THE WILLEM C VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

*Hew R. Dundas**

ABSTRACT

The Vis Moot is one of the great events of the international arbitral calendar; taking place each year in both Vienna and Hong Kong, 250 law schools prepare written memoranda for each of claimant and respondent, then argue the case in front of panels of arbitrators in a case study-based arbitration. Over 700 arbitrators evaluate and score the schools with awards for the best team, best memoranda and best advocate. The overriding focus of the Vis Moot is as an educational experience for the participating students but it brings substantial reward to all participants, not least the arbitrators.

Introduction

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Moot Courts form an integral part of law school curricula in some jurisdictions, particularly in the USA, but not in others. However, there are now many Moot Court competitions, covering varied aspects of law including criminal, human rights, environmental, FDI and others, taking place in several different countries and languages. The Willem C Vis International Commercial Arbitration Moot (the "Vis Moot" or the "Moot") is uniquely special and this article will outline why. The article will, broadly, be in three sections, one describing what the Vis Moot is and why, one discussing the 2008 Moot Problem (described by several key players as the most interesting in years) and one offering some personal observations.[1]

* Chartered Arbitrator DipICArb CEDR-Accredited Mediator, International Arbitrator, Mediator and Expert Determiner

[1] I am very greatly indebted to Professor Bergsten for many of the imaginative and penetrating analytical ideas which follow and for which he takes full credit; all errors are mine.

The Vis Moot[2]

The primary goal of the Vis Moot is to foster both the study of international commercial law, in particular the UN Convention on the International Sale of Goods 1985 ("CISG"), and the study of arbitration as the dispute resolution process of choice for international business disputes, thereby to train future law leaders in dispute resolution.

Willem C Vis (1924-1993) was, in a long and distinguished career, inter alia Deputy Secretary-General of UNIDROIT, Senior Legal Officer at the UN, Secretary of UNCITRAL, Professor of Law (and founder of the Institute of International Commercial Law) at Pace University. He was also Executive Secretary of the Vienna Diplomatic Conference which created the CISG. Sadly he died in late 1993 just as the Inaugural Vis Moot was getting under way. The Vis Moot stands as a monument to a great man.

It all started in Vienna in 1994 with 11 teams and the XVth Moot in 2008 saw record participation of 203 teams from 53 countries. The sibling Vis (East) Moot started in Hong Kong in 2004 with 14 teams and, in 2008, saw 52 teams from 13 countries participate.[3] In 2008, approximately 600 (Vienna) and 180 (Hong Kong) arbitrators, lawyers, academics and others either reviewed and evaluated the written submissions and/or heard oral arguments. In Vienna there were 467 hearings requiring 1,401 arbitrator "appointments", in Hong Kong 135/405. You can well imagine the logistical complexities[4],[5]!

The Moot takes place in two distinct phases, based on a detailed case study: first, the writing of memoranda for each of claimant and respondent

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[2] The Vis Moot is owned and organised by a "Verein", the "Association for the Organization and Promotion of the William C Vis International Commercial Arbitration Moot"; Pace University is a founding member of the Verein. The Vis Moot is sponsored by a wide range of the world's leading arbitral institutions, including the AAA, ASA, CIArb, CIDRA, CIETAC, DIS, ICC, JAMS, LCIA, SCC, SIAC, UNCITRAL, VIAC and others. The Vis (East) Moot's underwriter and primary sponsor is the Chartered Institute of Arbitrators East Asia Branch.

[3] Both venues are now at or nearer capacity limits; perhaps a 3rd leg to the Moot is a solution? However, timing would be very difficult, even impossible, since the Vienna and Hong Kong Moots are back to back in the period before Easter and the timings of law school terms also requires consideration.

[4] The whole system relies on, and requires, dedicated and flawless administration with, in each of Vienna and Hong Kong, outstanding administrative teams, in Vienna headed by Dr Bergsten's stepdaughter, Patrizia Netal.

