DIFFICULT AND NOVEL ISSUES EXPLORED BY THE STUDENTS WHO REPRESENTED THE UNIVERSITY OF BUCHAREST IN THE 2021-2022 EDITION OF THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

PROBLEME DE DREPT DIFICILE ȘI DE ACTUALITATE EXPLORATE DE STUDENȚII CARE AU REPREZENTAT UNIVERSITATEA DIN BUCUREȘTI LA EDIȚIA 2021-2022 WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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ABSTRACT

This article provides an overview of the Willem C. Vis International Commercial Arbitration Moot in general and of the novel and difficult legal issues raised by the 2021-2022 moot problem. The procedural issue revolved around determining the law applicable to an arbitration agreement where, as it is generally the case, the parties did not specifically select it, and with the additional twist of the existence/validity of the entire contract (including the arbitration agreement) being challenged by one of the parties. The relevant considerations are addressed in an article titled "Midnight problems: finding the law applicable to the arbitration agreement", co-authored by Diana Bucovală and Raluca Rusu. The substantive issues raised by the 2021-2022 moot problem, which were closely intertwined with the jurisdictional challenge, involved contract formation, including incorporation of general conditions containing an arbitration agreement, where one of the contracting parties was part of a larger group of companies. The expansion of the corporate group of companies doctrine in the area of contract formation (including formation of an arbitration agreement)

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is explored in an article titled "Relevance of the group of companies doctrine in international arbitration and contracting", co-authored by Mihnea-Filip Jére and Antonio-Alexandru Timnea. The incorporation of general conditions (including where they contain an arbitration agreement) is explored in an article titled "To incorporate or not to incorporate? That is the issue.", co-authored by George Domocoș and Alexandru Köber.

Keywords: *Willem Vis; moot; arbitration agreement; validity; applicable law; conflict of law rules; Dow Chemical; group of companies; non-signatory; practices; CISG; general conditions; standard terms; incorporation; contract formation*

REZUMAT

Acest articol oferă o privire de ansamblu asupra concursului internațional în domeniul arbitrajului comercial internațional Willem C. Vis și a problemelor juridice noi și dificile ridicate de problema care a făcut obiectul ediției 2021-2022 a concursului. Problema procedurală a vizat determinarea legii aplicabile unei convenții arbitrale în ipoteza în care, așa cum este în general cazul, părțile nu au selectat în mod specific legea aplicabilă convenției arbitrale, și cu dificultatea suplimentară provenind din faptul că existența/validitatea întregului contract (inclusiv a convenției arbitrale) era contestată de una dintre părți. Considerațiile relevante sunt abordate într-un articol intitulat „Dilema de la miezul nopții: determinarea legii aplicabile convenției arbitrale", redactat de Diana Bucovală și Raluca Rusu. Problemele de fond ridicate de problema care a făcut obiectul ediției 2021-2022 a concursului, strâns legate de obiecția jurisdicțională, au vizat formarea unui contract, inclusiv încorporarea unor condiții generale conținând o convenție arbitrală, între două părți, una dintre părțile contractante făcând parte dintr-un grup de societăți. Extinderea doctrinei grupului societăți, care provine la originea sa din sfera dreptului societar, către drepul contractelor (formarea contractelor, inclusiv formarea unei convenții arbitrale) este explorată într-un articol intitulat „Relevanța doctrinei 'grupului de societăți' în arbitraj și contractele internaționale", redactat de Mihnea-Filip Jére și Antonio-Alexandru Timnea. Încorporarea condițiilor generale în contract (inclusiv în situația în care acestea conțin o convenție arbitrală) este explorată într-un articol intitulat „A include sau a nu include clauza arbitrală? Aceasta este dilema", redactat de George Domocoș și Alexandru Köber.

