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## **The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity**

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THE WILLEM C. VIS INTERNATIONAL COMMERCIAL  
ARBITRATION MOOT: MAKING THE MOST OF AN  
EXTRAORDINARY EDUCATIONAL OPPORTUNITY

Jack M. Graves\* and Stephanie A. Vaughan\*\*

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1 INTRODUCTION

The purpose of this article is to share the authors' experiences as educators and coaches to teams in the Willem C. Vis International Commercial Arbitration Moot (the 'Vis Moot' or 'Moot'). We first had the opportunity to work with a team in the Tenth Vis Moot and quickly discovered that this particular Moot provided a variety of unique educational opportunities for our students and our institution. Over the four years that we have served as coaches,<sup>1</sup> we have developed a few ideas for making the most of these educational opportunities that we thought might be valuable to other coaches and teams participating in the Moot – especially to teams that might be

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We would both like to thank all the many individuals with whom we have enjoyed the pleasure of sharing the unique experiences of the Willem C. Vis International Commercial Arbitration Moot – especially the students. We would also specifically like to thank Professor Eric Bergsten for his helpful comments and his willingness to send out our survey to Moot participants on our behalf and Brooke Bowman (Assistant Professor of Legal Skills at Stetson) for her valuable editing assistance.

<sup>1</sup> The authors served as co-coaches for the team from Stetson University College of Law for the Tenth, Eleventh, and Twelfth Moots. In the Thirteenth Moot, Graves coached the team from Franklin Pierce Law Center, and Vaughan coached the team from Stetson, along with Assistant Professor Joseph Morrissey.

relatively new to the Moot. While our own personal experiences relate most directly to working with students within the context of law schools based on the US common law model, we have also spent significant time interacting with other coaches and teams from around the world. We hope that our own ideas and experiences, as further developed and described in this article, may be useful to coaches and teams from other countries and other legal systems as well.

Professor Eric Bergsten, the organiser of the Moot, has written a variety of articles providing an excellent overview and historical background of this extraordinary gathering of law students, law school faculty members, and practitioners from around the globe,<sup>2</sup> and the authors will not attempt to recreate that material here. Instead, this article will focus primarily on certain unique features of this particular Moot and discuss how these features give rise to unique opportunities to maximise the overall pedagogical benefit to be derived from an educational institution's participation in the Moot.<sup>3</sup>

For some institutions, the cost of participating in the Moot may exceed that of other moots. For example, schools outside of Europe will find the travel costs higher than those typically associated with domestic moots. As such, it may be important to these institutions that the Moot provide a substantially greater educational benefit than other moots, commensurate with these greater costs of participation. In this article, the authors hope to demonstrate that this Moot can indeed provide educational and institutional benefits commensurate with, or even beyond, its costs and will offer suggestions as to how those benefits might be maximised.

Part 2 of the article provides a general overview and introduction to the broad educational benefits of the Vis Moot, as well as the interaction between the

<sup>2</sup> See generally, e.g., Bergsten, E. E., 'Teaching about International Commercial Law and Arbitration: The Eighth Annual Willem C. Vis International Commercial Arbitration Moot' (2001) 18 *Journal of International Arbitration* 481; Bergsten E. E., 'Ten Years of the Willem C. Vis International Commercial Arbitration Moot' (2003) 6 *International Arbitration Law Review* 37 [hereinafter 'Ten Years']; Bergsten E. E., 'The Willem C. Vis International Commercial Arbitration Moot: The Perspective of the Organizer' (1999) 6 *Croatian Arbitration Yearbook* 167. Numerous participants (both coaches and students) have also written of their experiences. See generally, e.g., Balenovi, N., et al (students' portion), Sikiric, H. and Petrovic, S., (coaches' portion), 'The Willem C. Vis International Arbitration Moot: Reports of Zagreb Participants' (1998) 5 *Croatian Arbitration Yearbook* 235; Shulman, M. R., 'Moot Court Diplomacy', *International Herald Tribune*, 15 April 2006, available at: <<http://www.iht.com/articles/2006/04/14/opinion/edshulman.php>>. Last, but certainly not least, the Moot has been celebrated in song. See Flechtner, H., *The Mootie Blues* (2006) available at: <<http://www.law.pitt.edu/academics/programs/cilemootieblues.php>>; See also Flechtner, H., *The CISG Song* (2005) available at: <<http://www.law.pitt.edu/academics/programs/cileciscsongpage.php>>.

<sup>3</sup> In this article, we will focus exclusively on participation in the Moot held in Vienna, inasmuch as this is the venue from which we have derived our own experiences. However, the substance of the article should be equally applicable to participation in the Willem C. Vis (East) International Commercial Arbitration Moot held in Hong Kong.

pedagogical and competitive elements of the Moot. Part 3 then addresses certain specific educational opportunities provided by this particular Moot. This part is broken down into two primary segments: Part 3.1 – the educational process that takes place prior to the completion of the memoranda; and Part 3.2 – the educational process that takes place after the completion of the memoranda. In each, the authors provide suggestions, based on their own experiences, for maximising the educational benefits of the Moot. Part 4 concludes with a discussion of the relationship between the pedagogical and competitive elements of the Moot in the context of these suggestions for maximising its educational benefits. The authors suggest that the Moot's pedagogical and competitive elements are entirely consistent and mutually supportive.

## 2 THE VIS MOOT AND LEGAL EDUCATION

This article focuses primarily on the Moot as a pedagogical tool. However, one might reasonably ask at the outset whether this is in fact the primary purpose of the Moot. The Moot actually represents a competition between teams of students from individual law schools,<sup>4</sup> as well as a competition between individual law students,<sup>5</sup> and one might reasonably suggest that this competitive purpose predominates. This question has been explored thoroughly in a previous article by Professor Jeffrey Waincymer, who makes an excellent case for the predominance of pedagogy over competition.<sup>6</sup> The authors agree with the majority of Professor Waincymer's general conclusions and will, therefore, limit the discussion here to a few of his points. This article will begin by looking, generally, at the educational benefits of the Moot.

Skills training has become an increasingly important part of legal education, and mooting, generally, would seem to encompass many of the fundamental skills necessary for a prospective lawyer. The MacCrate Report, produced by an American Bar Association Task Force on Law Schools and the Profession, identified ten fundamental lawyering skills: (1) problem solving; (2) legal analysis; (3) legal research; (4) factual investigation; (5) communication; (6) counselling; (7) negotiation; (8) familiarity with comparative litigation and alternative dispute resolution processes; (9) organisation and management of legal work; and (10)

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<sup>4</sup> The Pieter Sanders and Werner Melis awards are made to the teams writing the best memoranda in support of claimant and respondent, respectively, and the Frédéric Eisemann Award is made to the team prevailing in oral arguments in Vienna. The names of the recipients of these awards are posted on the Moot website for posterity. See, e.g., *Thirteenth Annual Willem C. Vis International Arbitration Moot 2005-2006*, available at: <<http://www.cisg.law.pace.edu/cisg/moot/awards13.html>> (listing the team awards from the Thirteenth Moot).

<sup>5</sup> The Martin Domke award is made to the individual students receiving the highest average scores for their oral presentations in the general rounds. The names of the recipients of these awards are posted on the Moot website for posterity. See, e.g., *ibid* (listing the individual awards from the Thirteenth Moot).

<sup>6</sup> See generally, Waincymer, J., 'International and Comparative Legal Education Through the Willem C. Vis Moot Program: A Personal Reflection' (2001) 5 *The Vindobona Journal of International Commercial Law and Arbitration* 251.

recognition and resolution of ethical dilemmas.<sup>7</sup> Virtually all moots would seem to address some of these skills.<sup>8</sup> However, the Vis Moot addresses almost all of them.

As with most moots, the Vis Moot requires students to engage in (1) problem solving; (2) legal analysis; and (3) legal research in attempting to develop their arguments on the issues arising out of the problem.<sup>9</sup> In the case of the Vis Moot, they do so for both sides of the argument – advocating the positions of both claimant and respondent in their written and oral submissions and thereby expanding the educational opportunity.<sup>10</sup> Unlike most other moots,<sup>11</sup> the Vis Moot requires the students to engage in detailed factual analysis and even allows for (4) factual investigation or discovery in the form of requests for clarification.<sup>12</sup>

Students in the Vis Moot generally work in teams, some of which may include many students.<sup>13</sup> Working as part of a larger team requires (5) effective communication between team members, as well as (9) organisation and management of the work by individual team members.<sup>14</sup> Effective communication is also of course, crucial to effective written and oral advocacy skills;<sup>15</sup> each of which the students will have the opportunity to develop while participating in the Moot. The Vis Moot's focus on

<sup>7</sup> 'MacCrate Report: An Educational Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (1992) *American Bar Association, Section of Legal Education and Admissions to the Bar*, available at: <<http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html#Chapter%20Five>>.

<sup>8</sup> Waincymer, J., *supra* fn 6, at 260.

<sup>9</sup> Dickerson, D., 'In re Moot Court' (2000) 29 *Stetson Law Review* 1217, 1217.

<sup>10</sup> In most moots, students prepare written submissions on only one side of the dispute: *Ibid*, at 1220. Even moots that do require written submissions on both sides typically require that each of these submissions be made at the same time. See, e.g., *The 2007 Philip C. Jessup International Law Moot Court Competition Official Rules* (2007) ('Jessup Rules'), Rule 6.1, available at: <<http://www.ilsa.org/jessup/jessup07/rules.htm>> (providing for simultaneous submission of written memorials of applicant and respondent). In the Vis Moot, however, students first prepare written submissions on behalf of the claimant and then subsequently prepare such submissions on behalf of the respondent. Moreover, the written submissions on behalf of the respondent are prepared in response to the actual written submissions of the claimant prepared by another team: *Thirteenth Annual Willem C. Vis International Commercial Arbitration Moot Rules* (2006) ('Vis Rules'), Rules 31-3, available at: <<http://www.cisg.law.pace.edu/cisg/moot/rules13.pdf>>.

<sup>11</sup> See Kenety, W. H., 'Observations on Teaching Appellate Advocacy' (1995) 45 *Journal of Legal Education* 582, 582 (pointing out, as a weakness, that mooting 'generally does not require the sorting or mastering of facts').

<sup>12</sup> Waincymer, J., *supra* fn 6, at 272. See *infra* fn 78 for further discussion of this point.

<sup>13</sup> In many moots, the number of team members is strictly limited by the rules. See, e.g., Jessup Rules, *supra* fn 10, Rule 2.2 (limiting teams to a maximum of five members). However, there is no limit to the number of team members that may participate in the written submissions in the Vis Moot: Vis Rules, *supra* fn 10, Rule 26.

<sup>14</sup> See Blase, F., 'A Brief SWOT-Analysis of the Willem C. Vis Moot', (2001) 5 *The Vindobona Journal of International Commercial Law and Arbitration* 117, 118; Dickerson, D., *supra* fn 9, at 1218 (explaining that mooting teaches students to work effectively as a team).

