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Special Feature

*251 International and Comparative Legal Education through the Willem C Vis Moot Program: A Personal Reflection

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CONTENTS

1 INTRODUCTION

Just prior to the Easter university vacation each year, an increasing number of exceptionally fine law students, together with their coaches, guest arbitrators, alumni and administrators, gather together in Vienna for the oral stages of the Willem C Vis International Commercial Arbitration Moot. [FN1] The idea of organising such a moot was made at the UNCITRAL Congress in 1992 and taken up by the Institute of International Commercial Law at Pace University in White Plains, New York, where Willem C. Vis and Professor Eric Bergsten, both former Secretaries of UNCITRAL, were teaching. At current levels of participation, the program involves over eight hundred persons each year.

*252 Before coming to Vienna, most students will have completed an immense amount of work preparing written memoranda for both claimant and respondent. All devote significant energy to developing their advocacy skills and prospective arguments. Some students must think about ways to raise funds for what can be expensive travel. Many students must also think about development of their language skills for an event that presents obvious advantages for native English speakers. Many alumni admirably assist in coaching and practice moot sessions. Some schools play host to foreign participants en route to Vienna.

These efforts generally begin the previous October when students and coaches first receive the problem, although administrators and organisers work year round. Where participants are concerned, October is also the first time that some become

aware of such fields and phenomena as private international law, UNCITRAL, the United Nations Convention on Contracts for the International Sale of Goods (CISG), international commercial arbitration and even the notion of mooting as a tool of legal education.

As a coach of a team since the events inception, I have been asked to write this piece setting out my personal thoughts on my experiences. The hope is that this may be of some benefit to prospective participants, whether students, arbitrators or even coaches. My particular concern is to suggest that it is desirable for participants to begin by asking certain fundamental questions, namely, why are we doing this? What do we aim to achieve? What strategies should we adopt in order to attain those goals? A lack of thought on these issues can prevent much in the way of meaningful benefits arising from the program.

If the primary obligation should be to ask why we would undertake such an activity, this in turn calls into question the very nature of the event. I claim no originality in saying that the fundamental proposition I commend to all participants is that this is essentially a learning experience that merely utilises some competitive elements in aid of that purpose. Thus it should not be primarily seen as a competition. This is a point made over and over by the event's exceptional organiser, Professor Eric Bergsten, and is now firmly imbedded in the competition rules. [FN2] A similar plea was made by Friedrich Blase, the extremely capable inaugural president of the Moot Alumni Association (MAA) in a *253 recent issue of this journal. [FN3] Nevertheless, the point is one that invariably finds many deaf ears each year, some new and some old. This article seeks to support these pleas for a learning objective with a slightly more formal discussion, utilising a rudimentary exposition of comparative legal education and the benefits of skills exercises. While the message has been presented before, the fact that many who have had an ongoing active involvement feel the need to reinforce the point, suggests that there is a continuing problem that should be addressed.

In particular, this article seeks to explain why I think it is highly unfortunate if competitive elements drive the experience. There are two broad reasons why I believe this to be so. The first relates to the negative impact on the learning experience if competitive elements overly intrude. The second relates to the questionable value of the superficial results of student competitions. The overall thesis is that students and coaches must ensure that the Vis program is treated as a unique learning experience and should plan their strategies accordingly.

The argument proceeds in a number of stages. The opening sections provide a brief exploration of the value that a moot such as this may provide to a participant's legal education. Attention is given to comparative issues in legal education, to determine whether a skills exercise of this nature should be of value to students from different legal cultures. Specific attention is then given to the role of mooting and to an analysis of the similarities and differences between it and actual legal practice. Finally, attention is given to the problems of an unduly competitive disposition. This includes an explanation of what may be lost in the process if the competitive elements dominate the pedagogic. It is not suggested that these goals are always mutually exclusive. Pursuit of appropriate learning goals must go a long way towards indirectly preparing students to compete effectively. Nevertheless, in some aspects, pursuit of optimal learning goals may require a clear choice to refrain from certain competitive strategies. The paper concludes with an outline of my own teaching strategies within this endeavour.

As my own students are fond of pointing out, as a coach, I normally have a heightened propensity to ask "why?", coupled with a strong reluctance to provide answers. Yet in this article, certain answers are suggested very strongly. I would merely say that the views I present are individual and are provided in the spirit of comparative analysis and scholarship, which is a key element of the Vis program. A comparative approach seeks to outline one solution to a problem or issue, with a reasoned articulation of the choices *254 made. This will hopefully allow others to form their own views as to their preferred approach.

2 ABOUT THE AUTHOR

Obviously an exploration of such issues in a piece of this nature will display my biases as well as my views. The reader's analysis of the latter should be tempered by an understanding of the former. I should therefore begin with a brief self-portrait that will hopefully prepare the reader for at least some of those inevitable biases.

When the competition was first proposed, I had just left employment at Monash University in Melbourne Australia, to take a chair at a newer Law School at Deakin University in the same city. After the event was first suggested at an UNCITRAL meeting, letters of invitation went to a number of schools, including Deakin, the latter at the suggestion of a former colleague. My Dean, with admirable prescience and perhaps a lack of understanding of my ignorance of much of the subject matter, was apparently the first to accept such an invitation. At the time, my fields of teaching and research were taxation and public international trade law, the latter, particularly with regard to the then GATT, now subsumed into the World Trade Organization. My Dean's lack of consideration of the conceptually debatable and possibly ever diminishing distinction between public and private trade law, (then a chasm where I was concerned), allowed me to be involved in the most rewarding and challenging educational experience I have ever engaged in.

In the first year, I raced my students in trying to understand new fields and conquer the entrenched biases of a common law legal training, (which in my case was spent in many places other than lecture theatres and law libraries, as a true child of the 70s). I have reflected a great deal on the psychological aspects of teaching and learning, partly as a result of seeing so many exceptionally endowed students from so many countries face the program with an inappropriately heightened sense of self-doubt and concern with the competitive aspects.

In terms of substantive law, I have learned about new, exciting and challenging fields. I have ventured into scholarship in the field of international arbitration and have been privileged to be proposed as an arbitrator for an actual international dispute. I now teach regularly on the relevant topics, as well as continuing to coach teams each year. I have also been regularly involved in arbitrating at the competition and in judging the memoranda.

*255 A little bit of knowledge remains a dangerous thing and I have certainly learned how much I still do not know about the substantive fields involved and the teaching profession in general. Nevertheless, simply in terms of experience of the event, I have a very small comparative advantage. I am now the only coach who has engaged in that activity in each of the eight years of the program's life to date. In addition, and for various reasons, I have been better placed than most to see the development and growth of the wonderful alumni association and this journal, and to talk at reasonable length on some of these issues to a reasonably wide range of participants on an annual basis.

For those who value results, or who may at least want to temper my comments with that data, I will say that teams with which I have been associated have had formal rewards in terms of finals placings. [FN4] To some, an analysis of the results may even lead to a broad interest in what any Australian coach has to say more generally. At the time of writing, I am in the process of returning to Monash University to take up a joint appointment with the Law Faculty and the University's APEC Study Centre. I have taken over the coaching of the Monash team. A team from Monash won the oral competition last year, (hence proving that I am superfluous in a competitive sense at least!). When added to the previous successes of Deakin and Queensland and the higher than average finals appearances by Australian schools, there is at least a superficially strong set of results for such schools in general.

Those results are of limited importance to me as I will try and explain below. Nevertheless, they may induce some readers to read on to see if there is an Aussie secret (besides beer drinking). For other reasons, I am happy to explain my aspirations and methods, which inspired this invitation. Once again, I would provide the caveat that all coaches are individuals and there is certainly no homogeneous Australian or any other national approach.

3 THE ESSENCE OF THE VIS MOOT - A LEARNING EXPERIENCE

Like others before me, I have suggested that learning should dominate over any competitive disposition. To suggest that learning is more important than competing is an *256 assertion of relativity. This can be made up of support for learning per se and/or a critique of competition as a feature. At this stage the article seeks to analyse the first aspect.

It should be reasonably non-controversial to suggest that the primary point of being a university student is to learn. If this is accepted, students might look to the long term with respect to all Law School activities. On this basis they would view events such as moot programs as opportunities to learn further, or at least to learn in different ways from the traditional teaching paradigms operating in their own countries. A moot program is but one form of pedagogical experience, which in part uses some simulations of real legal practice as an aid to learning.

Here the coach's perspective and support is likely to be most influential. In my view, the primary obligation on coaches is to assist or facilitate that learning experience in all its facets.

