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REPORT FROM XIXTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW HELD IN VIENNA, 20-26TH JULY 2014

The International Academy of Comparative Law and Interdisciplinary Association of Comparative and Private International Law organized the XIXth International Congress of Comparative Law in Vienna between 20th and 26th of July 2014.

The International Academy of Comparative Law was established in 1924 in The Hague. According to Article 2 of the Statutes, its aim is to study legal systems from a comparative perspective[1]. One of the means to achieve this is the International Congress of Comparative Law.

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[1] Available online: http://www.iuscomparatum.org/141_p_1556/statutes.html [last accessed: 29.07.2014].

The congress is held every four years. The previous one took place in Washington DC while the next, the XXth, will be held in 2018 in Japan. Each congress provides an opportunity to examine current topics from the standpoint of many different jurisdictions. Any single subject of research is prepared and compiled by a general reporter – a specialist in the chosen field – who prepares a detailed questionnaire. Afterwards a questionnaire is sent to national reporters who answer it stating their national law and legal practice. Eventually, a general reporter gathers the information received from national reporters and drafts a general report, which is later issued as a publication with other general reports. It is also presented at a congress, where each panel is dedicated to one general report. Commonly national reporters are invited to participate actively in the session, stating their national law and practice. A time is also reserved for discussion. Subjects are chosen from nineteen topics: legal history and ethnology, general legal theory and legal philosophy, comparative law and unification of law, civil law, private international law, civil procedure, environmental law, commercial law, intellectual property, constitutional law, administrative law, international public law, labour law, tax law, penal law, human rights, computers, criminal procedure, and finally legal education.

This year's congress was held under the patronage of the President of the Federal Republic of Austria, Dr. Heinz Fisher. On his behalf, the opening address was given by Prof. Dr. Ludwig Adamovich, Counsellor to President Dr. Fisher, former president of the Constitutional Court of Austria, who underlined the importance of comparative legal study. He saw its influence in creating legal measures, but foremost in applying it. He referred to an example from the Austrian Constitutional Court and Austrian Supreme Court which often invoked German court rulings and BGB. Prof. Dr Adamovich stressed that comparative law required open-mindedness and even though the European Union might have cooled down the influence of comparative law, as long as separate countries exist its importance will remain.

The first session was dedicated to the issue entitled Migration and Law from the topic of Legal History and Ethnology. General reporters Professors Marie-Claire Foblets and Jean-Yves Carlier for this subject received 26 national reports. One of their observations was that migration

has many faces: refuge in search for asylum, family, and economic migration. The problem is of major importance as nowadays the number of immigrants equals the population of Brazil. On top of that there are different levels of legal regulations concerning migration. They vary from regional, through national, as far as international sources. Attitudes towards migration depend on a country's history and economic situation: on whether there is a need for manpower and how the problem of migration is presented in public debate. A general statement was made that most countries resort to sanctions in order to restrain unwanted immigration. However, laws that sanction migrations serve only as a symbols for publicity and any future incomers. They play a solely political, not a real role. It is perceived that in the future, the laws of prosperous countries in that field will strive for two goals: selective reception of skilled labor migration and simultaneous enforcement of border protection.

The next panel by Dr Andreas Reiner was conducted under the heading "International Commercial Arbitration: How international and how commercial is it and how autonomous should it be?". During his presentation Dr Reiner emphasized that although international commercial arbitration follows an internationally recognized set of principles, there are still differences between particular legal systems, for example as to the arbitrability of consumer disputes. Worth underlining is Dr Reiner's observation that nowadays international commercial arbitration is becoming more "commercial" as it is seen to be another area of business for lawyers, law firms, arbitrators, and even arbitral institutions. Simply put, today's international commercial arbitration is not just an ordinary mechanism of dispute resolution. Dr Reiner raised also issues of autonomy of and challenges to international commercial arbitration. He stressed that, while there is a widespread approval of arbitral autonomy, the arbitral tribunal must always take into consideration that this autonomy has its limits. State courts may thus intervene, prior to or after the rendering of the arbitral award, and take adequate actions, such as, for example, refusing to enforce an award. Therefore the arbitral tribunal must introduce ways of ensuring quality and ethical standards to prevent decrease of its reputation and legitimacy. Dr Reiner concluded that international commercial arbitration needs

more organization and control within a system that allows a high level of scrutiny.

