Kluwer Arbitration Blog

Interview with Our Editors: In Conversation with Prof. Dr. Stefan Kröll, Co-Director of the Willem C. Vis International Commercial Arbitration Moot

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Many arbitration practitioners nowadays trace their initial interest in arbitration back to their student days, when they competed at the world's largest and most renowned law student competition in the field of arbitration – the Willem C. Vis International Commercial Arbitration Moot. Created in 1993 by Prof. Dr. Eric E. Bergsten, the Vis Moot Competition fosters the study of international commercial law and arbitration and provides a practical training to students for resolving international business disputes. However, the Vis Moot has achieved much more than just its goals. As mentioned at the opening ceremony in March 2024, the Vis Moot has changed the professional and personal lives of countless mooties, in addition to becoming a staple event on the arbitration calendar.

For the past 12 years, the Vis Moot has been masterfully organized by three Directors, Prof. Dr. Christopher Kee, Prof. Dr. Stefan Kröll, and Mag. Patrizia Netal for the Moot Association which is now chaired by Assoc. Prof. Dr. Patricia Shaughnessy. Today, we have the pleasure of speaking with Prof. Dr. Stefan Kröll.

Prof. Kröll has been associated with the Moot since 1997, first as a coach for the University of Cologne and arbitrator and since 2012 as a Director. Prof. Kröll is the Professor for International Dispute Resolution at Bucerius Law School, Hamburg and the Director of its Center for International Dispute Resolution. He regularly acts as arbitrator and expert in arbitration proceedings. Additionally, Prof. Kröll is the Chairman of the German Arbitration Institute ("DIS") and member of the international advisory board of the Arbitration Institute of the Finland Chamber of Commerce.

Prof. Kröll, thank you for joining the Kluwer Arbitration Blog! We are thrilled to have this opportunity to share your story and perspectives with our readers.

1. ***By way of introduction, could you please explain how you came to be involved in the Vis Moot as one of its Directors?***

My involvement with the Vis Moot started in 1997 as one of the coaches for the team of Cologne University. When I finally gave up coaching after 7 years I continued to come as arbitrator. In

2008, Prof. Bergsten approached me for the first time to ask whether I could imagine following him with a team of others as a director of the Vis. When he asked a second time in 2010, I said yes and took over writing the case every year from the 21st Vis Moot onwards.

2. ***Having been involved in the Vis Moot nearly since its inception, first as a coach and then as a Director, you have witnessed multiple changes, most notably, when it comes to the sheer size of the Moot. What can you tell us, though, about the substantive issues addressed in the problems each year? What, if any, changes have you observed in the number and types of issues raised, the level of factual detail provided, the extent to which the problem reflects current events, etc.?***

The Moot has not only grown in size over the years, but also, the preparation of the teams has become much more professional. Today the majority of teams have participated in numerous pre-moots either in person or online. The top teams have rehearsed every single argument several times and there are numerous preparatory events where the legal issues relevant to the case are discussed by leading academics or practitioners, primarily after the memoranda have been submitted but sometimes also earlier. The professionalization applies not only to the usual suspects where the process of selecting team members already involves seminars on either the CISG or arbitration but also parts of the world where the universities do not have a comparable Moot tradition due to a lack of financial or personnel resources. We see organizations like the American CLDP-program or Africa in the Moot providing support to such teams on a large scale with former Mooties as outside coaches and by organizing seminars and training sessions. That professionalization naturally has to be reflected in the cases to prevent the students from solving the four problems within the first two months. Thus, while we still have 4 issues to be discussed, the size of the case file has increased over the years. It includes more facts which could be used by the teams to make their arguments, and usually one or two dead-ends which make the students think about additional problems going beyond those four problems discussed in the Vis Moot.

At the same time, the product or the set up is selected in a way that the students learn something beyond the mere legal problems under the CISG. They either involve new technologies, pressing ESG-questions, a particular way of contracting or controversial goods where the underlying interests are usually much more complex than presented in the public discussion in different parts of the world.

3. ***Though a certain dose of mystery adds to Vis Moot's magic, what can you tell us about the "behind the scenes"? For example, how is the problem that students spend months pondering (and/or crying) over born? How are the applicable institutional rules chosen? Do the names of some recurring characters (Langweiler, Fasttrack, etc.) have any hidden meaning?***

There is – to my knowledge – no hidden meaning attached to the name of the two lawyers, Langweiler and Fasttrack, which we have taken over from Prof. Bergsten. The names of the other characters, which change every year usually contain references to well-known persons associated with the economic field from which the product comes or the country where the institution whose rules we use is located.

The rules are selected by the Moot Association which is the formal organizer of the Vis Moot upon

a suggestion of its Rules Committee based on the applications received. There are several factors which play a role in the suggestions. Apart from the international caseload and the relevance of the institution for the regional and international market (every second year we take one of the large institutions), the geographical location of the institution, the length of its sponsorship, as well as its engagement with the Vis or other institution related events (e.g., centenary, new rules), play a role in the selection which is usually announced at the closing ceremony two years before the rules are actually used.

