Education Transnational Commercial Lawyers for the 21st Century: Towards the Vis Arbitral Moot in 2000 and Beyond (II)

Nottage, Luke
Associate Professor, Faculty of Law, Kyushu University

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Luke Nottage

III. Challenges in Preparing for the Vis Arbitral Moot

In the first instalment of this article, I argued that the Vis Arbitral Moot was more relevant to countries like Japan than it might initially seem (Part II.A).
That conclusion followed primarily from the fact that Japanese corporations use quite frequently transnational commercial arbitration as a dispute resolution mechanism (Part II.B); the growing possibility of CISG applying in their cross-border sales as the number of states ratifying CISG continues to grow (Part II.C); and, more tentatively, some signs of change in legal education in Japan. In the rest of this article, I first analyse briefly the development of the Moot competition, including the burgeoning numbers of participating teams, countries and “arbitrators” judging the entrants, and speculate about likely trends over the first few years of the 21st century (Part III.A). Part III.B considers some practical issues in preparing for the Moot, arising at various stages, particularly as seen from Japan. Part IV concludes by speculating about some possible future developments over the longer term. These relate both to the Moot competition itself, and more generally to the ongoing evolution of transnational contract law and dispute resolution.

III. A Development of the Moot

As previously mentioned, the idea of a moot competition bringing together students from around the world to argue a case involving CISG and other uniform law, in mock arbitral proceedings, was formally put on the UNCITRAL agenda in 1992. That followed many years of work on that idea by Willem Vis, Secretary of UNCITRAL until 1980 (when CISG was agreed upon by diplomatic conference in Vienna), and subsequently professor of law at Pace University School of Law. Although he died unexpectedly in late 1993, Pace organised the first competition in Vienna in March, 1994. Named in memoriam the Willem C. Vis International Commercial Arbitration Moot, competitions have reached their climax during the week before Easter for every year since, with the Seventh Moot scheduled for April 14-20, 2000. In the first four Moos alone, about 500 students took part. This success has been due to the enthusi-

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73 See supra Part II.A (Vol. 66 No. 1) at F2 note 4.
74 Laval Wins International Moot, 14/1 THE LAWYERS WEEKLY, May 6, 1996. It was won by Columbia University, with Laval University (Quebec) coming second. Winning teams in the oral hearings of subsequent Moos have been Freiburg University (1995), Cornell University (1996), University of Queensland (1997), University of Münster (1998), and Deakin University from Australia (1999).
asm and organisational skills of another former UNCITRAL Secretary-General and then Pace Law Professor, Eric Bergsten. He shared his time between Pace in New York State and Vienna, until retiring in 1999 as Emeritus Professor, to reside in Vienna and continue running the Moots.

Pace University School of Law and its Institute of International Commercial Law have become well known abroad as organisers of this increasingly popular event involving students, professors and jurists from all over the world. It seems the Law School's involvement also has been helpful in further developing ties with local law firms and corporate counsel in the US. But the Vis Moots also provide an opportunity for major arbitration centres to interact with existing and potential “consumers” and “producers” of transnational commercial arbitration. Not surprisingly, then, co-sponsors of the competition include the American Arbitration Association, Chartered Institute of Arbitrators (London), International Court of Arbitration of the International Chamber of Commerce (Paris), International Arbitral Centre of the Austrian Federal Economic Chamber, and the London Court of International Arbitration. Others are the Faculty of Law of the University of Vienna, which now provides the seminar rooms in which the mock arbitral hearings take place every year, and UNCITRAL itself. The competition also receives support from Kluwer Law International and Oceana Publishing Inc., who publish much arbitration-related material; and bodies benefiting from the growing yearly influx of Moot participants, namely the Vienna Convention Bureau and the City of Vienna itself.

The numbers of participating university teams, and their countries, have

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76 A tandem development, contributing to this, has been the growing amount of writing on CISG in the Pace University International Law Review. Recently, Pace University School of Law inaugurated an LL.M. Program for Comparative Legal Studies (www.law.pace.edu/pacelaw/compllm/). Students from abroad may become involved in Vis Moot participation and the activities of the Institute, with several research assistant positions being available. Interestingly, Hiroki Muraki from Japan, head of the Pace Global Students' Association and completing a J.D. degree along with an Environmental Law Certificate, is profiled on the website (www.law.pace.edu/pacelaw/compllm/hiroko-prof.html).

77 See e.g. Pace Hosts Corporate Bar Reception Focused on Internships, THE METROPOLITAN CORPORATE COUNSEL, October 1997, at 46.


79 Websites for UNCITRAL, and all the arbitral organisations mentioned, are linked to the Transnational Law Links webpage (www.law.kyushu-u.ac.jp/~luke/transnat.html) maintained by myself and Hiroo Sono. Some photos I took at the hearings are also available through that webpage (at www.law.kyushu-u.ac.jp/~luke/vis99.html).

80 “Jurisdictions” is a more accurate term, since for instance the “special administrative region” of Hong Kong has been a participant; but I use “countries” or “country” as convenient shorthand in this article.
grown steadily since 1994, with 71 teams from 29 countries represented in 1999 (Figure 1, infra).81

Extrapolating from these trends, we can expect that between three and four additional countries will participate every year. This appears to be underpinned by about three additional ratifications of CISG every year on average since 1980, a trend which has consolidated in the latter half of the nineties. Conversely, therefore, fewer than three or four additional countries may participate following a year or years in which additional ratifications are below average. This may explain why the number of participating countries in the 1997 did not increase compared to 1996, for 1996 saw only two additional countries ratifying CISG.82

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82 However, this is only an isolated episode; until the sample size is increased, i.e. there have been many more Vis Moots over the years, the precise interrelations cannot be determined with much confidence. It certainly may be true, as Prof. Bergsten has kindly pointed out in private correspondence, that the major determinant of rising participation in the Moot competition is growing interest within particular countries, not necessarily related to ratification of CISG (e.g. participation from India in recent years). In addition, it should be noted
By contrast, the increase in teams participating every year may be less sensitive to additional CISG ratifications. The very steady trend so far, indicated by Figure 2 supra, makes it reasonable to assume that at least ten additional teams will participate, on average, every year over the next few years. That also seems likely in view of the way in which participation seems to have taken firm root in countries not only like the USA (16 in 1999) and Germany (10), but also Australia and India (6 each), and possibly several more countries now fielding two teams (Figure 3, infra).

As suggested infra (Part III.B), it should become easier for others to compete in the Vis Moots as that sort of critical mass develops. Going by experiences in several countries so far, moreover, a number of countries currently fielding only one team will likely be able to field several over the next few years.

However, the proportion of participating countries — and therefore teams — coming from a common law tradition may decline. For the last few years, this has been about half, but the proportion already has declined slightly (47% in 1998, 45% in 1999) as shown infra (Figure 4).

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that the number of member States has been boosted since the early 1990s also because of political transformations in Eastern Europe, including the disintegration of Czechoslovakia, the U.S.S.R., and Yugoslavia.
Figure 3: Origin of Teams

Figure 4: Legal Tradition
Many law schools in the U.S. still have not participated, but growth there appears to have slowed. Three major Australian law faculties — University of Sydney, Melbourne University, and the University of New South Wales — are still noticeable in their absence. So is Auckland University in New Zealand, and the University of Hong Kong. Singapore ratified CISG in 1995, so some teams may come from there in the near future. However, unless England ratifies CISG, proportionate participation from common law jurisdictions may continue its slow decline. Considering the pattern of recent CISG ratifications, this may be offset by growing participation from the “rest of the world” rather than “Western Europe”.

