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Mass Claims Proceedings in Practice

A Few Lessons Learned

By
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Every mass claims process is different from the next. Mass claims proceedings are set up by usually complex political processes. Legal and moral issues come to the fore. Money matters, but it is particularly important to see that somebody still cares. The relevant facts are difficult to establish and are often traumatic.

Still, as one goes from one mass claims process to the next, a few lessons may be learned and may be worth recording.¹

1. SHOULD MASS CLAIMS COMMISSIONS BE ARBITRAL TRIBUNALS?

1.1.

No. They should, however, be composed and operate to some extent like arbitral tribunals.

1.2.

To be composed in arbitral fashion gives a mass claims commission legitimacy. The two sides of the controversy, or at least the champions of two sides of a controversy which may involve many more players, have a say about the composition of the commission.²

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1. For a presentation of the Property Claims Commission's work which is now ending, see Karrer, "Mass Claims to provide rough justice", in Festschrift Peter Schlosser, 2005. *See also* www.iom.int; www.compensation-for-forced-labour.org.

2. For instance, two members of the Property Claims Commission were appointed by the Governments of the United States of America (Prof. David Caron, soon replaced by Prof. Richard Buxbaum) and Germany (Prof. Gerold Hermann, later replaced by Ministerial Director emeritus Eberhard Hubrich), and the chairman by the two members so appointed. The victims and their organizations, German enterprises and their organizations, and others were all represented in the Foundation's 27-member Supervisory Council (Kuratorium), but not in the Commission, which had

1.3.

A larger number of interested parties is a feature also encountered in investment protection and in sport arbitration. This may lead a mass claims commission to accept *amicus curiae* briefs.³

1.4.

If an arbitral approach is taken, using a larger number of decision-makers to deal with numerous claims may seem an obvious solution,⁴ but often this approach will not be adequate. The numbers are far too large. Moreover, using many decision-makers leads to coordination problems, especially if the approach is not well defined from the start, as often happens with mass claims.

1.5.

The way mass claims commissions operate is quite remote from arbitral procedure. Using experienced arbitrators as commissioners will, however, help shape the process to its specific needs since arbitrators regularly design procedure.

1.6.

The arbitral agreement must, of course, comply with the requirements of the arbitration law at the seat of the arbitration and with the requirements of the New York Convention.

There must be an arbitral agreement in each case decided. One could think of a preexisting arbitral agreement open for acceptance.⁵ An arbitration agreement may also be pre-formulated in the claim form which is accepted at the time of the filing of the claim.⁶

1.7.

By agreeing to arbitration, a claimant waives his or her right to go to other fora. The decision becomes *res judicata*. However for practical purposes, finality may also be achieved without arbitration.⁷ One may indeed ask how important

just three members.

3. For instance, at an early stage, the Property Claims Commission invited victims' organizations to make submissions, which they did. There comes, however, a moment when a mass claims commission must decide. Later *amicus* submissions are difficult to handle. The Property Claims Commission received an *amicus* brief in the middle of its primary decisions process which led to a change of its decision pattern in one area. During the reconsideration phase, the Commission received a further *amicus* brief which duplicated an earlier brief and led to no change.

4. Because of the large number of cases, some programs such as U.S./Iran Claims Tribunal, CRT I or UNCC, operate with pools of decision-makers constituted by champions of two sides, plus a pool of neutrals.

5. This is the method used in investment protection arbitration.

6. This is the method used with athletes at Olympic Games, where the arbitration agreement is included in the registration form.

7. Thus, in the Property Claims Commission process, the original claimants in Federal Court in New Jersey withdrew their original claims against some German enterprises as part of the overall settlement which led to the establishment of a Property Claims Commission in the first place. This

finality is in practice.⁸

1.8.

An arbitral process is, moreover, necessarily inserted in the *lex arbitri* of the seat of arbitration. This opens it up to admittedly limited opportunities for challenge before state courts in that place.⁹

1.9.

Work in mass claims should be subject to the same tax treatment as arbitration. If the administrative support is provided by an international organization which enjoys special tax treatment this has obvious tax advantages.

1.10.

Many important elements of a true mass claim proceeding do not fit the arbitral pattern: there is only one claimant party, and no representative of the respondent, unless the entity which has the money pool may be described in this way. No adversarial proceedings are instituted.

operates as a waiver with respect to various original claimants, but of course not in respect of the many more claimants to whom the Property Claims Commission process was opened.

All claimants file a waiver declaration that merely suspends their claim. They do not waive their rights simply by going before the Commission. The Commission has no judicial or arbitral function. Its decisions do not make law in any system. If the claimant's claim is not simply denied, the claimant receives an additional claim to an ascertainable sum of money (to be established through a particular process) which the particular claimant may then collect. A waiver only occurs when a successful claimant accepts payment and thus fulfills the condition triggering the waiver declaration. See Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" (Law to Establish the Foundation "Memory, Responsibility and Future") [hereinafter "Foundation Law"], v. 2.8.2000 (BGBl. I 1263) § 16(2). This means that claimants who were not original parties before the federal court in New Jersey and were unsuccessful - or were successful but did not accept the payment (if that happens, the money will be paid to the JCC) - retain whatever right they have to sue German enterprises in courts all over the world.

