BOOK REVIEW

THE DANUBIA FILES: AWARD WRITING LESSONS FROM THE VIS MOOT

EDITED BY LOUISE BARRINGTON, NAPOLEÃO CASADO FILHO AND CLAUDIO FINKELSTEIN

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I GLOBAL ARBITRATION, REGIONAL ARBITRATION, AND VINDOBONA, DANUBIA

International commercial arbitration is commonly reported to be the preferred means of resolving international business disputes,[1] an assertion supported by

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[1] See, eg, Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 1 [1.01]; Gary Born, *International Commercial Arbitration* (Kluwer, 2009) 68; Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) 5 [1-15]; Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) 1.

empirical evidence.[2] At the global level, a number of jurisdictions are renowned as places-of-choice for international arbitral proceedings. Statistics published by the International Chamber of Commerce ('ICC') show that Switzerland, France and the United Kingdom are consistently among the most common seats of ICC arbitration.[3] In the Asia-Pacific region, both Hong Kong and Singapore are the recognised leaders in the field.[4]

Arbitration is said to be 'the new black' in Australian law.[5] The Rudd and Gillard Labor governments' policy platforms included aspirations to elevate Australia's standing as a seat for arbitration in the region.[6] Amongst the numerous advantages of attracting arbitration activity is that it is thought to make a valuable contribution to local economies.[7] An element of competition for arbitration business may be observed between jurisdictions and institutions around the world — if parties are unsatisfied with an arbitration environment, they 'may simply opt to go elsewhere'.[8] This is borne out in practice. For example, in ICC arbitration, despite the primacy of Switzerland, France and

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[2] School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2006* (2006) 5 <www.arbitrationonline.org/docs/IAstudy_2006.pdf>; School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2008* (2008) 5 <http://www.arbitrationonline.org/docs/IAstudy_2008.pdf>; School of International Arbitration, *Corporate Choices in International Arbitration: Industry Perspectives* (2013) 6–9 <http://www.arbitrationonline.org/docs/pwc-international-arbitration-study2013.pdf>.

[3] ICC, '2012 Statistical Report' (2013) 24(1) *ICC International Court of Arbitration Bulletin* 5, 14; ICC, '2011 Statistical Report' (2012) 23(1) *ICC International Court of Arbitration Bulletin* 5, 13.

[4] Chief Justice Marilyn Warren, 'Remarks at the International Commercial Arbitration Conference: Efficient, Effective, Economical? — The Victorian Supreme Court's Perspective on Arbitration' (Speech delivered at the International Commercial Arbitration: Efficient, Effective, Economical? conference, Melbourne, 4 December 2009) 5 <https://assets.justice.vic.gov.au/scv/resources/54c95bcf-0886-4df2-882c-f4d5fc679eaa/remarks+at+the+icac_4.12.09.pdf>. See also Albert Monichino, 'International Arbitration in Australia: The Need to Centralise Judicial Power' (2012) 86 *Australian Law Journal* 118, 118–9; Albert Monichino, 'International Arbitration in Australia — 2010/2011 in Review' (2011) 22 *Australasian Dispute Resolution Journal* 215, 215.

[5] Richard Garnett and Luke Nottage, 'The 2010 Amendments to the *International Arbitration Act*: A New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29, 31.

[6] See, eg, Robert McClelland, 'Australian Government Moves to Modernise International Commercial Arbitration' (Media Release, 21 November 2008); Attorney-General's Department, Review of the *International Arbitration Act 1974*' (Discussion Paper, 21 November 2008) [4].

[7] Loukas Mistelis, 'Arbitral Seats – Choices and Competition' in Stefan Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer, 2011) 363, 379.

