

AN INVITATION TO VIENNA

EXPLORING THE VIS MOOT

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WHAT IS THE VIS MOOT?

Where do all the arbitration-savvy lawyers flock to every spring? Vienna, of course. Every year, one week before Easter, Vienna—dubbed “Vindobona” in the moot world, after the city’s Roman name—fills up with law students, professors, lawyers, judges, and arbitrators. A lengthy flight, with perhaps a layover or two, is a price worth paying to be part of one of the biggest events in the international arbitration community—the Willem C. Vis International Commercial Arbitration Moot.¹

The Vis was designed to teach students, and, yes, even practitioners, about the intricacies of arbitration as a dispute resolution method, as well as about the *United Nations Convention on Contracts for the International Sale of Goods (CISG)*.² For those who don’t know, the *CISG* is like a sale of goods act for international transactions between businesses from states that have adopted the *CISG*.³ The Vis Moot was conceived by Professors Willem C. Vis and Eric Bergsten to

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¹ A “Vis East” Moot is also held annually in Hong Kong, using the same Moot problem and featuring teams from many of the same universities. The author’s experience is with the “main” Vis Moot, so this essay concentrates on the Vienna Vis experience; it should not be taken to imply that the Vis East Moot is in any way less competitive or less worth attending.

² *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) [*CISG*].

³ Or where the law governing the contract is that of a CISG contracting state. *Ibid* at art 1(1).

promote the *CISG*. In Canada, the *CISG* is part of the law in all 14 jurisdictions, so it is worth learning about.

Professor Bergsten drafted the Moot problem from its conception in 1992 until 2015, when Professor Stefan Kröll took over the drafting. The Moot problem is usually about 60 pages long, containing a Notice of Arbitration, a Response to Notice of Arbitration, exhibits, communication between arbitrators and the arbitral institutions, and two or more procedural orders. Each year the problem centres around a sale of goods transaction gone wrong, with arbitration as the dispute resolution method coming to the rescue.

WHAT THE PROCESS LOOKS LIKE: FOR STUDENTS AND FOR ARBITRATORS

The problem usually comes out the first Friday of October and is like no other moot problem out there. It is invariably well written, well thought-out, and well balanced. Layers upon layers of issues and facts lie beneath the first read, and it is common for mooters to discover novelties in the problem well past the final round. Unlike most moots, the “story” of the deal gone wrong unfolds through legal filings, including witness statements and exhibits. The more you read the *Vis* problem, and the more you think about the arguments, the more fun you’ll have at the competition—although it’s also perfectly acceptable to fly to Vienna just for the Riesling. Or the Grüner Veltliner.

Once the problem is published, the first deadline begins to loom as the written memoranda for the claimant are due in December. Teams work tirelessly for two months, finding every scholarly work and case they can get their hands on. Of course, no scholarly work or case provides the perfect answer, making the process of crafting the best argument all the more exhilarating.

After winter break, and working at a faster pace, teams submit their memoranda for the respondent in the third or fourth week of January. Following this submission, preparation

starts for the oral rounds in Vienna. Some teams opt for pre-moots, which are mini competitions held all over the globe that don't count toward the score in Vienna but help prepare teams for what awaits at the main event. Other teams head straight to Vienna.

Practitioners have several ways to participate as arbitrators. Those who volunteer to rank memoranda will receive four claimant memoranda in December and four respondent memoranda in February. In Vienna, those who volunteer to arbitrate at the general oral rounds are assembled into groups of three arbitrators and given a schedule specifying which teams they will arbitrate.

The general rounds are spread over four days with each team arguing four times, twice for the claimant and twice for the respondent. Then comes the moment of truth, when the moot coordinators calculate the scores to determine which 64 teams (of almost 400) enter the knockout rounds. The round of 64, followed by the rounds of 32, 16, eight, and four, culminate in the closing ceremony where all participants, coaches, and of course all the arbitrators assemble for the awards banquet in what seems like the biggest room on the planet. (The closing ceremonies are held in a trade convention hall in central Vienna.) After about a thousand people take their seats, the final round begins. The two top schools battle it out for the award each student in the room has been working for since that first week in October: the Eric Bergsten Award for the prevailing team in the oral arguments.

SOME EXAMPLES OF RECENT VIS PROBLEMS

While both fictional parties in a Vis problem have signed an arbitration agreement, one of the parties will typically want to avoid arbitration, and will ask its counsel to argue the arbitration agreement's invalidity, or that the particular dispute is inadmissible.

The 2019–2020 Vis problem involved an asymmetrical arbitration agreement. One party could proceed either in court or in arbitration while the other party could only proceed in arbitration. When a dispute arose, one party challenged the arbitration agreement on public policy grounds. Students researched how asymmetrical arbitration clauses are treated in jurisdictions around the world and then argued why the tribunal should or should not enforce the clause in question.