[5] Non-appearance of arbitrators is an occasional occurrence (e.g. business priorities, travel difficulties) but there are always reserves on standby. Non-appearance of a team for a hearing is rare but I had one no-show (reasons unknown) in Vienna this year so the Tribunal heard Claimant's advocates ex parte and made them work hard to prove their claim; this was, to my surprise, a very productive session!

and, second, the subsequent oral argument in front of panels of three arbitrators. The students have to determine questions of contract under CISG in the context of an arbitration of a dispute under specified Arbitration Rules (a different set of rules is applied each year).[6] One of the key learning tools is the pairing of teams from civil law schools against those from common law schools in front of mixed common/civil law arbitral panels. While the Moot is conducted in English,[7] none of the four semi-finalist teams in 2007 were from English-speaking countries and the 2008 winner was from Spain.[8]

The written memoranda are governed by rules limiting length so students have to decide what arguments and materials to submit, in itself a useful exercise. There is no limit on the size of the team preparing the memoranda but only two members appear in each oral argument, with the case study structured accordingly, usually split between jurisdictional issues and substantive ones. The memoranda serve as the basis for oral argument in the preliminary rounds but practice shows that the arguments develop over the six days of oral hearings as the students' submissions undergo testing by their opponents and by the tribunals. Teams are encouraged to present their case with due regard for an international perspective so that applicable law and authority can be found not only in the text of the applicable law itself but also in court and tribunal interpretations of law, scholarly commentary, treatises, and general principles of international law. In many instances, a particular issue may not have been adjudicated on in a given jurisdiction. In such circumstances, students may find authority in scholarly writings on the issue[9] as well as judicial and arbitral interpretations from other jurisdictions.

The memoranda are evaluated by an international panel of arbitrators (who also provide comments/feedback to the students), and a short list of the best for each of Claimant and Respondent are sent to a separate panel for ranking for prize purposes.

In the Moot itself, over the first four days each team argues twice as claimant, twice as respondent, and each of the three arbitrators awards

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[6] The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules) will be used in 2008-09 Vis Moot.

[7] This gives rise to a difficulty where authorities are in other languages although it should be noted that a common failing of some teams in the Moot is to rely only upon the authorities from their own legal system

[8] The winners in the Inaugural Vis (East) Moot in Hong Kong in 2004 were from Tsinghua University, Beijing.

[9] One law school imaginatively cited an article of mine (they would not have known at the time they did so that they would appear before me) which was very flattering; however (a) they misunderstood it and (b) attributed co-authorship to someone who had had nothing to do with it. Clang! Clang!

points[10] to each of the two oralists. These are added up over the four days, both to give a team total and individual totals. The top 64 teams (Vienna) and 16 (Hong Kong) go forward to the elimination stages, run on a knockout basis.[11] In these stages, no points are awarded, merely that the tribunal (after conferring) decides on a winner (often on a split decision).

The intention is that the oral argument reflects a real arbitration, to the extent practicable; one significant constraint is time since the highly compressed schedule requires that each hearing last not much more than one hour. Different arbitrators adopt different approaches to the oral arguments, in part reflecting the approach(es) customary in their different legal systems. Some ask few questions and do so at the end of a presentation by the advocate whereas others are highly interventionist, asking questions from the outset and sometimes not allowing the advocate much freedom of space to make any systematic argument at all.[12] Whenever possible the panels of three arbitrators for each argument are composed of a mix of common/civil lawyers and a mix of arbitrators/practicing lawyers/academics In consequence, advocates have to be prepared both to present a coherent reasoned argument without interruption and to have the entire period occupied by questions or something in between. Further, some arbitrators adopt a rigorous line of questioning, seeking authority for every proposition put forward, others look for advocacy skills and demonstration of a student's ability to think on his/her feet.[13] Questions are intended as focused on helping the argument rather than specifically testing or challenging the student. The successful oralist is one who is able to zealously advocate his or her position, while maintaining a professional and amicable tone and appearance, particularly under pressure.

At the end of each hearing in the preliminary stages, the arbitrators give oral feedback to the students, this being another [critically] important teaching/learning tool. However, it is by no means unknown that Arbitrator A says "I like the way you did X" and Arbitrator B says the exact opposite.

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[10] On a 25-50 scale, with most scores being in the 35-45 range; each arbitrator makes his/her own scores without consultation with the other two members of the tribunal.

[11] In Vienna in 2008, at least one team argued four times in a day i.e. the rounds of 64, 32, 16 and 8.

[12] Certain UK House of Lords and other judges do just the same!