It is not only about obligation but also opportunity. Being a unique form of legal training, it provides an opportunity for coaches to learn more about the teaching profession and the diverse needs of students, particularly in view of the fact that we inevitably work very closely and over a long period of time with a relatively small group of students. We therefore come to see more clearly how they learn, how they might differ in that regard and how their learning experience might be enhanced through individual aspects of our relationship with each. [FN5] Being an international event, it also provides all coaches with a unique opportunity for comparative reflection and inspiration as to teaching ideas and methods. In sum, it can be about learning how to teach and teaching how to learn.

There are also related opportunities. For coaches who are merely contemplating an academic career, the process affords a wonderful chance to test their interest and aptitude for such a vocation, albeit in a medium which they need to understand is quite distinct from the bulk of university teaching.

Yet to merely assert that it should be a learning experience does not prove the point, as there is much legitimate debate about pedagogical styles and methods. In this

vein, some question the value of moots as a formal tool of legal education. Others might see fundamentally different educational philosophies between different legal families. This *257 article addresses some of those challenges. It does so in the context of a brief discussion of comparative issues in legal education, after which specific attention is given to the utility of moot programs.

4 COMPARATIVE ISSUES IN LEGAL EDUCATION

Diversity is one of the most valuable aspects of the Vis moot. It brings together students from a range of legal systems and cultures to hopefully learn from the process and from each other. Nevertheless, in an article of this nature which explores the pedagogical utility of moot programs, it should be acknowledged that mooting has been much more prevalent in common law systems. Thus it is desirable to explore a broader utility for such endeavours. This is not the place for a comprehensive analysis of the history and basis for legal education in various jurisdictions. [FN6] The following discussion merely aims to touch on such questions to provide a brief picture of the role of skills training in comparative legal education as a backdrop to the discussion of the breadth of utility of moot programs. The ultimate thesis is that such programs should be of great benefit to students from all legal systems.

An exploration of that thesis must begin with an acknowledgment that there are significant differences between legal systems and their traditions of legal education. As a number of leading comparative law scholars have asserted, the form that legal education takes will generally follow the peculiarities of each particular legal system. [FN7] For that reason it is not easy to compare and evaluate different educational approaches without considering the essential nature of legal systems and their jurisprudential basis.

*258 With that caveat in mind, we may note that in comparing civil and common law legal systems, commentators will often contrast the skills orientation of the common law with the scientific orientation of civilian systems. Some are heard to speak of the common law as judge made through the principle of stare decisis, while the civil law is said to be scholar made, through the role of jurists in the development of the central Codes. The different sources of the law are said to lead to differences in logical process, with the civil law being primarily concerned with deductive conclusions from broad principles, with the common law said to be concerned with inductive conclusions from decided cases.

Common law is also sometimes seen as being about professional training, while civil law is sometimes asserted to be about the higher intellectual analysis of the legal system, on the same par with other academic pursuits of philosophy, sociology and economics. [FN8]

The suggested distinction between the practical and the scientific is seen as explaining the common law's development of interactive techniques such as the case method approach in the US and the expository or magisterial style of civilian legal education.

While these distinctions are all accurate to some degree and are certainly important, they do not provide a clear and dynamic picture of legal education in the two systems. Most importantly, they forget that each system has a common aim. As has been suggested, "(w)hile these two systems may differ in the respective emphases they place upon abstract principles and concrete factual observation as systems, they share the same problem-solving epistemology, an epistemology which combines abstract and concrete forms of reasoning." [FN9] Each system aims at solving real life

problems and must therefore consider the relationship between the abstract and the concrete. [FN10]

These observations are borne out by a brief analysis of the development of legal education. While legal education in the modern world tends to take quite distinct forms, this was not always the case. In the early stages in most systems it could generally be described as doctrinal and positivist. For example, in the common law world, legal training began by way of apprenticeship. Even when it became a university discipline, law was primarily taught by practitioners in an expository manner. It is appropriate to speak of the "black-letter" tradition in English legal education.

*259 With the development of the case method approach in the US, that system appeared to diverge significantly. Case method involved the development of casebooks to be used by students to prepare for questions posed by their Professors during lectures. The questions were aimed at developing students' understanding of the law and their ability to think about it under pressure. That style of questioning resonates with mooting as an educational endeavour.

The advantage of case method, at least in common law countries, is said to be that it trains students to work with the primary legal materials that they will utilise in practice and not simply rely on their professors' expositions of doctrine. The contentious aspects include the fact that its creators saw law as a science, where students could be taught to understand the law, as if there was a clear and objective body to discover. Thus it remained a positivist approach, but one which operated through a different methodology. [FN11] Thus from the outset, the key difference of case method from civilian approaches was about process, in particular, a process of learning by doing. It was not about a fundamental shift from a positivist ideology.

In spite of various criticisms, the case method continues to dominate in the US. It has continued alongside major advances in clinical and skills based education. This is not the place to debate the pros and cons of case method but its role in directing attention to certain forms of skills training should be emphasised. For example, in 1992, an American Bar Association (ABA) Task Force on Law Schools and the Profession published the MacCrate Report. [FN12] This identified what were seen to be ten fundamental lawyering skills. It called on law schools and the profession to ensure that students *260 acquired those fundamental skills before representing a client. The ten skills as identified were (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and ADR procedures; (9) organization and management of legal work; and (10) recognizing and resolving ethical dilemmas. [FN13] Mooting as an activity has an obvious relationship to a number of these skills.

These developments reflect the fact that, for much of the time, legal education in common law countries was dominated by the desire to prepare students for legal practice in all its facets, whether as advocate, legislator or judge. Many academics would see their role as training students to "think like lawyers", whatever that might mean. Other processes thought to be essential to a skilled lawyer are often incorporated into the legal curriculum. Mooting becomes an obvious teaching tool in that regard.

In spite of these ideas and developments, legal education in common law countries, like much in the way of scholarship, remains contentious. In particular, the development of skills programs sits at least somewhat uneasily alongside a growing interest in theory and post-modern perspectives in many law schools. This article does not seek to enter that broader debate about the proper focus of legal education. My

own immediate reaction is that whatever one's overriding preferences, pluralism in approach will often be of value in its own right at the stage of learning. Yet even if this is so, the distinct and concurrent trends do suggest some significant differences in attitudes as to the proper basis and content of modern common law legal education. [FN14] This leads to various challenges to skills training, some of which are addressed below. It should also remind us that it would be inaccurate to describe all common law legal education as based on the case method and concerned with the manipulation of cases. As an Australian academic, I would assert that expository teaching styles still predominate in my jurisdiction. The role of cases also varies significantly depending on the subject involved. In many areas, there has been a very significant growth in statutory materials and administrative guidelines to be analysed by students in conjunction with their professors. Hence the role of cases in our legal system is reduced.

Developments in common law countries need to be compared with those in other jurisdictions. For reasons of space and ignorance, I will confine myself to only a brief *261 discussion of the civil law tradition. While I have suggested above that it would be wrong to see all common law legal education as concerned with practical over scientific considerations, it is fair to say that legal education in Europe has been moulded by more consistent scientific attitudes to law and legal analysis, although once again there are significant differences between countries and significant changes over time. Just as it was inappropriate to consider common law legal education as homogeneous, the same can be said for civilian legal education. [FN15] Nevertheless, the Corpus iuris of Justinian and other codified principles and rules have tended to lead to a systematic methodology of teaching and writing. The systematic approach is broad ranging and can include training in methodologies for writing judgments as well as for critiquing them. [FN16]

As indicated above, a move to hands-on analysis of cases was at the forefront of modern approaches to skills training in the common law world. Mooting forms an important, albeit often ad hoc, part of that development. The same development could not be expected in the civil law tradition. Without a formal system of stare decisis, there is not the same concern for civilian professors to put cases before students or at least present them in the same way. In addition, the history of European legal education saw law as a more general form of intellectual analysis within universities, without a presumption that the majority of students would seek to be practitioners.