The previous year, the problem had students grapple with a tariff and whether it qualified as *force majeure* or hardship, as well as whether the tribunal had (and should exercise) the power to adapt a contract. One year earlier, the problem required students to maneuver through the *UNCITRAL Arbitration Rules* to resolve an arbitrator challenge in an *ad hoc* arbitration.⁴ In 2016, students researched the circumstances in which tribunals may order security for costs. Each year, the Vis Moot provides students and practitioners with an opportunity to delve deep into timely and thorny issues of arbitration law and practice.

For example, the public policy challenge to arbitration is familiar to Canadian lawyers who have read the *Uber v Heller* decision, in which Justice Brown devoted his concurring opinion to a new access to justice exception to competence-competence.⁵ And let's not forget that only a year earlier, Canada's Supreme Court ruled on one version of an asymmetrical arbitration clause in *Wellman v TELUS*.⁶ The Moot's subject matter is very much in-tune with what's on the minds of arbitrators and judges when it comes to arbitration.

Perhaps the best example of the Moot's relevance is the 2020–2021 Vis Moot problem. Having been drafted by Professor

⁴ See United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)* (Vienna: United Nations, 2014).

⁵ *Uber Technologies Inc v Heller*, 2020 SCC 16.

⁶ *TELUS Communications Inc v Wellman*, 2019 SCC 19.

Kröll in the midst of the pandemic, the latest problem had students exploring not only the timely topic of virtual hearings, but also some of the obstacles arising from a contract for the development of a vaccine. Are vaccines considered goods under the *CISG*? Hard to tell, even after six days of hearing arguments for and against. Maybe because each year the problem's layers strike the perfect balance, allowing counsel on both sides to master the art of persuasion.

SOCIAL EVENTS DURING MOOT WEEK IN VIENNA

The moot officially begins with an opening ceremony at the Vienna Konzerthaus. The evening is mesmerizing. It's the time to get dressed up and enjoy the venue. The food is simple but memorable—offering platters of what Westerners refer to as open-faced sandwiches and what Europeans call just sandwiches. The on-stage presentation is rounded out by a well-known *CISG* expert, Professor Harry Flechtner, who writes a song for each year's Moot problem but also has a staple *CISG* song that might just get stuck in your head.

Attending the Vis Moot competition is an excellent opportunity for both networking and education. Even if you don't want to read the memoranda or judge the oral rounds, practitioners are welcome to the networking events. These include debates, talks, cocktails, and dinners. Spending a week in Vienna will satisfy your social and substantive interests. But more importantly, it's an opportunity to build a sense of community beyond the border.

Those in attendance include heads of arbitration institutions, most recently from the Hong Kong International Arbitration Center, the London Court of International Arbitration, and the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC). You can meet some of the names you see on international commercial law textbooks, and even the problem's drafter, Stefan Kröll, a well-known author in the international

community. If commercial arbitration is a topic you enjoy, the Vis is the place to be.

HOW THE VIS MOOT HAS ADAPTED TO THE PANDEMIC

The Vis community's commitment turned out strong enough for a successful online moot in 2020. Taking place in mid-April, the 2020 rounds were moved to an online platform where students pleaded before arbitrators, all on camera. Some of us Canadians even woke up before dawn to watch our teams plead or to arbitrate a round. It was a worthwhile experience to sit through online arbitration rounds, if only to get a glimpse of how pleaders should look, sound, and carry themselves on camera. Until now, appearing on webcam was a skill most of us did not have to worry about. But now that Canadian courts—as well as most arbitral proceedings—have shifted to online hearings, what you learn from the online competition can help you in your own hearings. And while many moots cancelled their rounds when COVID-19 began, the Vis adapted, much like arbitration itself, which has continued unhampered despite the pandemic.

CANADIAN INVOLVEMENT

The Vis Moot is a source of pride for some Canadian law schools. Notably, Osgoode Hall Law School was the first Canadian law school to take home a victory at the Vis. The University of Ottawa proudly holds the world record for victories at the Vis. Several other Canadian law schools attend regularly, including McGill, Laval, Queen's, University of Montreal, and UBC. And while many Canadian lawyers have been involved in events at the Vis before, it would be exciting to see more Canadians taking part in this marquee international event.

WHY YOU SHOULD ATTEND THE VIS

If you are an experienced lawyer with arbitration knowledge, you should register as an arbitrator. Tell your real clients to wait and plunge into the Vis world, where the facts are fictional, but the legal issues are both real and relevant. Join in

2021 for a chance to be a part of the most magnificent arbitration event in the world, albeit virtually.⁷ And hopefully we can see each other face to face in Vindobona in 2022.

⁷ If you're on the West Coast and it's easier to fly to Hong Kong, then you can volunteer to arbitrate in the Vis East. The Vis East will also take place virtually in 2021.