[13] One difficulty for the students is in dealing with questions which are, based on the Guidelines for Moot Arbitrators, irrelevant and/or off limits; to say "Mr Arbitrator, your question is irrelevant/inadmissible/plain stupid" would be worse than foolhardy. One elegant student response to me in 2008 was "Mr Arbitrator, your question verges on the hypothetical ...".

There is another side to the Moot which is integral to it and only a little less important than the memoranda and arguments: a full social program is created for the students to bring them together as colleagues and not just as opponents. When the Moot first started it was considered appropriate to reduce the competitive aspect because of what can sometimes be the negative consequences that come with competition. Further, since so much of international life, particularly in international arbitration, depends on personal contacts, both those with people one knows from previous encounters and the general awareness of what we share and the extent to which our experiences are different. The Opening Ceremony is short on speech making, long on entertainment[14] and is followed by a wonderful Reception, usually in the impressive Vienna Konzerthaus, where one can meet people from a wide range of countries. Further, all participants in the Moot, whether as arbitrator or student, are encouraged to join the Moot Alumni Association which plays a key role at the Moot, particularly in creating and coordinating a social programme for the students. Further, there is a separate social programme for the arbitrators,[15] generally Receptions hosted by leading local law firms. These are invaluable occasions at which to meet colleagues from around the world and make new friends.

The 2008 Vis Moot Problem

The arbitration is between parties from the fictitious countries of Mediterraneo and Equatoriana and takes place in Vindobona, Danubia (a Model Law jurisdiction). The arbitration, assuming the Tribunal decides that it has jurisdiction (see below), concerns the offer by a supermarket chain in Equatoriana to buy 20,000 cases of wine from a supplier in Mediterraneo where the supermarket attempts to revoke the offer following bad (and inaccurate) media publicity concerning the wine.[16]

Mediterraneo Wine Co-Operative produces and markets wine from grapes grown by its members. It sells wine both domestically and for export. In May 2006 it participated in a trade fair for the wine industry. Equatoriana Supermarkets is a supermarket chain, is the largest retail seller of wine in Equatoriana and was also present at the fair to look for wines not previously marketed in Equatoriana. Supermarkets planned to mount a major wine promotion during the month of October 2006. While at the fair

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[14] Including, for example, song and comic routines from highly distinguished professors of law.

[15] Of course, they are welcome at the students' bar and discos!

[16] The case is loosely based on the 1985 Austrian Wine "Scandal" which arguably (a) wasn't a scandal and (b) was nowhere near as serious as the 1973 Bordeaux scandal (see "The Great Bordeaux Wine Scandal" by Nicholas Faith).

its buyers showed particular interest in a red wine shown by Wine Co-Operative called "Blue Hills 2005", a blended wine of several different grape varieties grown in the Blue Hills region of Mediterraneo. Subsequent to the fair there was an exchange of letters between the Sales Manager (Mr. Cox) for Wine Co-Operative and the Wine Buyer (Mr. Wolf) for Supermarkets, in which there was a discussion as to the quantity and price of a potential order.

On 10th June Mr. Wolf sent an order for 20,000 cases of Blue Hills 2005 at a price of US$68.00 per case,[17] for a total contract price of US$1,360,000. In the letter accompanying the order Mr. Wolf wrote that Supermarkets would need an acceptance of the order by 21st June, since it was important for them to be able to plan for the wine promotion. Mr. Wolf stated that, if there had been no acceptance of the order by then, they would turn to another wine distributor.

When the letter and order arrived (via e-mail) on 10th June, Mr. Cox was absent from the office on a business trip. Since the order as placed by Supermarkets differed from the price quotation that Mr. Cox had made, it was necessary to await his return to authorise its acceptance. Mr. Cox was expected to return on 19th June 2006 and on 11th June, Mr. Cox's assistant, Ms. Kringle sent a message to that effect to Mr. Wolf on receipt of the order for the wine, Mr. Wolf replying the same day by e-mail asking Ms. Kringle to be sure that Mr. Cox acted upon the order immediately on his return, since Supermarkets was operating under a tight time schedule for its wine promotion. Mr. Cox returned to the office on 19th June, signed the contract and sent it to Mr. Wolf by courier, all on the morning of 19th June. That acceptance of the contract was received at Supermarkets on 21st June.