While this factor may be an important reason for differences in curricula, it should not affect the broad thesis of this article. Moot endeavours such as the Vis program, being optional, may be particularly appropriate ways to encourage skill development in potential European practitioners. Even where the broader development of scientific understanding of law is concerned, it has been suggested that some variation of the case method can be valuable through introducing students to a non-systematised collection of legal materials and encouraging their own search for system and coherence. [FN17] Relying on expository lectures or treatises means that this work is already done for the student. [FN18] Thus case method, and by extension, exercises such as moots, could be supported on the basis of a more recently emerging skills focus in civil law legal education. Even within *262 civil law systems, there are significant movements in practice if not in principle to some degree of acceptance of a variant of stare decisis or at least methodology of utilising of past cases as aids in argument. [FN19]

That is also contentious as mastery of a scientific exposition of doctrine is still seen by many as the essential skill to be inculcated through that system. Nevertheless,

in complex commercial fields such as taxation and corporations law, it is as true in civil law jurisdictions as in the ever more inaptly named common law, that the student should presume that the law as practised will look quite different to the law as studied. In this environment, an ability to adapt to such changes without returning to university studies is vital. Here, evaluating skills versus content becomes an important element of pedagogic debate worldwide. There has also been a trend towards discussion of the role of communication in civil law education, which again has much resonance with moot programs. [FN20]

Whatever one's views on these questions, it is true that there is far less in the way of critical challenge to exposition of doctrine in the civil law world, although this is by no means absolute. It is also hard to make direct comparisons as current issues in civil law education are often dealt with in terms of the distinct but related question of European integration. Thus it reflects specific questions as to the need to consider broadening the subject matter of traditional national study to support European wide legal practice.

This also reflects the somewhat related scholarly debate as to whether there is or can be an emerging ius commune in Europe. At the very least, lawyers intending to practice in Europe need to understand different or even converging legal systems. Hence, as just *263 one response, there is an emerging development of casebooks covering a number of European jurisdictions. [FN21] The Vis program calls for students to consider the possible convergence of contract law principles and hence is an excellent support for such developments. [FN22] Students must also consider the differences in style between major legal treatises.

For civilian law students who see law as science, at the very least an introduction to different perspectives should be a valuable means of evaluating what they have learnt. Consideration of factual issues in a moot environment also allows civilian students to consider the limits of useful generalisation. [FN23]

As global legal practice and commercial activity call for responses from all professions and regulators, thought has also been given to the impact that globalization might properly have on legal education. This goes beyond European integration, although the latter may constitute a subset of the former. Here law schools are asked to broaden the provision of international law training and give appropriate attention to emerging sub-specialities of international human rights, labour law, environment, trade, investment and competition.

That kind of learning can ask students to consider questions of global governance, constitutional laws and institutions, the relationship between international and domestic law and the role of cultural and other perspectives in forming differences between legal systems. This in turn can ensure that students do not presume that their own system has the only natural solutions to complex legal and social problems. [FN24] Another invaluable aspect of the Vis program is its utilisation of international commercial arbitration and the CISG as the basis of analysis. As Berger has pointed out, the "natural comparative orientation and flexible procedural framework" of international arbitration makes it an ideal environment to consider such similarities and differences in legal systems and to *264 gain a richer understanding of our own systems through comparative analysis. [FN25] Here again the Vis program is an ideal learning environment.

It is certainly not the purpose of this paper to make any normative comments about optimal legal education in other cultures. This all too brief digression merely suggests that there is nothing inherent in the civil law educational goals that would make mooting an inappropriate exercise. Taken together, while differences and

debates remain, it seems that there would be a growing belief in some pedagogical value in skills programs within the civil law context. Certainly the growing popularity of the Vis program is consistent with that hypothesis. [FN26] The fact that there are remaining significant differences between legal families does not mean that such programs would be lacking in value. Rather, from a pedagogic perspective they might provide different benefits for different groups of students. As discussed below in relation to the development of individual skills in a small teaching environment, pedagogical aims may also differ for individual students.

So far the discussion has looked at education broadly and the growth of some skills focus. I now turn to the specific role and potential of moot programs in legal education.

5 MOOTING AND LEGAL EDUCATION

Merely noting that skills exercises can be useful because they have a relationship to real life activity does not mean that they will be conducted optimally. Nor does it mean that they will be of net benefit in absolute terms, let alone be valuable from an opportunity cost perspective. In the US context, one strident critique of mooting is provided by Kozinski. [FN27] I will not seek to survey the body of educational literature on mooting, but instead, use this critique to spur some personal reflections. In part, this is because I aim to speak about optimising the benefits of a process to those who have in any case resolved to undertake it. Nevertheless, the reader should remain aware of the dangers of this methodology.

Kozinski's primary concern, which I share to some degree, is that too much emphasis is often placed on the "moot" and not enough on the "court" by coaches with less than *265 appropriate levels of interest or practical experience. [FN28] The same can be said for adjudicators, who may tend to concentrate unduly on style rather than substance if they do not have the expertise, intelligence or commitment to preparation, to allow them to follow sophisticated arguments by students. While that is a potential problem with any simulation, it is a challenge that can be responded to with appropriate commitment by arbitrators.

A second challenge by Kozinski is one that I am glad to disagree with, namely that moot court success has little relevance to hiring decisions. That is not the case in Australia and I can even attest to the role that the Vis moot has played in the CVs of very worthy students and alumni officials in their successful applications to international organisations and multinational and national law firms.

Some suggest that activities such as moots are merely part of the process of "professional socialization" which seeks to influence values and habits rather than facilitate learning. [FN29] This flows in part from the post-modern perspective in common law critique alluded to above. Again this is a broad challenge that I do not wish to debate in so far as it may apply to a diverse range of specific training programs. I would merely make the point that a pedagogical approach to mooting that is less concerned with style of presentation than intellectual content, should be less open to this challenge. That is a pedagogical approach that I advocate below. [FN30]

This suggests that it is important to distinguish between inherent problems and avoidable ones. It is certainly true that bad moot experiences will have similar problems to other bad teaching experiences. This simply calls for proper attention to responsibilities as a coach and to the development of appropriate pedagogical techniques. Let me turn to the potential benefits if proper attention is given to these issues.

The most obvious skills benefits are in the development of public speaking competence and group skills in research, writing and decision-making. Here it would be wrong to see a moot as merely about advocacy training. It is about effective communication. In the oral phase this entails dynamic and interactive communication with a person in authority who has the power to set the agenda. While this is of obvious importance in advocacy, it *266 is also a skill needed in most aspects of legal practice and most other forms of professional and personal activities. The required skills even go beyond moot related issues to sometimes encompass fair and efficient co-ordination of travel and leisure agendas! In the written phase, the approach needs to be based on special research skills and a concern for cultural plurality, given the diverse writing styles in different legal systems. Working in a group environment emulates many aspects of real legal practice. In larger firms, teams of lawyers are often brought together to work on individual matters and are then disbanded, only to be reorganised into different groups for subsequent projects.

As indicated above, another key benefit, particularly with the Vis moot, is the promotion of an awareness of comparative law and comparative law technique. Participants also learn about emerging areas of substantive law, including the work of UNCITRAL, and in particular, its development of the CISG and the UNCITRAL Model Law on Inteernational Commercial Arbitration.

That benefit goes well beyond merely receiving a new body of knowledge. Because there is no doctrine of precedent applied by arbitrators and because arbitration and the CISG seek to accommodate a range of traditional legal perspectives, moot problems that build on grey areas in these fields also help a range of students, coaches and guest arbitrators analyse important current issues. The sheer number of articles published, the very establishment of this journal and the number of participants who do research, honours or post- graduate papers in the field, is a testament to this valuable aspect.

Another valuable aspect of the program is its potential influence on domestic legal education. This may range from the use of past problems in teaching to greater attention to skills training in jurisdictions where this has not been the norm.

A further value of moot programs is that they provide some variety in pedagogy in a discipline that is notorious for its long and repetitive nature. Law students around the world are generally asked to display competency in certain skills over a wide range of substantive areas. Once they know they can do so in one area, they can rightly feel under-stimulated when asked to perform the same essential functions in other areas. In some cases this drags over a five year period, and even longer in some systems with *267 formal placement programs and bar training included. Legal academics would thus be well advised to search out opportunities for more effective learning and teaching. [FN31]

Students also need to be aware that law teachers in most jurisdictions are not systemically encouraged to work to their optimal teaching potential. "Publish or perish" remains the currency of first order to those who follow price signals. If it is ever to be replaced, at least in countries with diminishing public funding models, it is more likely to see a "brave" new world in some cash strapped universities of a reward structure built around monetary earnings in either fee or research income, unless staff and students work together for more meritorious goals. Here students can assist by demanding more attention to innovative teaching strategies. Given that they are usually expensive, and given the lack of sufficient funds in all but the richest schools, demand will lead supply by some distance.

