

## XXIII<sup>rd</sup> WILLEM C VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Dear Colleagues

**WARNING: long(ish) post (approx. 2,020 words)**

***Caveat: this report is my personal production, not that of the Vis Moot Management, so any errors herein are mine alone.***

I am pleased to report that Vis 23 was a huge success with 311 teams (the first time over 300) from 67 countries (2015: 298 from 65) with 1,993 registered student participants (from an astonishing 96 nationalities) and, in all, >3,000 people were involved (i.e. including students, coaches, arbitrators, readers and administrative staff).

Of the 311 teams, the largest contingents were from USA (49), Germany (25), Brazil (21 (2015 17)), India (20 (2015 12)), UK (15), Turkey (14 (2015 10)), France and PRC/HK (each 13) and Australia (11) with Turkey remarkably out-numbering participation from some of the traditional “big league” mooting countries. These “big nine” (the same “big nine” as in 2015) represented 57.6% (2015 54.2%) of the total entry, the increase in %age being largely due to Brazil, India and Turkey.

Illustrating the truly international nature of the Vis Moot, ‘interesting’ single team entries came from Egypt, Iraq, Israel, Lebanon, Uruguay and Uzbekistan. Sadly, no teams from Albania, Azerbaijan, Cayman Island, Iran, Kyrgyzstan or Palestine participated as they had in 2015.

Of the six (6) universities that had competed in all 22 Vis Moots in Vienna up to 2015, five participated in 2016: Freiburg (Germany), Columbia (USA) (who reached the last 16), Deakin (Australia) (last 64), Lapland (Finland) and Pace (USA); it was truly impressive and a really great pleasure to see these five back again.

In addition, approx. 1,100 (2015: 1,126) arbitrators (listed across 15½ pages of the Moot Programme Book, from Abbas/Abdallah/Abghari/Adams/Adascalitai to Zollner/Zuberbühler/Zucker/Zürcher/Zweitel) from 70 (2015 also 70) countries participated of whom approx. 860 actually came to Vienna (the rest making a critically-important contribution as Readers of Memoranda).

Including e-mails sent to multiple persons (i.e. an e-mail sent to all 311 teams counts as 311, not 1), the Vis Management had issued more than 25,000 e-mails even before the Moot started and, with circulars at least daily to all arbitrators and all teams, will comfortably exceed 30,000 by the end.

### **The Problem**

The 23<sup>rd</sup> Vis Moot Problem was summarised in my circular concerning Vis East XIII and that summary can be found at the foot of this e-mail for ease of reference.

### **The Moot Arguments**

Everything could be argued both ways and duly was. The quality of argument was high and the quality of the students very high, even in comparison to those of recent years.

The last 64 featured teams from 29 countries (with USA 11, Germany 8, Australia 5, Brazil 4), R32 19 (USA 6, Australia, Brazil and Germany 3 each), R16 9 (Austria and Germany 3 each i.e. each country had a 100% success rate in R32), the Quarter-Finals 7 (only Brazil (2) had more than one) and the Semi-finals four. One measure of the successful distribution of places is that the averages are <2 whereas in former years it was much higher.

I sat as arbitrator in the Rounds of 64 (at 0800), 32 (at 1100) and 16 (at 1400) on Wednesday and found it no little effort of concentration to sit three consecutively so, not for the first time, I have huge admiration for the four teams that argued (far harder than listening to the arguments !) in R64, R32, R18 and R8 (the other four R8 teams had their R64 round on Tuesday evening), not least because between rounds the arbitrators can relax while the teams have a lot of work to do !!