However, on 18th June, i.e. prior to Mr. Cox's return to his office and prior to his acceptance of the purchase order, Mr. Wolf had sent an e-mail withdrawing the offer. It arrived at Wine Co-Operative's server but, because of a failure of the internal computer network at Wine Co-Operative, Mr. Cox did not receive the message until the afternoon of 19th June. Mr. Wolf stated in his e-mail that the reason for the withdrawal of the offer was that the newspapers in Equatoriana had reported that anti-freeze had been used to sweeten wine produced in the Blue Hills region of Mediterraneo, calling it a scandal. The articles had been widely circulated in Equatoriana.

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[17] The Sales Manager refers repeatedly to high quality wine; at $US68.00/case at $2= £1, the wholesale cost of a case in the UK is £34.00 + £18.87 duty + 17.5% VAT + transportation/distribution costs; assuming £3/case for the latter, this places the wine on a supermarket shelf at a cost of £5.18/bottle (say £6.49 retail). Château Lafite this is NOT. The pricing level for the Moot Problem is deliberate in that the wines affected by DEG in Austria in 1985 were at the bottom of the price range.

The facts show that the wine in the Blue Hills area of Mediterraneo had been sweetened with diethylene glycol ("DEG");[18] an expert report stated that DEG is toxic but considerably less so than ethylene glycol, which is the usual anti-freeze ingredient. DEG can be used as an anti-freeze component, but that use is rare. According to the expert's report, given the small amount of DEG used, (a) the alcohol in the wine would have proved be toxic prior to anyone experiencing any toxic effects from the DEG (b) vast quantities of the wine would need to be consumed to approach DEG's toxicity limits. Neither Mediterraneo nor Equatoriana has any legislation in respect of the use of DEG in wine, though both have such in regard to consumables in general. The amount of DEG in Blue Hills 2005 was within the permitted amount.

Wine Co-Operative claimed that the offer was irrevocable for the period of time necessary for Mr. Cox to return to the office and to consider and accept it, which Supermarkets denied. Supermarkets contended that that, in any case, the wine was not fit for the particular purpose expressly or impliedly known to the seller. Supermarkets also claimed that no arbitration agreement had been concluded.

There were five main issues the students had to address, both in the written memoranda and in the oral arguments. What follows is in some detail and one must remember that the teams have approximately 30 minutes each (40-45 in the later stages), divided between jurisdictional and substantive issues. They cannot possibly address all the issues so must focus (a) on their strongest arguments and (b) on countering those of the other side.

Issue 1: Jurisdiction of the tribunal

Supermarkets contended that since the offer to purchase the wine had been withdrawn prior to the conclusion of the contract, so too the arbitral clause in the sales contract had been withdrawn prior to acceptance, therefore there was no arbitration agreement. Article 16 of the Model Law[19] provides for separability of the arbitration agreement from the container contract so that the determination as to whether an arbitration agreement was concluded must be determined independently of the determination as to whether the contract of sale was concluded.

The rules on formation of contracts in the three countries differ: Mediterraneo's is similar to that found in the CISG, Equatoriana follows the general common law rule that the offer is revocable until accepted and acceptance occurs on despatch thereof while in Danubia the situation is

[18] This would have been undetectable on the nose or on the palate, needing laboratory analysis to reveal the DEG.

[19] Applicable in Danubia.

more complicated. In contracts involving one or more foreign parties the courts in Danubia seek to apply the substantive law of the most appropriate country. They look to the commercial situation of the parties and of the terms of the contract in question to determine which is the most appropriate law in the circumstances. When the question is whether a contract has been concluded, the courts of Danubia apply the law they would follow in regard to the substance of the contract.

However, JAMS Rule 18.1[20] provides that "The Tribunal will decide the merits of the dispute on the basis of the rules of law agreed upon by the parties. In the absence of such an agreement, the Tribunal will apply the law or rules of law which it determines to be most appropriate."