One related challenge not easily met is that to the extent that moot programs are pedagogically valuable, they are inherently elitist as they are only available to a small percentage of the law school student body. The same can be said for Law Review editorships and many clinical programs. One response is that selective external programs such as Vis and Jessup are not at the expense of internal programs, but rather, can be inspirations for broader internal curriculum review. Furthermore, those who control the purse strings can also open further opportunities for wider student involvement in such endeavours.

From my perspective, the most satisfying aspect is the development in general confidence levels, although at times, some participants come to this slowly and only after some troubling low points. As a coach, I would be foolish to ignore my role in unintentionally bringing many students to a position where these concerns are heightened. It is certainly dangerous to be an untrained pop-psychologist and moot coach combined, but psychological issues are inherent in learning and cannot be ignored *268 even by those without formal training. In that regard we should remember that psychological issues are an essential element in most formal systems of teacher training. For civilian law students, this can also provide a unique experience of small group interaction with a professor, where the norm is for extremely large classes.

Finally there are also countless benefits flowing from the development of friendships throughout the world. The reader does not need me to elaborate upon these.

6 THE RELATIONSHIP BETWEEN MOOTING AND REAL ADVOCACY

In order to get the most out of the learning experience, it is important for participants to understand the difference between moot programs and real legal practice, whether in court environments or within arbitration. At the extreme, the differences lead some to call into question the value of the mooting endeavour. [FN32] The differences certainly pose challenges for moot coaches but in my view, do not reduce the fundamental utility of moots as a learning process. Nevertheless, I would agree that a lack of understanding of the differences and lack of discussion and explanation of them with students, may interfere with the learning process.

In one sense mooting and real advocacy are similar in that both can be analysed as games with applicable strategies, although this is not to be taken as indifference to the cultural and psychological aspects of real legal disputes. Peoples' lives should not be destroyed by moot competitions, but litigation can have this effect on a regular basis. That may be exacerbated by the insensitivity of lawyers.

To describe the distinct activities as games is simply to draw attention to the strategic options for pursuing such endeavours successfully. In turn, this requires an identification of the goals of each. This should hopefully cause attention to be given to appropriate moral and ethical dimensions. Just as a key thesis of this paper is that moot court activities should not be about competition and ego, but rather, about learning, so too should litigation not be seen as the pursuit of formal victory by the advocate, but rather, about meeting the reasonable needs of the client.

One obvious difference is that in real legal practice, there must be a separate decision to bring a case. There is also ongoing consideration of whether to pursue it or settle and a *269 consideration of the ambit of the claims and pleadings. [FN33] The moot problem is given and the moot must be held regardless. A moot coach can at least explain and discuss these issues as an additional element of the teaching program.

If the game analogy is acceptable, it is then necessary to identify the different rewards and strategies. Here I address competitive elements simply because one critique is that for those who aspire to do well, mooting might encourage attention to inappropriate skills. This then requires attention to be given to the appropriate attributes of moot advocacy, which in turn calls into question the criteria by which performance in a moot is judged. While there may be legitimate differences of view as to the keys to moot judging, there would be reasonable consensus that analysing advocacy skills entails a consideration of the participants' knowledge of the issues, both legal and factual, their development of cogent and innovative arguments, their manner of presentation and their responsiveness to questions. Critics would point out that these are not the factors being considered by a real adjudicator when deciding the outcome of a case. Nevertheless, these skills should all be relevant to determining whether an advocate has presented the case in a persuasive manner.

Even so, there will inevitably be some tactical decisions that are adopted in a different manner to real litigation. For example, as a moot participant, you may feel that there was clearly a breach of contract by your client but also believe that it was not fundamental and further that the damages claimed were unsustainable. In the real world, where cost may be an issue and where an adjudicator may be annoyed by undue time spent on weak arguments, an advocate may choose to concentrate on the key elements of the case as identified by research and analysis. This will be even more apparent in inquisitorial systems where the judge gives more direction as to the points of major concern. Conversely, in a moot, an advocate may impress most strongly by the way he or she deals with the weaker parts of the designated case. While some may disagree, most arbitrators would consider that a participant has avoided the central challenge if they conceded issues that were expressly within the terms of reference of the competition rules. Furthermore, if most students can readily identify the strong points, students may stand out more favourably if they identify a unique way to deal with the poorest parts of their case, particularly if they can along the way, cleverly deflect the most obvious probing questions that arbitrators are determined to pose.

*270 These differences are important but if properly understood by coaches and students, should not detract unduly from the learning experience. On the contrary, pointing out those differences and questioning students as to their practical implications can itself be a valuable learning methodology. For example, coming from a country where litigants pay costs on an ongoing basis and where the prima facie rule is that losers pay winners, albeit on a scale well below current commercial rates, I always ask students to tally up their total hours worked on the Vis problem and then present them with one of the many challenges of practice. I suggest that few clients would want them to be any less prepared than they have been, but no client would want to pay a bill wildly out of proportion to the amount in dispute. How a lawyer deals with these conflicting desires and the degree to which she or he seeks to empower a client in that determination, is an interesting practical and ethical question.

Another variable in mooting is the nature and style of questions. Adjudicators in the real world will hopefully confine themselves to questions that will meaningfully assist them in deciding the outcome of the case. The Vis moot rules expressly call for competition arbitrators to do likewise which is highly commendable, but it is impossible to constrain some arbitrators from acting as if they are on some Paper Chase form of legal pedagogy or from testing the limits of knowledge of a particular participant. Even so, if coaches follow the rules and help students understand what is

the difference between the two forms of questioning, the students must still learn a valuable lesson even where arbitrators do not adopt a realistic questioning format.

Another obvious difference between the Vis moot and real advocacy is that in the latter, one is not asked to represent both sides on different days. It has been suggested that this is a flaw of mooting, on the basis that it makes the student think of their own interests and not the client's. [FN34] In my view, the opposite is the case as long as pedagogy dominates over competition. Preparing both sides teaches students not to be one-sided in researching real cases. The best arguments of your opponent are the weakest arguments for your side. An advocate is not truly representing the client's best interest and deservedly earning a fee without fully preparing all aspects of the case. Forcing students *271 to take both sides can also challenge presumptions that might wrongly apply and help them develop a more open-minded approach to analysing a problem. Looking at both sides is also good training for adjudication itself and is directly relevant to the type of problem style examinations that apply in many legal education systems.

Another difference between mooting and advocacy is that regardless of the rules of the competition, the actual oral hearings are likely to depart significantly from the written briefs. This will be so for a number of reasons. First, some busy moot judges may not have carefully read the briefs. The unrealistically short time allocated to oral presentations, necessary for logistical reasons, also makes it impossible for presentations to flow from and refer to those briefs. It certainly precludes close analysis of cases and treatises.

In the Vis moot, where there are separate awards for written and oral stages, many judges would also be reluctant to penalise participants in the oral stage based on limitations in briefs completed months before and often when students had only a rudimentary knowledge of novel legal areas such as conflicts, arbitration and the CISG. A related reason is that the aim is for students to continually learn more and refine their arguments. Nevertheless, these factors put an undue emphasis on oral advocacy, which in the context of any international competition, imposes one of a number of systemic biases in favour of common law style adjudication. It is also unrealistic as even in those jurisdictions, judges usually have a backlog of judgments to write and will concentrate heavily on written material in making final determinations.

Where the written briefs are concerned, a critic could also suggest that the style of presentation adopted in moots will often depart from the approach taken in practice. Even if that is the case, they will at least afford the students a relatively rare opportunity for sustained research and writing on a complex issue in a group format. Furthermore, the particularly strong results of German teams in the written stages of the Vis moot, invites comparative analysis of that system's scientific approach to the development of legal writing competence, hence providing a basis for self-evaluation in other systems. There is no reason why that reflection might not lead to long-term changes in practice in those systems.

*272 One key criticism that pervades much of legal education worldwide is that many moot competitions downgrade the importance of facts, even in appellate advocacy. [FN35] First instance courts or arbitrations in the real world will consider complex issues of conflicting evidence but even appellate decisions will look at the court record, analyse fact/law distinctions and consider reasonableness of fact-finding methodology. [FN36] The criticism is not one which can be legitimately levelled against the Vis moot. It invariably emulates real world situations where conflicting and ambiguous communications must be pored over and debated. The most

impressively researched and immaculately delivered legal argument can comprehensively be rebutted by a better argument based on nothing more than a close analysis of the facts. In one year, the essence of the moot was merely a preliminary hearing about a request for discovery. The program also invites participants to make formal requests for clarifications. Students are asked to analyse the Problem at the outset and may seek answers to questions of fact. This is an important element of legal practice not generally addressed in core curricula where facts are usually given.