[8] Chief Justice Warren, above n 4, 5.

the United Kingdom as arbitral seats, 2012 saw arbitrations conducted in 92 cities across 59 states.[9]

Against this background, it may be easy to overlook the humble 'Vindobona, Danubia' as a seat of arbitration. That is, unless one is familiar with the Willem C Vis International Commercial Arbitration Moot, held annually in Vienna,[10] and the Vis (East) Moot, held annually in Hong Kong.[11] In these events, collectively referred to here as 'the Vis Moot', law students from around the world argue a hypothetical legal case involving international sale of goods and international commercial arbitration issues in the context of an arbitration held in the (fictional)[12] seat of Vindobona, Danubia. In the Vis Moot, Vindobona, Danubia has 'the status of an arbitral Mecca'.[13]

II THE WILLEM C VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT, AND *THE DANUBIA FILES*

The Vis Moot today stands out as the world's premier private international law mooting competition. The Vienna event is now in its 21st year, and the Hong Kong event in its 11th year. The Vis Moot is inherently international — in the 2012/13 competition 290 universities participated in Vienna,[14] while in Hong Kong 93 teams took part.[15] Even in the very first Moot in 1993/94 nine states from both common law and civil law legal traditions were represented.[16] The Vis Moot has, over its first 20 years, given more students

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[9] ICC, '2012 Statistics', above n 3, 14.

[10] See generally Association for the Organisation and Promotion of the Willem C Vis International Commercial Arbitration Moot, *The Annual Willem C Vis International Commercial Arbitration Moot* (3 October 2013) <http://www.cisg.law.pace.edu/vis.html>.

[11] See generally Vis East Moot Foundation Limited, *The Willem C Vis (East) International Commercial Arbitration Moot* (16 August 2013) <http://www.cisgmoot.org/index.html>.

[12] Though strictly a fictional seat, as a matter of history, 'Vindobona is the Roman name for Vienna': Mistelis, above n 7, 364.

[13] Ibid.

[14] Association for the Organisation and Promotion of the Willem C Vis International Commercial Arbitration Moot, *Twentieth Annual Willem C Vis International Commercial Arbitration Moot — 2012 — 2013 Registered Teams* (2013) <http://www.cisg.law.pace.edu/cisg/moot/participants20.html>.

[15] Vis East Moot Foundation Limited, *Participating Teams* (2013) <http://www.cisgmoot.org/docs/10thVisDocs/participating_teams_r2.doc>.

[16] Association for the Organisation and Promotion of the Willem C Vis International Commercial Arbitration Moot, *Inaugural Willem C Vis International Commercial Arbitration Moot — Registered Teams 1993 — 1994* (1994) <http://www.cisg.law.pace.edu/cisg/moot/participants1.html>.

than could be counted a truly 'unique' educational experience,[17] and has inspired Professor Jeffrey Waincymer to initiate, launch and promote the Bergsten Program, an educational capacity-building intiative.[18] *The Danubia Files*[19] is itself directly born out of the Vis Moot event. Its editors, Louise Barrington, Napoleão Casado Filho and Claudio Finkelstein, all have a long-standing relationship with the event. In particular, Louise Barrington is and has been the Director of the Vis (East) Moot in Hong Kong since its inception.

The Danubia Files is not the first text inspired by the Vis Moot. In 2008, Janet Walker's *The Vis Book*[20] was published, containing contributions by a number of individuals having long-standing involvement in the event, and providing a very interesting insight into what has now become a private international law institution. Festschrifts have been published in honour of both Eric Bergsten[21] and the late Albert Kritzer,[22] two names very well known, alongside Michael Sher and Willem Vis himself, as drivers of the Vis Moot initiative. Further, a number of scholarly articles have considered the Vis Moot as an educational endeavour[23] — which is after all the primary purpose of the event.[24] However,

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[17] Jack Graves and Stephanie Vaughan, 'The Willem C Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity' (2006) 10 *Vindobona Journal of International Commercial Law and Arbitration* 173, 173.

[18] See generally Jeffrey Waincymer, 'Development in Legal Education and Legal Education for Development — Building on the Vis Moot' in Louise Barrington, Napoleão Casado Filho and Claudio Finkelstein (eds), *The Danubia Files: Award Writing Lessons from the Vis Moot* (Outskirts Press, 2013) xi, xxv–xxix.

[19] Louise Barrington, Napoleão Casado Filho and Claudio Finkelstein (eds), *The Danubia Files: Award Writing Lessons from the Vis Moot* (Outskirts Press, 2013).