<sup>15</sup> Dickerson, D., *supra* fn 9, at 1217.

arbitration exposes students to a form of (8) alternative dispute resolution<sup>16</sup> – one used increasingly in both domestic and international commercial transactions and sometimes overlooked in the traditional law school curriculum. At least one Vis Moot problem has presented students with the (10) ethical dilemmas faced when the impartiality and independence of an arbitrator is challenged.<sup>17</sup>

In addition to practical skills training, the students have an opportunity to develop their doctrinal knowledge and understanding of international sales law and international commercial arbitration. The Moot has always been intended to promote awareness of the United Nations Convention on Contracts for the International Sale of Goods (the ‘CISG’) and the work of UNCITRAL (including its work in the area of international commercial arbitration)<sup>18</sup> and, as such, provides an outstanding educational opportunity in these two important and developing areas of doctrinal international law.

Moreover, the Vis Moot provides this educational opportunity in an international environment. Students are encouraged to employ a comparative perspective in their analysis and advocacy. Through this comparative approach, students arguably gain a better understanding not only of other legal systems, but of their own as well.<sup>19</sup> Teams are also paired up in the preliminary rounds so that they meet only teams from other countries,<sup>20</sup> and this means that each team will also prepare a written memorandum on behalf of the respondent that is responsive to a memorandum prepared by a team from another country.<sup>21</sup> In short, the Moot provides an outstanding introduction to the practice and theory of international commercial law and dispute resolution.<sup>22</sup>

Assuming that one accepts the basic premise that mooting, generally, serves a strong pedagogical purpose, and further agrees that this particular international Moot focused on commercial law and arbitration provides additional pedagogical values, we might nonetheless return to our original question about pedagogy versus competition as the Moot’s predominant purpose or value. In the case of this particular Moot, one might reasonably ask, ‘Are pedagogical and competitive values necessarily inconsistent?’ Professor Waincymer acknowledges that the two values or goals may not always be inconsistent.<sup>23</sup> However, he goes on to suggest that, in some circumstances, the advancement of educational and competitive goals may reach a point of cross-

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<sup>16</sup> Unlike most moots, see Kenety, W. H., *supra* fn 11, at 582, the Vis Moot includes a procedural issue or issues that might reasonably arise in the context of arbitration.

<sup>17</sup> This issue was raised in the Tenth Moot.

<sup>18</sup> Bergsten, E. E., Ten Years, *supra* fn 2, at 37.

<sup>19</sup> See Waincymer, J., *supra* fn 6, at 257-64; Blase, F., *supra* fn 14, at 118.

<sup>20</sup> Bergsten, E. E., Ten Years, *supra* fn 2, at 40.

<sup>21</sup> Vis Rules, *supra* fn 10, Rules 32 and 58.

<sup>22</sup> The Moot helps students from all over the globe meet, converse, argue and better understand each other, which in turn builds friendships and even future business bonds that are everlasting: Bergsten, E. E., Ten Years, *supra* fn 2, at 41 (quoting Martin Hunter).

<sup>23</sup> Waincymer, J., *supra* fn 6, at 253.

purposes, and their paths may diverge.<sup>24</sup> This article will address the latter point and will suggest that an optimal educational strategy will, in virtually all cases, also be an optimal competitive strategy. This is not to suggest that the two are equally important, but simply to point out that a choice to focus on pedagogy need not make a team any less competitive in the Moot. In fact, competitive elements may serve as fuel to further advance the educational experience.

The Rules of the Moot unequivocally describe the primary goal as educational and relegate competitive elements to a secondary or incidental role.<sup>25</sup> These same Rules, however, allow faculty advisors or other coaches to help guide the students' early efforts at analysis, research, and advocacy,<sup>26</sup> and allow teams to engage in practicing oral arguments with other schools prior to the Moot.<sup>27</sup> These two latter rules – quite unique in the world of mooting – arguably go a long way towards eliminating any conflict between the educational and competitive goals of the Moot. Instead, the authors suggest that these goals are entirely complementary.

### 3 MAKING THE MOST OF TWO UNIQUE FEATURES OF THE VIS MOOT

While the Moot includes many unique features to commend it as an educational experience, this part of the article will focus on two of those specific features. First, the Vis Rules allow for interaction between coaches and students while the students are analysing the Moot problem, researching the legal issues, developing their arguments, and drafting the memoranda on behalf of the claimant and the respondent.<sup>28</sup> Second, the Vis Rules allow individual teams to engage in 'Pre-Moots' in which they participate in practice moots against teams from other institutions prior

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<sup>24</sup> *Ibid*, at 253, 273 (suggesting that the best educational strategy allows a larger group of students to develop the arguments, themselves, while an optional competitive strategy might involve only a few students, who are fed specific arguments to hone to perfection) and 279 (suggesting that a larger team expands the educational experience, but is not an optimal competitive strategy).

<sup>25</sup> Vis Rules, *supra* fn 10, Rule 3. Admittedly, the competitive elements may take on a heightened significance as the Moot moves into the elimination rounds, beginning with the Tuesday evening announcement of the teams 'moving on' and continuing with the announcement of the winners of those elimination rounds on Wednesday and Thursday. However, all but one team is destined to be designated a 'non-winner' by the end of the Moot (a point always made by the President of the Moot Alumni Association during the opening ceremonies for the Moot). For all of these non-winners, the sting of loss is generally quite brief, and the joy of the overall experience of participating in the Moot, along with the substantial educational benefit, remains for a long time to come.

<sup>26</sup> *Ibid*, Rule 73.

<sup>27</sup> *Ibid*, Rule 74.

<sup>28</sup> *Ibid*, Rule 73.



to the actual Vis Moot in Vienna.<sup>29</sup> Each of these unique features provides for exceptional pedagogical opportunities not typically found in other moots.<sup>30</sup>

The Moot problem provides an opportunity for students to expand their doctrinal legal knowledge, while developing and applying their analytical, research, writing and advocacy skills. The rules of most moots prohibit or at least significantly limit the involvement of faculty or other non-student coaches until the briefing has been completed,<sup>31</sup> thus significantly limiting the educational benefits that might be achieved during this process. While such limits might serve to sharpen the competitive process, they would seem counter-productive when it comes to pedagogy. The early involvement of a faculty member or other coaching mentor in working with the students can serve to improve the educational experience in many of the same ways a faculty member's involvement serves to improve the educational experience in a traditional law school class taught on the common law model. Moreover, the educational experience provided by the Moot problem can be extended to a larger body of students by using the problem in the classroom. This opportunity is further explored in Part 3.1.

Once the student teams have completed their written submission(s), many moots allow for outside coaching assistance as the teams prepare for the oral competition. However, such coaching assistance is often limited,<sup>32</sup> and the rules for most moots do not allow students to practice against teams from other institutions prior to the formal oral competition.<sup>33</sup> Again, this might represent a reasonable limit if one focuses on the competitive process, but one that seems to eliminate an outstanding pedagogical opportunity.<sup>34</sup> The coaching assistance and Pre-Moots allowed under the rules of the Vis Moot represent further opportunities for students to extend their analysis of the Moot problem and to develop and practice their advocacy skills – all in an environment emphasising the learning experience. These Pre-Moots can also extend the oral argument experience beyond the limited number of students able to participate in the Moot in Vienna. This opportunity is further explored in Part 3.2.

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<sup>29</sup> *Ibid*, Rule 74.

<sup>30</sup> Moots are typically treated solely as 'extracurricular' activities: *Wikipedia: The Free Encyclopedia* (2006) available at: <[http://en.wikipedia.org/wiki/Moot\\_court](http://en.wikipedia.org/wiki/Moot_court)> (explaining that extracurricular activities are those falling outside of the normal curriculum). While there is much to be said for providing for opportunities outside of the law school curriculum, it is hard to see why an institution should not want to maximise a curricular opportunity provided by a moot, or why the rules of a moot should necessarily limit such educational opportunities.

<sup>31</sup> Greenberg, S. N., 'Appellate Advocacy Competitions: Let's Loosen Some Restrictions on Faculty Assistance' (1999) 49 *Journal of Legal Education* 545, 546 (explaining that outside assistance is prohibited during the briefing process). But see Dickerson, D., *supra* fn 9, at 1220 (stating that most moots prohibit any outside assistance during the briefing process, but noting that a few allow limited assistance); Jessup Rules, *supra* fn 10, Rule 2.4 (allowing for some limited faculty assistance).

<sup>32</sup> Greenberg, S. N., *supra* fn 31, at 546.

<sup>33</sup> See, e.g., Jessup Rules, *supra* fn 10, Rule 2.4.

<sup>34</sup> Greenberg, S. N., *supra* fn 31, at 546-7.

By making the most of each of these two unique features of the Vis Moot, a participating institution can significantly enhance the overall educational value to its students, as well as the overall institutional benefit. In order to better understand and share the extent to which various institutions participating in the Vis Moot might be utilising these opportunities, the authors conducted a brief survey of participants in the Thirteenth Moot.<sup>35</sup> The survey results are included in the Appendix and will be referenced where appropriate in the various subsections of Part 3 below.

### **3.1 BUILDING A COURSE AROUND THE VIS MOOT PROBLEM (GRAVES)<sup>36</sup>**

Students participating in the Vis Moot will sometimes begin the process with little or no substantive knowledge in international commercial law or international commercial arbitration.<sup>37</sup> These students may also lack any background in comparative law, thus making the challenge of learning international law and procedure even a bit more daunting. While participating students are obviously capable of overcoming these

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<sup>35</sup> The complete survey results are included in the Appendix. The survey was prepared by the authors and e-mailed by Professor Eric Bergsten during the summer of 2006 to the individual team contact persons for the Thirteenth Annual Vis Moot. The survey was returned by 82 of the 156 teams (or 53% of the teams) participating in the Thirteenth Moot. The survey respondents represent a broad cross section of teams, including institutions from Australia, Austria, Belarus, Belgium, Brazil, Canada, China, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, India, Indonesia, Kosovo, Lithuania, Mexico, Moldova, the Philippines, Poland, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Ukraine, the United Kingdom, and the United States. Unfortunately, almost half of the participating teams did not respond, and we obviously have no way of knowing how this might have affected the survey results. The survey results should, therefore, be viewed as reflective of the experiences of the majority of Moot participants, but not all such participants. Nonetheless, these results provide valuable insights into the utilisation of the educational opportunities associated with the Moot. This initial survey may also provide a catalyst for future survey efforts in which greater response levels may be attained.

The survey questions relating to academic credit for participation in the Moot were inspired, in part, by an earlier survey of US participating law schools, conducted by Lynn Fraser, Adjunct Professor, Georgetown University Law Center, and co-coach of the Georgetown team.