7 THE UTILITY OF COMPETITION AND ITS POSSIBLE EFFECTS ON THE STUDENT EXPERIENCE

I now turn to the second broad category of reasons for promoting pedagogy over competition, namely, that it is questionable in the context of any student simulation program to put too much store in the results attained. It is true that many aspects of life are competitive. Competitive instincts are also to be expected, particularly among elite students who have competed to get to premier law schools and then to be selected for small group endeavours. Within teams, individuals may be competing for positions as speakers. Students may have already competed locally to enter the program. It is natural for all who enter to hope to achieve a place in the finals at least. It is natural for students who enter the program to aspire to a speaking position. None should feel ashamed of this but, in my view, all should put these feelings in proper perspective.

Before exploring this further, it is worth noting that a comparison of competitive and pedagogical elements presumes that a particular event has features of both. Yet where determination of an optimal learning strategy is concerned, there need be nothing inherently competitive in mooting even though it simulates an adversarial endeavour. [FN37] *273 A moot program could be organised in a totally non-competitive spirit, with personalised confidential feed-back after each presentation. Whatever its relative value as a teaching mechanism, such an event may not have attracted the interest that Vis has attracted. That interest is itself of immense value, bringing so many people together to explore differences and similarities in their legal systems and to learn more about the valuable work of UNCITRAL.

The next general point is that even if a moot is to have some competitive features, there can still be considerable variations in emphasis, both officially and individually. In particular, competitive elements can be arranged so as to minimise the disincentives to learning. This has occurred with the Vis moot. To some extent, it was inspired by experiences of the Jessup Moot. Yet rather than slavishly copying that program, the founders began with one excellent modification by eschewing national play-offs and guaranteeing that all who enter are assured of the benefit of the Vienna experience.

Nevertheless there are at least some competitive elements and participants need to decide how much importance to place on these. [FN38] I would argue that this should be minimal. Undue concern with the competitive elements by coaches or students can too often be largely ego driven or forced on them by others. Such an approach is based on faulty analysis of the process as an indicator of merit. It is also a poor guide to what individual students actually learn. It is an even poorer guide to how coaches actually perform in their own obligations. It must also come at some considerable cost to the potential for learning and teaching for students and coaches respectively.

Dealing with the last issue first, the most crucial reason why an unduly competitive spirit can negate a significant part of the learning experience is that an optimal competitive strategy would rarely if ever be the same as an optimal teaching

and learning strategy. For example, an optimal competitive strategy would often be concerned to find and concentrate attention on a small team rather than give the opportunity to moot and learn to a wider group. An unduly competitive strategy would also provide a temptation to some to feed ideas to students and have them prepare "party piece" speeches honed to perfection over time. This is all far removed from the dynamics of real advocacy and does not allow the students to feel real ownership of the work presented. Such behaviour is not inherent in all forms of competitive spirit and may not be displayed by the majority of, or indeed any, coaches. At the very least, *274 however, these strategies may appeal to some who are most interested in winning a competition and deserve analysis as a result.

I now turn to the reasons why results are questionable indicators of merit or of learning outcomes. Where merit is concerned, one reason for results being a poor guide to relative ability is that the rules cannot be made to be wholly fair to non-homogeneous students. As to fairness, I speak again as an Australian. For example, my students are always allowed to moot in their native language. Yet we struggle to order coffee, tequila or opera tickets in Vienna in a foreign tongue, let alone moot complex international law problems. We are regularly humbled by seeing the many non-native English speakers who work hard to develop their skills in what is at times their third, fourth or even fifth language.

Secondly, as Australians, my students come from a legal tradition where mooting is a respected part of the curriculum. Other students who come from backgrounds where there is a purely expository legal tradition are thus further disadvantaged. Because of the strong moot culture in my jurisdiction and because of a healthily anti-authoritarian disposition of Australian students, our law schools can also readily find at least one or two faculty members who are interested in devoting considerable energy to coaching. We may not be better teachers but we at least operate in an environment where students rightly voice their demand for conscientious and considerate behaviour. In this regard, demand may even have some impact on supply. Once again, there is little fairness in comparison when facing teams who are self-coached or who only have access to recent alumni for that purpose, although many of these are highly committed and extremely able coaches, notwithstanding a lack of teaching or legal experience.

There can also be significant differences in the ages and educational experiences of participants. In most countries, law is a first university degree after high school. This is not the case in the United States. Furthermore, the rules permit LLM and doctoral candidates to participate if they have not been admitted to practice.

Variations in team size can also have significant effects. A larger team might be expected to do more comprehensive research. A smaller team might be expected to have a higher per capita amount of moot practice sessions. Teams in Vienna tend to vary between two and twelve students and between zero and four coaches.

Thirdly, while Australian law libraries are not impressive by US or some continental standards, they compare favourably with those of many Vis participants, particularly those from developing countries. Again, preparation based on an abundance of resources *275 cannot be fairly compared to work produced without such support, although the internet is helping redress this concern, particularly with some of the specialty web-sites that have developed in the field of international trade law, some inspired by the moot itself.

Finally, market principles suggest that a trip to Europe will be a particularly strong incentive for students from such far reaches as Australia, many of whom have not previously travelled overseas. Some European participants on the other hand, merely

look forward to a short car trip to a city they have visited many times before. I do not find it hard to drum up interest in a trip to Vienna where we might travel via places such as Paris, Rome, Berlin or Tuscany. [FN39]

These factors relate to the disparities in preparation and incentives for different types of student. Once again, it needs to be said that it is impossible to judge fairly non-homogeneous teams in terms of starting attributes.

The next group of issues relate to the inherent subjectivity of moot judging. If it is not possible to judge even homogeneous teams fairly, then it is even less meritorious to put undue emphasis on results. This is not a critique of the Vis or any other specific program, although I do not shy away from reminding any prospective moot judge of the obligations to prepare properly, follow the rules of the competition and give all participants the opportunity to display their true abilities. Nevertheless, just as teachers, coaches and students may have different levels of commitment and ability, so too will arbitrators in the real world and in an event such as this.

Some of these problems of judging can at least be related to aspects of life in legal practice and can hence be inducted into the learning process. Most Vis arbitrators prepare extremely thoroughly and I am pleased to say that this tendency is growing exponentially. Nevertheless, it still remains the case that some students, like many advocates, will find that they are facing a panel with at least one adjudicator with limited knowledge of the issues. In legal practice, this is simply a challenge that needs to be properly understood and prepared for. In that environment, it may be less of a problem in terms of outcome, as long as the adjudicator gives the advocate sufficient time to develop the argument, although this may come at considerable cost to the litigants.

*276 In a moot competition, where it is often the case that there is much to cover in something like a twenty minute period, the less adjudicators know of the issues, the harder it will be for them to judge participants fairly. Advocates will have a difficult choice between "dumbing down" the argument so as to be understood, with the possibility that the arbitrator will see it as superficial, or alternatively, plowing ahead with a sophisticated argument that may fly well over the head of the under-prepared arbitrator. In the Vis moot, where there are three arbitrators who each ascribe their own marks, the problem is often exacerbated because the three arbitrators may have very different attributes. A strategy that will work best for one may be counterproductive for another.

I suggest to my students that, rather than be annoyed by this, they should accept it as a wonderful training exercise in what may be the most challenging form of advocacy in a competitive sense at least. [FN40] In the real-world, adjudicatory panels with multiple members generally follow a majority rules approach to decision making. If one or two judges are clearly against you, you can and should ignore them if you can identify a "winnable" majority. In the Vis moot, where each arbitrator gives their own mark and where finalists are determined by aggregate marks and not win-loss records, an advocate has to try and impress all arbitrators equally.

A related problem is that it is impossible to devise a neutral judging scheme. A system which aggregates marks, as is the case with the preliminary rounds of the Vis moot, is different to a system based on knock-out one on one events, which occurs during the finals. Neither is inherently better as a measure of relative ability. A knock-out system has problems in treating both sides equally when the facts in the problem are not completely balanced. As balance is often in the eye of the non-homogeneous beholder, I would argue that no hypothetical problem can ever be made truly balanced.

If so, this also makes the luck of the draw in match-ups crucial, particularly if used during the preliminary rounds when there are a large number of teams.

