Kluwer Arbitration Blog

The 2020 Vis Moot: Facing Emerging Challenges, While Continuing to Hone Best Practices in Procedure and Ethics

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For decades, like clockwork, the Willem C. Vis International Commercial Arbitration Moot ('Vis Moot') and its sister competition, Vis East Moot, have brought together students, academics, practitioners, and arbitrators to consider emerging and important substantive topics in international arbitration and international sales law. Many of us honed our passion for these fields as student participants in the Vis Moot. We enthusiastically return to the Vis Moot each spring, as an opportunity to step back from the rigors of real-world practice and catch up with old friends and colleagues, while supporting students and considering emerging topics through the lens of the current problem.

Emerging Challenges

In the Fall, the Vis East Moot saw the decision by many student teams to withdraw in light of ongoing protests stemming from local concern over Hong Kong's autonomy from mainland China. In addition, recent months of preparation for oral hearings have been overshadowed by the global public health crisis associated with COVID-19. This led to the reluctant, but appropriate and necessary, decision by Vis Moot organizers to first postpone in-person oral hearings in Hong Kong (to an unannounced date), followed by the recent decision to cancel oral hearings in Vienna.

The Vis Moot continues to execute its mission in unexpected ways. Student teams now have an opportunity to engage, in real-time, with the realities of arbitral practice. Most practitioners and arbitrators, after months of preparation, have seen hearings cancelled, either due to settlement or other circumstances requiring their delay. We also are now on the eve of the first Virtual Vis Moot: the organizers of each competition are separately providing students the opportunity to present their oral arguments from "home." During the current public health crisis, nothing else could feel more modern. Globally, social distancing and remote working are emerging as a new reality. Practitioners face the pressurized challenge to rely on technology to transition their work and collaboration to a virtual setting, including the conduct of court and arbitration hearings. Consistent with the spirit of Lucy Greenwood's Campaign for Greener Arbitration, there may be a silver lining to this momentary disruption. We have an opportunity to re-evaluate our individual carbon footprints and implement environmentally-friendly best practices. Indeed, each of these challenges and reactions highlights the true resilience and strength of both the Vis Moot community and the

global arbitration community.

The 2020 Problem

Substantively, the Vis Moot problem always includes important questions – perhaps ones that have been percolating under the radar for some time – concerning arbitral procedure and contractual interpretation. It calls upon students, coaches, practitioners, and academics to consider these questions in detail and over a long period of time to glean collective insights and solutions. Already, in 2020, these goals have been achieved. While we may not all meet in person this year in Danubia (the Vis Moot's fictional "seat"), the experience of coaching, researching, preparing memoranda, scoring memoranda, and preparing for oral hearings are each exercises that facilitate the Vis Moot's goals.

With respect to arbitration, this year's Problem involves two main questions.

First, the validity and enforceability of a unilateral option arbitration clause. This question was thoroughly considered on the Blog in a recent post by Kevin Cheung.

Second, the regulation of party representatives and the appropriate standards to guide whether their conduct is ethical and fair. Specifically, the Problem involves a scenario where one party has engaged an expert witness, one of the world's few English-speaking experts on the subject. The other party contends that this expert's selection is merely a tactic to create a conflict of interest with its party-appointed arbitrator and will lead to a (yet to be filed) improper arbitrator challenge and create delay in the resolution of the dispute. Under these circumstances, does the tribunal have the power to exclude the expert witness? The remainder of this post draws upon the Blog's archives for insights to guide this analysis.

The Case for Tribunal Regulation of Counsel Conduct

In recent years, the tribunal's power to regulate the conduct of party representatives has attracted significant attention.

Prof. Margaret Moses has previously explained the arbitration community's concern: arbitration is increasingly global and no longer controlled by an elite and exclusive "club" of parties, counsel, and arbitrators who implicitly understand the appropriate standard of conduct. Thus, with increasing use and diversity among its players, it is important to create explicit (rather than implicit) minimum and equalized standards for conduct. Indeed, Blog contributors have commented that national rules regulating counsel behavior rarely envisage the unique circumstances that counsel are confronted with in international arbitrations. Moreover, the reliance on national frameworks to regulate counsel conduct would probably lead to a fragmented response to transnational problems.

While there is agreement that a basic conceptual framework is needed and codes of conduct would be instructive, there is not agreement on what these codes of conduct should provide. This consensus stems from the understanding that self-regulation alone is not effective. The risk of guerilla tactics is pervasive. However, the existence of this risk does not automatically mean that

the tribunal is the appropriate body to promulgate such standards (nor does it necessarily have the "power" to do so). If the tribunal exercises powers it has not been granted, could its award be vacated on the ground that it exceeded the scope of its power? In this year's Problem, this is precisely the risk. The International Law Association's Committee on Commercial Arbitration has considered the issue and offered some useful recommendations by identifying two buckets of powers held by the tribunal: inherent and implied. Exercise of both types of powers can fall within their mandate to adjudicate a dispute.

As noted by Prof. Maxi Scherer, the goal should be to level the playing field among counsel and their clients. Because national rules cannot be relied upon to exclusively regulate counsel behavior in international arbitration, arbitral institutions are uniquely positioned to lead this debate by formulating common standards and rules regulating counsel conduct. Indeed, the London Court of Arbitration ('LCIA') was the first arbitral institution to offer guidelines on the conduct of counsel in international arbitrations (for the similar ICC initiative, see here). This year's Problem specifically invokes the LCIA Rules (2014) as the lens for analysis.