<sup>36</sup> This portion of the Article was authored primarily by Jack Graves, based in large part on his experience in developing and teaching a course entitled 'International Sales Law & Arbitration'. The course was first offered and taught by Graves during fall 2003 and fall 2004 at Stetson University College of Law, and during fall 2005 at Syracuse University College of Law. The course remains a part of the curriculum at Stetson University College of Law and is currently taught by Assistant Professor Joseph Morrissey.

<sup>37</sup> While the majority of responding institutions offer courses in these areas, 35% of the responding schools did not offer a course in international commercial arbitration, and 28% of the responding schools did not offer a course in international commercial law. Eighteen percent of the responding schools did not offer a course in either: see Appendix. Even if such courses are offered, they are typically elective courses, and a participating team member may or may not have taken them.

challenges on their own (and often do so, to varying degrees), I will suggest in this portion of the Article that there might be another method that makes more effective pedagogical use of the Moot and its underlying annual problem.

### 3.1.1 A BRIEF STORY OF MY OWN COURSE DEVELOPMENT

During our first experience as co-coaches in the Moot four years ago, Professor Vaughan and I found ourselves working with just such a group of students who had little, if any, background in the relevant subject matter. As it turned out, a colleague, Professor Bradford Stone, agreed to help the students early in the semester with an ‘ad hoc’ overview of the CISG over a number of lunch hours, while I helped them get up to speed on the basics of arbitration in a similar manner. The students ultimately did a remarkable job of learning both while working on the Moot problem, writing briefs, and preparing for the oral arguments in Vienna. However, at the end of this process, we looked at the toll this had taken on the students, as well as on us, and said ‘there must be a better way to do this.’ Fortunately, our Deans were supportive and gave me the opportunity to develop a three credit hour<sup>38</sup> law school course<sup>39</sup> built around the Vis Moot problem to be offered the following fall.

The idea of combining a traditional law school doctrinal course with a practical skills based course came from my earlier experiences at the University of Colorado with an integrated five credit hour course combining Evidence and Trial Practice.<sup>40</sup> This had been my favourite course as a law student at the University of Colorado and one of the most fulfilling as a law professor when I had the chance to teach it some years later at the same school. I thought that this sort of approach made for a better learning experience in terms of both doctrine and skills, and I hoped the same thing might happen with a course built around the Vis Moot problem.<sup>41</sup> The rules seemed to allow and perhaps even encourage this approach with respect to the team of students participating in the Moot,<sup>42</sup> and the course would allow more students to benefit from the educational experience than just those ultimately chosen for the actual Moot team.

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<sup>38</sup> This is roughly ten percent of the annual course load taken by a full-time US law student.

<sup>39</sup> Based on my subsequent experience in teaching the course, I believe that it would be even more effective as a four credit course. While it is certainly possible to accomplish the course goals in three, there is more than enough doctrine to cover in the first half of the course, and more than enough work to do in the second half, to justify an additional classroom hour per week and a total of four credit hours for the entire class.

<sup>40</sup> My own law school Professor, Marianne Wesson, still teaches this course at the University of Colorado and deserves much of the credit for getting me to think about the idea of combining theory and practice in this way in a single course.

<sup>41</sup> Professor Darren Latham had developed and taught a class built around the Moot problem at Rutgers, and he had also provided us with early advice and assistance in preparing for the Moot during the first year Stetson participated.

<sup>42</sup> Vis Rules, *supra* fn 10, Rule 73. The Vis Rules allow for limited interaction between students and faculty during the period in which the students are working on the written memoranda, thus allowing for the use of the Moot problem in a classroom environment. The Vis Rules also, however, expressly state that the students must ‘do all the research and writing of the

When addressing questions of validity under Art. 4 of the CISG, one can briefly introduce the doctrine of separability of the arbitration clause, providing for arbitration in most cases, even if the contract containing the clause is deemed invalid.<sup>64</sup> Later, when addressing avoidance under Arts. 49 and 64 of the CISG, one can point to Art. 81(1), which essentially adopts the doctrine of separability in cases of avoidance.<sup>65</sup> Thus, when the course focus shifts to arbitration, and the doctrine of separability is addressed in detail, along with competence/competence,<sup>66</sup> the students are already familiar with the context in which it arises, and a difficult analytical construct is made more understandable to students.

When addressing contractual intent under Arts. 8 and 9 of the CISG, one can remind students that arbitration is, essentially, defined and driven by the parties' intent. At this point, I typically introduce the students to a hierarchy of sources of the parties' rights and obligations, beginning at the top with mandatory rules, followed by specific express provisions, general express provisions, practices and usages between the parties and within the trade, and finally default rules. We then compare default rules of the CISG and Model Law, which can be 'trumped' by the parties whenever they express the desire to do so, with mandatory rules, which cannot. Once we have established the boundaries (mandatory rules at the top and default rules at the bottom) we can deal with various distinctions within those boundaries, such that between general and specific terms. During this process, I point to arbitration rules as examples of contract terms by reference or incorporation, also explaining that specific variations from such general references would typically be seen as better evidence of the parties' specific intent (or that the rules are simply another layer of default terms, expressed by the parties). I believe the benefits of this approach are twofold. First, the students are able to look at a hierarchy of contractual intent from two points of reference – the arbitration agreement and the broader contract, as a whole. Second, when we shift the focus to arbitration, I almost never have to answer the question, 'What is the difference between the UNCITRAL Model Law and the UNCITRAL Model Rules, and why to we need both?' Or, if I do, it is much easier to answer by reference back to our earlier discussion of contractual intent.

At some point during the 'contracts' discussion, one will likely want to introduce the UNIDROIT Principles of International Commercial Contracts (2004) (the 'UNIDROIT Principles') as a potential source of international contract law. I typically point out the UNIDROIT Principles as a potential source of 'general principles' when addressing the interpretation of the CISG under Art. 7, and then suggest that parties might even want to consider adopting them as either primary or secondary sources of governing law. This is a great opportunity to introduce the students to the Preamble of

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<sup>64</sup> Model Law, Art. 16(1).

<sup>65</sup> CISG Art. 81(1) (providing that '[a]voidance of the contract does not affect any provision of the contract for the settlement of disputes').

<sup>66</sup> Competence/competence provides that an arbitral tribunal is empowered to rule on its own jurisdiction and is addressed in Model Law Art. 16(1), along with the doctrine of separability.

law and/or arbitration,<sup>46</sup> and a little over a third offer a course for credit that specifically addresses the substance of the Vis Moot problem.<sup>47</sup>

Even if the institution does not offer a course built around the problem, almost half of the responding institutions award the students academic credit for their work on the Moot outside of any formal classroom setting,<sup>48</sup> and more than a quarter offer general courses on moot court or advocacy.<sup>49</sup> The students then work largely on their own to apply (and perhaps learn in the process) the relevant legal doctrine while also developing their related skills. This is likely the approach taken in most moots.

The students undoubtedly profit from both the doctrinal knowledge and skills acquired during their work on the Moot problem – whatever the approach. In either of the above cases, however, doctrinal coverage and skills training remain largely separate and/or self-directed by the students. Without the benefit of purposeful curricular integration by a faculty member, some elements of the extraordinary pedagogical opportunity presented by the Moot may be lost.

The nature of learning is such that one learns, understands, and remembers far more of what one actively uses or applies than what one passively reads or hears.<sup>50</sup> It also stands to reason that the more one separates the educational elements of theory and practice, the less effective the latter in promoting active learning. When one combines theory and practice in a single course,<sup>51</sup> the instructor is best able to draw upon recently learned legal theory in challenging the students to apply that theory to the

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<sup>46</sup> See Appendix (showing that 65% offer a course in international commercial arbitration and 72% offer a course in international sales law). The survey did not ask whether such courses are considered pre-requisites for participation in the Moot, but an institution could certainly implement such an approach if appropriate.

<sup>47</sup> See Appendix (showing 63% offering some sort of academic credit and 56% of this group offering credit for a course specifically related to the substance of the Moot – or 35.3% of total respondents).

<sup>48</sup> See Appendix (showing 63% offering some sort of academic credit and 67% of this group offering credit for participation in the Moot, separate and apart from any course specifically related to the substance of the Moot – or 42.2% of total respondents).

<sup>49</sup> See Appendix (showing 63% offering some sort of academic credit and 44% of this group offering credit for a course in mooting, generally – or 27.7% of total respondents). Stetson offered such a general one credit hour course, taught by Professor Vaughan, which made the integration of doctrine and skills much easier in the International Sales and Arbitration course that focused specifically on the problem. See *infra* fn 101 (discussing the potential for combining various courses).

<sup>50</sup> Cooper, B. D., 'The Integration of Theory, Doctrine, and Practice in Legal Education' (2002) 1 *Journal of the Association of Legal Writing Directors* 51, 58-60.

<sup>51</sup> One could likely achieve the same benefits by integrating sequential courses in theory and practice. The key is for the students to be able to link their prior doctrinal learning with the practical educational experience presented by the Vis Moot problem.

Moot problem before them.<sup>52</sup> Thus, the combination of doctrinal theory and practical skills training in a single course would arguably better maximise the educational benefit of the Moot.<sup>53</sup>

The second question relating to course content involves the question of combining doctrinal coverage of international sales law and international commercial arbitration in a single course.<sup>54</sup> The most obvious benefit to doing so in this context is that the Vis Moot focuses equally on both.<sup>55</sup> However, there are other good reasons as well. The predominant body of international sales law, as represented by the CISG, and arbitration, as the predominant method of resolving international sales contract disputes, work together, hand and glove, to promote international trade.<sup>56</sup> An international commercial lawyer must be fully mindful of both – whether at the contract negotiation and drafting stage<sup>57</sup> or at the dispute resolution stage. For many of the same reasons that these two distinct subject matter areas provide a perfect combination for the Moot, they also provide a perfect combination for a doctrinal law school class.

At its core, an arbitration agreement is nothing more than a contractual obligation – one that obligates the parties to settle their controversies through a private adjudicative

<sup>52</sup> See Smith, M. R., 'Alternative Substantive Approaches to Advanced Legal Writing Courses' (2004) 54 *Journal of Legal Education* 119, 120 (noting the value of taking skills training beyond the first-year curriculum, when integrated with a specific advanced doctrinal area).

<sup>53</sup> My own student evaluations bear this out. I have consistently received the most positive student evaluations for this course that I have ever received as a law professor – despite the fact that these students also say they worked harder in this course than any other in law school. Nonetheless, the survey indicates that this approach is employed by only 24% of the responding schools. Perhaps there are good reasons for this that I have simply missed or overlooked. Or perhaps the survey questions were not sufficiently precise to capture the appropriate data. However, I also wonder if this is to some degree a structural or institutional challenge. For example, in US law schools, doctrinal faculty do not typically teach skills courses, and skills faculty often do not teach doctrinal courses. Thus, any course combining the two will often require law school faculty to teach 'outside the box' in terms of traditional curricular focus, or will require team teaching efforts: Cooper, B. D., *supra* fn 50, at 60-1. While such institutional issues may indeed increase the challenge in developing a course combining theory and practice, perhaps they can be overcome if one agrees that such a course is desirable.