An aggregation system also has problems. It relies on the proper application of some common standards among a large number of arbitrators. This is hard to achieve. In addition to the disparities in background, ability and preparation referred to above, there is also the fact that people tend to have fundamentally different views about marking levels. Some judges will tend to award high marks to all, feeling that the loser should *277 not be insulted with a low mark, no matter how low the standard. Others find it hard to ever award close to full marks no matter how good the quality. Both approaches are problematic but observable. In an event that in the past has required something in the order of a 43 average out of 50 over four moots to reach the finals, an aberrant arbitrator can unduly limit a team's results.

The Vis moot wisely seeks to respond to this problem with written guidance to arbitrators as to the standard to be expected within each of a defined series of point ranges. Experienced arbitrators are also placed on each panel wherever possible. That is probably as much as can be done but it will not guarantee consistency. Even with an experienced chair, marks are likely to be most volatile in the first round, as inexperienced arbitrators have little frame of reference for what is essentially a comparative evaluation. Many conscientious arbitrators try and sit in on another moot before their own session to obtain such guidance, certainly a desirable approach, although one session among many may not be a sufficient guide.

If there are problems in trying to identify an optimal approach to marking, there are likely to be additional problems if marking methods change as the event progresses. As indicated, the Vis finals are conducted by way of knockout and any imbalance in the problem is likely to be more influential at this stage. There are a number of reasons for this. Being a knockout stage, it pits claimants directly against respondents for the first time in a results sense. In addition, the adjudicators often are more prestigious and coaches are not involved as arbitrators. This will have many benefits but can have the downside that at times, arbitrators in the finals may lack experience with the standard of the argument overall. An obvious argument to experienced coaches may sound fresh and compelling to a one off participant.

Again this is not a critique of the program as developed. It is an explanation of the many reasons why the competitive determinations are not the best guide to the achievements of participants. Most importantly, however, all of these arguments pale into insignificance if set against a more meaningful set of goals for the program, namely those built around optimal learning for all participants. In this regard, an independent adjudicator cannot possibly tell how much an individual student has learned and progressed throughout the period of the program. For example, how should we compare the outcomes of an excellent student who has learned little, with a moderate student who has learned much? Why would we even wish to make a comparison, other than to determine what might be achievable in terms of learning? If learning is the real goal, only the students and coach can be the judges of the achievement. Results in later law subjects can also be objective evidence of improved skills, but those results cannot be *278 measured at the Moot itself. The learning outcomes of students who do not speak in Vienna are obviously not capable of measurement by adjudicators.

Once again, I adopt a dubious order by speaking to students first. If the marks are not a fair guide to student performance, they must surely be even less so where coaches are concerned. Even putting aside all the abovementioned factors, coaches should be wary of presuming that results reflect their own abilities when much

depends on the levels of ability and motivation of the students themselves, although coaches certainly can influence motivational levels and can hopefully facilitate effective learning. Nevertheless, coaches themselves do not moot and are not judged by arbitrators. Most importantly, we do not generally judge teaching performance by aggregating the marks obtained by our students. If teacher evaluation is part of our educational culture, which I strongly support, we generally rely on anonymous analysis of our teaching abilities by students and peer evaluation of our subject content. Graduate assessment after years of practice is also seen as a particularly valuable guide to educational theorists. Self-assessment is also an appropriate tool when used in conjunction with these other measures.

Finally, if coaches cannot justifiably engage in ego trips based on moot performances, even less so should supervising professors, deans or university rectors and vice-chancellors. Yet I imagine that funding decisions are often taken with prospective glory in mind.

The foregoing discussion has sought to challenge the value of the interpersonal competitive elements of any moot event, particularly the Vis moot. It has asserted that the event should instead be about the opportunities for learning and teaching. I turn now to outline my personal approach to that task.

8 A PERSONAL STRATEGY

The foregoing discussion is not intended to suggest that all competitive aspects should be counteracted or ignored. A fair balance can reasonably be struck, although the reader may legitimately take issue with my chosen balance. My approach is to say that if students concentrate on learning, an indirect spin-off is that their performance is likely to be reflected in better results overall. Thus my approach, which I explain to my students at the outset, is to concentrate on treating the event as a subject aimed at benefiting all participants. In my case I take twelve students into the program each year. I suggest my approach will indirectly have them introduced to about 80% of what will make them competitive. I consciously avoid engaging in the other 20%.

*279 I advise them that I am interested in a number of direct goals. The first is to introduce them to various ideas about advocacy and legal argumentation and provide them with intensive training in such techniques. The second is to challenge them to develop an innovative set of ideas and arguments about the problem. While there is likely to be a limit to innovative legal arguments when over ninety excellent teams work on the same problem for five months, in my experience, the same is not true with factual arguments. Here I seek to explain the typical deficiency of legal education in training students to understand and develop factual arguments in the face of conflicting evidence.

I ask the students to self evaluate the quality of their argument against those of other teams. This is not for competitive reasons. It is simply because there is no objective way to determine when a case is fully prepared as you cannot know the arguments you have not thought of. I suggest that completion of the written documents is effectively the start and not the end of the preparation. A client would expect a lawyer to continually assess the quality of argument. Moot practices provide an ideal setting to test how effective particular approaches are likely to be. If the night before a real case you feel that your strategy is wrong, you would change it. I encourage my students to take the same approach in Vienna, subject to their social obligations discussed below.

The third goal is to learn how to work productively and harmoniously in groups, another skill undervalued at university but crucial in most forms of interaction,

whether professional or social. A particular benefit is to have students subjected to the scrutiny of peer pressure from their team mates, thus learning the ability to be critical and to accept criticism while still maintaining a viable working relationship. Choosing twelve students is certainly not an optimal competitive strategy. I choose a large team simply to give an opportunity to a wider number of students. While twelve can certainly do more comprehensive research than two, trying to get twelve students to write one common paper leads to some inevitable tensions. There is also the fact that twelve students cannot moot in Vienna. [FN41] I invite the students to make as many decisions as possible collectively. If they wish to do so, they may select the team and determine who speaks and how often, although they are also allowed to delegate this task to me, which unsurprisingly has been the norm.

*280 The fourth aim is to have the students gain the benefits of an intense analysis of the subject matter and comparative technique. The fifth is to learn to overcome feelings of inadequacy and see them as counterproductive. I will often venture to suggest that such feelings are even shameful in the context of the attributes and privileges of virtually all participants. Nevertheless, in writing this piece and receiving comments from one very able student, I have reflected even more than normal on my own contribution to students' insecurities. By continually challenging their reasoning and inviting continuing re-evaluation and analysis, I have come to understand that students will feel that they are further away from the ideal than would normally be the case in an undergraduate law exam. It saddens me that education systems, at least my own, breed insecurity in such circumstances rather than humility. Instead of being in awe of the breadth and depth of knowledge and ideas, we are perpetually in fear of our ignorance.

My primary technique is again to question, hence a recent knick-name as "Professor Why", although I tend to be more tyrannical about the required leisure activities addressed below. Where mooting is concerned, at the elementary level, the questioning technique aims to show students the difference between a reasoned argument and a mere assertion, a common failing in law exams as well as advocacy.

Such questioning also seeks to teach students about the fundamental difference between moot advocacy and debating. In a debate, the student is not interrupted or challenged by the adjudicator. Hence the student is in control over the presentation. In a moot as in real legal practice, the advocate must be ready to discern and respond to the concerns of the adjudicator. This makes it an inherently dynamic endeavour. True preparation means appropriate preparation for any reasonable eventuality, and if the stakes are high enough, even some unreasonable ones. Students are asked to moot with the aid of their own short outline of issues and not try and use a prepared speech. This is a clear pedagogy choice as it means students are encouraged to compose a fresh presentation each time. If they are off balance on any day, this may lead to lower evaluation so it is not a strategy for those obsessed with winning.

The dynamic element means that students should be ready to think on their feet, although this is metaphoric with the Vis moot, where the process might be more appropriately described as thinking by the seat of the pants (or dress!) That process of thinking means students should not be frightened of silence. If a question is challenging, students should be prepared to take a moment to think it through. This has a significant psychological element. The training process should ensure that students learn not to feel *281 inadequate and learn not to concentrate on how they are perceived during such moments, but instead, simply try their best for the party whose interests they represent.

In terms of speaking styles and skills, I encourage people to essentially be themselves, save for the fact that most are either predisposed to overstate or understate in terms of style. Shy students can profit by being encouraged to be more confident. Brash students can be encouraged to tone down. I reflect on the possible relationship between moot judging and judging in job interviews. This limited attention to style is again a conscious choice to reject one aspect of a competitive strategy. It is also a personal bias about the more important attributes of good mooting. A related factor is that when I judge moots in Vienna, I try not to judge English competency, which I know is a great worry for many non-native English speakers. My strongly held view is that if a participant has presented a good argument in an understandable manner, no account should be taken of any fault in grammar or elocution.