[20] Janet Walker (ed), *The Vis Book — A Participant's Guide to the Willem C Vis International Commercial Arbitration Moot* (JurisNet, 2008).

[21] Kröll et al, above n 7.

[22] Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across Boundaries* (Wildy, Simmonds and Hill Publishing, 2008).

[23] See, eg, Eric Bergsten, 'The Willem C Vis International Commercial Arbitration Moot: The Perspective of the Organizer' (1999) 6 *Croatian Arbitration Yearbook* 169; Eric Bergsten, 'Teaching About International Commercial Law and Arbitration: The Eighth Annual Willem C Vis International Commercial Arbitration Moot' (2001) 18 *Journal of International Arbitration* 481; Friedrich Blase, 'A Brief SWOT-Analysis of the Willem C Vis Moot' (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 117; Jeff Waincymer, 'International and Comparative Legal Education through the Willem C Vis Moot Program: A Personal Reflection' (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 251; Soo-Hyun Oh, Jakob Sättler and Nils Wighardt, '12th Annual Willem C Vis International Commercial Arbitration Moot — Overview and Personal Reflection by Law Students of Johann Wolfgang Goethe University' (2005) 6 *German Law Journal* 1121; Graves and Vaughan, above n 17; Leonila Guglya, 'Oral Advocacy Training: A Beginner's Look at the Willem C Vis International Commercial Arbitration Moot from a Coaching Perspective' (2008) 12 *Vindobona Journal of International Commercial Law and Arbitration*

The Danubia Files is different from all of these previous works. In essence, *The Danubia Files* provides what students of the Vis Moot over six specific years of competition have long waited for — the final word on the cases that they spent so long studying, researching and then arguing. In *The Danubia Files*, eminently qualified expert authors provide mock arbitral awards for the hypothetical cases hotly debated in the 14th to 19th Vis Moots.[25] And given the general principle in international commercial arbitration that awards are not subject to review on the merits,[26] it might be said with tongue in cheek that these six cases can now, finally, be treated as resolved.

III POINTS OF INTEREST AND RELEVANCE TO THE AUSTRALIAN LEGAL ENVIRONMENT

At this stage, the reader may be forgiven for assuming that *The Danubia Files* is a text with a niche audience. Of course, the text will be of most interest to those having some association with the Vis Moot. Nevertheless, it has a number of points of interest that extend beyond this community and some particular points of relevance to the Australian legal environment.

The text's six substantive chapters in Part II contain the text of the mock awards for the 14th to 19th Vis Moots.[27] Irrespective of their relationship to those six specific Vis Moot problems, these mock awards are valuable illustrations to any student of international arbitration, or international dispute resolution in general, of award writing style and technique. With some

125. See also the nine individual chapters comprising Part III (Legal Education) of the festschrift for Eric Bergsten — Kröll et al, above n 7, 685–842.

[24] Both the Vienna and Hong Kong competition rules clearly identify that the Vis Moot is primarily an educational endeavour in the form of a competition, rather than a competition with incidental educational benefits: Association for the Organisation and Promotion of the Willem C Vis International Commercial Arbitration Moot, *Twenty First Annual Willem C Vis International Commercial Arbitration Moot — The Rules* (2013) [3] <http://cisgw3.law.pace.edu/cisg/moot/rules21.pdf>; Vis East Moot Foundation Limited, *Eleventh Annual Willem C Vis (East) International Commercial Arbitration Moot — The Rules* (2013) [3] <http://www.cisgmoot.org/docs/11thVisDocs/11th%20Vis%20East%20Rules%20FINAL.pdf>.

[25] In the Vis (East) Moot in Hong Kong, these were the 4th to 9th Moots.

[26] Blackaby and Partasides, above n 1, 606 [10.60]. For an application of this principle in Singapore, by way of example, see *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166 (14 August 2012) (Prakash J). Cf *UNCITRAL Model Law on International Commercial Arbitration*, adopted 11 December 1985 (as amended 7 July 2006) (the '*Model Law*') art 34; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 19 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (the '*New York Convention*') art V.