Cuvinte cheie: *Willem Vis; concurs; convenție arbitrală; validitate; legea aplicabilă; norme conflictuale; Dow Chemical; grup de societăți; nesemnatar; practici; CVIM; condiții generale; clauze standard; includere; formarea contractului*

In March-April 2022, the oral phase of the 29th edition (Vienna) and 19th edition (Hong Kong), respectively, of the Willem C. Vis Moot competition ("**Willem Vis**") were held. Due to the ongoing global pandemic, the oral phase of the competition

took place virtually, similarly to the previous two editions (2019-2020 and 2020-2021). The 2021-2022 competition brought together virtually over 3,000 students and 1,000 practitioners and academics and was attended by 362 law schools (Vienna) and 132 law schools (Hong Kong) from more than 80 countries. Universities such as Harvard, Yale, Columbia, New York University, Paris 1 Panthéon-Sorbonne, University College London, Queen Mary, Freiburg, Heidelberg, Munich, Singapore Management etc. attend the competition every year. As such, the Willem Vis competition is the largest private law competition in the world, combining international contract law and commercial arbitration.

The Willem Vis moot, conducted in English, is an amazing cultural and professional opportunity for law school students. It tests not only legal knowledge in the areas of international contracts and international commercial arbitration, but also practical skills: how to prepare written legal documents and the ability to advocate. The Willem Vis moot problem always involves a dispute arising out of a contract governed by the UN Convention on Contracts for the International Sale of Goods ("**CISG**"). The contract contains an arbitration clause through which the parties establish the arbitral tribunal competent to resolve their disputes. The applicable rules of procedure vary from year to year. In the 2021-2022 edition, the 2021 Rules of the Asian International Arbitration Centre ("**AIAC**") were used.

The written phase of the Willem Vis moot involves drafting a Memorandum for Claimant and a Memorandum for Respondent replying to a Memorandum for Claimant of another law school, selected randomly. The "pre-moot" phase involves preparation for the final oral phase by participating in various pre-moots to test the oral arguments developed in support of the written submissions. The oral phase consists of four rounds of pleadings in the general rounds (each team having two as Claimant and two as Respondent) against other teams, in front of "arbitral tribunals" consisting of practitioners and academics. Based on the results obtained in the general rounds, 64 teams (Vienna edition) and 32 teams (Hong Kong edition) enter the elimination rounds. After successive knockout pleadings, the remaining two teams argue in the final.

In each of the two versions of the competition (Vienna and Hong Kong, respectively) there are four categories of awards for the written and the oral phase of the competition: (a) Pieter Sanders/David Hunter award for the best Memorandum for Claimant, (b) Werner Melis/Fali Nariman award for the best Memorandum for Respondent, (c) Frédéric Eiseman/Eric Bergsten award for the teams that qualify to the elimination rounds and (d) Martin Domke/Neil Kaplan award for the best individual oralists (to be eligible, a student must argue once as Claimant and once as Respondent).

The University of Bucharest has been participating in the Willem Vis moot every year since 2012, with a track record of achievements. For example, with respect to the oral phases of the competition, the University of Bucharest team

reached the semi-finals in Vienna in 2018, and the semi-finals in Hong Kong in 2014, 2017 and 2019, qualified into the elimination rounds in Vienna or Hong Kong in 2014, 2016, 2017, 2018 and 2019, and obtained individual prizes for students in the best oralist category in 2014, 2016, 2018 and 2019. With respect to the written phases of the competition, the University of Bucharest has obtained several prizes for written memoranda in 2013, 2014, 2016, 2019, 2020 and 2021.

For the 2021-2022 Willem Vis moot, the University of Bucharest was awarded, in the Hong Kong edition, an honourable mention (4th place, *ex aequo*) in the *Fali Nariman* category for the Memorandum submitted on behalf of Respondent. The overall winner in this category was Heidelberg Law School, followed by Vienna Law School and Freiburg Law School.

The team who proudly represented the University of Bucharest in the 2021-2022 edition of the Willem Vis moot consisted of nine students: Dóra-Krisztina Bács, Diana-Steliana Bucovală, George Domocoș, Mihnea-Filip Jére, Alexandru Köber, Andreea Mitroi, Luka Perović, Raluca Rusu and Antonio-Alexandru Timnea. The team was coached by lect. univ. av. dr. Raluca Papadima, av. drd. Mihaela Gherghe, partner at the law firm Rizoiu & Poenaru, and av. Maria Avram, associate at the law firm Țuca, Zbârcea & Asociații.