<sup>54</sup> One could likely achieve the same benefits by integrating sequential or simultaneous courses in sales law and arbitration. The key is for the students to be able to link the doctrinal theory in the two subject matter areas in a way that they can more fully appreciate their interrelatedness.

<sup>55</sup> The Moot problem typically splits roughly evenly between procedural arbitration issues and substantive sales law issues. The *Vindobona Journal of International Commercial Law and Arbitration* also combines the two.

<sup>56</sup> The United States Supreme Court has suggested that arbitration is 'an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.' *Scherk v Alberto-Culver Co.*, 417 US 506, 516 (1974).

<sup>57</sup> Stipanowich, T. J., 'Contract and Conflict Management' (2001) *Wisconsin Law Review* 831, 831-2.

process resulting in a final resolution of the dispute.<sup>58</sup> This obligation may be a conditional one included in the parties' basic commercial transaction, or it may be included in an agreement drafted after the dispute has already arisen. In either case, the agreement to arbitrate is largely a matter of contract. As such, arbitration is arguably at least as related to doctrinal contract law as it is to more traditional forms of public adjudication conducted by state institutions.

As a crucial element of many contracts, the subject of dispute resolution provisions should be 'woven into first-year courses in contracts, encouraging law students to consider key questions [inherent in private dispute resolution]'.<sup>59</sup> The value of integrating arbitration and contract doctrine would seem even stronger in the case of an advanced course covering international sales law and arbitration.<sup>60</sup> Advanced law students should be better able to comprehend and benefit from an integrated approach, and arbitration is even more important in international transactions.<sup>61</sup> International sales law and arbitration are also quite teachable together.

My own approach is to begin with an introductory overview of both subject areas and then move to detailed coverage of the CISG, weaving in coverage of specific relevant arbitration issues along the way. When we have largely completed our basic coverage of the CISG, I then shift the primary focus to arbitration, referring back to relevant provisions of the CISG, as appropriate. In this way, the students are able to gain a basic understanding of each, independently, while also seeing their interconnectedness.<sup>62</sup>

For example, when discussing Art. 11 of the CISG, which does not require a contract of sale to be evidenced in writing, one can simultaneously point out that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') and the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') do require such a writing.<sup>63</sup> Thus, a signed writing is generally quite important in international sales transactions – notwithstanding Art. 11 of the CISG.

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<sup>58</sup> *Ibid*, at 833, 840.

<sup>59</sup> *Ibid*, at 835-6.

<sup>60</sup> While I am, first and foremost, a teacher and scholar of contracts and commercial law, I have been drawn to arbitration as an important contractual provision governing party driven dispute resolution – particularly in the case of international contracts.

<sup>61</sup> Stipanowich, T. J., *supra* fn 57, at 841.

<sup>62</sup> To date, I have used two separate texts, largely because I am not currently aware of a single text that combines both. For the commercial law focused portion, I have used Spanogle, J. A., and Winship, P., *International Sales Law* (2000); and for the arbitration-focused portion, Garnett, R., Gabriel, H., Waincymer, J., and Epstein, J., *A Practical Guide to International Commercial Arbitration* (2000). I have hopes of writing a combined casebook myself, but that project currently remains in the 'idea' stage.

<sup>63</sup> Compare Art. 11 of the CISG (dispensing with any writing requirement), with Art. 7(2) of the Model Law, and Art. II of the New York Convention (each requiring an agreement in writing).

When addressing questions of validity under Art. 4 of the CISG, one can briefly introduce the doctrine of separability of the arbitration clause, providing for arbitration in most cases, even if the contract containing the clause is deemed invalid.<sup>64</sup> Later, when addressing avoidance under Arts. 49 and 64 of the CISG, one can point to Art. 81(1), which essentially adopts the doctrine of separability in cases of avoidance.<sup>65</sup> Thus, when the course focus shifts to arbitration, and the doctrine of separability is addressed in detail, along with competence/competence,<sup>66</sup> the students are already familiar with the context in which it arises, and a difficult analytical construct is made more understandable to students.

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the UNIDROIT Principles, which, among other things, expressly suggests that parties choose arbitration over court adjudication based on its greater deference to party choice of governing law.<sup>67</sup>

I could go on with other examples of integration of the materials, but I hope the foregoing list has convinced the reader that both subjects can effectively be taught in a single class.<sup>68</sup> If so, then one might want to consider taking both the first and second integration steps that I have taken: (1) integrating the theoretical doctrine with a skills course built around the problem; and (2) integrating both contract and arbitration theory into the doctrinal coverage.

While this Article takes the position that a fully integrated course will best maximise the educational benefits of the Moot, I also recognise that others may reasonably disagree or may, for a variety of good reasons, be unable to offer such an integrated course. However, some of the elements of an integrated course may nonetheless prove useful to anyone building a law school course around the Moot problem – whatever the overall content of such a course.

### **3.1.3 SOME THOUGHTS ON IMPLEMENTING THE COURSE**

If one agrees that a course built around the Vis Moot problem is a valuable pedagogical enterprise – whatever the level of doctrinal integration – then the next issue to address is the details of such a course. What follows is a description of the course I developed, which I provide solely as a source of potential ideas.<sup>69</sup> There are likely many different ways to teach such a course, some of which would be more effective than those I have employed. In fact, my successor at Stetson has arguably

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<sup>67</sup> UNIDROIT Principles, Preamble cmt. 4.a. (2004). See also Model Law, Art. 28(1) (granting the parties the right to choose their own governing law). In the absence of a choice of arbitration, many courts will ignore the parties' express choice of non-national law, such as the UNIDROIT Principles. See Graves, J. M., 'Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform' (2005) 36 *Seton Hall Law Review* 59, 79 (suggesting that such a choice would be unenforceable in US courts).

<sup>68</sup> The survey indicates that this approach is relatively rare, with only 11% of responding schools employing it: see Appendix (showing that 11% of those schools offering courses in both subject matter areas offer combined coverage). As with the integration of doctrine and skills, this may, to some degree, reflect structural or institutional challenges. Professors teaching commercial law may not teach arbitration. If not, then, again, any course combining the two will often require law school faculty to teach 'outside the box' in terms of traditional curricular focus, or will require team teaching efforts. As I understand it, this institutional split between substantive commercial law and procedural law governing arbitration may be particularly significant in civil law countries (the survey results also seems to reflect this, showing just 4% of responding schools integrating the two doctrinal courses). While such institutional issues may indeed increase the challenge in developing a course combining doctrinal elements, perhaps they too may be overcome if one agrees that such a course is desirable.

<sup>69</sup> I am also happy to provide a copy of my course syllabus to anyone that might be interested.

‘improved’ on the course I left behind in a variety of ways. Thus, if any of these ideas sound interesting, I encourage you to use them in any way that you may find useful.

The course allows for enrolment of up to 24 students.<sup>70</sup> Any student interested in participating in the Vis Moot is required to enrol, but it is also open to students that are simply interested in taking the course.<sup>71</sup> By opening the course to a larger group of students, the educational benefits derived from the exercise are made more broadly available. This also helps, to some degree, in addressing the challenge by some that the Vis Moot is excessively expensive considering the number of students receiving its benefits.<sup>72</sup> By spreading the cost over a greater number of beneficiaries (even partial beneficiaries), the cost per benefited student is reduced.

The first half of the course is devoted to a doctrinal survey of international sales law and arbitration<sup>73</sup> and concludes with a traditional law school exam on the Thursday before the Vis Moot problem is distributed.<sup>74</sup> The most significant challenge in this first half of the course is the amount of material to be covered,<sup>75</sup> and the key to getting through it is to maintain a ‘survey’ level approach. If the students understand the basics, particularly the underlying general principles, then they will be well prepared to research and analyse specific detailed issues that arise – whether those issues arise in the Moot or later in the practice of law.

The second half of the course is entirely devoted to the students’ work on the problem. The students organise themselves into groups<sup>76</sup> and work together for the remainder of the semester, with this group dynamic serving many of the same purposes as the group structure of a team in the Moot itself.<sup>77</sup> From this point forward, the students primarily drive the class, with the instructor serving largely as facilitator. In class, the students (1) break down and analyse the issues presented by the problem; (2) make presentations to their classmates summarising and analysing their most important research results; (3) discuss the need for additional fact discovery in the form of

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<sup>70</sup> The limit on the number of students is largely driven by the structure of the skills portion of the class. However, there is no limit on the number of students from any given institution that may participate in the Moot: Vis Rules, *supra* fn 10, Rule 26.

<sup>71</sup> The last year that I taught the class at Stetson, approximately half of the students tried out for the team and about half simply took the class for its own benefits. Apparently, many of these students recognised the educational benefits of such a class, independent of the extraordinary opportunity to travel to Vienna and participate in the oral rounds of the Moot.

<sup>72</sup> See Waincymer, J., *supra* fn 6, at 267 (also taking note of this challenge).

<sup>73</sup> See *supra* Part 3.1.2.

<sup>74</sup> The distribution date for the problem typically works reasonably well in terms of splitting a US law school semester into two reasonably equal parts. To the extent that it may come a bit early, I have simply moved a couple of classes forward by rescheduling them prior to the exam date.

<sup>75</sup> This material, if covered in depth, could easily support an entire class or more, and it is covered in half of a three credit hour class.

<sup>76</sup> I use groups of four, but one might reasonably use more or less.

<sup>77</sup> See *supra* Part 2 (describing the extensive range of skills training addressed by the Moot).

clarifications;<sup>78</sup> and (4) engage in mock oral arguments of the issues.<sup>79</sup> Outside of class, the students are expected to work in their respective groups to research and write the memoranda for the claimant,<sup>80</sup> along with of course preparing for their 'in class' exercises.

The instructor serves an important role in facilitating the process through continuous questioning – very much on the classical 'Socratic' model<sup>81</sup> – while the work itself is done entirely by the students. The instructor can also provide important feedback to the students – encouraging their effective efforts and raising further questions when they seem to be veering too far off track.<sup>82</sup> While this is largely a collaborative process on the part of the students, it is also a graded one. The students receive individual grades for their respective 'in class' participation, and group grades for their respective written memoranda.<sup>83</sup>

The activities described above include all of the students in the class. However, there is one additional activity that is limited to those students hoping to be selected for the team that will ultimately travel to Vienna and participate in the Moot. Relatively late

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<sup>78</sup> As discussed *supra* Part 2, the requests for clarifications allowed by the Vis Rules provide an excellent opportunity for the students to engage in focused fact discovery. In contrast to broad discovery requests allowed in US courts, these requests for clarifications must be quite specific and must be justified – much like such requests to an arbitral tribunal. See also Bergsten, E. E., Ten Years, *supra* fn 2, at 41 (explaining that lawyers often learn important facts 'only by asking questions – the right questions, of course').

