



Second Study Commission
Civil law and procedure

Meeting in Montevideo, 20 - 24 November 2005

Conclusions

ALTERNATIVE DISPUTE RESOLUTION AS A MEANS OF IMPROVING
THE DELIVERY OF JUSTICE AND REDUCING DELAYS IN CIVIL PROCEDURE

The subject for discussion in the Second Study Commission was "alternative dispute resolution as a means of improving the delivery of justice and reducing delays in civil procedure".

The number of national reports received in time for inclusion in the draft General Report was 22, but a further three reports were submitted shortly before the Annual Meeting. The meetings of the Study Commission were attended by delegates from 25 countries.

Among the principal matters discussed in the Study Commission were the following :

1. The distinction between the relatively long established judicial conciliation procedures which are to be found in the legislation of a number of legal systems and the processes of mediation which have become more widely used in recent years was a matter of initial discussion. Among the observations made, particularly by those having experience of both judicial conciliation and mediation, was that the greater sense of confidentiality felt by parties as a result of the extra-judicial nature of mediation encouraged greater frankness and a willingness to depart from stated positions.
2. The development of court-attached or court-linked mediation services was discussed. The Commission was fortunate in having delegates with direct experience of such services. Their experiences were generally positive but it was important that the case should be suitable for mediation.
3. The discussion explored the features which might make a case suitable for mediation. The draft General Report indicated such factors as a continuing domestic or commercial relationship but it was thought that the willingness of parties to seek a solution to their disputes was important. The potential cost of litigation as opposed to the costs (if any) of engaging a mediator might also be a relevant factor.
4. The discussion also turned to the extent to which a judge might actively encourage parties to resort to mediation. Many delegates thought that since a positive desire by both parties to seek a solution was important for the success of a mediation process a judge should normally not go beyond suggesting to the parties that they consider the possibility of mediation. The existence of a court-attached mediation service could usefully assist parties to take up the suggestion.

The delegates were content with the summaries and analyses contained in the General Report which was adopted unanimously.

After discussion the following conclusions were reached and adopted :-

1. Mediation should be seen as a complementary means of access to justice available in suitable cases rather than a procedure in competition with the courts.

2. Since mediation requires the willingness of each party, it is desirable that in so far as a judge may suggest mediation he should consider the suitability of the case for mediation.
3. A court attached mediation service with qualified mediators is a useful means of facilitating the resolution of disputes in appropriate cases.

The topic selected by the delegates for study and discussion at the next meeting is:

" What legal rules regarding patrimonial interests, succession and duties of mutual support should apply to couples living together but not being married. "

This subject is similar to (but not identical with) the topic discussed in 1985 but there have been developments in society and in legislation in many countries over the last twenty years. It may also be interesting to compare the current position with that disclosed in the reports of the 1985 Study Commission.