The team received financial support from the University of Bucharest, from a number of prestigious law firms, and from Asociația Vindobona pentru Promovarea Arbitrajului în România (the Vindobona NGO for the Promotion of Arbitration in Romania), a non-profit organization created and managed by young Romanian practitioners, including former and current students and coaches of the University of Bucharest's Willem Vis team. The main sponsors of the team were: Suciu Popa & Asociații and Ţuca Zbârcea & Asociaţii. The team also received generous financial help from Bohâlțeanu & Asociații, Guia Naghi & Asociații, Markó & Udrea, Mihai & Co. Business Lawyers, Raluca Papadima, Rizoiu & Poenaru, Tudor Andrei & Asociații and Stoica & Asociații.

Due to these contributions, the team was able to attend the following pre-moots: Asia Pacific pre-moot (9-13 February 2022, online), ICDR pre-moot (18 February 2022, online), Bucharest 2022 Pre-Moot and International Conference (19-20 February 2022, online), Fordham pre-moot (26-27 February 2022, online) and Belgrade pre-moot (1-4 April 2022, in person, 49 participating teams). Additionally, the team benefited from guidance and support from practitioners during its preparation for the oral rounds by participating in pre-moots organized and hosted by the following law firms: Ţuca Zbârcea & Asociaţii (25 February 2022, online), Filip & Company (4 March 2022, online) and Guia Naghi & Asociații (9 March 2022, online).

The problem in the 2021-2022 edition of the Willem Vis moot involved, once again, novel and difficult legal problems. ElGuP plc ("**Claimant**") was a producer of palm oil and palm kernel oil, based in the fictitious country of Mediterraneo. From 2010 to 2018, Claimant had a commercial relationship with Southern

Commodities ("**Southern**"), a multinational conglomerate based in the fictitious country of Ruritania. During this time, Claimant (acting through Mr Chandra) and Southern (acting through Ms Bupati), concluded approximately 40 contracts: 32 during 2010-2014 and 8 during 2016-2018. The last negotiation between Mr Chandra and Ms Bupati, as representatives of Claimant and Southern, took place in June 2018. In 2019, Ms Bupati (while still at Southern) negotiated with another representative of Claimant for deliveries in 2020. The negotiations failed. On 28 March 2020, Mr Chandra and Ms Bupati reconnected at a Palm Oil Summit. Mr Chandra was at the Summit as COO of Claimant, since June 2018. Ms Bupati was at the Summit as Head of Purchasing of JAJA Biofuel Ltd. ("**Respondent**"), a producer of biofuel, based in the fictitious country of Equatoriana. Ms Bupati's new role, which she had since 2019, was a result of Southern's acquisition of Respondent in 2018. The climate in which Respondent operated in Equatoriana was very different from that applicable to Southern in Ruritania, including with respect to the public perception of arbitration and environmental awareness.

At the Summit, Mr Chandra and Ms Bupati discussed the potential terms of a commercial relationship between Claimant and Respondent. Unlike the relationship between Claimant and Southern, who concluded several contracts annually (one large contract at the beginning of the year, followed by several small contracts, each with its own price negotiations), Claimant and Respondent contemplated a long-term contract spanning over 5 years (2021-2025). The quantities were also to be significantly increased to 20,000 tons per year. The type of oil purchased would be palm oil, not palm kernel oil. The quality was also going to be different, in the sense that it would be "fully segregated" and "RSPO-certified" oil.

On 1 April 2020, Ms Bupati emailed Mr Chandra reiterating the main points of the discussions they had at the Summit. Ms Bupati then raised a number of additional issues for further discussion between the parties. Among others, she insisted that the contractual documentation reflects Respondent's crucial requirements that "*all palm oil delivered is RSPO-certified and that the supply chain is properly monitored*" and she expressed a concern regarding arbitration as the dispute resolution method, particularly due to a perceived lack of transparency.