I also encourage students to reflect on what they have found to be good and bad in their legal education to date in preparing them for their own role as oral communicators in the moot. I suggest that listening is a difficult process. Most university students actually take in about ten per cent of a lecture, although ten per cent was well beyond me in my student days and this is still a challenge when I go to conferences. Any communicator has a responsibility to try and be engaging. Voice modulation is a start and students need to learn to "underline" words with their voice and really emphasise and sell their most innovative and compelling arguments. Students need to learn to judge the body language of arbitrators and determine as they are speaking whether they are being understood and are being convincing. If not, they need to adapt their presentation on the spot. Again there should be no place for prepared speeches.

Many choices are guesses as to what may be more convincing. Should the presentation outline the facts or at least ask if the arbitrators would like this? Should it concentrate on doctrine, facts, authorities or practical sounding solutions? Here I seek to point these choices out to students and let them thrash out the possibilities, although I see it as my duty to ensure sufficient attention to the practical and factual, simply because of the students generally poor preparation for this in most forms of substantive legal scholarship, and also because of the strong bias towards the practical in much of modern commercial arbitration.

The final goal is to have fun and make lifelong friendships with the other moot participants. I am truly saddened by the number of participants who do not partake of the rich social and cultural opportunities in Vienna, concentrating instead on final *282 preparation for the moot. Here again students can be asked to think about analogies with practice. Even the most successful lawyers would surely wish to have enjoyable and productive non-professional lives, so again, the moot can be an experiment in balancing.

If a student has seen an inordinate amount of their coach (at least outside of a bar or concert hall), their hotel room and their notes in Vienna, and does not come away with experiences of such things as Schönbrunn, the Hofburg, Musikverein, the Opera, Belvedere, Kunsthistorisches Museum, Jugendstil, the Vienna Woods, Durnstein, Hawelka, Café Central, Kleines Cafe, Trezniewski's, some Heurigen and the Bermuda Triangle, (excuse my biases as there are a wealth of other places to see), they have missed a golden opportunity to display that balance. I would encourage everyone to work extremely hard as the learning potential through the program is immense, but why not do so at home and reap the rewards of appropriate preparation through more free time in Vienna?

Whatever one's goals ultimately are, it is worthwhile to assess their degree of attainment. If the formal competitive results are not the best guide to outcomes, what else might be utilised for that purpose? I suggest to my students that they should be the best judges of that more fundamental achievement. For a moot student, I ask them to evaluate what they have learned in terms of substance and self-confidence, and how they rate the quality of arguments they developed in the light of what they have heard from other teams throughout the event, including the finals. For the latter reason, I have strongly, and so far successfully, discouraged all students from listening to any other team until they are knocked out of the competition, even though this is expressly allowed and is rightly stated to be one valuable form of learning. It is another conscious way in which a winning strategy is eschewed.

I also suggest that the ability to judge ones own performance is a very important aspect of legal practice, and hence is a skill worth experimenting with in the Vis moot. This is so for a number of reasons. First, any litigator has the facts and law of the case as given. Both sides are never completely even. Thus win/loss ratios cannot be a clear guide to ability as a lawyer, given that all do not start with equal chances. Secondly, from the client's perspective, not all wins and losses count equally. Many formal winners lose much through the legal process and some formal losers gain. Money earned by the lawyer is also not an ideal indicator of ability even if the client's aspirations are ignored, particularly in terms of its dependence on field of practice and firm within which practice is conducted.

*283 A whole range of issues might need to be considered in determining when a lawyer has done a good job or not. For example, what original advice did the lawyer give? Was the client properly prepared for the events as they unfolded? Was the strategy adopted consistent with the client's wishes and best interests? Did the litigation need to proceed? How were any settlement offers made or responded to? What orders were made by the court or arbitrator? Did the advocate help shape these to the benefit of the client? What costs were born by the client? Were these fair and reasonable? How long did the process take and how disruptive was it for the client? How sensitive and supportive was the lawyer in respect to these aspects? If these factors are vital, accurate self-assessment capabilities are necessary.

9 CONCLUSION

In this article, I have sought to suggest that the Vis program is a unique process with immense potential as a learning, cultural and social experience. No matter what the particular participant's home jurisdiction, the Vis moot provides a wonderful opportunity to learn about important substantive areas, to think about at least some of the issues of globalization and legal systems, to embark upon a comparativist analysis, to develop research skills, group skills, self confidence and public speaking ability, to learn to respond quickly and effectively to verbal challenges, to integrate issues of fact more fully into legal analysis than is commonly the case with much traditional legal education and to consider the essential attributes of compelling legal arguments.

To optimise the benefits, coaches and students need to consider and respond to issues of optimal teaching and learning respectively. In particular, each must determine how they will respond to the inevitable competitive pressures and opportunities. What is right for one may not be right for all and I have not sought to set out an unduly prescriptive manifesto. In this intensely personal and reflective piece I have merely sought to set out my ideas based on my own experience, in the hope of stimulating thoughts and ideas in others. I look forward to many more years of debate

on such issues, particularly if held in the convivial environment that beckons in Vienna.

[FNa1]. Currently coach of the Monash University moot team and Professor of Law elect at that University. Formerly a Professor of Law at Deakin University and the moot team coach since the inception of the Willem C Vis program. I am indebted for the insightful comments of Eric Bergsten, Duncan Travis and Jeremy Kingsley on an earlier draft of this paper. It remains a personal reflection and these readers are obviously not responsible for any of its failings.

[FN1]. The Vienna Moot is organised each year by the Pace University School of Law. It is co-sponsored by the American Arbitration Association, the International Arbitral Centre, Vienna, the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators, the International Chamber of Commerce and the University of Vienna Faculty of Law, which also hosts the Oral Rounds.

[FN2]. The rules for the 9th annual moot state in the introduction that the "Moot is designed to be an educational program with many facets in the form of a competition. It is not intended to be a competition with incidental educational benefits."

[FN3]. Blase F, "The Willem C Vis International Commercial Arbitration Moot Competition: A SWOT analysis", (2001) 5(1) VJ 117.

[FN4]. Deakin teams placed first in the orals on one occasion, second on another, equal third on two others and overall have been in the finals in six of the eight years. One team also won a best respondent's document award, (albeit slightly ashamedly so, given their own hindsight assessment of the document's quality!). Six students have been mentioned in the individual awards over the years. In my view, based on the criteria I value, the teams and individuals that did not win awards, generally reached similar high standards to those who did, although it would be foolish to suggest that there are no individual differentials, however they are to be measured.

[FN5]. For a discussion of these issues see Boyle R and Dunn R, "Teaching law students through individual learning styles," 62 Albany Law Rev 213 (1998).

[FN6]. The following articles would give a reader a basic introduction to some broad comparative issues. Casper G, "Two Models of Legal Education," 41 Tenn L Rev 13 (1973); Damaska M, "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment," 116 University of Pennsylvania Law Rev 1363 (1968); Geck W K, "The Reform of Legal Education in the Federal Republic of Germany," 25 Am J Comp L 86 (1977); Glendon M A et al, Comparative Legal Traditions: Text, Materials and Cases, 122-50 (1985); Gostynski Z and Garfield A, "Taking the Other Road: Polish Legal Education during the Past Thirty Years," 7 Temple Int'l & Comp LJ 243 (1993); Lambert E and Wasserman M J, "The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law," 39 Yale L Rev 1 (1929); Ledain G E, "Teaching Methods in the Civil-Law Schools," 17 Can Bar Rev 499 (1957); Ledain G E, "The Theory and Practice of Legal Education," 7 McGill LJ 192 (1960-61); Merryman J H, "Legal Education There and Here: A Comparison," 27 Stanford Law Rev 859 (1975); Merryman J H and Clark D S, Comparative Law: Western European and Latin American Legal Systems, 397-452 (1978); Perillo J M, "The Legal

Profession in Italy," 18 J Legal Educ 274 (1966); Rheinstein M, "Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany," Wis L Rev 5 (1938); Valcke C, "Legal Education in a 'Mixed Jurisdiction': The Quebec Experience," 10 Tul Eur & Civ LF 61 (1995).

[FN7]. Damaska, op cit footnote 5, p 1363; Merryman, op cit footnote 5, p 859.