After 685 hearings involving 2,055 arbitral appointments, the Final Panel (comprising Dr Alice Fremuth-Wolf (Austria; Deputy Secretary-General of VIAC), Professor Gary Born (USA; no description can possibly do him justice) and Professor Harry Flechtner, (USA; not only a highly distinguished professor at the University of Pittsburgh but also the highlight of the Opening Ceremony with his musical contributions including those smash hits “The CISG Song” and “Mootie Blues”)) heard a close-fought argument between the University of Buenos Aires (representing Claimant, Kaihari Waina Ltd) and Singapore Management University (representing Respondent, Vino Veritas Ltd) in which **Buenos Aires prevailed.**

The University of Auckland (NZ) and the Pontifical University of Paraná (Brazil) were the other semi-finalists and the University of Sydney (Australia), the University of Georgia (USA), the Pontifical University of Sao Paulo (Brazil) and the Honourable Society of the Middle Temple (UK) reached the Quarter-Finals.

The Pieter Sanders Award for best Memorandum for Claimant was won by Lucerne (with Harvard and Düsseldorf as joint Runners-Up) and the Werner Melis Award, presented by the 80-year-old eponymous Great Man himself, for the best Memorandum for Respondent was won by Freiburg with Geneva 1<sup>st</sup> Runner-Up and Sydney as 2<sup>nd</sup> Runner-Up. It was nice to see the University of Vienna, host to all recent Moots, win an Honourable Mention.

The Award for Best Oralist was, I think for the first time ever, a triple tie for first place between Karmijn Krooshof (Amsterdam), Rebecca Lennard (Nôtre Dame (Sydney)) and Dimitri Peteves (Florida). Among many Honourable Mentions from well-known universities, it was deeply gratifying to see Iran, Beirut and Edinburgh listed.

After thanking the many people and organisations (in particular VIAC, UNCITRAL and the City of Vienna) without whose contributions the Vis Moot could not be what it is, the XXIII<sup>rd</sup> Vis Moot concluded in traditional fashion with, first, a generous round of applause for the three immensely hard-working Co-Directors (Dr Christopher Kee, Mag, Patrizia Netal and Professor Dr Stefan Kröll) then, second, a prolonged and very loud standing ovation from approx. 3,000 people in honour of Professor Dr Eric Bergsten.

### **Vis East XIV/Vis XXIV**

Vis East XIV in Hong Kong will start on Sunday 26<sup>th</sup> March 2017; it will finish as usual on Sunday 2<sup>nd</sup> April i.e. two weeks before Easter.

Vis XXIV in Vienna will run from 7<sup>th</sup> to 13<sup>th</sup> April 2017, i.e. (as usual) starting on the Friday 9 days before Easter and finishing on Maundy Thursday.

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### **The Vis Moot Problem**

The 2015/16 Problem was based on an arbitration under the Vienna International Arbitration Centre Rules including issues of loss of profits, the recoverability of contingency fees and document production.

### **The Facts**

Kaihari Waina Ltd, the Claimant, is a wine merchant which is incorporated under the laws of Equatoriana and which has developed an expertise in Mata Weltin wines from Mediterraneo where Vino Veritas Ltd, the Respondent, is a wine producer, highly regarded in the wine business for its diamond quality Mata Weltin wine.

In April 2009 the Parties concluded a Framework Agreement (“FA”) which provided that Claimant purchases a varying number of bottles of Mata Weltin annually to a maximum of 10,000.

The FA contained the following arbitration agreement as Article 20:

*“All disputes shall be settled amicably and in good faith between the parties. If no agreement can be reached the dispute shall be decided by arbitration in Vindobona by the International Arbitration TRIBUNAL (VIAC) under its International Arbitration Rules (...). The proceedings shall be conducted in a fast and cost efficient way and the parties agree that no discovery shall be allowed. (...) This contract is governed by the law of Danubia including the CISG.”*

[Preliminary question: which VIAC ? Vienna or Việt Nam]

Respondent’s Mata Weltin wine had won several prizes in early 2014 causing an increase in the volume of pre-orders of the wines and, in late 2014, Claimant ordered the contractual 10,000 bottles from Respondent stating that it needed the full 10,000. Shortly afterwards, Claimant received a letter from Respondent stating that only 4,500-5,500 bottles could be delivered because of a bad harvest which had caused a drop in production volumes. However, Claimant believed that Respondent had offered reduced quantities because of its contracting with wine retailer SuperWines so continued to insist on delivery of 10,000 bottles. In consequence, Respondent’s then-CEO considered the contract terminated because of Claimant’s purported refusal to cooperate.