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83 The latter was given honourable mention for the Memorandum in support of the Claimant’s position, submitted in the first stage of the Sixth Moot (see infra note 91); but did not make it to the oral hearings in the Vienna in March, 1999.
83a Prof. Katherine Lynch hopes to field a team soon (personal communication, March 25, 1999). The City University of Hong Kong already has participated several times, building on new post-graduate programs in dispute resolution, and hoping to encourage the further development of Hong Kong as a major venue for commercial arbitration in Asia. See Arbitration Key to Future: ‘SAR Needs Bigger Pool of Legal Experts to Handle Disputes’, SOUTH CHINA MORNING POST, May 21, 1998, at 23.
84 There have been rumours that, at long last, this may be nigh (personal communication from Prof. Peter Schlechtriem, June 20, 1999); but I have been unable to confirm this from public sources.
85 I use these geographical categories, rather than for instance the notion of “civil law” jurisdictions for “Western Europe”, for the “Rest of the World” includes legal systems like
Geographical diversity of the “arbitrators” judging teams’ performance at the oral hearings in Vienna, and especially their numbers, have grown rapidly over the years as well. In 1995 there were 78 from 22 countries; in 1997, 120 from 25 countries; and in 1999, 175 from 31 (including 2 from UNCITRAL) as shown by Figure 5 supra.86

By contrast with student participation, almost half are from Western Europe whereas only 32% are from common law countries:

This is due to the understandably high number of Viennese lawyers who assist as arbitrators, as well as hosting some receptions during the week of hearings. There are also disproportionately many from France, Switzerland Japan’s which have been heavily influenced by German and French law in certain legal institutions (including legal education) and particularly in contract law. See e.g. HANS LESER, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG [INTRODUCTION TO COMPARATIVE LAW] (1999) at 26. Of course, within the “common law tradition”, there are also very significant differences between US law, on the one hand, and English law on the other. See P.S. ATIYAH AND R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987). This holds also in contract law; indeed, in some respects, contemporary New Zealand contract law appears even more formal (i.e. “English”) than the English common law ever was. See Luke Nottage, Form, Substance, and Neo-Proceduralism in Comparative Contract Law: Law in Books and Law in Action in New Zealand, England, Japan and the U.S. (unpublished Ph.D. thesis, Victoria University of Wellington, submitted on September 2, 1999). Nonetheless, in the tradition of moot competitions and so on in legal education, these “common law” systems do have much in common with each other, at least compared to most countries in Western Europe and the rest of the world.

86 Sources are Pace University School of Law’s International Commercial Arbitration Moot Draws Students to Vienna, THE METROPOLITAN CORPORATE COUNSEL, July, 1995, at 28; Sono, supra note 80; and a list of arbitrators provided for the 6th Vis Moot in 1999 (on file with me).
and England: major centres for arbitration. Otherwise, the numbers of arbitra-
tors from each country is roughly proportional to that of teams from each
country, except that only one arbitrator came from India for the Sixth Moot in
1999 (Figure 5, supra). Combined with other factors, this make-up of arbitrator
participation may have some significant practical implications for student
participation in the Moots, discussed next.

III. B Moot Procedure and Practical Issues in Preparation

The Moot competition really proceeds in three stages, although the second
one usually has not been separated out clearly and discussed extensively by
commentators, or indeed the organisers.87 This Part sets out the various stages
of the Moot, giving as an example the timetable for the forthcoming Seventh
Moot. It also highlights practical issues in preparing for participation, particu-
larly for a Japanese national university like Kyushu University.

1 Written Memoranda

The first stage formally begins when the Problem, ultimately to be argued
in Vienna the week during Easter, is made public. Nowadays this is done
through the Pace's Institute website, otherwise by e-mail or express mail. For
the Seventh Moot, it was made public on October 1, 1999. The problem consists
of a Notice of Arbitration and Statement of Claim, with Claimant's exhibits
(such as letters between the imaginary parties, contract documentation, etc.); and
the Respondent's Statement of Defence (with Counter-Claim, if any), together
with Respondent's exhibits.

In principle, the facts which can be argued by the teams are restricted to
those given in the Problem, together with any logical and necessary extensions.
As an example of the latter, the Rules for the Seventh Moot explain that:88

87 Cf. e.g. Sono, supra note 81; Rules for the Seventh Annual Willem C. Vis International
extensively on these Rules in this Part III.C, and I urge readers to read them in their entirety.
88 Rules, supra note 87. Cf. the notion of keikensoku ("the canons of logic or of common
experience": TAKAAKI HATTORI, AND DAN HENDERSON, CIVIL PROCEDURE IN JAPAN (1983-5
LOOSELEAF) § 8.03 [3][b]) in Japan's law of civil procedure: KOJI SHINDO, SHIN MINJI
The subject matter of the dispute in the Fourth Moot was men’s suits. It was legitimate to assume that the suits were made of cloth. It was not legitimate to assume that they were, or should have been, made of pure wool. If a team intended to base an argument on the material out of which the suits were made, the team should have requested a clarification of the Problem.

The teams have several weeks in which to request from the Institute clarifications of Problem facts. They must be limited to matters likely to have legal significance, and must include a short explanation of the expected significance. This time the deadline for such requests was October 22, and formal clarifications were notified by the Institute by October 29. These become part of the Problem, and therefore can be used by all teams in their arguments.

Each team then has to deliver to Professor Bergsten in Vienna by December 6, 1999, a memorandum in support of the claimant's position. The Institute forwards this to another team by December 17. The teams then have another two months or so to prepare a Memorandum in support of the respondent. For the Seventh Moot, this must be delivered to Professor Bergsten by February 14, 2000.

Memoranda are forwarded to a panel of arbitrators for evaluation; arbitrators may volunteer for this task when registering their intention to attend the Moot, or may be asked specifically by Professor Bergsten. The Memoranda are scored on the basis of quality of analysis, persuasiveness of argument, thoroughness of research, and clarity. The Pieter Sanders Award, named after a well-known arbitration expert, is presented to the team submitting the best Memorandum for Claimant, several weeks after the conclusion of each Vis Moot. The Werner Melis Award is presented to the team submitting the best

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89 Special arrangements can be made for teams from the southern hemisphere which have examinations immediately prior to this first deadline.
91 For the Fifth Moot, it went to the University of Münster; Heidelberg University took second place, and Griffiths University (Australia) took third; and honourable mention went to Freiburg University, University of Cologne, Victoria University of Wellington (V.U.W.), and the University of Zagreb. For the Sixth Moot, the Award went to the University of Basel, followed by Zagreb and Kiel University; with honourable mention to Freiburg, Deakin (Australia), Münster, University of New South Wales, and Bonn University.
Memorandum for Respondent. The teams with the best memoranda recent Moots have been announced on the Pace website, and the best Memoranda uploaded in full.