On 9 April 2020, Mr Rain, the assistant of Mr Chandra, sent Ms Fauconnier, the assistant of Ms Bupati, a draft contract signed by Mr Chandra. Mr Rain confirmed that Claimant's template would be used and added that Claimant's General Conditions ("**GC**") would apply. While the template was attached to the email, the GC were not. Ms Bupati's concerns regarding the dispute resolution mechanism or transparency were not addressed in the cover letter.

In May 2020, Mr Rain and Ms Fauconnier had subsequent conversations regarding payment, manner of certifying conformity with the quality standards (RSPO), and the dispute resolution method, including the issue of transparency.

The parties disagreed as to whether all matters were resolved. However, Respondent's representatives did not send back to Claimant a signed version of the contract. In October 2020, invoking Claimant's public admission of fraud with respect to RSPO certification, Respondent's CEO sent a letter to Claimant purporting to terminate any negotiations with Claimant and/or the contract.

In 2021, after an unsuccessful mediation before the AIAC, Claimant commenced arbitration seeking a declaration that the contract was validly formed and that it incorporated Claimant's GC, an order for damages for the 2021 quantities, as well as a declaration that Respondent must perform the contract for 2022-2025. Respondent challenged the jurisdiction of the Tribunal arguing that the parties did not enter into an arbitration agreement. Respondent also argued that no contract was validly concluded between the parties and that, in any event, it did not incorporate the GC which contained the arbitration agreement on which Claimant relied.

Claimant argued that the Tribunal had jurisdiction based on art. 9 of Claimant's GC, which provided: "*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules. The seat of arbitration shall be Danubia. The language to be used in the arbitral proceedings shall be English. This contract shall be governed by the substantive law of Danubia. Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.*" Although art. 9 of Claimant's GC provided that "*This contract shall be governed by the substantive law of Danubia*", both parties were in agreement that this provision was superseded by the oral agreement, made at the summit, that the law of Mediterraneo would govern at least the sales portion of the contract and that, consequently, that provision should read: "*This contract shall be governed by the substantive law of Mediterraneo.*"

The existence of a valid arbitration agreement depended on two matters, relating to the merits of the dispute, which the Tribunal was asked to resolve: (i) if a contract was validly entered into between the parties, and (ii) if so, if Claimant's GC were properly incorporated into that contract. As such, the question of jurisdiction was closely intertwined with the merits of the dispute.

In resolving the jurisdictional challenge and deciding whether a valid arbitration agreement existed, the Tribunal had to first determine what law governed the arbitration agreement. Claimant submitted that the arbitration agreement was governed by Danubia law (as the law of the chosen seat) or, alternatively, by Mediterraneo law excluding the CISG. The parties were in agreement (at the very least at the time and for purposes of the arbitration proceedings) that, were a contract concluded, it was governed by Mediterraneo law, including the CISG. However, parties disagreed with respect to the law governing the arbitration agreement. Respondent submitted that the arbitration

agreement was governed by the CISG as part of Mediterraneo law. Equatoriana, Mediterraneo and Ruritania were Contracting States of the CISG but Danubia was not. The general contract law of all four countries involved (Equatoriana, Mediterraneo, Danubia and Ruritania) was a verbatim adoption of UNIDROIT Principles, while the arbitration law in all four countries was a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"). With respect to the form requirement for arbitration agreements, set forth in art. 7 UNCITRAL Model Law, Danubia and Equatoriana had adopted Option I (the "in writing" requirement), while Mediterraneo and Ruritania had adopted the more lenient Option II. Lastly, all four countries were Member States of the New York Convention on the Recognition and Enforcement of Foreign Awards.