The jurisdictional issue gave rise to a number of interesting questions, including: (i) if Supermarkets had properly and validly revoked its offer to purchase wine, did that not mean that it had also revoked its offer to arbitrate? (ii) How does the Tribunal have any jurisdiction if there was a serious question whether any contract was formed? How could there be an arbitration if there was no valid contract? (iii) Do parties have a right to revoke their consent to arbitrate? (iv) Is not the validity of the contract a question that the Tribunal has the power to decide under Model Law Article 16? (v) Was not the intent of the parties to arbitrate since the contract, which Supermarkets drafted, contained an arbitration clause? (vi) What harm would Supermarkets suffer in arbitrating? (vii) What would be likely to happen if arbitration was denied? Would Wine Co-Operative have to sue Supermarkets in Equatoriana? Is the latter simply seeking the advantage of having a dispute resolved in its "home court?" (viii) Is not international arbitration the norm for resolving international disputes? Would not the parties' expectations be met by proceeding with arbitration? (ix) If the court finds that there was no valid contract, would that render the arbitration proceedings worthless? (x) Is it not more efficient and less costly to have only one proceeding going at a time?

Issue 2 – Supermarkets' Application to the Court

After Supermarkets received the notice of arbitration, it applied to the Commercial Court of Vindobona for a declaration that no arbitration agreement had been entered into. In effect this was an action contesting the jurisdiction of the tribunal and it was done pursuant to Article 8(2) of the Arbitration Act of Danubia,[21] which provides "Prior to the constitution of

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[20] The JAMS International Arbitration Rules are stated to apply, assuming that there is a valid arbitration agreement.

[21] A comparison can be made between the introduction of Article 8(2) into the Danubian law and its introduction into the German law when the Model Law was adopted in the two countries. There were several amendments to the Model Law, when adopted in Germany,

the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible."[22] Article 8(3) then provides "Where an action or application referred to subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court."

Two issues are raised by the application to the court. The first arises out of JAMS Rule 17.3. "By agreeing to arbitration under these Rules, the parties will be treated as having agreed not to apply to any court or other judicial authority for any relief regarding the Tribunal's jurisdiction, except with the agreement in writing of all parties to the arbitration or the prior authorization of the Tribunal or following the latter's ruling on the objection to its jurisdiction."

Wine Co-Operative has brought this situation to the attention of the tribunal and has asked that the tribunal declare that Supermarkets "is in violation of its obligations towards the claimant and towards the tribunal by commencing litigation in the Commercial Court ...." Supermarkets argues that Rule 17.3 is applicable only if there is an agreement to arbitrate under the JAMS Rules, and there has been no agreement to arbitrate.

Wine Co-Operative has requested the tribunal to do two things in regard to the litigation: (i) to order Supermarkets to terminate its litigation in the court until the tribunal has had an opportunity to rule on its own jurisdiction; (ii) to order Supermarkets to pay the full costs of the litigation in the Commercial Court, including all Wine Co-Operative's expenses.

Supermarkets has requested that the tribunal stay its proceedings until the Commercial Court of Vindobona has ruled on the existence or non-existence of the arbitration agreement. It has pointed out that Article 8(2) of the Arbitration Law of Danubia specifically permits such an action to determine whether the arbitration is admissible but only if the tribunal has not been constituted, and the tribunal had in fact not been constituted at the time it commenced its action. Furthermore, there is no Danubian jurisprudence on whether the same rule on formation of contract applies to an arbitration clause. Since Article 8(3) is discretionary as to whether the arbitration will be commenced or continued, the tribunal should, it is argued, exercise its discretion in favour of waiting for the decision of the court. A counter-argument might be that the tribunal would have the

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that reflected an apparent desire that jurisdictional decisions be made early in the arbitration, allowing for early court review. Those other amendments were not made in Danubia, suggesting that early court review might not have been seen as important by the Danubian legislators.

[22] It should be noted that this addition to the Model Law is taken from the German arbitration law which added it when the Model Law was adopted in that country.

opportunity to influence the decision of the court by ruling on the matter. The decision of the court is not expected before the summer of 2008 which would give the tribunal sufficient time to deliberate and rule on the matter.

Possible questions to be addressed include: (i) Is JAMS Rule 17.3 in conflict with Article 8(2)? (ii) Is Article 8(2) mandatory? How should the Tribunal decide whether or not it is mandatory? What does it mean to say that Danubian law is mandatory? (iii) Does use of the word "may" in 8(2) mean that it is not mandatory? (iii) Why is Respondent's arbitration clause, which it signed and sent to Claimant, not a valid waiver of Article 8(2), as well as consent for disputes to be governed by the JAMS rules? (iv) Does the Tribunal have the authority to issue an anti-suit injunction? (v) What level of review of validity of the arbitration agreement is the Commercial Court likely to provide? Is the level of review determined by law or is it a matter of discretion? What is the legal basis for saying that the court is likely to only perform a prima facie review of the existence of the arbitration agreement? (vi) Would a stay of arbitration not simply delay the process since the Commercial Court will probably send the matter back to the arbitrators anyway? (vii) Did not the parties plan for efficient resolution of disputes by including an arbitration clause in the contract and would a stay not defeat that purpose?