During this stage of preparing written Memoranda, and until the Moot hearings in Vienna, participants may receive instruction and advice from professors, and others at their universities, only with regard to general matters in regard to the law of sales or arbitration. Students should not be advised “on the substance of the legal issues arising in the Problem”. There is no restriction on using previous years’ Moot Problems as teaching tools. The Moot Problems also have tended to concentrate on issues arising under CISG; only to a lesser extent under other initiatives to harmonise substantive law. Already, the Rules for the Seventh Moot state that the problem involves an issue under CISG. In previous years, issues have mainly related to contract formation and, especially, remedies under CISG. However, teams must have a good grasp of the entire Convention, since broader arguments may be made by analogy from opposing teams (especially in the later oral hearings), or arbitrators may interject questions along such lines. To truly understand CISG — and perhaps to appreciate lines of argument from opposing teams or questioning from arbitrators from different legal traditions, at the later oral hearings — students also need to appreciate differences in approach in the sales law of major countries. Relatively less time can be spent on arbitration law and procedure. However, participants must have a basic understanding of:

- commonly used Arbitration Rules (in the Seventh Moot, applicable Rules will be the recently revised ones of the London Court of International Court of Arbitration, one of the co-sponsors of the competition);
- the UNCITRAL Model Law (since the site of the arbitration, in the imaginary country of Danubia, has enacted this as its arbitration legislation); and

92 Winners in the Fifth Moot were again Münster; with V.U.W. taking second place and Cologne coming third; and honourable mention to University of Copenhagen, Heidelberg, University of Vienna, and Zagreb. Winners in the Sixth Moot were again Basel; followed by Freiburg and Kiel; with honourable mention to Laval University (Quebec), Bonn, University of Rijeka (Croatia), and Vienna.


94 Rules, supra note 87, Part VI.
the venerable New York Convention, which recently celebrated its fortieth anniversary (Danubia, and two other imaginary countries involved in this Problem, are parties).

Bearing all this in mind, Hiroo Sono and I have devised a syllabus for a course on "Uniform Contract Law and Transnational Commercial Arbitration", beginning in mid-October 1999 and running until January 2000, as part of Kyushu University's LL.M. program in International and Business Law.96

This small program, taught in English and running from early October to early September since 1994, attracts about a dozen students from abroad (mainly on ten special scholarships from Japan's Ministry of Education).97 Hoping that some of the new students might be attracted to participating in the Moot competition, we invited preliminary expressions of interest by sending them in September, 1999, a manuscript of this and an offprint of the previously published instalment. We also did so for the five students who will be the first in a three-year LL.D. program beginning in October, 1999, also supervised in English and with Japanese government scholarships (and, this year, including some former graduates of the LL.M. program). We hope that some of these LL.M. or LL.D. students will join some of the mainly Japanese students whom we have been teaching in Japanese since April, 1999, in a one-year post-graduate seminar also focusing on CISG, to make up a team from Kyushu University.

There is no requirement that participating team members all be of the nationality of the university in question. Indeed, that would be contrary to the whole idea behind the Moot, which is to foster a truly global community of jurists. Apparently, too, there have already been cases of students on exchange or doing courses at universities overseas, joining that university's team for the Moot competition. Particularly in view of the various difficulties facing Japanese universities in fielding a credible team, and both to take advantage of Kyushu University's attempt to internationalise as well as to reinforce that,

96 The syllabus was uploaded on my website (<http://www.law.kyushu-u.ac.jp/~luke/llmsyllabuses.html # ucltca>) in August 1999. See also the syllabus for an intensive LL.M. course which I will teach at Chulalongkorn University Law Faculty in Bangkok, over September 1999: <http://www.chulalongkorn.ac.th/~luke/chulallm.html>.
having a joint team like this seems best. A realistic mix would be two or three Japanese students, and one or two LL.M./LL.D. students. (Under the Rules, a team should consist of two or more students — with no upper limit — but at least four is desirable so that two teams of two “advocates” can practice arguing the Problem against each other in the second stage of the competition, described infra Part III.C.2) However, a high proportion of the cohort of LL.M. and LL.D. students beginning in October, 1999, will be disqualified under the Rules because — as in previous years — many of them have been admitted or licensed to practice law in their home countries.

One of the difficulties facing even large, well-established national law schools like Kyushu University’s, is that professors really do not have research assistants as such, who also can help instruct the teams generally in uniform sales law and so on, particularly on a small group basis. They are undoubtedly a contributing factor to the success registered by teams from Western European universities, especially German universities but also for instance from the University of Zagreb. They can also help coach the students in use of the English language, terminology and so on, which the Rules permits for teams from countries where English is not the mother language — albeit not extending to help in actually preparing Memoranda, by editing or otherwise. Apparently, the sole entrant from Japan so far, Meiji Gakuin University in Tokyo, brought in a U.S. student to coach their students both in English and rehearsing arguments (see infra Part III.C.2), before their second appearance in Vienna, for the Sixth Moot in 1999. Private universities can afford such luxuries, but unfortunately not national universities like Kyushu University. However, perhaps some of the special LL.M. or LL.D. program students at Kyushu University — even if disqualified from actually being team members — can help both in fostering the understanding of sales law principles and with legal writing in English, particularly among Japanese students. As well as advancing their own

98 There are joshu or assistants; but numbers are limited. See generally (but centred on Tokyo University): Eric Feldman, Mirroring Minds: Recruitment and Promotion in Japan’s Law Faculties, 40 A.J.C.L. 265 (1993). Kyushu University Law Faculty, with over 50 full-time teaching staff at present, has only 12 joshu. Six of these, moreover, are administrative assistants who help in preparing course materials, research grant applications, law journal editing, etc.
knowledge, it would offer them a good opportunity for interaction with Japanese students, otherwise difficult especially for those coming only for the one-year LL.M. program.

Japanese students may also be able to sit in on a non-credit course on "Legal Research and Writing" offered, on my initiative, to LL.M. students since 1997. However, its focus is increasingly on how to conduct legal research, rather than on legal writing; and the instructor or LL.M. coordinator may object if the number attending those classes becomes too large. On the other hand, the task of writing up Memoranda has become easier as a result of fine, award-winning examples being uploaded on the Pace website. Although the style varies, any provide good specimens to imitate in both phrasing and structure.