The first legal issue raised by the 2021-2022 Willem Vis moot problem provided the inspiration for the article titled **"Midnight problems: finding the law applicable to the arbitration agreement", co-authored by Diana Bucovală and Raluca Rusu**. In this article, the authors focus on the methods for determining the law governing the formation and validity of an arbitration agreement absent an express choice made by the parties. The article's methodology is a comparative review of caselaw from both common and civil law jurisdictions, in an effort to find, from a theoretical point of view, the mechanism that best reflects the parties' intent. The authors observe that it is not common for parties to choose the law applicable specifically to the arbitration agreement, and, based on an overview of model clauses, that arbitral institutions usually recommend placing both the choice of law clause and the arbitral seat within the arbitration agreement. As such, an issue arises where the parties have chosen (or the applicable rules of international private law led to) a law to govern the entire contract or the merits of the dispute which is different from the law of the seat. The issue becomes particularly difficult if one of the parties challenges the validity of the arbitration clause. The authors address the available solutions by reviewing relevant caselaw and scholarly writings and provide drafting recommendations to avoid the problem.

This second legal issue raised by the 2021-2022 Willem Vis moot problem, namely, whether a contract had been validly entered into between the parties, provided the inspiration for the article titled **"Relevance of the group of companies doctrine in international arbitration and contracting", co-authored by Mihnea-Filip Jére and Antonio-Alexandru Timnea**. In the Willem Vis problem, Claimant argued that the parties had validly concluded a contract at the latest on 3 May 2020, either orally at the Summit in March 2020, or through the classical mechanism of offer and acceptance, including potentially implied acceptance by conduct, performance or as a result of practices. In so doing, Claimant relied on practices established between Mr Chandra and Ms Bupati, the natural persons representing the legal entities involved in the dispute. One particular difficulty was that Ms Bupati had potentially established practices with

Mr Chandra while she was at Southern. However, the counterparty to the contract at issue was not Southern but rather Respondent, a newly acquired subsidiary of Southern, represented by Ms Bupati (albeit in a different capacity). Consequently, the students had to explore questions such as the extent to which legal persons are bound by the conduct of their natural person representatives, as well as the extent to which a parent company might be bound by practices established by its 100% owned subsidiary. The article's starting point is the corporate law version of the *group of companies* doctrine (used to hold liable an overly controlling member of the group for the torts committed or contracts entered into by another member of the same group). The authors discuss the root of the doctrine and how it made its way into the field of international arbitration, i.e. by starting with the *Dow Chemical* award and the subsequent decision of the French courts confirming the Dow Chemical award (which bound a non-signatory member of a group of company to an arbitration agreement). The article proceeds to usefully review caselaw subsequent to *Dow Chemical* from around the world, and masterfully draws from that caselaw, by analogy, a framework based upon which it proposes a new application of the group of companies doctrine in the area of international contract law.

The third legal issue raised by the 2021-2022 Willem Vis moot problem was whether the GC (which contained an arbitration agreement on which Claimant relied) were validly incorporated into the contract. This provided the inspiration for the article titled **"To incorporate or not to incorporate? That is the issue.", co-authored by George Domocoș and Alexandru Köber**. The premise of the article is that the modern commercial environment has created faster ways of negotiating and concluding contracts (by resorting to general terms and conditions), as well as of resolving disputes (by providing for arbitration instead of litigation). Often, these two mechanisms come together in the form of arbitration clauses included in general terms and conditions of one of the contracting parties. The authors first review the international practice under the CISG regarding the incorporation of general terms and conditions. They then delve into the specific issue of the valid formation of arbitration agreements contained as clauses in general terms and conditions, including the very difficult question of the law applicable to decide that issue. In so doing, the authors helpfully and clearly review the interplay between the applicable substantive law(s) and procedural laws such as the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Awards. The article then evaluates the benefits of "hiding" an arbitration clause in general terms and conditions versus the risks associated therewith.

The careful analyses presented in these three articles represent the result of nine months of research of these topics and the reason why the team representing the University of Bucharest in the 2021-2022 edition of the Willem Vis moot was able to bring home yet another award for its written submissions. By their hard work and impressive results, these young students continue to put Romania on the map of international commercial arbitration.