<sup>79</sup> Even before the memorandum is completed, oral arguments can help the students in fleshing out the issues. In much the same way students develop new ideas in Vienna by arguing in rounds with other teams, the students in the class will develop new ideas by 'testing' their arguments against each other, and against their instructor/mock arbitrator. The educational benefit of this experience was further enhanced by the fact that many of the students were simultaneously enrolled in a general course in moot court advocacy. See *supra* fn 49.

<sup>80</sup> An alternative approach for the course, effectively used by Professor Morrissey at Stetson, is to assign half of the class to write a memorandum for the claimant and half to write a memorandum for the respondent. This of course only relates to the memoranda produced for course credit, because all students must first submit the claimant's memorandum in the Moot itself. In any case, it is useful to encourage the students to develop the arguments on both sides of the issues early in the analytical process. Inasmuch as they will be writing a memorandum for the claimant to which no reply is allowed, they must anticipate and proactively address the most likely arguments to be raised by the respondent.

<sup>81</sup> See Waincymer, J., *supra* fn 6, at 280 (describing one of his primary roles as that of asking 'why?' in a way that encourages the students' analysis).

<sup>82</sup> The opportunity to provide this timely feedback is one of the major advantages of the structure of the Vis Moot, allowing interaction between coach and student during the briefing process. See Cooper, B. D., *supra* fn 50, at 61 (noting the crucial role of timely evaluation and correction). The instructor should not, of course, provide students with 'answers' to their research and analytical quests, but may sometimes need to raise potential questions or challenges that students may have missed. In doing so, the instructor is focused on 'enhancing' the educational value of the students' own efforts rather than performing those efforts in place of the students. See *supra* fn 42.

<sup>83</sup> See *infra* Part 4 (discussing the significance of grading).

in the semester, these students compete in oral argument tryouts, separate and apart from the 'in class' mock oral arguments. Based on these oral arguments, as well as each student's performance in the overall class, a team is selected.<sup>84</sup> Once the final memoranda have been submitted for course 'grades', the students selected for the team work collaboratively to assemble a final competitive claimant's memorandum for submission as part of the Moot.<sup>85</sup>

For the remainder of the Moot, this team works together much like any other team in the Moot. However, they carry with them much of the collective wisdom of their classmates, and their classmates carry with them many of the educational benefits provided by the Moot.

### 3.2 *TEACHING ORAL ADVOCACY THROUGH THE VIS MOOT* (VAUGHAN)<sup>86</sup>

An expressed 'purpose of the Moot is to develop the art of advocacy in international commercial arbitration proceedings.'<sup>87</sup> In order to better understand this particular educational mission of the Moot, a basic discussion of 'advocacy' is helpful. Advocacy is defined as 'the act of pleading for or actively supporting a cause or proposal,'<sup>88</sup> typically pleading 'the cause of another before a tribunal or judicial court.'<sup>89</sup> The idea of any moot court competition is to advocate the cause of a fictitious client, and the essential requirement for such advocacy is persuasion. Persuasion is the key.

Before any student can be prepared to argue, whether it is before a judge, a panel of arbitrators, professors, lawyers, or peers, he or she must have a basic understanding of *how to persuade*. Many are born with a natural gift of persuasion, but all can learn to persuade – even those lucky enough to possess a natural gift can improve and refine that gift. Once the basic concepts and skills of persuasion become second nature to the student through preparation and practice, the Pre-Moot is particularly beneficial in refining these skills before the final stage of the Moot, the oral hearings in Vienna. This part will address the events leading up to the oral 'competition', which provide

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<sup>84</sup> This is obviously the most difficult and least enjoyable part of this process. Unfortunately, it is also a necessary part, because budgetary issues limit the number of students that can travel to Vienna.

<sup>85</sup> The students selected for the final team typically come from more than one of the 'teams' of students working together in the course, so they will seek to combine the best of their respective course memoranda for the competitive submission.

<sup>86</sup> This portion of the article was authored primarily by Stephanie Vaughan, based on her experience, generally, as faculty advisor to the Stetson Moot Court Board for the past six years (this Board has fielded approximately one hundred teams in forty interscholastic moot court competitions) and coach to more than fifteen moot court teams, and, specifically, as a coach to Stetson's teams in the Vis Moot over the past four years.

<sup>87</sup> Vis Rules, *supra* fn 10, Rule 76.

<sup>88</sup> *Black's Law Dictionary* (8th ed, 2004) 60.

<sup>89</sup> *Merriam Webster's Collegiate Dictionary* (10th ed, 1993) 18.

an opportunity to maximise the pedagogical benefits of the Moot with respect to oral advocacy.

### 3.2.1 ADVOCACY AND THE ART OF PERSUASION

Law students can and should learn the art of persuasion – an art that must be used in any venue, in any country, and before any tribunal if one is to serve as an effective advocate for one’s client. To persuade, effectively, is to *clearly* articulate a position. To be persuaded, a tribunal must of course understand the advocate’s position and cannot do so unless it is clearly stated. Effective persuasion before a tribunal is also more like a conversation than a speech.<sup>90</sup> A tribunal may ask questions, requiring a dialogue between counsel and tribunal, and even a silent tribunal is more likely to be persuaded by a respectful conversational style than by a monotonous and perhaps demeaning lecture.

Of course one also requires an effective delivery vehicle for this clear, conversational persuasion, and perhaps the single most effective vehicle is the presentation of one’s advocated position as a story.<sup>91</sup> The advocate pleads his or her client’s cause by presenting the most interesting and compelling story to the audience<sup>92</sup> – in this case, the tribunal.<sup>93</sup> Thus, in order to persuade, the student must learn to tell a complete and compelling story of the case. However, ‘the tongue cannot paint what the eye cannot see.’<sup>94</sup> The only way to tell such an effective story is, first, to know and understand the law and, second, to know, and almost live, the facts of the pending case.<sup>95</sup>

This persuasive, clear, and conversational story does not simply recite the law and facts – the idea is to wrap the law *around the facts*. One begins by explaining in simple terms the underlying business transaction and laying a basic, common sense foundation for the story.<sup>96</sup> Upon this solid foundation, the story gains traction with the

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<sup>90</sup> Dickerson, D., *supra* fn 9, at 1221.

<sup>91</sup> See Voss, J., ‘The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom’ (2005) 29 *Law & Psychology Review* 301, 315 (discussing the value of storytelling in communication).

<sup>92</sup> *Erasmus Debating Society*, ‘Why Debate?’, available at: <<http://www.debate.nl/index.cfm?fnPageID=559>>.

<sup>93</sup> The late Alan Buchmann, lawyer, colleague, friend and frequent reader of memoranda and arbitrator in the oral rounds, often used to say, ‘You are not telling me a story. The only way you can persuade the arbitrators is to make the deal, the parties and the facts seem real and interesting.’

<sup>94</sup> Chinese proverb.

<sup>95</sup> Again, the development of the facts is particularly important in the Vis Moot. See *supra* fn 78.

<sup>96</sup> Dr. Eugen Salpius, a noted international arbitrator, and a frequent arbitrator in the Moot, has explained to a group of my students that, regardless of the ‘moot’ nature of the problem, the student is in the position of explaining what business people would do in the situation before the tribunal. Merely because there will be no outcome on the merits, common sense and business-mindedness should come into play, fostering the story and in turn allowing students to learn and appreciate how the real world works.

addition of interesting and important details, as well as relevant legal authority explaining why such details favour the advocate's cause.<sup>97</sup>

It often helps to begin with the least controversial points of the argument, building rapport and trust with the tribunal before moving on to the more controversial points. Of course, controversial points cannot be avoided for long and must be addressed directly and confidently, or the failure to do so may cause an advocate to lose this same rapport and trust. A successful advocate must learn to develop and maintain credibility with the tribunal, whether it is in a moot or in a real case.

Persuasion, advocacy, and lawyering are all ultimately about communication. Moot court programs in law schools have roots in debate, which is all about communication, and mooting is a classic way of teaching students these essential skills.<sup>98</sup> The majority of the institutions participating in the survey provide some form of academic credit in recognition of the educational value of the Vis Moot experience and mooting, generally.<sup>99</sup> Among those institutions providing academic credit, two-thirds provide credit for the students' participation in the Moot, separate and apart from any formal or structured class.<sup>100</sup> Over half of these institutions provide credit for a course focused specifically on the Moot problem, and almost half provide credit for a course in mooting or advocacy generally.<sup>101</sup>

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<sup>97</sup> For purely illustrative purposes, one might use an issue arising in the Twelfth Moot, in which the seller was asserting a CISG Art. 79 impediment based on a storm that destroyed the cocoa crop intended as the seller's source of supply. Instead of saying 'the storm was an impediment because ...', one might say 'there was a cocoa bean contract and the beans were to be delivered; there was a storm that wiped out most of the cocoa bean crops, and there were no beans left. This storm created an impediment. Impediments are defined as ...'.

<sup>98</sup> Participating in moot court competitions 'enhances students' research, writing, oral and analytical skills. It teaches students to communicate more effectively and to think more quickly on their feet.' Dickerson, D., *supra* fn 9, at 1217-8.

<sup>99</sup> See Appendix (showing that 63% provide academic credit related to the Moot).

<sup>100</sup> See Appendix (showing that, of those providing academic credit related to the Moot, 67% do so separate and apart from enrolment in any class).

<sup>101</sup> See Appendix (showing that, of those providing academic credit related to the Moot, 56% offer credit for a problem focused class and 44% offer credit related to mooting, generally). Of course, a school may offer credit for more than one course or involvement related to the Moot, and many do. For example, at Stetson, students receive three credit hours for the fall course in International Sales Law and Arbitration built around the Moot problem, see *supra* Part 3.1.3, and also receive one credit hour for a fall course on mooting generally. The students then receive an additional two credit hours, as independent study, for their spring participation in the Moot. See also Appendix (the percentages for the three sources of credit add up to 167% reflecting multiple sources of credit from various institutions). The survey also reflects some interesting variations between institutions from countries with common law and civil law heritages. Civil law institutions were almost twice as likely to offer a course focused on the problem, while common law institutions were more than three times as likely to offer a general course in advocacy or mooting. Common law institutions were slightly more likely to provide credit for work on the Moot outside of the context of any class, but civil law institutions that did so offered almost twice the amount of credit.

There are three aspects of communication: content, structure and style.<sup>102</sup> Content includes the substance of the advocates' argument – the facts and the law. When many of us think of legal argument, it is content that first comes to mind. In fact, it is the content of the communication that will typically decide real cases.<sup>103</sup> However, content may be misunderstood or lost without structure and style.

Structure includes the use of roadmaps and signposts to inform the listener about what to expect and how to expect it. Without structure, the importance or relevance of a particularly important detail may be completely lost in the torrent of information provided to the listener. Style, or non-verbal communication, may be the most significant of all three.<sup>104</sup> Style involves the delivery of the communication – body language, facial gestures, speech inflections, pace, and eye contact, to name just a few. If an advocate's body language is distracting, or pace of speech too rapid, then again the content, no matter how sound, may be lost. However, a well-structured argument, complete with clear and distinct signposts, delivered with appropriate pace and emphasis, while engaging the eyes of the listener, will almost certainly convey the content of the argument to the mind of the listener.