The case is generally a mixture of problems coming from my own cases, from suggestions of the selected arbitration institution, from published cases or those reported to me by colleagues as well as from the discussions of problems in the literature. For the arbitration issues I normally discuss with the institution whether they have any provision in their rules that they would like to be covered in the case or any problem from their caseload. Furthermore, I discuss the product with them which often refers back to something the country in which they are located is known for.

4. ***Organizing the Vis Moot is undoubtedly a time-consuming endeavor, taking a toll on one's physical wellbeing during the one week in Vienna, but also on other professional commitments throughout the year. How do you balance the multiple competing demands on your time?***

The answer of my family and my assistants concerning the balancing would probably be: not very well. So far, it has worked … but there is definitively room for improvement. To keep sufficient time for the Vis Moot, I only accept a limited number of arbitrator appointments and also reject many of the speaking engagements or other commitments, but probably still not enough. The last three years, after taking over the chairmanship at the DIS have been challenging. But at the DIS we are on a good way and I hope to be able again in the near future to devote more time to my academic work.

5. ***Speaking of the DIS, one of the hallmarks of the 2018 DIS Arbitration Rules ("DIS Rules") is the duty of the arbitral tribunal to "at every stage of the arbitration, seek to encourage an amicable settlement" (unless any party objects thereto; the importance of amicable settlement is also evident from the fact that the "tribunal's contribution to encouraging an amicable settlement" may lead to an increase in fees). By contrast, e.g., the ICC Arbitration Rules, envisage the possibility of an arbitrator taking steps to facilitate settlement only "where agreed between the parties and the arbitral tribunal" and "provided that every effort is made to ensure that any subsequent award is enforceable at law." The recently published ICC Report on "Facilitating Settlement in International Arbitration" considers some techniques, including those that are common in Germany. In your experience, is there a pronounced tendency towards amicable settlement under the DIS Rules? What techniques have been most successful?***

There definitively is a tendency towards amicable settlement under the DIS Rules, and the provision gives the arbitrators a justification to ask at different times during the proceedings whether there is a chance of a settlement. The views of the Parties on the strength of their case may change over time. If the enquiry as to whether there is a chance of settlement comes from the Arbitral Tribunal, there is no risk that it will be seen as a sign of weakness by the other parties.

Moreover, if it happens as a matter of course one can also not draw any conclusions from it as to the Arbitral Tribunal's view on the case.

In the majority of cases, the arbitrators will limit themselves to giving preliminary views on certain crucial issues based on the submissions made so far. In light of the costs associated with lengthy arbitral proceedings, I have seen an increasing willingness – also from parties from the common law world – to ask for such preliminary evaluations after the first round of the submission. Even if that does not lead to a settlement, it at least helps to focus the second round of submission. While such preliminary evaluations have been very useful in my experience, they should not be confounded with proper mediations. Those have a number of additional benefits and should thus always be considered by the Parties even in the course of the arbitration.

On the other side, the arbitrators should definitively avoid creating the impression that they want to force the Parties into a settlement. In particular, where the Parties have tried mediation before, there are often good reasons why no settlement is reached and in starting an arbitration the Parties seek a decision and not a settlement in the end.

6. ***Another unique feature of the DIS is its recently published "Supplementary Rules for Third-Party Notices (DIS-TPNR)" which is effective as of 15 March 2024. What was the rationale behind the development of these Rules?***

Increasingly, there are situations where separate contracts are so closely related to each other that disputes arising from one of them have a considerable bearing on the other. Typical examples are contracts in a supply chain where the determination that the goods delivered to the final customer are non-conforming may influence the dispute between the seller and its supplier. In such cases, it may, on the one hand, not be appropriate to let the supplier participate as a full party in the proceedings, on the other hand, it may make little sense to arbitrate the question of conformity a second time. In many jurisdictions there are special rules on third party notices or third party interveners which address these problems in state court proceedings. The DIS-TPNR try to mirror the effect of these rules on a contractual basis, allowing for a limited participation of the notified third party in the first arbitration in return for a binding effect of some of the determination made in the first arbitration for a second arbitration between the seller and its supplier. We are convinced to have added with the DIS-TPNR another useful tool to the growing tool box of alternative dispute resolution which beyond the supply chain cases may also be valuable for employer-contractor-subcontractor situations. We hope that they are equally successful as our Supplementary Rules for Corporate Disputes which are based on the same idea and have been the model for comparable rules of other institutions.

6. ***Finally, and recognizing that patience is a virtue, what can we look forward to seeing in the 32nd Vis Moot problem?***

A – hopefully – interesting problem to be resolved under the new Arbitration Rules of the Finland Arbitration Institute. ?

Thank you for your time and perspectives, Prof. Kröll – we wish you continued success!

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