Issue 3: Was the offer irrevocable for a period of time sufficient for Mr. Cox to accept the offer?

CISG Article 16(1) provides that "[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." The e-mail from Mr. Wolf withdrawing the offer reached the Wine Co-Operative server on 18th June, the day prior to the day Mr. Cox returned to the office, signed the contract and sent it back. Both Equatoriana and Mediterraneo have adopted the UNCITRAL Model Law on Electronic Commerce whose Article 15(2) addresses the timing of receipt of e-mail messages. It was not in dispute that that Mr. Wolf's message withdrawing the offer had arrived at Wine Co-Operative on 18th June and it is irrelevant that Mr. Cox could not and did not receive it until the afternoon of 19th June subsequent to his signing and sending the contract. Therefore, according to CISG Article 16(1) the offer had been effectively withdrawn prior to the conclusion of the contract.

However, Wine Co-Operative's argument is based on CISG Article 16(2) which provides that "However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." This Article is a compromise between the civil law position that offers are

irrevocable in certain circumstances and the common law one that offers are always revocable until accepted unless an option contract is concluded. Article 16(2)(b) does not apply to the present case since Wine Co-Operative did not act in reliance on the offer, except to accept it.

The key question is whether Mr. Wolf "stat[ed] a fixed time for acceptance" or otherwise indicated that the offer was irrevocable for any particular period of time. In his letter of 10th June[23] he had informed Mr. Cox that the time for the wine promotion had been moved forward from October to September "which means that we must now move quickly." He went on to say that "Since we are now under rather intense time pressure to prepare the wine promotion, we would have to turn to another quality wine as the featured item in our promotion if the contract closing were to be delayed beyond 21st June." That certainly fixed a date after which the offer would have to be considered to have lapsed. When Ms. Kringle replied by e-mail that Mr. Cox was absent from the office and would return on 19th June, Mr. Wolf requested Ms. Kringle "[p]lease be sure to have Mr. Cox act on our purchase order immediately on his return, since we are operating under a narrow time frame for our wine promotion in September." The latter statement emphasizes Mr. Wolf's strong desire to have immediate action. It also makes it clear that he was willing to wait until Mr. Cox returned. Are those two statements together enough to satisfy Article 16(2)(a)?

Questions to be addressed include: (i) Does the mere mention of a date make an offer irrevocable under the CISG? (ii) What evidence is there that that the offer was irrevocable? (iii) Was e-mail an acceptable means of communicating the revocation of an offer that was originally in signed hard copy form? Had Ms. Kringle not communicated with Supermarkets by email previously? (iv) Should the offer not have made it clear at from the outset that it was revocable? Should Supermarkets carry the risk that Wine Co-Operative would understand the offer to be irrevocable? (v) Did the specific mention of the date of June 21st make the offer irrevocable? (vi) Ms. Kringle was just an assistant and not an agent for Wine Co-Operative; aside from her e-mail, how is it that Wine Co-Operative consented to communication of revocation by email?

Issue 4: Was Blue Hills 2005 fit for the Particular Purpose?

CISG Article 35(2) provides in relevant part "(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) ...(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract,

[23] Sent by e-mail attachment and by courier.

except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;" This issue is relevant if, and only if, there is a contract and it also depends on the arbitral tribunal having jurisdiction.

It would be possible to argue that Supermarkets had two different, albeit closely related, purposes in offering to purchase, or contracting to purchase, the 20,000 cases of Blue Hills 2005. Supermarkets had around 2,000 retail stores and was the largest wine retailer in Equatoriana. Therefore, it was constantly purchasing wine for its stores. Although Mr. Wolf has now decided that he does not want Blue Hills 2005, there was nothing wrong with the wine in spite of having been sweetened with DEG. The expert report stated this clearly and Supermarkets never seriously contested this. The most that can be said is what is found in Mr. Wolf's letter of 25th July in which he said "[e]ven though there may be no health concerns associated with the quantities [of DEG] used in the Blue Hills 2005 (which I do not accept) ...." The words in parentheses could be understood either to mean that Mr. Wolf was contradicting the conclusions of the expert's report or they may simply be cautious words with no particular thought behind them. In any case, the amount of DEG present in the wine is within the limits permitted by the law of both Equatoriana and Mediterraneo and is less toxic than the alcohol in it.

