

# REPORT OF THE SECOND STUDY COMMISSION

## TO THE CENTRAL COUNCIL

### 64<sup>th</sup> ANNUAL MEETING OF THE IAJ

TEL AVIV, ISRAEL

September 19<sup>th</sup> - 23<sup>rd</sup>, 2022

This was the first in-person meeting of the Second Study Commission since the 2019 meeting in Nursultan, in Kazakhstan. The topic proposed, and approved in Central Council, for discussion at the next meeting, then scheduled for Costa Rica the following year, was “How data protection rules are impacting on civil litigation”. The Board of the Second Study Commission circulated a questionnaire based on this topic in early 2020, but relatively few responses were received back due to the pandemic, and as it transpired the pandemic disruption continued throughout 2020 and 2021 with the result that the study commission did not meet in either of those years. Nevertheless, a summary of the 25 responses received was prepared and has been uploaded to the website.

When it became clear that the Second Study Commission was likely to be able to resume meeting in person at the 64<sup>th</sup> Annual Meeting of the IAJ to be held in Tel Aviv, Israel in 2022, the Board of our Commission then considered how best to proceed. There were two influential considerations. The first was that the relatively few responses received to the questionnaire that had been circulated in 2020, suggested that respondents were focusing more on simply describing the data protection rules in their countries rather than on how data protection rules were affecting the conduct of their roles as judges. It was felt that the questionnaire as circulated had therefore not been sufficiently focused in its questions. Secondly, it was thought that the rapid move by many countries during the pandemic to hearing at least some cases remotely using video-link and other technologies presented a unique opportunity for the Second Study Commission to attempt to assess the general success, or otherwise, of those experiences, and to see if lessons could be learned for the future. It was decided therefore to focus on the latter topic during the 2022 meeting, while also considering how to better focus our enquiries with respect to the impact of data protection rules on civil litigation, with particular reference to the impact on the process of judging, with a view to returning to that topic in 2023. We therefore issued a new, relatively short, questionnaire for 2022 seeking members reflections on their experiences of conducting virtual trials during the pandemic.

The revised questionnaire contained six questions and member representatives were asked to provide short but concise answers.

There were 45 responses to the questionnaires that were circulated to member associations.

As in previous years, 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 Tel Aviv. Instead, we decided that we should treat the questionnaire as being a series of background questions to stimulate the delegates thinking in the context of the theme of reflecting on their experiences of conducting virtual trials during the pandemic.

In doing so, the President of the Board, Mr Justice John Edwards, presented a short paper at our first session of the Second Study Commission with a view to stimulating discussion. This was then replied to and critiqued by Madame Justice Kristine Eidsvik (retired), also a Board Member. Judge Mette Soegaard Vammen, another Board member, then moderated a wider discussion amongst the 29 delegates in attendance. A lively discussion then ensued with numerous valuable contributions.

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

1. Our discussions revealed that prior to the pandemic the vast majority of countries did not routinely conduct court business by virtual means. Some countries allowed for proceedings to be conducted, in whole or in part, but these tended to be the exception rather than the rule. A small number of countries were already making wide use of technology facilitated remote hearings.
2. The Commission focused, in particular on the rapid move by the majority of countries to the transaction of court business by virtual means following the onset of the pandemic. Responses received indicated that while some countries continued with physical proceedings as before, and some countries simply suspended court operations in whole or in part, the majority of countries in fact adopted some means of proceeding virtually and were able to offer at least a partial continuing service, and in many cases an impressive level of continuing service, notwithstanding the difficulties being encountered.
3. The message strongly received was that where it is suitable to avail of them, technology assisted virtual court proceedings represent a valuable alternative to physical proceedings, however, most judges felt that physical proceedings were in many instances preferable. An important insight was that virtual proceedings were more easily able to accommodate appellate type hearings than trials at first instance. However, some found that deliberations amongst collegiate court members were less satisfactory when conducted virtually. It was found to be more difficult, but not impossible, to conduct some forms of trial at first instance, particularly those involving the taking of evidence in person from witnesses, and utilising juries, remotely. An important insight was that those jurisdictions that had already embraced some level of digitisation of their court procedures coped best. Some contributors have suggested that the generally positive experience gained should lead to a greater openness to a “blended environment” in how court proceedings are conducted in the future.

4. Time precludes for any detailed discussion in this report of the difficulties associated with virtual court proceedings that were discussed. However, some of the issues justify mentioning:
  - a. Poor infrastructure, including internet connectivity and court equipment.
  - b. Cybersecurity issues.
  - c. Lack of immediacy.
  - d. Access to justice issues particularly the elderly and those without technological competence.
  - e. Lack of solemnity, and formality.
  - f. Public accessibility and transparency.
  - g. Recording.
  - h. Difficulty in managing documentary material.
  - i. Isolation amongst collegiate court members.
  - j. Some contributors emphasized the need to develop strong protocols to regulate and best facilitate the use of virtual proceedings.
5. It was indicated in our plenary discussions that the pandemic experience has led in some countries to an acceleration of a move towards the widespread adoption of electronic technologies for the conducting of court proceedings, and that there has been widespread acceptance of this in those countries, albeit with the knowledge that there remains room for improvement.
6. Other contributors indicated however, that there was a general view that virtual proceedings could never replace in person hearings in many instances. Moreover, their view was that while virtual trials had enabled the continuation of service provision during the pandemic, the service provided was somewhat inferior to that which would otherwise have been possible.

The overall sense of the discussions was that the experience gained during the pandemic has resulted in a greater willingness going forward, to make use of technology in delivering court services, and the strongest lesson to be learned is that where this is being contemplated, strong protocols need to be developed and applied to ensure maximum success.

I wish to thank my co-members of the Board, Judge Mette Søgaaard Vammen of Denmark, Judge Flávia da Costa Viana of Brazil, and Madame Justice Kristine Eidsvik (retired) of Canada for their helpful and wise contributions to the work of the Commission during this past year. Regrettably,

due to circumstances beyond her control, Judge Flávia da Costa Viana, was unable to be in Tel Aviv, but her important contributions, particularly in translating documents into Spanish on behalf of the Commission requires acknowledgment.

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

John A. Edwards

Ireland

President, Second Study Commission