Claimant then decided to seek an interim injunction from the High Court of Capital City in Mediterraneo which would have prevented Respondent from selling the 10,000 bottles to any other customer(s). However, Claimant was unable to secure the services of any Mediterranean law firm on conventional terms so engaged LawFix under a Contingent Fee Agreement ("CFA"). The interim injunction was granted by the Court.

In January 2015 Respondent's new management (the former CEO being gravely ill), in a letter to Claimant, requested clarification of the purportedly uncertain arbitration clause but Claimant did not respond to that letter. Respondent then initiated court proceedings before the High Court of Capital City, requesting a declaration of non-liability for the non-delivery of 10,000 bottles. Ten weeks later, the High Court dismissed Respondent's action for lack of jurisdiction following Claimant's invoking the arbitration agreement.

Three months later, Claimant lodged a request for arbitration with VIAC along with its Statement of Claim, seeking US\$ 50,280 in damages being the legal fees payable to LawFix. In addition, Claimant requested production of documents from Respondent indicating the profits made from selling 5,500 bottles of Mata Weltin wine to SuperWines. Claimant waived any claims for specific performance as a sign of good faith.

### **The Arbitration**

The Arbitral Tribunal took note of the facts that Respondent

- (i) had not challenged the jurisdiction of the Tribunal but had explicitly consented at the Telephone Conference that this Arbitral Tribunal established on the basis of the VIAC Rules had jurisdiction to hear the dispute under the VIAC-Rules in line with the other provisions of the arbitration agreement;
- (ii) will – for the time being – not contest that the termination of contract was a breach of contract but reserved the right to do so should the Arbitral Tribunal come to the conclusion that in such a case Respondent would be liable for the damages requested by Claimant;
- (iii) undertook to deliver 4,500 bottles of Mata Weltin 2014 without prejudice and without admitting or recognizing any legal obligation under the contract to do so.

Both parties were reminded that the above undertakings were given by Respondent's new management solely as an effort to facilitate the proceedings and to allow for cost efficient dispute resolution. They may merely be used to prove such a commitment of Respondent to efficient dispute resolution. In no way should they be understood as the admitting of a particular view or understanding at the time the contract was entered into.

### **Legal Issues**

In the light of these undertakings and the particular facts of the case and the Parties' discussions, the Arbitral Tribunal decided, with the agreement with the Parties, to address Claimant's claims for damages first on the basis of the assumption that the termination of the contract and the refusal to deliver any wine was a breach of contract.

Furthermore, the Arbitral Tribunal decided, first, merely to address the questions whether the existing damages claim covered, in principle, the various heads of damages claimed. Any detailed discussion would then occur at a later date once the Arbitral Tribunal had decided whether or not to grant the request for document production. In the light of the Arbitral Tribunal's conclusion on the damages which may be due in such a scenario Respondent would then be entitled to decide whether it wished to pursue its original defence that the decision to terminate the relationship was not a breach of contract but justified in the light of both the limited quantities of wine produced in 2014 and Claimant's behaviour. That would then be addressed in a second phase of this case, should Respondent decide to seek a decision on whether any such breach ever actually occurred.

The specific issues to be argued by the Moot students were

- (i) does the tribunal have the power to and, if so, should it, order Respondent to produce the documents requested by Claimant ?
- (ii) is Claimant entitled to the damages claimed for the litigation costs of US\$50.280 incurred partly (a) in its application for interim relief and (b) in its successful defence against the proceedings in the High Court of Capital City;
- (iii) can Claimant claim the profits Respondent made by selling the bottles to SuperWines as part of its damages, even if that included further profits ?