Supermarkets contended that the particular purpose for which the wine was being purchased (or perhaps to be purchased in the quantity ordered) was that the wine would be the feature item in the wine promotion planned for September 2006; Wine Co-Operative was certainly aware that that was the intention. Although it cannot be said from the record, it obvious that Wine Co-Operative was very pleased that its wine would be featured. As stated by Mr. Cox in his letter of 19th June enclosing the signed contract "As you know, this is the first time our wine from Mediterraneo will be marketed in Equatoriana. I am so please that you are the launch customer."

Supermarkets would, understandably, not wish to feature/promote a wine that its local newspapers had labelled a "scandal". As stated by Mr. Wolf in his e-mail of 18th June, "[m]oreover, we were planning to feature Blue Hills 2005 in our wine promotion, which would have created for us a commercial catastrophe going far beyond our sales of wine." However, if the amount of DEG in the wine was within the limits permitted by law, the only thing wrong with the wine is that it had acquired a bad but [objectively] unjustified reputation. While the bad reputation might be a sufficient commercial reason not to purchase the wine in the first place, was it a sufficient legal reason not to fulfil the contract (assuming there is one)?

Questions to be addressed include: (i) was the wine purchased for its quality of taste or its marketability? (ii) Who bore (or should bear) the risk

of the adverse publicity? (iii) Was there any obligation on Wine Co-Operative to notify Supermarkets that the wine contained a chemical not usually found in wines? (iv) Are there other examples where DEG has been added to wine? (v) Would replacement wine from the same region, even if it contained no DEG, still be tainted by the adverse publicity? (vi) What is it that makes the wine unmarketable, the media articles or the DEG itself? (vii) Was Supermarkets responsible for knowing what ingredients were in the wine before it purchased it for a promotion? Did it ask or should it have asked?[24] (viii) Does it violate the CISG for Supermarkets to refuse to accept a viable alternative to Blue Hills 2005? (ix) Can breach be declared if the seller is not given a chance to rectify the situation?

Issue 5: Did the wine conform to the qualities that the seller held out to the buyer?

It is possible to argue that Blue Hills 2005 did not have the qualities that Wine Co-Operative stated that it had. CISG Article 35(1) provides that "The seller must deliver goods which are of the ... quality ... required by the contract ..." The contract described the goods by their name but did not specify quality. However, Article 35(1) provides that they must be "required" by the contract, not that they must be provided for in the contract. CISG Article 8 permits reference to the pre-contractual statements to know what was required by the contract. Naturally, Mr. Cox praised the Mediterraneo wines in general and Blue Hills 2005 in particular. In his letter of 14th May 2006 he described it as "an outstandingly fine wine in its price category." He went on to say that it would be "an outstanding choice for a promotion of quality wines." He said much the same in his letter of 1st June 2006, "[Blue Hills 2005] is an exceptionally fine wine that will certainly satisfy all of your customers." This would seem to be normal sales talk, but not sufficiently specific enough to constitute any kind of warranty.

The questions above at Issue 4 apply here.

Issues Outwith the Moot

Given limitations on time, it was necessary to exclude certain issues from discussion in the Moot, even if such introduces a slightly artificial air into the proceedings. These are (i) the remedies claimed by Wine Co-Operative for the alleged breach of the contract of sale; (ii) the allocation of costs of the arbitration.