Key to the teams' preparing good Memoranda is availability of good reference material. I was fortunate to spend July-August, 1998, at the Law Center for International and European Cooperation (R.I.Z.) at the University of Cologne, which had done consistently well in the Moots. As well as able Assistants who select and coach their team each year, the Center had a fine library focused precisely on international economic law, in major Western languages. It made me realise many gaps in the collection at Kyushu University. Its Law Library is a big one — overflowing, literally, as the University awaits a long-delayed move to a new campus — and has a large annual budget to continue building its collection, also covering all major Western languages. Yet each professor has been allocated a proportion of funds to buy whatever books he or she wants. Generally these books will be in that professor's specific area; but the creation since 1998 of "large chairs", grouping over half a dozen professors, may make it difficult to build up collections focused on narrower areas. In any event, gaps can arise from differing research interests, staff mobility (increasing in recent years), time pressures on professors, and the lack of professionally trained law

100 See e.g. <http://www.law.kyushu-u.ac.jp/~luke/legwrite.html>.
For general information in English on R.I.Z., see Law Centre for European and International Cooperation <http://www.uni-koeln.de/jur-fak/riz/indexeng.htm>.
103 The Law Faculty has had one female associate professor, of political science, since 1995.
104 See <http://www.law.kyushu-u.ac.jp/eng/about.html>. This follows a trend at other major national universities in Japan recently.
librarians. Nonetheless, by informally pooling resources with colleagues such as Caslav Pejovic and especially Hiroo Sono (initially in different Chairs) since their arrival at Kyushu University in 1997 and 1998 respectively, the Law Library has purchased core texts including the complete set of Yearbooks of Commercial Arbitration, and the UNILEX looseleaf collection of CISG case law abstracts and bibliographical material, etc.\textsuperscript{105}

Even with a sizeable budget, a worrying feature of some recent literature on CISG and uniform law generally is its high cost. An example is the UNILEX service, which also entails the expense of updates. Fortunately, the Pace CISG database has grown into a substitute resource which is freely available over the internet, being added to and made more user-friendly all the time. It was inaugurated in 1995 to help participants in subsequent Moots as well as practitioners and others, Pace having a program to serve the legal profession on the internet,\textsuperscript{106} so hopefully it will continue to grow and remain free for all to use. Further, as shown by the success in its written Memoranda of Victoria University of Wellington — which had an even patchier collection of reference material on uniform sales law and comparative private law, as I recall from painful experience in teaching there from 1994 to early 1997 — success can follow from persuasive presentation based on solid understanding of core texts.

One key reference for the Seventh Moot will be the third edition of Emeritus Professor John Honnold's commentary, although by August, 1999, for instance, a first printing had already sold out and internet book retailers (almost always cheapest) were saying — probably overoptimistically — that they would require 3-5 weeks to ship the new printing.\textsuperscript{107} Honnold's first edition was one the earliest commentaries to be published, and has proven very reliable in its analysis of CISG. That is important because at early stages in the life of CISG, especially in the 1980s, various scholars were proposing often competing views on how to interpret provisions or principles of CISG. This also lessens the difficulty of law schools preparing teams to participate in the Moots for the first time, because it means that they do not necessarily need some of that earlier

\textsuperscript{105} See supra (Part I.) note 2.
\textsuperscript{106} Supra note 86 (Pace University).
writing — although having it may suggest some new angles on the Moot Problems!

A second key text will be the 1998 translation of an even more detailed commentary edited by Professor Peter Schlechtriem. The fact that this was hitherto only available in German very probably contributed to the recent success, particularly in written Memoranda, on the part of German participants from his University (Freiburg) and other universities in Germany, and participants able to read materials in German. In that respect, Japanese students may have an advantage over those from common law countries, for most postgraduate law students at national universities are required to pass examinations in two languages other than Japanese and, for those specialising in private law and civil procedure, this often includes German as well as English. On the other hand, at Kyushu University this requirement is only for those entering the doctoral program or a two-year “research” program for a Masters or Doctoral degree in Law, not for the growing number of those who embark on a Masters degree in newer courses aimed at those who already have had work experience since completing their undergraduate law degrees. There were only 85 such “research track” students enrolled from April 1999, as compared to 101 in the newer courses and 1210 undergraduates. The novelty of the notion of competing in the Vis Moot, and indeed of uniform law like CISG, makes it difficult to attract and retain their interest. Nonetheless, if even one with good reading ability in German joins the team, for instance, this creates a potential advantage over students from common law countries and others in which Western languages are not required or studied much by post-graduate law students. Yet, as just indicated, this advantage is diminished by translations into English of core texts such as Professor Schlechtriem’s. It is further diminished in that Professor Klaus Peter Berger of Münster University — a leading German authority on transnational arbitration and contract law — has produced quite quickly translations of two of his key works.

109 See generally Flex-Course <http://www.law.kyushu-u.ac.jp/info/flex.html> and Advanced_Course <http://www.law.kyushu-u.ac.jp/info/advan.html>. These new courses at Kyushu University also follow an initiative taken by other national universities in the 1990s.
As well as researching and writing up Memoranda, another key activity for students at this first stage of the Moot will be investigating funding or sponsorship to be able to participate in the moot. Registration for the Seventh Moot costs US$500 or 460 Euro per team. Payment must be effected at least by December 6, 1999, the deadline for filing the Memorandum for Claimant; but the Pace Institute urges payment as soon as possible after the Problem is made available on October 1, 1999. In addition, of course, there are the costs of team members, and preferably at least one coach and a supervising professor, travelling to Vienna and staying for almost a week during the oral hearings in April 2000.

It is not difficult for professors at Japanese law schools, particularly the larger and longer established ones such as Kyushu University, to find funding to get to Vienna. Especially for research with a comparative or international aspect, they can readily attract grants from the government (the Ministry of Education and the Japan Society for the Promotion of Science are particularly generous) or from a myriad of private foundations and sources. Research funding from public sources entails remarkably little accountability. To a lesser extent, this also is true for most private funding, which I have obtained on three occasions in joint research projects over the last two years. Yet almost no funding can be used for student travel and accommodation expenses.

Students in Japan seeking sponsorship to participate in Vis Moots therefore would need to look to Faculty or university funding for projects related more to the promotion of new educational techniques and/or international collaboration. At Kyushu University, for instance, students may be able to apply to the Law Faculty’s International Exchange Fund, which now offers a scholarship to a doctoral student to study abroad for a year. However, particularly in the light of the low interest earned on this Fund, like deposits in Japan generally in the late 1990s, it may be difficult to obtain full funding from this source. At the university level, a logical possibility is funding under “P&P” programs, which has been extended to the LL.M. program. Building on Kyushu University’s reputation generally, the program also attracted funding subsequently from the “Nanashakai”, a grouping of the seven largest companies in the Kyushu region. However, I am unaware of the precise terms of these funding arrangements, and whether they can be extended to students forming a team to compete in a moot
competition overseas. Perhaps funding even under these schemes will only be extended to LL.M. students. Whatever the source, if related to funding which has entered the university’s financial accounts, my experience is that applications must be made very much in advance.

Thus, students wishing to participate in the Seventh Vis Moot, at least, very probably will need to look for independent, outside funding. Individual professors like myself, and the Dean, of course may be able to help in this respect. Despite Kyushu University’s reputation, however, the endless economic recession in Japan makes this particularly challenging at present. Airline companies are squeezed by extensive price competition. The local bar association is already providing enormous support in hosting internships for the LL.M. program students every year, and there are only a few firms doing much international work anyway. Law firms in Tokyo, including many of “foreign law solicitors” (gaikoku-kuho jimu bengoshi) established after amendment to the Lawyers’ Law in 1986, may be a more likely source of sponsorship. This is so particularly if they can see the benefit, possibly even in the short term, of hiring particularly able students selected to participate in the Moot teams. On the other hand, Kyushu University is still not necessarily well known among transnational lawyers in Tokyo.

