply it. In the Vis Moot, the students learn about the law of international arbitration as well as deepen their knowledge about the law of contracts as found in a contract for the sale of goods. Secondly, the facts are seldom neatly packaged presenting an illustration of an important point of law or an interesting question of interpretation, as they are in the classroom. It is imperative that the students and lawyers thoroughly understand the facts as they become evident. However, the facts in the Vis Moot, as in real disputes, are often convoluted and not particularly clear. The student/lawyer must make as rational a story in favor of the client as possible from the facts given. Furthermore, there will always be documents, presented as exhibits in the Moot, that are the location of the details that strengthen or weaken the client's case. It is tempting to overlook them, but one does so at one's peril. The use of one word rather than another in a letter may be the key to winning or losing the case.

Of course, the other party to the dispute also has a story to tell that will differ in important details from that of the first party. In order to fully understand what happened and the legal consequences that flow from there and to make the most effective argument possible for the client, it is necessary to understand both sides of the story. In the Vis Moot that is accomplished by having every team represent both the claimant and the respondent. But not at the same time. Not even an experienced lawyer would be able to formulate the best arguments for both sides if s/he were to submit those arguments at the same time. Instead, the teams submit a memorandum for claimant in early December at which time they receive the memorandum for claimant of one of the other teams. About six weeks later, the teams submit a memorandum for respondent in opposition to the memorandum for claimant they have received. During those six weeks, the students often find that the arguments they were so proud of representing the claimant are not only wrong, but inconceivably wrong. Those students are well on their way to understand the entire business situation and to argue the case for either of the two parties to the dispute.

Those are not the only challenges for the students. The Vis Moot takes place only in English. That means that the majority of the teams must write their memoranda and must argue orally in a language other than their mother tongue. I have always said that this gives the non-Anglophone teams an advantage educationally over the Anglophone teams, at least for those students who think that they might later wish to be engaged in any kind of international

dealings whether in a law office, corporation or governmental office. At present, English has become the primary language of international affairs, both commercial and political. The Vis Moot gives the students the opportunity to use English in a professional context without having to worry about the serious consequences to themselves, their employers and the client from making mistakes. Nevertheless, it makes the Vis Moot more of a challenge than a national moot court for many of the participating students.

A challenge for all of the students is to argue in both written and oral form to arbitrators who have a different legal formation from their own. This is particularly true since the Vis Moot always involves a contract of sale and the law of contracts is the heart of the private law in the civil law and the common law legal systems, as well as those that do not fall neatly into either category. The difference in doctrinal approach in the different legal systems is the basis for many misunderstandings between lawyers educated in those different systems.

Aside from the many other difficulties faced by many teams in finding financing and help in understanding what was expected of them, many teams have internal organizational problems. The study of law tends to be an activity one does alone. Unlike some other disciplines (engineering and medicine come to mind), law students rarely work in teams. Law students usually study alone. Even when they study with other law students, it is not a truly joint enterprise. Examinations are taken by oneself. Teamwork is an aptitude that seldom enters into the study of law. However, any sophisticated legal practice is a matter of teamwork. Unfortunately, over the years, there have been several teams that have withdrawn because team members could not work together.

The writers of the chapters in this book have experienced these and other difficulties in the Vis Moot as student participants. Many of them have coached teams in the Moot. A number are now in the practice of law, many doing just the kind of work that the Vis Moot emulates. There is no better group that can advise you on what to look for, how to overcome some of the difficulties, and in general, how to make the most of the opportunities that the Vis Moot offers. Take advantage of their experience by reading the entire book carefully.

Prof. Dr. Eric E. Bergsten

Director of the Vis Moot 1993–2013

Overview

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