Other panels conducted on the first day of the conference were: "Foreign precedents in constitutional litigation" from the constitutional law topic, "Recognition of foreign administrative acts" from administrative law and from the topic of civil law: "Disgorgement of profits". General reporters of the former topic started their session by citing the words of Lord Hatherly in *Jegon v. Vivian* (1870-71) who said: "[t]his court never allows a man to make profit by a wrong"[2]. They concentrated on the issue of whether national laws recognize disgorgement damages as a general remedy. The answer to this question was that private law seldom recognizes disgorgement as a general remedy for all infringements of law. Usually, different branches of law are involved when dealing with the issue of disgorgement. Strong evidence of disgorgement damages is visible in intellectual property law, as well as PECL and DCFR in cases of breach of fiduciary duties and confidence. A trace of it can be also found within personalities rights infringements. A less obvious example of its existence can be found in unfair commercial practices and competition law. A common idea shared by almost all national reporters was that their national legal system was highly inappropriate as to disgorgement of unlawful profits. They would appreciate creating or expanding the concept of such damages.

The second day of the congress offered a variety of panels, one of them being "Review and recognition of foreign arbitral awards – the application of the New York Convention by national courts" from the topic of Comparative Law and Unification of the Law. Prof. George A. Bermann, author of the general report, undertook the difficult task of analyzing national reports from thirty eight jurisdictions. The effect of his work is truly impressive and constitutes a great comparative study on the differences in implementation, interpretation, and application of the New York Convention in various legal systems. Presenting his report in Vienna, Prof. Hannah Buxbaum started with the statement that, despite the mentioned differences resulting from the general language of the Convention, there is little doubt that the Convention proved

[2] Law Reports Chancery Appeal Cases VI, p. 742, 761.

to be essential for the functioning of the international arbitral system. Prof. Bermann's general report focused on five main themes. Its first part addressed issues connected with the process of implementation of the Convention. In particular it asks in what form the Convention has been implemented into national law and inquires into declarations and/or reservations, if any, to which the Convention has been subjected in that process. Moreover this part of the general report sought to understand how the basic terms: "arbitral award" and "foreign arbitral award" were to be interpreted. Another part of the general report concentrated on the enforceability of agreements to arbitrate, in particular on two issues: first, interpretation of the Convention term "null, void, inoperative, or incapable of being performed" from Article II and the influence of choice-of-law rules in that process and second, what kind of objections to the arbitration agreements in the light of Article II national courts are willing to entertain prior to the arbitration and which not. Furthermore, the general report touched upon issues widely regarded as at the heart of the Convention, namely the grounds on which recognition or enforcement of a foreign arbitral award may properly be denied. The second to last part of the general report took up the issues of the procedural aspects of judicial actions to enforce foreign arbitral awards. In that matter the general report raised the very important question of time limitations to bring an action to enforce a foreign arbitral award. Finally, it aimed to identify on one hand the areas where the Convention is most commonly subjected to criticism, and on the other hand pointed to reforms which were considered particularly useful or appropriate in the view of national reporters.