2 Rehearsing for the Oral Hearings

Rather than agreeing immediately to provide funding to get to the Moot competition in Vienna, however, they may prove very amenable to helping in the second stage of preparations. The Rules for the Seventh Moot state that “it is expected that teams will have practice arguments, whether against other members of the team or against other teams that will participate in the Moot”. In fact, it has become almost universal for participating teams to rehearse in the interlude of another two months, between submission of their Memoranda for Respondents and the oral hearings in Vienna. Teams like that from R.I.Z., and the University of Münster (Professor Berger having close links to R.I.Z.), have

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113 Supra note 111 at 72, 76-77.
done formidably well partly by embarking in February-March every year on a heavy program of mock arguments, primarily before experienced German practitioners in the immediate vicinity (Cologne, Düsseldorf, Frankfurt). Even if Kyushu University students can organise a team, by contrast, they will have to travel at least as far as Osaka (three hours' by the fastest bullet train) and especially Tokyo (90 minutes by plane) to find enough lawyers with good English and interest in international sales law or arbitration, before whom to practice their arguments.

As well as further funding implications, this entails another dilemma. The lawyers in Tokyo with the best English will tend to be gaikokuhō jimu bengoshi, and by law they are only supposed to give advice on the law of their home jurisdiction. It is unclear whether they can advise on matters of international law, although in practice probably most of them do. Of course, assisting students by hearing them argue a hypothetical arbitration case is not illegal. The point is that these foreign law solicitors in Japan may well have become rusty in their knowledge of CISG and other uniform law. That may encourage them to agree to assist, in fact, namely to keep up to date. They can also be invaluable in giving tips on presentation, how to develop arguments and rebuttal convincingly, and so on. Yet the German students with their German practitioners retain a distinct advantage. Practitioners in Germany are also perhaps the most likely in the world to encounter cases involving CISG, because Germany was an early signatory to CISG (1989) and its courts have dealt with the most CISG cases by far¹¹⁴ — not to mention the many cases, further down the dispute resolution pyramid, which never got to a final or reported judgment.

Japanese practitioners (bengoshi), with no restrictions on scope of practice, may have had more opportunity to deal with cases involving CISG than gaikokuhō jimu bengoshi. But they will have had decidedly less compared to German practitioners, for instance, because Japan still has not ratified CISG (infra Part II.C). Moreover — and herein lies another aspect of the dilemma — many bengoshi have less training in concentrated trials and oral advocacy compared to the foreign law solicitors in Tokyo, predominantly from common law countries. Thus, bengoshi may have somewhat more grounding in CISG, but they may be

less helpful in providing advice and training to students in Japan preparing for the 90-minute oral Moot hearings held in Vienna.

Of course, a combination of rehearsals before both bengoshi and foreign law solicitors would help to overcome these problems. Yet another arises from the fact that both categories of lawyers in Japan are unlikely to have had much experience in transnational arbitration proceedings, at least in Japan (infra Part II.B), especially in the case of foreign law solicitors because until 1996 they were deterred by uncertainty as to their rights to appear in arbitral proceedings in Japan. Experience may continue to accumulate, and indeed having students argue a mock arbitration case before them may provide a welcome form of “continuing education”. There are also a number of readily identifiable lawyers and academics with experience as acting as arbitrators, not as advocates or expert witnesses, and they may be particularly helpful as well as amenable to assisting students preparing for the Moots. These are the people who have registered themselves (with background information) as potentially willing to serve as arbitrators on an intriguing new facility on the Japan Commercial Arbitration website. (They are not necessarily those on the JCAA list from which it selects arbitrators when parties to arbitration have specified JCAA arbitration, but have not designated an arbitrator.) Nonetheless, until all these practitioners and academics have participated as arbitrators in the Vis Moot competition, with its distinctive rules and flavor, they probably will not provide the same degree of preparation as German practitioners, many of whom travel to Vienna regularly to participate.

On the other hand, teams from Japan can still prepare in other ways. Team members from the University of Zagreb, which has chalked up considerable success, first worked on timing their presentations. As most academics know even better than students, it is difficult to keep to strict time limits in oral presentations. In the moot hearings, each of the two oralists generally is given 15 minutes, and the team as a whole is asked questions for a total of another 15 minutes (almost invariably interrupting presentations), so that each team gets

117 Supra note 99.
about 45 minutes and the entire hearing is concluded after 90 minutes. The team from Zagreb then divided into two teams to argue against each other, trying to identify and work through all possible questions which might be raised by arbitrators in the hearings. The team also had a final rehearsal before all interested professors on their Faculty. This therefore should be the first and easiest aspect of preparations to organise at this stage of the moot competition. Even that, however, is really subject to there being four members into a team, so they can argue against each other quite often. At a pinch, a research assistant or coach or even a professor could fill one or even two spots; but they may not even be available. A second solution is to substitute former team members from the same university; but this will not help those like Kyushu University who have not yet been able to field a team. A third possibility is to enlist the help of anyone who has previously participated in the Moot competition.

This is potentially facilitated by the consolidation of “The Alumni Association of the Willem C. Vis International Commercial Arbitration Moot”. The idea for an alumni association was floated at the Third Moot in 1996. It had its formal establishment meeting in April 1997, during the Fourth Moot. By that time it had signed up some 330 members, although some have probably given up membership as it has since set an annual fee of U.S.$30. Early on, the Association was seen to have the potential to provide a pool of arbitrators for future Moots, and this probably become increasingly important as team participation continues to grow (supra, Part III.A). The Association also has been particularly energetic in organising social events for alumni and new participants, and lectures, during the Oral Hearings each year. One tangible achievement so far is collaboration with the Pace University International Law Review in editing the REVIEW OF THE CONVENTION FOR THE INTERNATIONAL SALES OF GOODS (CISG) — 1998, published by Kluwer Law International in June 1999, and to be published annually henceforth. Another is publication of two

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118 Ibid.

119 Universities in southern hemisphere countries — New Zealand and Australia, at least — have an inherent advantage in this respect. Because their academic year finishes in early November, participating team members cannot be in their final year of study. Hence they are available to help a team in the following year. This continuity may help explain their relative success over the years.

120 Supra note 75.

121 See e.g. Kay-Jannes Wegner and Onno de Lange, MAA Events at the Orals 1997, 1 VINDOBONA J. 49 (1997).
F 22  66 Hosei Kenkyu (1999)

issues of its annual VINDOBONA JOURNAL, including an article on arbitration in Croatia about which the editors note at the start of the issue: "we understand it is a principal obligation of the Moot Alumni Association also to shed light on those arbitration institutions which do not stand at the forefront of international attention".\textsuperscript{122} This mentality may be extended to encouragement and assistance for teams or countries participating in the Moots themselves for the first time, but the Association is still developing various strategic plans.\textsuperscript{123} It is also too much to expect that sort of assistance in countries like Japan, far from the countries in which most of the alumni are to be found (mainly Western Europe and the U.S.A.), until there has been more participation generally from Japan or nearby countries. As of early 1997, the only member from Japan was my colleague Hiroo Sono, with five others (including one professor) from Hong Kong;\textsuperscript{124} and, as mentioned above, only one university in Japan so far has sent teams to the competition, for the Fifth and Sixth Moots.