Some have suggested that mooting may focus too much on style (or style and structure), as opposed to substance (or content).<sup>105</sup> In deference to competitive fairness, the arguments of the students are judged not on the merits, but on their effectiveness, given the substantive circumstances presented.<sup>106</sup> At least one critic has suggested that this approach to competitive judging completely disconnects the mooting process from the real world and renders it largely ineffectual in teaching students practical advocacy skills.<sup>107</sup> One problem with this argument is that it may prove too much. If the complete substance of a dispute were easily apparent to all, then we would have no need for advocacy or advocates. However, substance is often subject to reasonable debate, and it is often the 'close cases' that end up before real

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<sup>102</sup> See *Erasmus Debating Society*, *supra* fn 92.

<sup>103</sup> See Waincymer, J., *supra* fn 6, at 264-5; Kozinski, A., 'In Praise of Moot Court – Not!' (1997) 97 *Columbia Law Review* 178, 182-3 (each suggesting, though to varying degrees, that moot court competitions may focus excessively on style, whereas real cases are presumably decided on the substance).

<sup>104</sup> Psychologists suggest that non-verbal communications account for 65-70% of total communication between humans. See *supra* fn 91, at 316.

<sup>105</sup> See *supra* fn 103.

<sup>106</sup> In the Vis Moot, the problems are typically quite well balanced. In fact, the coaches and arbitrators will often disagree as to which party should win any given issue on the merits. However, in this particular instance, a nod to competitive fairness is probably appropriate so that each student feels that he or she is being judged on his or her own merits, and not those of the case itself. This in no way conflicts, however, with the pedagogical goals of the Moot, because the student must learn effective advocacy in order to make such a competitive presentation.

<sup>107</sup> See Kozinski, A., *supra* fn 103, at 182-3.

tribunals.<sup>108</sup> In close cases, style may very well matter – not because it is more important than substance, but because style is the communications vehicle through which the tribunal comes to understand the substance.

Moreover, success in real world advocacy is not measured simply by winning and losing on the merits. Success in rhetoric includes two measures: (1) victory, the external end of rhetoric; and (2) ‘whether the rhetorician makes the best possible argument on behalf of a particular position’, the internal end of rhetoric.<sup>109</sup> This internal end may be important, in and of itself, particularly when one considers the fact that ‘victory’ may take various forms and over various time frames. A judicial dissent generated as a result of the effective rhetoric of a ‘losing’ party may eventually become a majority position – in effect, a delayed victory.<sup>110</sup> In addition, the very foundations of common law jurisprudence depend on effective advocacy on the part of both sides – the winner as well as the loser.<sup>111</sup> In short, mooting serves a valuable educational purpose even if it does focus predominantly on the internal end of rhetoric rather than the external result.

In mooting, students must focus on both substance and style. The substantive content of the presentation is course crucial.<sup>112</sup> Without content or substance, structure and style cannot carry the day – not even in mooting.<sup>113</sup> While the decision on the merits is not controlling in mooting, the students’ use of the available facts and law will be – just as it often is in a real life close case. Once the student has marshalled the relevant facts and law, he or she must communicate them effectively. This is where structure and style become important, particularly in the context of international dispute resolution, and particularly in the context of the Vis Moot.

In the Moot, students will typically make presentations to arbitrators from a variety of different legal and cultural backgrounds. Many of these arbitrators will not be native English speakers, and even those who are may speak a version of English that may sound somewhat foreign to another English speaker.<sup>114</sup> In such an environment, the

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<sup>108</sup> As we often tell our students, many cases do not have ‘right’ and ‘wrong’ answers. That is one reason why we often see split judicial or arbitral decisions.

<sup>109</sup> Scharffs, B. G., ‘The Character of Legal Reasoning’ (2004) 61 *Washington & Lee Law Review* 733, 760-1.

<sup>110</sup> *Ibid*, at 760.

<sup>111</sup> In particular, many criminal defence lawyers would be considered very poor advocates if measured only by their record of wins and losses – a measure that is entirely ineffective in recognising the value of a competent defence for every accused, however one-sided the substantive evidence may look.

<sup>112</sup> See *Erasmus Debating Society*, *supra* fn 92.

<sup>113</sup> Though, one will sometimes see an advocate with a very weak case who seems to be doing everything possible to obfuscate the actual content or substance of the argument by employing a deliberately confusing structure and style (or the lack thereof).

<sup>114</sup> The differences between American and British English can sometimes be quite confusing, as can regional colloquialisms; each leading to misunderstandings in the absence of effective communication.



importance of style is often elevated, perhaps even above substance – not because style is more important, in and of itself, but because one often cannot convey ‘substance’ without a certain amount of ‘style’.

For example, one of the most obvious style issues involves speaking pace. A native English speaker may speak at rapid pace, perhaps even challenging for another native speaker to follow. For a non-native speaker, this rapid pace may inhibit communication of substantial portions of the student’s substantive argument. It is as if the substance was never argued, even though it arises from an ineffective style. Another favourite topic of advocacy coaches is ‘eye contact’. While we may often joke about this, its importance is arguably quite real. From the arbitrator’s perspective, it is simply easier to remain engaged and focused on the argument of a person with whom you are making eye contact. When following a complex argument, perhaps in a second or third language, such an engaged focus may make the difference between understanding and missing the student’s point. Eye contact may also enhance a student’s credibility with the arbitrators.<sup>115</sup> From the student’s perspective, it is important to look the arbitrators in the eye for signs of understanding or confusion, so that the student may attempt to adjust his or her presentation accordingly.

In each of these examples, the style of communication may substantially affect the substance of what is communicated to the listener. In evaluating the effectiveness of communication, we know that what the listener hears is far more important than what the speaker says – whether in the Moot or in front of a real life court or arbitral tribunal. The elements of style cannot and should not be eliminated from the criteria for judging student performance in the Moot, because they are an important part of real life communication and an important part of the educational benefits of the Moot.

Ultimately, all of the students’ efforts to prepare for the oral rounds in Vienna are likely to provide these students with an important educational benefit. However, the extent of this benefit is significantly enhanced when these efforts are aided by a coach or faculty member, who can provide guidance in advocacy and the art of persuasion. A brief article such as this one cannot hope to provide an extensive treatise on advocacy, but instead serves simply to suggest its importance as a legal skill to be learned and some of the opportunities for such a learning experience provided by the Moot. The Vis Pre-Moots substantially enhance and expand these opportunities.

### 3.2.2 LEARNING ADVOCACY THROUGH PRE-MOOTING

The Vis Moot is unique in that it allows and even encourages pre-moots, or practice moots against other teams.<sup>116</sup> Other moots typically do not allow for such an opportunity.<sup>117</sup> By allowing for pre-mooting, the Vis Moot provides for far more opportunities for participating students to develop their advocacy skills than those provided by internal team practices. Pre-mooting also allows for more individual

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<sup>115</sup> See *supra* fn 91, at 319.

<sup>116</sup> Vis Rules, *supra* fn 10, Rules 74, 76.

<sup>117</sup> See *supra* fn 33.

students to share the experience of participating in a moot arbitration with students from other schools, countries, and legal systems. Together, these pre-mooting opportunities expand the educational opportunities astronomically.

A pre-moot, as the term is used here, would include any meeting of two or more teams to conduct moot arbitrations addressing the subject matter of the current Vis Moot, occurring prior to the official oral rounds in Vienna<sup>118</sup> and providing for some sort of constructive feedback for the students involved. Our survey indicates that an overwhelming majority of the teams participating in the Vis Moot last year also engaged in a substantial number of pre-moots. Seventy-nine percent of the teams participated in at least one pre-moot.<sup>119</sup> Of those teams participating in pre-moots, 78% met at least three other teams, and 41% met at least seven other teams, with 74% attending multiple pre-moot events, and 17% attending five or more such events.<sup>120</sup> Eighty-nine percent of these teams met at least one team from another country, thus engaging in an international pre-moot.<sup>121</sup> Based on this survey, one can reasonably conclude that pre-mooting has become a very significant element of the overall Vis Moot experience for most teams.

Most of this pre-mooting activity is non-competitive in nature. Sixty percent of the teams participating in pre-moots last year engaged only in non-competitive events.<sup>122</sup> However, there are also a significant number of competitive pre-moots. Fifteen percent of the teams participated only in competitive events, and 25% participated in both competitive and non-competitive events.<sup>123</sup> Both competitive and non-competitive pre-mooting is undoubtedly valuable from an educational perspective. However, the distinctions between them are potentially significant, so each will be addressed in turn.

A competitive pre-moot ultimately produces a winning team or teams, whether from paired matches, or individual team scoring, or some combination of the two. In one example, a group of teams might engage in a series of elimination matches, with winning teams meeting other winning teams and losing teams meeting other losing teams.<sup>124</sup> In another example, a group of teams might first engage in a series of scored rounds, with the teams receiving the highest scores then moving on to a series of elimination rounds to determine an ultimate victor – much like the oral rounds in the

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<sup>118</sup> The same description would apply to pre-moots held before the Vis East Moot in Hong Kong, but, for simplicity, this article will solely focus on Vienna.

<sup>119</sup> See Appendix.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> This format has been used for the past two years in a pre-moot involving four participating teams from Florida and sponsored by the International Litigation and Arbitration Committee, International Law Section of The Florida Bar.

Moot, itself.<sup>125</sup> These competing teams are afforded an excellent opportunity to practice and develop their advocacy skills in moot arguments with other teams, often from other legal backgrounds. The teams also have an opportunity to learn how their current level of advocacy measures up against other teams in the views of the participating arbitrators. However, the selection of winners in a head-to-head competition, as well as the scoring of performances to determine which teams advance to the elimination rounds, necessarily involves the implied designation of losers.

One of the challenges in a competitive pre-moot is to avoid the potential negative impact on the students of failing to 'win' – an impact that will of course be felt by all but the victor, and may be felt quite acutely by teams repeatedly failing to win. Failing to win a competitive pre-moot is also quite different from failing to win in the Moot itself. In the pre-moots, the students are attempting to prepare for the oral rounds in Vienna, and the development of their self-confidence is a huge part of that preparation. The implications of failing to win in a pre-moot may harm that self-confidence.<sup>126</sup> Nor are the competitive elements of a pre-moot necessary to fuel its pedagogical benefits. The students still have the Moot itself to do that.<sup>127</sup> The competitive elements of the Moot itself are an important part of the overall experience, and the sting of defeat is easily overcome in Vienna.<sup>128</sup> Thus, one might at least want to consider carefully the value of adding a competitive element to pre-mooting by thoroughly weighing its additional benefits with its additional risks.

