

REPORT OF THE SECOND STUDY COMMISSION

TO THE CENTRAL COUNCIL

62nd ANNUAL MEETING OF THE IAJ

NUR-SULTAN, KAZAKHSTAN

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The topic for discussion in the Second Study Commission this year was: “Problems, large and small, in the financing of litigation”. We have limited the questionnaire to five questions and have asked member representatives to provide short but concise answers.

There were 34 responses to the questionnaire that were circulated to member associations.

However, we did not believe that the questionnaire and answers should be central to the work done by the Second Study Commission at our meetings here in Nur-Sultan. Instead, we decided that we should treat the questionnaire as being a series of background questions to stimulate the way in which the delegates would be thinking in the context of the theme of “Problems, large and small, in the financing of litigation”.

In doing so, we invited Judge Yvonne Summer of Austria to prepare a paper to be presented at our first session of the Second Study Commission. She prepared an excellent discussion paper in relation to problems in the financing of litigation. Her paper was circulated to all members before our meeting in Nur-Sultan for their perusal and consideration.

We have focused upon the principal paper and three commentaries from different jurisdictions to provide broadness and diversity of perspective. The commentaries were prepared by Madam Justice Kristine Eidsvik of Canada, Lord Philip Brodie of Scotland and Judge Nicola Shaw of England.

These three presentations generated a lively and robust discussion amongst the member representatives who attended the meetings on Monday and Wednesday of this week.

The work of the Second Study Commission here in Nur-Sultan was made considerably easier due to simultaneous translation and excellent support received from our Kazakh colleagues on the organizing committee. The translation services and technical assistance provided to us have ensured excellent discussions amongst the delegates. We recommend that simultaneous translation be provided for future study commission meetings. We would like to convey our thanks to our Kazakh colleagues.

For purposes of this report to Central Council, we have reduced our deliberations to principal conclusions. They are as follows:

1. The Commission looked at the question of who incurs the cost of civil litigation in different jurisdictions and noted a marked distinction between how this is done in civil law jurisdictions and in common law jurisdictions, with the State bearing a much higher burden than the parties in civil law jurisdictions. A much greater part of the burden of ascertaining the facts and researching the law lies on the parties in a common law system.
2. The Commission focused, in particular, on a number of litigation financing possibilities, including:
 - State provided civil legal aid;
 - Insurance in various forms;
 - Third Party Financing;
 - Contingency fee recovery systems
 - Filing and court fees, particularly when imposed at commercial rates
 - Court awarded costs.

In considering these possibilities the Commission considered some of the barriers to Third Party financing that have existed, and which in some jurisdictions continue to exist, based on the traditional rules relating to Maintenance and Champerty.

3. Much of the Commission's discussions emphasized that all of these litigation possibilities could serve to enhance access to justice, but subject to the provision of adequate safeguards against potential abuses. In that regard the Commission noticed an increased tendency towards statutory regulation of litigation financing possibilities.
4. It was clear from our discussions that amongst those jurisdictions where litigation funding agreements are permitted, there is a wide variety within that group as to the forms of such agreements.
5. The Commission concluded that with the increasing complexity of modern litigation there is a need for openness to new ideas and further creative solutions with respect to litigation funding.

We wish to thank Judge Yvonne Summer for accepting to prepare and provide an excellent paper and presentation. As well, we wish to thank Madam Justice Kristine Eidsvik, Lord Philip Brodie and Judge Nicola Shaw for accepting to prepare and present commentaries which were very well done and most helpful in our deliberations.

The topic for discussion next year to be approved by the Central Council is: “How data protection rules are impacting on civil litigation”.

I would like to thank the Study Commission Vice-chairs, Mette Søgaard Vammen of Denmark, John Edwards of Ireland and Judge Flávia da Costa Viana of Brazil, for their helpful and wise contributions to the work of the Commission during this past year.

Thomas E. Cyr
Canada
Chair, Second Study Commission