[27] Barrington et al, above n 19, 37–298.

exceptions, drawn principally from ICC practice,[28] international commercial arbitral awards are usually confidential and access to primary texts is often difficult or impossible to obtain. The six mock awards in *The Danubia Files* provide an interesting and realistic illustration of award writing, by 18 authors (a three member panel for each of the six awards) who are eminently qualified to write such awards.

Part I of the text extends its educational endeavours further by providing three chapters of particular interest to those seeking further insight into the award writing process.[29] First, Louise Barrington sets out in a concise but thorough 14-page chapter a 'how-to' guide for drafting an international arbitration award[30] with reference to the *New York Convention*, the *Model Law* and ICC practice. Following this, a checklist for the drafting of international arbitral awards is presented[31] which draws upon the experience of both the ICC and the Chartered Institute of Arbitrators. Finally, a second 'how-to' guide is included, prepared by Pierre Karrer, which is particularly practical given its straightforward question-and-answer style of presentation.[32]

In these respects, *The Danubia Files* is faithful to the vision of the Vis Moot as first and foremost an educational endeavour,[33] and lives up to its stated objective of providing 'award writing lessons'.

In the Australian context, *The Danubia Files* is an interesting stimulus for reflection on the current state of the law and some ongoing law reform initiatives. As noted above, arbitration is said to be 'the new black' in Australia.[34] Each of the six mock awards in *The Danubia Files* concerns issues arising under the *CISG*[35] and the *Model Law*, as well as issues involving the *New York Convention*, all three of which have been adopted by Australia, and have been given effect by domestic legislation. Further, one of

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[28] Sanitised extracts of ICC awards, often relating to a particular theme, are published in a dedicated section of the *ICC International Court of Arbitration Bulletin*. ICC awards are also sometimes published, in their full and unedited form, in *Mealey's International Arbitration Report*. Other reporting of arbitral awards (including ad hoc awards and awards of other institutions) does occur, but on a more sporadic basis.

[29] Barrington et al, above n 19, 1–36.

[30] Ibid 1–14.

[31] Barrington et al, above n 19, 15–18.

[32] Ibid 19–36.

[33] Association for the Organisation and Promotion of the Willem C Vis International Commercial Arbitration Moot, *The Rules*, above n 24, [3]; Vis East Moot Foundation Limited, *The Rules*, above n 24, [3].

[34] Garnett and Nottage, above n 5, 31.

[35] *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

these mock awards (the 'pumps file' from 2009/10)[36] is drafted pursuant to the arbitration rules of the Australian Centre for International Commercial Arbitration ('ACICA')[37] (the principal Australian arbitral institution with respect to international commercial disputes). For this reason, though the cases themselves are both international and hypothetical, the legal analysis has direct relevance to Australian law.

In addition, *The Danubia Files* is an interesting text in the Australian context, given the ongoing review into Australian contract law initiated by the Attorney-General's Department in 2012.[38] While, at the time of writing, no specific proposals have been formulated as a result of this review, the public consultation documentation published in 2012 raises for discussion the internationalisation of Australian contract law, using the *CISG* as a source of inspiration.[39] This proposal has received some support (particularly from the academic community) in the subsequent literature.[40] The consistent failure of some Australian courts and practitioners to properly understand the *CISG* is well documented,[41] and was even noted in the Attorney-General's Discussion

[36] Barrington et al, above n 19, 201–42.

[37] The problem for the 17th Vis and 7th Vis (East) Moots was framed around the 2005 edition of the ACICA, *Arbitration Rules 2005* (2005) <http://acica.org.au/assets/media/Rules/ACICA_Arbitration_Rules.pdf>. The current version of the Rules came into force in 2011: ACICA, *ACICA Arbitration Rules Incorporating the Emergency Arbitration Provisions 2011* (2011) <http://acica.org.au/assets/media/Rules/Rules-inc-emergency-provisions.pdf>.

[38] See generally Attorney-General's Department, 'Review of Australian Contract Law' (2012) <http://www.ag.gov.au/consultations/pages/ReviewofAustraliancontractlaw.aspx>.

[39] Attorney-General's Department, 'Improving Australia's Law and Justice Framework — A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (2012) 15 [5.2]–[5.4] http://www.ag.gov.au/consultations/pages/ReviewofAustraliancontractlaw.aspx>. See also at 6 [2.11].