In a non-competitive pre-moot, the students present their arguments in the normal fashion, and are provided with a critique after each round,<sup>129</sup> but no winner is ever declared. The non-competitive pre-moot essentially provides a forum for participating in a mock oral argument with another team in front of an arbitral panel, receiving constructive feedback, improving ones' arguments, and learning to be a better overall advocate.<sup>130</sup> A non-competitive pre-moot may in fact provide an optimal educational

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<sup>125</sup> This format was used last year in a pre-moot hosted by Catholic University of Leuven and including ten teams from a variety of countries.

<sup>126</sup> Of course, a team that fails to win in a pre-moot might also find itself even more motivated to work harder in its continuing preparation. The point here is not to suggest that this competitive element will always have a positive or negative effect, but to raise the issue so that it may be considered and addressed.

<sup>127</sup> See *infra* Part 4.

<sup>128</sup> See *supra* fn 25.

<sup>129</sup> These critiques may range from extensive public comments by each of the arbitrators and coaches present, to private comments between coaches, students and team mates.

<sup>130</sup> Over the past few years, Stetson has been privileged to host non-competitive pre-moots on its campus with teams from the Universities of Zagreb, Basel, Florida, and Franklin Pierce Law Center. The Stetson team has also been privileged to attend a non-competitive pre-moot hosted by the University of Zagreb and attended by the Universities of Rijeka and Notre Dame, Australia.

environment.<sup>131</sup> The students already have plenty of competitive motivation provided by the actual Moot to follow,<sup>132</sup> but they are able to focus more squarely on learning to be better advocates during the pre-moot.

The lack of any burning desire to come out 'on top' may also help foster collegiality and openness in sharing ideas for making the strongest arguments on various issues.<sup>133</sup> This interaction between the students is often one of the most effective educational experiences in the entire Moot – especially when the interaction includes students from different countries and legal backgrounds. A non-competitive pre-moot may also be easier to organise at an earlier stage of the students' preparation. I think most coaches would be hesitant to bring their teams to a competitive event until the students had spent substantial time preparing and polishing their oral arguments. However, there may be significant learning opportunities provided by practice rounds with other teams held quite early in the process, while the students are still in the process of developing their arguments. A non-competitive early pre-moot may provide such an opportunity.<sup>134</sup> Of course each team will need to weigh its own goals in determining whether to participate in competitive pre-moots, non-competitive pre-moots, or both. However, from an educational perspective, it would seem that a non-competitive event provides the greater overall benefits.

Pre-moots also provide some additional valuable opportunities.<sup>135</sup> One of the most important benefits of the Moot is the opportunity to meet and interact with other students, faculty and arbitrators from all over the world – all of whom share a passion for international commercial law and arbitration and a common experience of working through the substantial challenges of the current year's Moot problem.<sup>136</sup> While the oral rounds in Vienna unquestionably present the broadest and most extensive opportunity for such social interaction, a pre-moot arguably presents the most intimate one. In a pre-moot, students may also have an opportunity to meet and interact with

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<sup>131</sup> See Waincymer, J., *supra* fn 6, at 272-3 (suggesting that an 'optimal learning strategy' might in fact eliminate any competitive element in oral presentations – instead providing solely for personalised feedback after each presentation).

<sup>132</sup> See *infra* Part 4.

<sup>133</sup> Teams participating in pre-moots typically notify Professor Bergsten of the teams they meet so that he can avoid pairing up such teams in the preliminary rounds in Vienna. In a pre-moot, the students know they will not meet these teams in competition (unless it happens in the elimination rounds, in which case they are likely just thrilled to be there), so there is little reason to withhold any 'competitive' strategies.

<sup>134</sup> Last year, Professor Graves took his team from Franklin Pierce Law Center to a pre-moot hosted by Harvard University and attended by New York University, which was held just two weeks after the submission of the respondent's memoranda. Without any competitive pressures, the students from all of the schools were able to learn a great deal from each other very early in their preparation.

<sup>135</sup> These opportunities would seemingly arise in either competitive or non-competitive pre-moots.

<sup>136</sup> Bergsten, E. E., *Ten Years*, *supra* fn 2, at 40; Blase, F., *supra* fn 14, at 118-9; Waincymer, J., *supra* fn 6, at 281-2.

other students, faculty, and arbitrators from other countries and legal backgrounds – but in a much smaller group and perhaps in a more relaxed environment. While the pre-moot experience could never replace the ‘Vienna’ experience,<sup>137</sup> it certainly provides a valuable and complimentary one.

Pre-moots can also provide an opportunity for broader participation.<sup>138</sup> In many cases, a team will include members that, for various reasons, may not be able to argue in Vienna.<sup>139</sup> However, pre-moots are open to anyone. There is no requirement that any individual who participates in a pre-moot must argue in Vienna, and, depending on the location of the pre-moot, the institution may be able to afford to send more students to the pre-moot than it can afford to send to Vienna. Pre-moots can thus be used to extend the full mootting opportunity to a broader number of students.

Pre-moots have unquestionably become an important part of the overall educational process provided by the Moot. They may be used to deepen the educational experience of those who will argue in Vienna, and may also be used to make that educational experience available to a larger group of students. They also undoubtedly help to prepare students for the ultimate competition in Vienna – which brings us finally to the broader question of the interaction between the pedagogical and competitive elements of the Vis Moot.

#### 4 COMBINING PEDAGOGY AND COMPETITION

The authors would submit that the competitive aspects of the Moot are a crucial element of its pedagogical success – much in the same manner that law school exams or other graded performances are a crucial element of the pedagogical success of a typical law school course. While the exam or grade itself may be of questionable value or reliability,<sup>140</sup> its role in spurring student efforts in the educational endeavour seems clear. Virtually anyone who has ever taught a law school course has likely heard a student ask the question, ‘Will this be on the exam?’ Whether we like it or not, law school exams provide a significant catalyst in fuelling the efforts of most students to work harder to master legal doctrine than these students would absent such exams. In a similar fashion, the competitive elements of the Vis Moot undoubtedly provide a

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<sup>137</sup> Indeed, one of the most important elements of the Moot is the fact that all teams attend the oral rounds in Vienna, without the necessity of qualifying through any regional competitions: Bergsten, E. E., *Ten Years*, *supra* fn 2, at 40.

<sup>138</sup> With four preliminary oral rounds in Vienna, the opportunity to argue is limited to a maximum of eight students. If students are to be afforded the opportunity to argue at least once for the claimant and once for the respondent, then the opportunity is further limited to a maximum of four students.

<sup>139</sup> See, e.g., Waincymer, J., *supra* fn 6 at 279, (explaining that he chooses a comparatively large team of twelve students in order to allow a broader group of students to participate, but noting the fact that all twelve cannot argue in Vienna).

<sup>140</sup> The debate on this question is far beyond the scope of this article. We simply acknowledge the issue here.

catalyst in helping to fuel the extraordinary efforts of the students who participate in the Moot.<sup>141</sup>

If one wishes to maximise the educational value of such a catalyst, the key is to structure the educational process and the catalyst such that 'shortcuts'<sup>142</sup> are unproductive. Presumably, an instructor will structure a law school course in a manner to achieve certain pedagogical goals. If the student believes that the most efficient path to exam success is to follow the instructor's structure, then the student will likely follow that path, hopefully achieving the instructor's goals. Thus, the best way to achieve the instructor's pedagogical goals is to structure the course and the examination in such a manner that the latter encourages the sought after behaviour in the former. The structure of the competitive elements of the Vis Moot achieves exactly this purpose, thus arguably 'mooting' any debate between pedagogical and competitive strategies.

For example, while examining the facts, students are afforded the opportunity to ask for clarifications. Of course, all students receive the same clarifications, so some might be tempted to 'shortcut' the process and simply wait for the answers. However, a team seeking a 'competitive' edge, will search the facts high and low, for something subtle that might make a difference in the effectiveness of their arguments, but which might escape the less focused attention of others. Thus, the students are encouraged to engage in a thoughtful and detailed examination of the facts, a valuable skill for any lawyer.

Students are required to submit written memoranda on both sides of the issues.<sup>143</sup> This requires the students to analyse the Moot problem in far more depth than if they only had to construct the arguments on one side, thereby encouraging a deeper level of analysis and a deeper level of understanding.<sup>144</sup> In fact, this aspect of the Moot

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<sup>141</sup> Another catalyst for their efforts might be the opportunity to travel to Vienna and participate in the overall experience of the Moot, which admittedly also includes valuable social elements that all of us very much enjoy: Blase, F., *supra* fn 14, at 118-9. However, students need not work as hard as most of them do in order to take advantage of these social opportunities. In fact, the contrary would seemingly be true. Thus, one can reasonably assume that their efforts are driven by other objectives, among them competitive aspirations.

<sup>142</sup> For example, in US law schools, these 'shortcuts' often come in the form of study aids, which purport to allow the students to master the basics and perform well on exams – irrespective of the student's efforts to work through the materials in the manner suggested by the instructor.

<sup>143</sup> The actual written submissions for the claimant and the respondent are not prepared at the same time. The submission for the claimant is prepared first, and the submission for the respondent is prepared subsequently in response to a submission for the claimant prepared by another team. See Vis Rules, *supra* fn 10, Rules 31-3. This sequential approach to briefing allows the students to prepare a more persuasive written submission on behalf of each party than if both were prepared simultaneously. However, students will likely want to at least begin their analysis of both sides of the issues at a very early stage of their analysis in order to proactively address the likely arguments to be raised on the other side.

<sup>144</sup> But see Waincymer, J., *supra* fn 6, at 270 (seemingly suggesting that pedagogical and competitive goals might diverge here to the extent that an actual lawyer would not argue both

provides an incentive for students to look at both sides of the issues very early in the problem. If a team has to do it anyway, better earlier than later so that they can use their analysis to their advantage in the first memoranda.

Once the memoranda are completed, the competitive elements of the Moot also encourage students to prepare to orally argue both sides of the issues. Students that do not are not eligible for individual oral awards.<sup>145</sup> As with the written memoranda, this competitive requirement of learning both sides of the issues promotes the pedagogical goal of further developing the students' analytical abilities. We have watched students as they worked diligently to overcome a particularly challenging argument on the other side of the issue and, as soon as they have succeeded, watched them shift gears and do the same again from the other side. By engaging in this process, the students are learning to perform the sort of 'in-depth' analysis performed by the best of the legal profession.<sup>146</sup>

Perhaps one might argue that, despite all of this, a team might decide simply to go through the motions during the preparation of the memoranda and focus entirely on polishing their deliveries of scripted oral presentations in hopes of competitive success in the oral rounds.<sup>147</sup> If so, then this might be just the sort of 'shortcut' that could undermine the value of the competitive catalyst and dilute the educational value of the process. However, there are plenty of arbitrators during the oral rounds at the Moot that will almost certainly derail such an approach. While some arbitrators are

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sides of the case). We are not sure that we agree with Professor Waincymer on this point. In the practice of law, an attorney should always analyse the issues from both sides, fully developing the other side's arguments in order to meet them, and Professor Waincymer seems to acknowledge this: at 270-1. In 'real' high stakes cases, a legal team may hold a full mock trial in preparation for the 'real' trial or arbitration, with one of the members of the team actually arguing for the other side during the mock event. If one does not fully analyse the other side in practice, it is not because it will not make one's presentation stronger – it is more likely an issue of cost or competence. In the Moot, a team is also likely to write a better memorandum and present stronger oral arguments if each of the students has thoroughly examined both sides of the issues. Thus, pedagogical and competitive interests would each seemingly support the same strategy.