The LCIA Rules (2014) include General Guidelines for the Parties' Legal Representatives ('LCIA Guidelines') as part of its rules (for a general overview on the 2014 LCIA Rules, see here). Interestingly, the LCIA Guidelines are binding upon its users by virtue of Article 18.5, which provides that the participation of legal representatives before LCIA arbitral tribunals is *conditioned* to the compliance with the LCIA Guidelines. Accordingly, counsel give their consent to the LCIA Guidelines by agreeing to appear by name before the arbitral tribunal.

With respect to the Problem, the LCIA Guidelines provide that:

- the LCIA Guidelines should not be interpreted so as to undermine a legal representative's obligation to present the party's case effectively to the tribunal (Paragraph 1); and
- legal representatives should not engage in activities intended unfairly to obstruct the arbitration or to jeopardize the finality of any award (Paragraph 2).

As one Blog commentator mentioned, these recommendations are fairly general and high-level. As the application of these guidelines is not straightforward, tribunals should be particularly careful when interpreting Paragraph 2 of the LCIA Guidelines, which refers to obstruction strategies – the so-called guerrilla tactics. Indeed, certain procedural steps might be necessary to represent effectively a party in an arbitration, such as the appointment of a party expert whose linguistic capabilities and expertise make her unique to represent a party's case in the arbitration – such as that of Respondent in the 2020 Problem. Accordingly, tribunals should strike a fine balance between discouraging and sanctioning those that engage in guerilla tactics, while at the same time not undermining a party's right to present its case effectively.

In regard to the scope of the tribunal's power to analyze claims connected to party representatives' conduct, Article 18.6 grants tribunals significant discretion to decide, upon complaint of one of the parties or upon its own initiative, on whether legal representatives have violated the LCIA Guidelines. Moreover, the provision sets forth sanctions to be applied by tribunals, which include written reprimands or cautions in regard to future conduct in the proceedings, as well as the catch-all remedy of applying "any other measure necessary" for the tribunal to fulfil its general duties. One Blog contributor challenged whether a party-appointed arbitrator would be prepared to impose sanctions on the counsel that appointed her, knowing that such an approach would potentially undermine future appointments – indeed, given the economics, would party-appointed arbitrators

be prepared to bite the hand that feeds them?

While analyzing the design of the LCIA Guidelines, a Blog commentator affirmed that the preference for broadly drafted recommendations is somewhat inherent to any attempt to formulate universally acceptable principles for the conduct of the parties' legal representatives. The same can also be said about non-binding codes of ethical conduct that are relevant to the Problem, such as the 2013 IBA Guidelines on Party Representation in International Arbitration (for other examples of non-binding codes of ethics, see comments on the Prague Rules here and on the Spanish Arbitration Club's Code of Best Practices in Arbitration here).

Discretionary Rules: The 2013 IBA Guidelines on Party Representation in International Arbitration

The 2013 IBA Guidelines on Party Representation in International Arbitration ('2013 IBA Guidelines') cover similar aspects to those covered by the LCIA Guidelines and reflect another institutional approach, although not binding upon parties unless expressly agreed by them either before or during the arbitration proceedings (for a general overview of the 2013 IBA Rules, see here).

According to its Preamble, the 2013 IBA Guidelines were not designed with the intention of replacing mandatory rules or agreed-upon arbitral rules, nor of vesting arbitral tribunals with powers reserved to regulatory professional bodies, as a contributor said. Rather, the 2013 IBA Rules consists of a valid initiative to consolidate best practices in international arbitration, which may level the playing the field between legal practitioners coming from different legal traditions, as well as between less and more experienced lawyers.

However, critics affirm that the 2013 IBA Guidelines will likely not offer optimal efficacy in shaping the conduct of party representatives, even if they are to become binding rules through the acceptance, in whole or in part, by the parties. This is so for a number of reasons.

First, the IBA 2013 Guidelines do not provide guidance on all aspects of party representative conduct, leaving out important aspects. *Second*, as raised by one contributor, the 2013 IBA Rules is concerned with *counsel* conduct, and not with conduct of the *parties* themselves, who are those that could consent to the application of the regulation.[1)] In this sense, there is an inconsistency between those that are subject to the regulation and those who could agree to its application, which may deprive counsel from the incentives to act in accordance with the guidelines.*Third*, and as a consequence, the sanctions provided by the 2013 IBA Rules inherently penalize the end user of the arbitration, not their legal representative, as one contributor suggests. This is the case of adverse costs orders (for an analysis of this matter, see here).[2)]

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All in all, this year's Vis Moot participants will have a rich experience – both substantively and procedurally – and we are looking forward to seeing advancement of the debate, and the success of the participants, during the upcoming online pleadings!

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References

?1 On this point, see Comments to Guidelines 1-3 (“A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a Party Representative is an obligation or duty of the represented Party, who may ultimately bear the consequences of the misconduct of its Representative.”).

?2 2013 IBA Rules, Guideline 26(b) and (c).

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