[40] See, eg, Lisa Spagnolo, 'Law Wars: Australian Contract Law Reform vs *CISG* vs *CESL*' (2013) 58 *Villanova Law Review* 623, 636–7, 641; Martin Doris, 'Promising Options, Dead Ends and the Reform of Australian Contract Law' (forthcoming, *Legal Studies*). See also Luke Nottage, 'The Government's "Proposed Review of Australian Contract Law": A Preliminary Positive Response' (Research Paper No 12/49, Sydney Law School, 16 July 2012) 10–12 <http://ssrn.com/abstract=2111826>.

[41] See, eg, Lisa Spagnolo, 'The Last Outpost: Automatic *CISG* Opt-Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10 *Melbourne Journal of International Law* 141; Bruno Zeller, '*Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462' (2005) 9 *Vindobona Journal of International Commercial Law and Arbitration* 43; Bruno Zeller, '*Downs Investment Pty Ltd v Perwaja Steel SDH BHD* [2000] QSC 421' (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 124; Bruno Zeller, 'Getting Off the Fence' (2000) 74(9) *Law Institute Journal* 70; Bruno Zeller, 'The *Vienna Convention* — 11 Years On' (1999) 73(3) *Law Institute Journal* 72; Benjamin Hayward, 'The *CISG* in Australia — The Jigsaw Puzzle Missing a Piece' (2010) 14 *Vindobona Journal of International Commercial Law and Arbitration* 193.

Paper.[42] To the extent that *The Danubia Files* adds to the corpus of *CISG* literature[43] and provides a practical illustration of the *CISG's* application, it will be a useful resource for the purpose of this review (should it progress any further following the change of federal government in September 2013).

Finally, and perhaps not as widely known as this contract law review, the Standing Council on Law and Justice (formerly the Standing Committee of Attorneys-General) is currently conducting a public consultation in relation to private international law — concerning matters of jurisdiction, choice of forum and choice of law.[44] These three matters are, of course, the bread and butter of Vis Moot problems; in particular, applicable law issues and disputes frequently arise in the context of the Vis Moot. Once again, *The Danubia Files* is an interesting point of reflection with respect to this consultation, given its inherently international outlook, and given that the purpose of the consultation is closely tied to the policy of promoting cross-border trade.[45]

IV CONCLUSION

The Danubia Files is a practical, interesting and insightful text. While squarely framed around the Vis Moot, it is far from being a text of purely niche interest and is a valuable contribution to the literature on, and education in, international commercial arbitration and international dispute resolution in general. While this is perhaps not immediately apparent, it is also an important stimulus for reflection upon both the current state of Australian law, and on present law reform initiatives.

The Danubia Files will be both appreciated and enjoyed by '[m]ooties',[46] those interested in international commercial arbitration, '*CISG* enthusiasts',[47]

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[42] Attorney-General's Department, *Improving Australia's Law and Justice Framework Discussion Paper*, above n 39, 15 [5.4].

[43] For the most extensive online open-access collection of scholarly material concerning the *CISG*, including (at the time of writing) 1569 texts as well as 10 105 citations – see Pace Law School, *Albert H Kritzer CISG Database* (7 October 2013) Institute of International Commercial Law <http://www.cisg.law.pace.edu>.

[44] Attorney-General's Department, *Private International Law Consultation* (2012) Consultations Reforms Reviews — Achieving a Just and Secure Society <http://consult.govspace.gov.au/pil>.

[45] Ibid.

[46] Arno Eisen, Edgardo Muñoz and Pedro Martini, 'A Message from the MAA — Moot Alumni Association' in Louise Barrington, Napoleão Casado Filho and Claudio Finkelstein (eds), *The Danubia Files: Award Writing Lessons from the Vis Moot* (Outskirts Press, 2013) v, vi.

and also all those interested in learning from the great practical and academic experience of the eminently qualified array of individual authors represented within this edited work.

[47] See Camilla Andersen, 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the *CISG*' [2012] *Journal of Business Law* 699, 712.