From the topic of air and maritime law a problem of security interests burdening transport vehicles – the Capetown Convention (CTC) and its implementation in national law – was raised. General reporter, Prof. Souichirou Kozuka from Japan divided national reports into two groups, those from the contracting states to the Convention[3] and those from countries which have not ratified it. In an introductory word the main issues of the CTC were presented. Prof. Kozuka referred to its specific "umbrella type construction", which means that CTC consists of a main

[3] Convention on International Interests in Mobile Equipment, Cape Town 2001.

convention with general provisions and – for the time being – three protocols with asset-oriented norms, for aircraft, railway stocks and space assets respectively[4]. Only the aircraft protocol has come into force with 54 contracting states so far, the other two have not attracted such attention. The CTC aims to create a simple system of registration and priority of an international interest with an aim to safeguarding its enforcement even pending insolvency proceedings. Comparing the system of registration under CTC with national rules on security interests, the general reporter noted that many states do not have special registration as to interests in aircraft (Canada, Poland, USA), while others have rules on aircraft mortgage specifically (England, Finland, Greece, Italy, Portugal, and Switzerland). Since CTC recognizes as international interests security, leasing, and title reservation agreements (conditional sale), one of the questions was how do national laws understand security transactions? Some countries, like the USA and Canada, adopt a similar functional approach, while others take a more formalist approach. As to the issue of remedies available to the secured creditor, the general reporter noted that there was no uniformity in that respect among national jurisdictions. In some countries preference is given to juridical sale, other offer to the creditor a variety of remedies, while some allow for the parties' agreements on a variety of remedies. Under CTC a single international register is established. It operates in accordance with a Latin rule *prior tempore, potior iure*. Moreover, registered interests entertain priority over any other, even earlier established unregistered interest. Another issue raised by the general reporter was the status of an international interest pending insolvency procedure. Under the Convention, a creditor may exercise his international interest even after insolvency procedure has been commenced. If a contracting state declares alternative A under the Aircraft Protocol such a creditor is protected even better. Reporters from countries which have ratified the convention stated that their national laws secured interests of a creditor according to the most favorable solution

[4] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Cape Town 2001; Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, 2007, not yet in force; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, 2012, not yet in force.

under the Convention, including the United States of America, which has not chosen any alternative under CTC, but their national law provides for the very same creditor's protection standard. All of the national reporters briefly introduced particular aspects of their domestic regulations, among them Canada, the United States of America, Italy, Finland, Netherlands, and Poland.

Among Thursday's sessions one was dedicated to the issue of mediation, more particularly cross-border and judicial mediations. General reporter Prof. Dr Carlos Esplugues[5] stressed that modern societies are much linked to the idea of litigation. He referred to the phenomenon of the "litigation explosion" which has had an impact on full access to justice. Thus, a recourse to alternative methods of dispute resolution is needed. However, the number of conducted mediations is still small. An example was given of Spain where only 769 mediations were reported next to almost 2 million court cases. Moreover, the problem of the concept of mediation was brought to the attention of delegates. The general reporter stated that all national reporters knew the concept of mediation, but understood it in different way. Commonly it is of a voluntary nature, but Italy and Slovenia provide also for compulsory mediation. Generally it is allowed in civil and commercial matters, but no general common meaning of those terms exists. Some accept only commercial matters, others solely family law matters, finally some allow mediation in labor law. There is a growing number of jurisdictions providing for mediation in criminal, administrative, and taxation matters. On the other hand cross-border mediation disputes practically do not exist. No common approach to the mediation clause is shared in different jurisdictions. In many countries no special laws relate to the mediation clause or agreement to mediate, while in others some basic requirements are provided by law, most commonly the one referring to written form. Similarly, differences exist among jurisdictions as to the issue of who may be a mediator. In some countries in order to be a mediator one has to be enrolled in a register of mediators. In others different legal schemes relate to registered and unregistered mediators. As to the proceedings of mediation, the will and flexibility of the parties is the core characteristic

5 The general report was prepared together with Mr Louis Marquis.

in all countries. Generally, national laws have only basic rules concerning such proceedings, or have no rules whatsoever. Before the national reporters took the floor, the chairman of the session, Mme *Bénédicte Fauvarque-Cosson summarized the general report by referring to a paradox that everybody seemed to favor mediation while* figures do not reflect its attractiveness.