Insufficient critical mass also makes it more difficult for a university to embark on another means of preparation in this stage, also mentioned as expected by the Rules for Seventh Moot: practising arguments against other teams. Before their second showing in Vienna, Meiji Gakuin University apparently had rehearsals against teams from Pace and Freiburg University. This presumably meant another round-the-world trip for their participants, prior to the actual hearings in Vienna, which is probably only conceivable in a private university setting in Japan. Alternatively, perhaps they visited these universities on the way to Vienna; if so, that preparation probably came too late. For most Japanese universities, particularly national universities, preparation at this stage will only become easier when a number have already participated seriously in Moots — somewhat of "a chicken and egg" problem. Perhaps this can be overcome by collaborating with universities in North-East or South-East Asia, although no university from these sub-regions has yet participated — most probably linked to the lack of ratifications of CISG (China and Singapore being the sole exceptions: infra Part III.A).\textsuperscript{125}

\textsuperscript{123} See its five Newsletters, most recently in May, 1999 (on file with me).
\textsuperscript{124} List of Members, 1 VINDOBONA J. (1997) 61, 63.
\textsuperscript{125} Interestingly, Japanese universities have been involved in setting up an Asian version of
3 Oral Hearings in Vienna

Albeit to varying degrees, teams prepared by drafting of written memoranda, and various forms of rehearsing oral presentations, arrive in Vienna for almost a week of oral hearings during the week before Easter, with Spring in the air. In 1999, as mentioned, hearings will begin on April 14. In the General Rounds, each team argues four times, usually once per day from Saturday through to Tuesday. Each team argues once as Claimant against the team which received its Memorandum for Claimant in December; once as Respondent, conversely, against the team whose Memorandum for Claimant it had received in February; and then once more each as Claimant and Respondent, against teams assigned by Professor Bergsten. Each oralist is graded out 50 by the panel of each of the three arbitrators at each hearing, based on (a) organisation and preparation, (b) presentation, (c) handling questions, and (d) legal reasoning. Teams with the highest scores proceed to Elimination Rounds on the Wednesday and Thursday. The winning team is announced on the Friday at the Awards Banquet.

In all its hearings as Claimant, and in its first hearing as Respondent, each team is restricted to the arguments submitted in its written Memorandum. Only in its second hearing as Respondent may it depart from them to rebut arguments made by the Claimant in its Memorandum. These restrictions are advantageous for teams who have produced well researched and argued written Memoranda, and help prevent embarrassment even for teams who have not submitted good Memoranda. Nonetheless, they are stricter than for most proceedings even in court and especially in real arbitral proceedings, I expect. Perhaps for this reason, or simply because the arbitrators are unaware of these Rules, the restrictions are not always enforced strictly by them — as far as I could determine, participating in or sitting in on oral hearings in the Sixth Moot. In any event, the restrictions do not apply in the Elimination Rounds, thus making oral advocacy skills increasingly important as the team advances through the rounds. This may explain how teams from common law countries have managed to do relatively well at the end of each competition, either overall or in terms of specific team members, even without particularly notable written Memoranda.

Jessup Moot Capped the Asia Cup (personal communication from Prof. Tsutsui, Waseda University, August 22, 1999).
Another reason may be related to the interventionist style of most arbitral panels in the hearings, even in the General Rounds. The Rules for the Seventh Moot observe that:

The arbitrators are required to act during the oral hearings as much as possible the way they would in a real arbitration. There are significant differences in style dependent on both individual personalities and on perceptions of the role of an arbitrator (or judge) in oral argument. Some arbitrators, or arbitral tribunals, may interrupt a presentation with persistent or even aggressive questioning. Other arbitrators, or arbitral tribunals, may listen to an entire argument without asking any questions. Therefore, teams should be prepared for both styles of oral presentation.

In fact, based on my admittedly limited experience and observations of hearings, but also informal discussions with those who have attended the Sixth and other Moots, the more interventionist style is much more common. Several reasons for this can be imagined. The first is the background of the arbitrators (supra Part III.C), particularly the strong presence from Germany, Austria and Switzerland (both heavily influenced by Germany at least in civil adjudication). As a recent empirical study showed, albeit focusing more on the role of arbitrators in promoting settlement in transnational arbitration proceedings, German arbitrators tend to be more pro-active.\textsuperscript{126} This is seemingly related to differing systems and norms of civil procedure, and a more pro-active style also has been noted among some French arbitrators.\textsuperscript{127}

In the Moots, this tendency also may be reinforced by the rather high proportion of legal academics serving as arbitrators. Notwithstanding all the

\textsuperscript{126} CHRISTIAN BUEHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS (1996) at 157-65, 188-92.

\textsuperscript{127} See e.g. Fritz Nicklisch, Positive Experiences with Conciliation in International Arbitration in Civil Law Systems, 14 INT'L CONSTRUCTION L. REV. 289 (1997). A similar provision is to be found in Article 21 of the French New Code of Civil Procedure: Richard Hill, MED-ARB: New Coke or Swatch?, 13 ARB. INT'L 105 (1997) at 106. Not too surprisingly, then, we learn that a former President of the French Cour de Cassation "created shock and consternation with the American lawyers at the [Iran-U.S.] Claims Tribunal when he used quickly to interrupt them and say: 'save all your explanations, the only issues which I am interested in are the following ones'": R. Briner, Domestic Arbitration: Practice in Continental Europe and its Lessons for Arbitration in England, 13 ARB. INT'L (1997) at 160.
Viennese lawyers — and quite a few lawyers from the U.S., probably inclined to take intervene as little as possible, except for those well versed in the practice of transnational commercial arbitration — out of the 175 who registered for the Sixth Moot I counted around 50 arbitrators who seemed to be legal academics: those listed as Professors, or as doctoral assistants or otherwise with university addresses. Legal academics, it seems to me, are probably more likely to want to know — or at least explore, with oralists and co-arbitrators, at the Hearings — the answers to the many interesting issues raised by the Problems. Practitioners, especially judges, may tend to focus more on deciding who is more right or more convincing.

Nonetheless, all probably want to find out or explore possible answers more than in standard court or even arbitration proceedings involving domestic law, or even more settled uniform law such as the Hague-Visby Rules for maritime contracts of carriage. The reason is the paucity, still, of court and arbitral rulings on CISG — and their relative inaccessibility (especially to those speaking or reading only English) — despite the best efforts of UNCITRAL and others to uncover them by means of National Reporters and so on. Most of this case law just tends to whet one’s appetite for further concrete applications of CISG, and arguments about possible interpretations. The Problems in the Vis Moots can fill this need, so arbitrators feeling this way have to try to restrain themselves, to let the teams get on with presenting and arguing their case at the hearings. The participating students, after all, probably care more about the educational experience — and often about winning (or at least doing well enough, perhaps, to attract further funding for next year’s competition or to embellish their Curricula Vitae!)

There also are some other incentives for arbitrators to intervene quite vigorously. Professor Bergsten makes available beforehand to the arbitrators a few pages of analysis of the Problem. No doubt this is important for those busy arbitrators who have little time to research the issues before arriving in Vienna, or those who know less about CISG as opposed to arbitration procedure.

128 Supra note 87. In contrast, there were only three Judges, all from the U.S.A. The remainder were predominantly lawyers, with some full-time arbitrators or dispute resolution specialists.