<sup>145</sup> Admittedly, this may not be possible on a larger team with more than four members arguing. However, almost every team has at least some members arguing both sides, thus exposing the entire team to the benefits of close analysis of both sides of an issue.

<sup>146</sup> Judge Kozinski, in his critique of mooting, generally, puts forth an opposing view, suggesting that arguing both sides of a single case is unrealistic, because no lawyer would ever argue more than one side to a tribunal in practice. See Kozinski, A., *supra* fn 103, at 185-6. While technically correct, Judge Kozinski has entirely missed the point. Learning to 'understand' the arguments on both sides is in fact a very valuable skill in the real world of legal practice, and arguing both in a moot helps improve the students' abilities to recognise and understand both sides in practice. See Hernandez, M. V., 'In Defense of Moot Court: A Response to "In Praise of Moot Court – Not!"' (1998) 17 *The Review of Litigation* 69, 73-4.

<sup>147</sup> The letter of the rules would arguably allow this, but it would certainly be contrary to the spirit. See Waincymer, J., *supra* fn 6, at 273 (suggesting the temptation, and explaining that it would be contrary to the spirit of the Moot).

relatively silent during arguments, irrespective of a student's demonstrated oral skills, many others are quite active. A strong oral advocate is often interrupted with increasingly challenging questions, perhaps in an effort to find out just how strong an advocate he or she is. While some such questions might reasonably be anticipated, many will not be. Ultimately, there is really no substitute for a thorough grounding in the facts and the law – not just the specific legal rules at issue, but also a broad comparative understanding of the jurisprudential underpinnings of those rules.

In short, the educational and competitive elements of the Moot are entirely consistent, with the latter supporting the paramount importance of the former. If a student seeks competitive success in the Vis Moot – and I am convinced that most do on some level – then the student must do the necessary work, thereby deriving the intended educational benefits of the Moot.<sup>148</sup> The best evidence that this process actually takes place is the legendary efforts of the students themselves, which has recently been celebrated in song.<sup>149</sup> The structure of the Vis Moot provides both the educational framework and the competitive catalyst to spark the educational process.<sup>150</sup> All we have to do as coaches is to try to make the most of both.

## 5 A FEW FINAL THOUGHTS

Vis Moot team coaches come in many forms – current and aspiring law school professors, practicing lawyers and arbitrators, and even current law school students. All of us, however, are ultimately acting together as teachers and mentors to the next generation of international commercial lawyers. As such, there is much to be said for an ongoing collaboration with respect to our teaching and mentoring efforts to make the most of the wonderful educational experiences provided by the Moot. In this Article, the authors hope to have made a small contribution to that collaborative effort, and we look forward to continuing collaboration and fellowship with all of you in the months and years to come.

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<sup>148</sup> We would not, of course, suggest that every student who works hard will achieve his or her competitive goals. The nature of such a competition is that the judging process is highly subjective, and the results always, therefore, reflective of a certain degree of good or bad fortune: Waincymer, J., *supra* fn 6, at 274-7. However, this does not in any way affect the relationship between competition and pedagogy. A student who puts the work in will almost certainly get the educational benefit, particularly with the guidance of an effective coach, (at 277), and this same student will make the most of his or her 'competitive chances' – whatever those might be.

<sup>149</sup> See Flechtner, H., *The Mootie Blues*, *supra* fn 2 (singing 'Well I'm a Vis mootie, baby. I work that problem day and night. Yes I'm a Vis mootie, baby. Writin' memos til dawn's light. I don't ever take no break – yea, the moot gave my social life the blight. Well I'm a Vis mootie, baby. I can argue orally. Yes I'm a Vis mootie, baby – got a response for every inquiry. Just don't ask me about my love life, 'cause the moot took that away from me.').

<sup>150</sup> Professor Waincymer captures this concept well in suggesting that the Moot 'is essentially a learning experience that merely utilises some competitive elements in aid of that purpose.': *supra* fn 6, at 252.



6 APPENDIX<sup>151</sup>

	All	Com.	Civ.
<i>Academic Credit</i>			
<b>Any credit related to Moot?</b>	<b>63%</b>	<b>74%</b>	<b>55%</b>
Moot problem focused class?	56%	50%	63%
Average % of annual credits	10.2	10.1	10.3
Moot participation without class?	67%	75%	58%
Average % of annual credits	15.3	14.3	16.8
General mootting/advocacy?	44%	64%	21%
Average % of annual credits	11.9	11.3	15.0
<i>Subject Matter Courses</i>			
<b>ICA course coverage?</b>	<b>65%</b>	<b>74%</b>	<b>57%</b>
<b>CISG course coverage?</b>	<b>72%</b>	<b>63%</b>	<b>80%</b>
No course covering either?	18%	21%	16%
Courses covering both?	55%	58%	52%
ICA/CISG taught together?	11%	18%	4%
Combined with Moot problem?	21%	21%	20%
<i>Pre-Moot Participation</i>			
<b>Did your team participate?</b>	<b>79%</b>	<b>74%</b>	<b>84%</b>
1 or 2 teams	22%	11%	30%
3 to 6 teams	37%	46%	30%
7 to 10 teams	23%	29%	19%
11 or more teams	18%	14%	22%
1 event	26%	25%	27%
2 events	37%	25%	46%
3 events	15%	21%	11%
4 events	5%	7%	3%
5 or more events	17%	21%	14%
Teams from other countries?	89%	82%	95%
Competitive	15%	14%	16%
Non-competitive	60%	61%	59%
Both	25%	25%	24%

<sup>151</sup> Columnar data is provided for (1) all responders (82 total – or 53% of the 156 teams participating in the Moot); (2) responders from primarily common law jurisdictions (38 total); and (3) responders from primarily civil law jurisdictions (44 total), respectively. Survey questions are divided into three groups: (1) the awarding of institutional academic credit related to participation in the Moot; (2) institutional availability of courses addressing the subject matter of the Moot; and (3) institutional participation in pre-moot events. The primary

question (or questions) in each group is shown in bold, with subsidiary questions following. The full text of each individual question, along with an explanation of the related columnar data, is provided below.

#### **Academic Credit**

**Any credit related to Moot?** – Did your institution award academic credit to students related to their participation in the Moot?

- *The number of 'yes' responses are shown as a percentage of the total responses.*

*The following subsidiary questions were only to be answered by those answering 'yes' to the primary question above. Each was to be answered independently, such that some teams answered 'yes' to more than one of the subsidiary questions.*

**Moot problem focused class?** – Do students receive credit based on their enrolment and participation in a course that specifically addresses the substance of the Vis Moot problem, itself, for the current year?

- *The number of 'yes' responses is shown as a percentage of only those institutions answering 'yes' to the primary question.*

**Average % of annual credits** – If you answered 'yes', what percentage of a student's typical annual curricular credits does this credit represent?

- *The average amount of credit awarded – by institutions awarding such credit – is shown as a percentage of average annual credits awarded to students seeking a law degree.*

**Moot participation without class?** – Do students receive credit for their participation in the Vis Moot, separate and apart from their enrolment in a class (if any) that specifically addresses the subject matter of the Vis Moot problem for the current year (e.g., credit for independent study or 'moot court' credit)?

- *The number of 'yes' responses is shown as a percentage of only those institutions answering 'yes' to the primary question.*

Average % of annual credits – see same entry above.

**General mooting/advocacy?** – Does your institution provide a course for credit related to moot court or advocacy, generally, separate and apart from any specific moot?

- *The number of 'yes' responses is shown as a percentage of only those institutions answering 'yes' to the primary question.*

Average % of annual credits – see same entry above.

#### **Subject Matter Courses**

**ICA course coverage?** – Does your institution currently offer any academic course for credit, which is focused substantially on International Commercial Arbitration (including substantial coverage of: (1) the UNCITRAL Model Law; and (2) the UNCITRAL Model Rules and/or a representative survey of international commercial arbitration rules)?

- *The number of 'yes' responses are shown as a percentage of the total responses.*

**CISG course coverage?** – Does your institution currently offer any academic course for credit, which is focused substantially on International Commercial Law (including substantial coverage of the CISG)?

- *The number of 'yes' responses are shown as a percentage of the total responses.*

No course covering either? – There was no separate question asking this.

- *The number of institutions responding 'no' to each of the primary questions above is shown as a percentage of the total responses.*

Courses covering both? – There was no separate question asking this.

- *The number of institutions responding 'yes' to each of the primary questions above is shown as a percentage of the total responses.*

*The following subsidiary question was only to be answered by those answering 'yes' to both of the primary questions above.*

**ICA/CISG taught together?** – Are these [subject matter courses] separate or combined courses?

- *The number responses choosing 'combined' is shown as a percentage of only those institutions answering 'yes' to both of the primary questions.*

*The following subsidiary question was to be answered by those answering 'yes' to either of the primary questions above.*

**Combined with Moot problem?** – Are [either or both of] these courses combined with a course that specifically addresses the substance of the Vis Moot problem, itself, for the current year?

- *The number responses choosing 'yes' is shown as a percentage of only those institutions answering 'yes' to the earlier question above regarding a 'Moot problem focused class'.*

### ***Pre-Moot participation***

**Did your team participate?** – Did students from your institution participate in any 'pre-moots' occurring prior to the actual Vis Moots in Vienna or Hong Kong last year?

- *The number of 'yes' responses are shown as a percentage of the total responses.*

*The following subsidiary questions were only to be answered by those answering 'yes' to the primary question above.*

**Number of teams** (each of the 4 choices listed was available as a response) – How many individual teams did your team meet in pre-moots?

- *The number responses reflecting this choice is shown as a percentage of only those institutions answering 'yes' to the primary question.*

**Number of events** (each of the 5 choices listed was available as a response) – How many pre-moots events (regardless of the number of teams) did your team attend?

- *The number responses reflecting this choice is shown as a percentage of only those institutions answering 'yes' to the primary question.*

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Teams from other countries? – Did your team participate in pre-moots with students from other countries?

- *The number of 'yes' responses is shown as a percentage of only those institutions answering 'yes' to the primary question.*

Competitive, non-competitive, or both (each of the 3 choices listed was available as a response) – Were these pre-moots structured as competitions (i.e., with winners announced) or not?

- *The number responses reflecting this choice is shown as a percentage of only those institutions answering 'yes' to the primary question.*