The other panel on Thursday was dedicated to the subject of personal guarantees between commercial law and consumer protection. General reporter, Univ. Prof. Dr Andreas Schwartze from the University of Innsbruck summarized national reports starting with the issue of legislation pertaining to personal guarantees. He stated that generally dependent guarantees as surety are regulated by general private law, whereas abstract guarantees are not covered by any specific legal rules. Additional provisions for commercial or business actors are increasingly rare, they exists for example in Germany, Turkey, Croatia, Portugal, and Argentina. On the contrary, an emerging trend is legislation favoring the weaker party to the contract, as in Austria, Croatia, Turkey, Denmark, France, Estonia, and the EU (DCFR). Moving to the substantive law aspects, normally jurisdiction recognizes two types of guarantees: a dependent guarantee of an accessory relationship to the main debt; and an independent guarantees having no relation to the underlying debt. A dependent guarantee usually has merely a subsidiary character, an exception being in Poland and Estonia. However large differences exist as to the extent of such subsidiarity. In some countries a payment request suffices (for example in Austria, Croatia, and Israel), while in others a secured creditor has to commence court proceedings against the main debtor (as in Germany, Switzerland, Turkey, Denmark, Quebec, and the USA) or execution proceedings (in Greece and Argentina). As to the form requirement of dependent guarantees, the written form prevails in the majority of jurisdictions (as in Germany, Austria, Switzerland, the USA, Turkey, and Croatia); in some it is necessary only for consumer contracts (Estonia, France, Israel and the EU – DCFR). In Italy and Portugal only an express declaration of surety is valid, while in Switzerland a public authentication is needed. Some jurisdictions demand a maximum sum statement in the document (Switzerland, Denmark, or France). For independent guarantees no form requirement

is necessary (as in Germany and Switzerland) or the same legal regime applies as for sureties (in Austria, Turkey, Denmark, Quebec, and the USA). Additionally, the general reporter touched upon the issue of the extent of the guarantees, stating that the majority of jurisdictions opted for unlimited personal liability (for example Germany, Australia, Greece, and Portugal). In some a maximum amount must be stated in the contract. Moving to consumer protection issues, it has been stated that no uniform definition of a consumer has been adopted, even within the EU since, for instance, in Croatia and Italy legal persons are not considered consumers, whereas in Austria, Greece, Turkey, and Argentina they are. Similarly, differences appeared in pre-contractual duties to inform the guarantor.

One of Friday's panels concerned damages for the infringement of human rights. General reporter, Prof. Ewa Bagińska from Poland, making use of reports from 20 different countries, concentrated on two main issues. Firstly, whether compensatory claims based on infringements of human rights have been made through special cause of action or rather through existing liability rules and reasons for such solution. Secondly, is a new cause of action required? As to the first issue a process of constitutionalisation of a right to damages for such infringement was addressed. Various solutions are adopted. There may be a general right to compensation for violation of every constitutionally protected right, a right implicit in the constitutional right to claim damages for unlawful conduct of public authorities, or finally there may exist a specific right to compensation for violation of a specific human right. There are rare examples of a general constitutional right to compensation for every violated right. Usually a mixture of the two latter solutions prevails. It is perceived that such constitutionalisation results in enhanced protection of human rights. Moving to the issue of new causes of action for infringement of human rights, reference was made to the United Kingdom where the Human Rights Act of 1998 allows the bringing of a claim for a breach of a Convention right. The general reporter presented this example as a minority approach of creating a special regime for compensation for a breach of human rights. After the national reporters took the floor presenting details of their national regulations, Prof. Bagińska summarized that generally all the national reporters agreed

that private law elements would not be modified when an infringement of human rights was concerned, however the way of their application might differ.