129 See e.g. JOHN RICHARDSON, THE HAGUE AND HAGUE-VISBY RULES (4TH ED. 1998).
and so on. Yet the analysis provided further whets one’s appetite. Ultimately, moreover, one comes away slightly hungry because no-one writes a model award for the Problem after the Moot competition is concluded. Except, that is, if one is lucky enough to be an arbitrator for – or to observe – two excellent teams subjected to strong arguments from each other and from experienced and knowledgeable arbitrators.

More reasons may be imaginable, and it should not be forgotten that Professor Bergsten’s “Instructions to Arbitrators” (at least for the Sixth Moot) warned that:

it is particularly important that arbitrators not ask questions whose sole purpose is to test whether the students have understood the problem and the law. Such questions are not appropriate in a Moot that attempts to simulate a real arbitration.

Nonetheless, in view of the abovementioned differences from a true arbitration setting and certainly as a practical matter, teams thinking of participating in the Moots therefore should be prepared for active questioning from arbitrators in most of their hearings.

This reinforces the need for good preparation, before a variety of mock arbitrators, at the second “rehearsal” stage (supra Part III.B.2). Such a style nonetheless remains particularly challenging for students, like those from Japanese law schools, whose native language is not English or indeed a Western language. Of course, they can be trained to ask arbitrators to repeat the question, or – usually more useful – to rephrase the question. Often, if the oralist is still looking blank, another arbitrator may intervene to help. The probability of this may increase if one arbitrator persists in aggressive questioning, which co-arbitrators (often meeting each other for the first time) may not take to either.\footnote{At the Sixth Moot, of the many arbitrators I met or saw in action (out of a total of 175), I encountered only one potential “loose cannon”. Nonetheless, students need to be prepared for that sort of eventuality, which could occur after all in real arbitral proceedings as well. At least one other arbitrator had a rather disconcerting but harmless habit of taking photos (still or video) during hearings, although this year not when serving as arbitrator (as far as I know). This habit was noticed, using a rather unfortunate term for the person in question (perhaps due to English not being the native language of the writers), in an article in the MAA BULLETIN (May 1999) at 2.}
Even this may not be enough, however. More extreme solutions may be required, which entail further work on teamwork at earlier stages of preparation. I see no reason why, for instance, if a Moot arbitrator interrupts or asks a question of one team member and he or she is at a loss, his or her co-counsel could not help in trying to answer it. That would be highly unusual and generally frowned upon in court proceedings in New Zealand, for example. However, most rules of arbitral institutions permit arbitrators to decide themselves on how they proceed, so it would depend on the three arbitrators in the particular Moot hearing — subject, of course, to this being kept within limits, especially the necessity for the arbitrators to grade each oralist for their overall performance in each hearing. This further technique may be particularly useful if a native English speaker, such as an LL.M. student, can join a team like Kyushu University's; but it could also provide welcome relief for a team consisting solely of non-native speakers.

Finally, other support and encouragement provided during the week of oral hearings in Vienna may need considerable preparation for a team from Japan, as opposed to other countries. It seems that it is quite common for Ambassadors in Vienna to invite participating students from their country to a reception or formal dinner. This was reported so, at least, for Australia in 1995 and for Croatia in 1997. As well as a change of diet from Viennese fare, fine though it is, those no doubt provided further precious experiences and insights into the world of international diplomacy, which after all gives birth to treaties such as CISG. Naturally much depends on the individual personality of the ambassador, and quite a few Ambassadors for Japan are graduates from Law Faculties (often Tokyo University, still); but the rather conservative nature of Japan's Foreign Ministry may make it quite difficult to arrange a similar experience in Vienna for students coming from Japan. Rather similarly, it is virtually inconceivable that the Emperor himself would present in person any Vis Moot award given to a Japanese team or team member, like the Governor-General of

[131] In the context of "conduct of the proceedings", LCIA Rule No. 14.2 provides that "unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable ..." (available via LCIA — Arbitration International <http://www.lcia-arbitration.com/rulecost/english.htm>.

[132] See, respectively, supra note 86 (Pace University) and note 99.
Australia did in 1997 for the team from the University of Queensland, which prevailed in the oral hearings of the 4th Moot.\textsuperscript{133} Admittedly, this may have been because Sir William Deane was a former Chief Justice of the High Court, Australia's highest court. Yet the President of the Federal Republic of Germany, a non-lawyer, also conveyed a personal congratulatory message to the team from Freiburg, which won the 2nd Moot.\textsuperscript{134} This no doubt reflects a broader awareness of the significance of the Moot competition. Yet even this sort of encouragement from Japan's head of state, or indeed its Prime Minister, remains quite hard to imagine.

III. Conclusions and Future Directions

Many of these challenges to preparing and fielding a team from Japan in the Vis Arbitral Moot competition are minor. They can be overcome, as Meiji Gakuin University's participation has demonstrated over the last few years. Yet they amount to quite a formidable barrier, and require thinking through. I hope to have given some indications of how to identify and navigate some of the main shoals, particularly for universities in Japan thinking of sending teams for the first time. This should also be useful for countries in other regions, particularly in Asia, which have not sent teams yet at all — such as China, which ratified CISG as early as 1986 — or only to a limited extent. Without such attempts, these countries and their law schools will miss out on a means of training transnational commercial lawyers for the 21st century which probably will grow in importance, at least over the next five years (supra Part III.B). In the longer run, conversely, lack of participation from this part of the world probably will lead to the Vis Moot competition losing its present momentum.

As that momentum appears to be at least correlated with steady growth in countries ratifying CISG (supra Part III.A), a challenge arises for UNCITRAL as well. It provides another incentive to concentrate on getting more ratifications from countries in Asia. The region now seems to be recovering well from the worst of the economic crises which hit many parts of the region in 1997 and 1998, and thus may regain growing importance in world trade and investment patterns more quickly than some initially expected. The pervasive initial impact of the

\textsuperscript{133} Vice-Regal, THE CANBERRA TIMES, September 23, 1997.
\textsuperscript{134} Supra note 86 (Pace University).
cresses also led to a range of law reform initiatives, particularly in commercial law, which have sparked more theoretical debate and reflection on the relationship between law and socio-economic development. In recent years, UNCITRAL certainly has made some useful steps towards promoting uniform trade law in the Asia-Pacific region, sometimes working with regional bodies. However, rather like attracting participation in the Vis Moots, globalisation—at least in this part of the legal world—is neither automatic nor speedy.

My analysis also leaves challenges for the Alumni Association (supra Part III.C.2), and the organisers of the Moot competition. The latter no doubt will have their hands full over the next few years coping with continued growth of the competition, in its present form; but some possible future directions might already be considered in the light of the perspective presented in this article. One initiative might be encourage regional rounds for an interim stage of oral hearings. A longer term goal might be to hold the final round itself somewhere outside of Vienna in the latter half of the coming decade, for instance, and thereafter periodically in different parts of the world. Perhaps even more challenging, but easier to organise over the shorter term, would be to think of ways of incorporating the possibility of settlement in the Vis Arbitral Moot proceedings. This has become increasingly common in recent years—or at least provided for in Rules of arbitration institutions or national arbitration legislation—around the world. Yet countries in the Asian region may have comparatively more experience in this respect—although not, I hasten to reiterate, due to any demonstrably different “cultural” proclivities (supra Part II.B).