[FN8]. One irony is that the supposedly more practically oriented common law education is taught primarily by non-practitioners while the supposedly more scientific approach in the civilian system is commonly taught by professors who spend the bulk of their time in private legal practice.

[FN9]. Valcke, op cit footnote 5, p 135.

[FN10]. Ibid, p 128.

[FN11]. That aspect has been criticised from the outset. Joel Seligman, The High Citadel; The Influence of Harvard Law School, 47-49 (1978). A further and more recent critique has questioned the ethical and philosophical dimensions of the methodology.

A related contentious aspect of case method is the methodology of questioning applied by many of its proponents. Case method unfortunately came to be known in the US as Socratic dialogue. Yet Socrates would have had little time for the Sophistry and paternalistic and authoritarian modes epitomised in the movie The Paper Chase, based on the novel by John Jay Osborne and Scott Turow's book One L, based on his first year law experience at Harvard Law School. He also had a different aim in his technique, namely to elicit latent ethical beliefs through questions. See Heffernan W C, "Not Socrates but Protagoras: The Sophistic basis of legal education," 29 Buff L Rev 399 (1980).

[FN12]. The Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development: An Educational Continuum, 1992 ABA Sec of Legal Education and Admissions to the Bar 6 (July 1992) [MacRate Report]. For general surveys of current literature in the US see Hess G F, "Monographs on teaching and learning for legal educators," 35 Gonzaga L Rev 63; Lopez Torres A and Lundwall M K, "Moving beyond Langdell II: an annotated bibliography on current methods for law and teaching," 35 Gonzaga L Rev 1.

[FN13]. MacRate Report, op cit footnote 11, at 138-40. In the UK, the Lord Chancellor's Adisory Committee on Legal Education and Conduct, in its Review of Legal Education (ACLEC 1994), referred to the relevance of intellectual and personal skills and an understanding of law in its operational context.

[FN14]. Silverman R H, "Weak law teaching, Adam Smith and a new model of merit pay," 9 Cornell J L & Pub Pol'y 267, 281.

[FN15]. Valcke, op cit footnote 5, p 131-2, points to the growing use of Socratic elements in civilian teaching. Merryman, op cit footnote 5, p 865, points to developments in South America through co-operation with US institutions. There is also the particular situation of mixed jurisdictions such as Louisiana and Quebec.

[FN16]. The consistently strong results of civil law teams in the written phase of the Vis program might raise an interesting challenge for common law coaches to learn more about alternative styles of written legal communication, a point repeated below. Common law universities might also seek to introduce legal writing courses if they have not done so.

[FN17]. Gordley J, "Comparative law and legal education," 75 Tulane Law Rev 1003, 1012 (2001).

[FN18]. Ibid p 1013.

[FN19]. See Davies G L, "Justice in the 21st Century," 10 Journal of Judicial Administration 50, 60 (2000); Berger K P, "Harmonisation of European Contract Law: the Influence of Comparative Law", 50 International and Comparative Law Quarterly (2001) 877.

[FN20]. See for example Berger K P, "Arbitration as a Source of Inspiration for Comparative Law, Legal Teaching and the Transnational Negotiation Process" in Böckstiegel K-H, Perspectives of Air Law, Space Law and International Business Law for the Next Century (1995) 318.

These questions have often arisen in the context of study of alternative methods of dispute resolution and not necessarily as discrete elements of learning competences in an undergraduate degree.

In at least one instance, a more pragmatic basis for possible reform has been suggested. A number of studies in Japan have recommended adoption of US style legal education to promote a greater number of lawyers who feel able to match US counterparts in bilateral deal-making and litigation. For a critical perspective see Fujikura K, "Reform of legal education in Japan: The creation of law schools without a professional sense of mission", 75 Tulane Law Rev 941 (2001). Japanese legal education has also focused more heavy on the training of government administrators than practicing lawyers. Chalmers Johnson, MITI and the Japanese Miracle 57-62 (1982).

[FN21]. van Gerven W, "Casebooks for the common Law of Europe: presentation of the project," 4 Eur Rev Priv Law 67 (1996).

[FN22]. Damaska, op cit footnote 5, p 1377. European integration has also meant that the traditional distinctions between common and civil law have inevitably been challenged because it has brought together leading common law and civil law cultures, see generally de Witte B and Forder C (eds), The Common Law of Europe and the Future of Legal Education (1992).

[FN23]. Damaska, op cit footnote 5, p 1378.

[FN24]. Berger K P, op cit footnote 19, p 316. For example, it must to some extent be a failing of Australian legal education that some of my common law students look awestruck when they cannot find the requirement of consideration for the formation of a contract under the CISG. Many are even more troubled when I explain that stare decisis does not apply.

[FN25]. Berger, op cit footnote 19, p 316.

[FN26]. For an interesting discussion of a coach's perspective from Eastern Europe see the contribution of Professors Hrvoje Sikiric and Sinisa Petrovic on the Pace website.

[FN27]. Kozinski A, "In praise of moot court-not!," Columbia Law Review 178 (1997); for a rejoinder to that article see Hernandez M V, "In defence of moot court: a response to 'in praise of moot court-not!'", Review of Litigation 69 (1998).

[FN28]. Ibid.

[FN29]. Boyer B B and Cramton R C, "American Legal Education: An Agenda for Research and Reform," 59 Cornell L Rev 221, 257 (1974).

[FN30]. I acknowledge that the notion of appropriate "intellectual" content would be the subject of legitimate debate.

[FN31]. I would admit that this criticism is very much from a common law perspective. If the civilian view of law as coherent science is accepted, analysing a range of legal areas from an identical methodology is not problematic.

Where quality of common law teaching is concerned, some comments in US literature are unlikely to be atypical. For example, Robert M Hutchins a former Dean of the Yale Law School suggested that the typical law professor "has never thought about legal education. He has thought about law." Hutchins R M, "The Current of Legal Education," Ky B Assoc J 258, 267 (1929). Jerome Frank suggested: "It is presumptuous of me to talk about what constitutes a good legal education. I know no lawyer who had one. Certainly I have not." Cited in Pound R et al, "What Constitutes a Good Legal Education," 7 Am L Sch Rev 887, 894 (1933). For a critique by then student, now academic, see Kennedy D, "How the Law School Fails: A Polemic," 1 Yale Rev L & Soc Action 71 (1970).

[FN32]. See Kozinski, op cit footnote 26.

[FN33]. Yet even in the world of practice, litigators in some jurisdictions at least, too often follow the ordained procedures almost automatically. At the extreme they might take issue at every point and laud small interlocutory victories that remain incomprehensible to the client other than in terms of adverse cost, or at least delay.

[FN34]. Kozinski, op cit footnote 26, p 185 While the two sides in a moot problem would never be evenly balanced, Kozinski does make a sensible suggestion as to how to run a moot where students stay on the same side throughout. (194). This would entail judging claimants against each other and similarly having a separate competition between respondents. There would then be a final between top claimants versus top respondents, although what is less clear is how the last final would deal with differences in the case itself. One could simply have awards for top claimant and respondent and never have a final other than for demonstration purposes. One advantage of this approach is that the judge could announce who he or she would have decided in favour of, without skewing the competition results.

[FN35]. See, eg, Gordon RW, "Lawyers, Scholars, and the 'Middle Ground'," 91 Mich L Rev 2075, 2108-9 (1993) who notes that "working with messy and complicated factual records" is a skill not tayght in law school.

[FN36]. Kozinski, op cit footnote 26, p 189.

[FN37]. Here I am using "adversarial" in the sense of contest and not in reference to the common law system.

[FN38]. While every participant gets to attend Vienna, and while each team currently partakes in four preliminary rounds, there is a finals stage involving the highest-ranking sixteen teams.

[FN39]. My students will even be disposed to think the sound of a Vienna Opera or Philharmonic experience might be exotic and romantic, although the group I dragged to a Canned Heat concert, (yes older readers, they still tour), tended to prefer that in hindsight.

[FN40]. In saying this I do not suggest that they do not have legitimate grounds for disappointment when this occurs. That disappointment cannot simply be about losing but about not being taken seriously and not having their expensive endeavours treated with appropriate respect.

[FN41]. In one year I took 25 students into the program to try and give an even wider group some experience of the process. I found this to have two main problems. First from a financial point of view, all students could not go to Vienna so we had the very unpleasant process of deciding who would stay behind, notwithstanding significant work from all. The second problem was with such a large group, having enough moot practises so each could truly develop their advocacy skills was a logistical nightmare and a rather demanding personal load.

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