Other sessions conducted during the congress were:

- from a topic of constitutional law: "Foreign precedents in constitutional litigation" by general reporter Marie-Claire Ponthoreau; "Limitations on government debt and public deficit" by general reporter Fred Morrison,
- from a topic of administrative law: "Recognition of foreign administrative acts" by general reporter Jaime Rodriguez-Arana Muñoz,
- from a topic of commercial law: "The law of close corporations" by general reporter *Holger Fleischer;* "The protection of minority investors and the compensation of their losses" by general reporter Martin Gelter; "Company Law and the Law of Succession" by general reporter Susanne Kalss,
- from a topic of private international law: "The effects of corruption in international commercial contracts" by general reporter Michael Joachim Bonell and Olaf Meyer; "Proof of and information about foreign law" by general reporter Yuko Nishitani,
- from general legal theory: "Judicial rulings with prospective effect" by general reporter Eva Steiner; "The independence of a meritorious elite: The government of judges and democracy" by general reporter Sophie Turenne,
- from international public law: "The UN Convention on the rights of the child and its implementation in national law" by general reporter Olga Cvejić Jančić,
- from labour law: "Whistleblowing" by general reporter Gregor Thüsing,
- from tax law: "Taxation and development" by general reporter Karen B. Brown,
- from penal law: "Counter-terrorism law" by general reporter Kent Roach,
- from civil law: "The effects of financial crises on the binding force of contracts: renegotiation, rescission or revision" by general reporter Rona Serozan; "Contractualisation of family law"

by general reporter Frederik Swennen; "The influence of human rights and basic rights in private law" by general reporter Verica Trstenjak,

- from environmental law: "Genetic technology and food security" general reporter Roland Norer,
- from human rights: "Applicable religious rules according to the law of the State" general reporter Silvio Ferrari; "Social and economic rights as fundamental rights" by general reporter Krzysztof Mariusz Wojtyczek,
- from intellectual property: "License contracts, free software, and creative commons" by general reporter Axel Metzger,
- from the topic of computers: "Secondary liability of service providers" by general reporter Graeme Dinwoodie,
- from criminal procedure: "Undercover investigations" by general reporter David Chilstein,
- from civil procedure: "The organisation of legal professions" by general reporter Martin Henssler,
- from legal education: "The internationalisation of legal education" by general reporters William van Caenegem and Christophe Jamin.

Special sessions were also included.

It is envisaged that all general reports presented during the congress will be published by Springer in a special volume. Additionally, in many instances, publication of national reports answering one topic is planned. All Polish reports are published in a book under a title *Rapports polonaise: XIXe Congrès International de Droit Comparé = XIX[th] International Congress of Comparative Law, Vienne, 20-26 VII 2014*, edited by Prof. B. Lewaszkiewicz-Petrykowska[6].

The congress's final act took place in the Viennese Rathaus where a gala dinner was held. There a new Executive Committee elected by the General Assembly of the International Academy was announced – Katharina Boele-Woelki from the Netherlands as President; Vice-Presidents: Bénédicte Fauvarque-Cosson from France, Giuseppe

[6] B. Lewaszkiewicz-Petrykowska (ed.), *Rapports polonaise: XIXe Congrès International de Droit Comparé = XIXth International Congress of Comparative Law, Vienne, 20-26 VII 2014*, Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2014.

Franco Ferrari from Italy, Toshiyuki Kono from Japan, Marek Safjan from Poland, Jorge Sánchez Cordero from Mexico, and Ulrich Sieber from Germany; Secretary-General: Diego P. Fernández Arroyo from Argentina and Treasurer: Joost Blom from Canada. Also, a Canada Prize for an original written comparative study of common law and the civil law systems in the field of private or public law was presented. The prize in the amount of 10 000 Canadian dollars was given to Pauline Abadie for a book *Entreprise responsable et environnement. Recherche d'une systématisation en droits français et américain*[7]. Finally, the venue of the next congress was announced. The XXth congress in 2018 will take place in Fukuoka, Japan.

[7] P. Abadie, *Entreprise responsable et environnement. Recherche d'une systématisation en droits français et américain*, Bruxelles: Bruylant, coll. Droit & Economie 2013.