The biggest practical challenges nonetheless remain those facing the students themselves studying in this region and in Japan; their professors and law

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135 See e.g. the papers from the conference on “Legal Crisis? Asia and Japan” hosted by the Asian Law Centre of the University of Melbourne from August 12-14, 1999, and forthcoming in 2 AUST. J. ASIAN L.
138 See e.g. Uwe Schneider, Combining Arbitration with Conciliation, in INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL DISPUTE RESOLUTION CULTURE 57 (Albert Van Den Berg ed., 1998).
schools more generally; local lawyers and the wider legal profession; and arbitration institutions trying to draw themselves away from the “periphery”\textsuperscript{139}. A major aim of this article, particularly supra Part III, has been to provide a framework for identifying and surmounting these challenges, by adopting a novel perspective on an interesting but little written about development in transnational legal education in the latter half of the 1990s.

Although primarily presented to argue for the relevance of the Vis Moot competition even as seen from Japan, Part II of this article has also introduced some important broader developments in the normative order affecting transnational contract and arbitration. Future transformations will form a crucial determinant of the ongoing evolution of the Vis Moot, at least in the longer term. Analysing those transformations, however, raises difficult theoretical and empirical questions.

On the one hand, will contract law norms in fact become harmonised around the world or will local variations remain resilient? Even if harmonisation proceeds, in what way will this occur? One possibility is the expansion of formal reasoning or rule-orientation, probably — although not necessarily, at least in theory — accompanied by the perfection of individualism and autonomy as justification for law. Arguably, this remains the approach preferred by New Zealand law, true to the tradition of English law. A second possibility is more substantive justice as an underlying justification, corresponding with a purposive orientation towards interpretation of contract norms. That orientation appears distinctly more prominent both in Japan and the U.S., an orientation reinforced by important institutional differences compared to most Anglo-Commonwealth jurisdictions. But recent “neo-proceduralist” theories of law present a third possibility: more norms oriented towards processes, justified by functional controls of self-regulation and/or communicative — as opposed to instrumental — rationality. Originally developed primarily by theorists in Germany such as Teubner and Habermas, elements of this model arguably can be found in private law and civil dispute resolution developments in Japan. They may even be present or emerging in England and New Zealand.\textsuperscript{140} That leaves intriguing

\textsuperscript{139} Supra note 78.

\textsuperscript{140} See Nottage, supra note 85, 239-271. Cf. generally Kenji Yamamoto “Glocalisation, Contract and Community: Reflections on Contemporary Contract Law Discourses” (Paper

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theoretical and empirical questions as to whether neo-proceduralist tendencies emerge only more slowly or haphazardly in more formal legal systems, compared to more substantive ones.

Further complications arise when these questions are raised at the transnational level. One is that the full spectrum of predominantly formal, substantive or neo-proceduralist orientations can be found already among member States of CISG, and that contrasting orientations will likely multiply as CISG continues to attract new members. How will these features play out in interpreting CISG, for instance, or in any attempts to amend or improve it? Secondly, the UNIDROIT Principles often spell out in more detail some rules or principles left unclear in CISG, and this may encourage more formal reasoning; but new principles instead may allow or encourage more substantive reasoning, or even neo-proceduralist tendencies in transnational contract law.

On the other hand, can we talk now of a growing transnational arbitration culture, involving shared normative expectations and practices among different

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1 Teubner's variant of neo-proceduralism, for instance, might see this combined development as part of ongoing "repoliticisation" of lex mercatoria, or otherwise consistent with "autopoietic" theories of contemporary law: see supra note 51. Interestingly, too, over a decade ago it was suggested that several important values underlie and give coherence to CISG: (1) respect for the differing backgrounds of actors affected by the Convention; (2) contractual commitment, and a secondary value of protecting reasonable expectations; (3) forthright communication between contracting parties; underpinned by (4) good faith; and (5) forgiveness of human error. See Amy H. Kastely, Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention, 8 Nw. J. Int'l L. & Bus. 574, 594-600 (1988). While this analysis concluded more generally that CISG involved a "precarious community" (id. at 620-22), a parallel commentary focused on potential conflict between (1) "the contract principle" and (2) "the discussion principle" inherent within an important area covered by CISG: Richard Hyland, Liability of the Seller for Conformity of the Goods under the UN Convention (CISG) and the Uniform UCC, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT [UNIFORM SALES LAW AND NATIONAL LAW OF OBLIGATIONS] 305 (P. Schlechtriem, ed., 1987). If the first of these principles or values can be conceptualised as promoting formal reasoning and individual autonomy, then tension may emerge within the second either as a more substantive value or as a reflection of neo-proceduralism. As well as further theoretical refinement, such linkages deserve focused empirical research.

Almost in parallel, in the early 1990s Prof. Takeshi Uchida attempted to extract underlying principles from developments within contemporary Japanese contract law generally, also highlighting the expansion of good faith doctrine. He suggested that these consisted primarily of "continuity" and "flexibility", related to contract practices and justified or justifiable by communitarianism. That appears to overlook noticeable formal tendencies within the areas examined, or the possibility of other values in conflict. Whether these tensions can be reconciled and justified by variants of neo-proceduralist theory, for instance, still awaits more theoretical and empirical examination as well. See generally Luke Nottage, Japanese Contract Law, Theory and Practice: Plus ça change, plus c'est la même chose?, in ASIAN LAWS THROUGH AUSTRALIAN EYES 316 (V. Taylor, ed., 1997).
countries or regions around the world? If so, how has this emerged and how may it develop? Many would agree that since the 1980s transnational commercial arbitration generally has become more formalised in the sense of more weight being put on allowing parties to present all arguments thought relevant to their legal rights, often involving their legal advisors more, to be strictly adjudicated by an impartial arbitrator. Partly in reaction to that, however, there is now a growing interest in combining arbitration particularly with mediation. Are these competing tendencies, reflecting or promoting more formal as opposed to more substantive reasoning and justifications underlying the norms applied in commercial disputes? Or do they open up more space for neo-proceduralist approaches?

Such questions, involving both substantive and procedural norms applied in transnational settings, have remained largely unexplored theoretically and especially empirically. Part of the reason is simply that the scale of the enquiry required. The Vis Moot competition may provide a more manageable case study or barometer for charting developments in transnational contract law and dispute resolution. Will it too witness “creeping codification” or various forms of formalisation, for instance, or will other patterns emerge? Thus, its history as well as its future evolution invite the ongoing attention of those interested in contract law and dispute resolution theory, and globalisation more generally, as well as those more interested in more practical aspects of educating transnational commercial lawyers for the 21st century.

143 These were themes for an entire conference hosted by the ICCA in Seoul on October 10-12, 1998: see INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL DISPUTE RESOLUTION CULTURE (Albert Van Den Berg, ed., 1998)
144 Supra note 138.
145 Supra note 78.
146 Prof. Klaus Peter Berger of Munster University, for instance, is presently engaged in an empirical study involving the usage of UNIDROIT Principles. Results are not expected to be published before 2000, however.
148 For an attractive recent survey and analytical perspective, see generally ROBERT J. HOLTON, GLOBALIZATION AND THE NATION-STATE (1998).