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[24] It had an experienced wine buying team "on the case" so could not play "innocent"

Conclusions Concerning the 2008 Problem

I will leave it to others to rank this problem against those from prior years[25] should they wish but do not consider such an exercise worthwhile. Undoubtedly it was popular with both students and arbitrators, perhaps because most of us readily relate to wine drinking whereas not everyone relates so easily to wet sugar, industrial-specification electrical fuses, printing machinery and the like. The interweaving of the separate issues was noteworthy and the fine balance of argument on some aspects of the case remained in evidence to the end.[26]

Some Personal Reflections

Since the Moot dates in Vienna are driven by the date of Easter,[27] it is easily possible to set aside the time well in advance (and book cheap flights up to a year in advance!) and I have done so. The ten days in each of Hong Kong and Vienna are a genuine highlight of my professional year and both professionally rewarding and hugely enjoyable.[28]

Having participated as arbitrator in the last three Moots in Vienna and all five in Hong Kong, with eight hearings in Vienna, six in Hong Kong in 2008 (I think 11 in Hong Kong in each of 2006 and 2007), I have probably sat in approximately 60-70 in total. Some can be dull, especially on the first day when nearly everyone reads prepared scripts based on the written memoranda[29] but the best hearings are enjoyable for all parties and, as Chairman, I try to achieve that particularly by building rapport with the participants and through reasonably lively dialogue with them - no long set speeches if I can prevent them: anyone can write a good speech and recite it but that, to me, is not oral advocacy. I watched one of the semi-finals in Vienna this year and, courtesy of brilliant chairmanship by a distinguished

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[25] Having had the privilege of contributing, in a small way, to the Problem I express no view! However "the best ever" seems a clear consensus.

[26] In my view, where a case study leads to a reasonably clear conclusion (i.e. is a 55/45 balance rather than a 51/49 one), I see an advantage in the context of the Moot competition to defend the weaker position since a heroic defence of a poor case is, in my view, more likely to impress the panel than the easier offence.

[27] The availability of the University of Vienna Faculty of Law's premises mean that the Moot starts on the Friday 9 days before Easter and finishes on Maundy Thursday; the date of Easter Day is readily ascertainable (it follows a formula) far out into the future.

[28] The numerous Receptions etc for the arbitrators are wonderful for establishing personal contacts and for business networking.

[29] I want to scream when a student opens up "I have three submissions to make; my first submission is in four parts ...". This year, two teams (one in Vienna, one in Hong Kong) opened with "This case is not about law or about contract formation, it is about forcing toxic materials down the throats of unsuspecting consumers". Yes, you have my attention now, I thought.

Swiss arbitrator allied to imaginative probing by two highly distinguished co-arbitrators, it was a wonderful experience; similarly the 2008 final in Hong Kong was another superb achievement by all involved.

If there is one aspect of the Moot which I am unhappy with, it is the performance of some of the arbitrators who can give the impression of not understanding the issues or who adopt a style which I can describe only as bullying. In one recent case the chairman of a panel spent so much time asking very aggressive questions that it was very difficult to evaluate the students since they were given very little space or time. In another case, the chairman insisted on having citations for every proposition, a time-consuming approach best left (in my view) to the written memoranda.

I have also been privileged to have participated, in a minor way, in the creation of the 2008 Moot Problem and have witnessed the extent of Professor Bergsten's extraordinary scholarship, experience, ingenuity and craftsmanship in this regard.

I recall many highlights from the eight Vis Moots in which I have participated, but I will content myself with four. First, on the first day of the 2004 Vis (East) Moot in Hong Kong (my first Moot), I heard the ultimate winners and was blown away by their skills, knowledge and poise – I had difficulty in believing that these were 20 year-old law school students in a second language. Second, in the 2005 Final in Hong Kong, the winning Indian pair[30] turned in a, highly-skilled, highly-professional yet passionate, even mesmeric performance that had me and the rest of the audience in no doubt that if we were on trial for our lives in India or our commercial dispute was being litigated or arbitrated, I wanted these advocates on my case. Third, I was greatly honoured to have sat on the Final Panel in Vienna in 2007 but found it daunting sitting up on a large stage in front of an audience of 1,200-1,500!

Fourth and finally, in the 2004 Vis (East) Moot I saw a team[31] whose English was limited, who appeared not to understand the problem fully and who appeared to have little concept of oral advocacy; in 2007, I heard the same university with two students arguing professionally and skilfully in excellent English with complete command of the myriad of details. The Vis Moot is intended as, and is, a learning experience; this example demonstrates why.

I conclude by stating my strongly held view that the Vis Moot is a truly extraordinary creation, one in which I have been very greatly privileged to have participated and which has proved so immensely rewarding.

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[30] From the National University of Juridical Sciences, Kolkata, India.

[31] From Chulalongkorn University, Bangkok.