In the United States, there is something special. As part of the settlement, the United States Government undertook to issue a declaration that it was in the national interest of the United States that legal peace would be maintained as far as the United States were concerned towards German Enterprises. See Executive Treaty, Art. 2, Art. 3(3). For the purpose of legal peace, German enterprises were those that had their headquarters within the 1937 borders of the German Reich (before the "Anschluss" of Austria or other World War II-era expansions) or had their headquarters in the Federal Republic of Germany, or enterprises owned by Germans from the 1937 Reich, or in which German enterprises situated in the 1937 Reich had a stake of 25% or more, at any time between seizure of power by the Nazis in 1933 and the entry into force of the Foundation Law in 2000. Foundation Law § 12(2).

8. It would be expensive to pursue property claims for relatively small amounts (to be sure, well in excess of the payments resulting from the Property Claims Commission process, but still relatively small). The chances of success would be doubtful in view of the statute of limitations and the difficulty of sufficiently proving a case to conform to standards applicable in courts of law.

9. It is somewhat surprising that the CRT-I arbitration agreement, which provides for arbitration in Zurich, Switzerland, did not provide for a waiver of remedy to the Swiss Federal Supreme Court as permitted under Art. 192 PIL Statute. Nevertheless, no challenge of CRT-I decisions to the Swiss Federal Supreme Court was ever made. One can only speculate as to the reasons, but it is likely that the chances of success were seen as extremely limited (generally only one challenge on the merits is successful in two years).

Rather, the process is administrative in nature. If only limited funds are available, mass claims processes resemble bankruptcies. The amount ultimately awarded is then determined essentially by the money available in a pool, which is divided among the recipients. The amounts originally certified as amounts to which claimants are entitled may then be subject to pro rata reduction.¹⁰

2. HOW CAN A SMALL COMMISSION DEAL WITH AN ENORMOUS NUMBER OF CASES?

IT MUST ANALYZE THE PROBLEM AS A WHOLE AND AVOID PARTIAL SOLUTIONS.

2.1.

The numbers have a significant impact. Quantity rules quality. The precise numbers make little difference.¹¹ They will, in any event, largely exceed what can be handled by a limited number of decision-makers in the classical arbitral tribunal mode.

2.2.

How should the money available for the process be spent? Ideally, the funds available for the process should bear some realistic relationship with the number of transactions that must be considered.¹²

2.3.

The cost of the process should be budgeted separately from the money to be distributed in the process. An open budget is dangerous.¹³

10. The Property Claims Commission thought of flagging this to claimants by certifying "points" rather than money amounts, but rejected the idea because claimants would find this too abstract and difficult to understand. To minimize psychological problems, the Property Claims Commission sought to approximate or slightly overshoot the amounts that it would ultimately pay out. It accordingly preferred to certify EUR 1,000 subject in the end to a 15% reduction rather than certifying EUR 10,000, only to implement in the end a 91.5% reduction, even though both methods lead to the same result—EUR 850 in the successful claimant's pocket. The reductions of the amounts certified by the Property Claims Commission were ultimately about 15% for one group and about 35% for the other.

11. The total claims in the Property Claims Commission process were 34,955.

12. For example, to deal with a EUR 100 million case of high complexity, an international arbitral tribunal will have arbitration costs of roughly EUR 1 million, and the party representation costs for both parties, taken together, may go up to EUR 5 million. This will mean that for 100 claimed items, the overall costs per item will be around EUR 60,000. Compare this with the costs of the Property Claims Commission which operated at a cost of less than EUR 100 per item. It is obvious that for a cost that is but a small fraction of what is normally spent in international commercial arbitration, one can only expect a much rougher approximation of justice.

13. The experience of the CRT-I and ICHEIC shows that where there is an open budget, as must be expected, the mentality of "no stone unturned" will take over, with grotesque results. The process will cost substantial money to those who fund it (in our two examples, the banking and the insurance industries). It will bring enormous profits to those who carry it out (accounting firms and law firms). It will necessarily take a long time. This cannot be in the interest of the claimants. If a common fund is set up, as was for the Property Claims Commission process, the commission is faced with the additional difficulty of finding the right level of funding for the process in relationship

2.4.

It is very difficult for many to accept this, but rough justice is inevitable in mass claims. The only question is, how rough? How can one maximize justice for the available money?

2.5.

Arbitral tribunals are expected to work essentially without staff or only with clerical staff whom they pay individually. Chairmen of arbitral tribunals do not, of course, type out the awards themselves, but arbitral institutions notoriously discourage the use of legal assistants by arbitral tribunals.

By contrast, in mass claims, a large infrastructure is indispensable. If costs must bear a reasonable relationship to the amount of money distributed, paramount attention must be given in a mass claim process to staff and computerization.

To deal with large numbers, a mass claims process must necessarily operate with a steep staff hierarchy.

The main role of the commission is to design the overall process. Even a large portion of that work will not be performed by the commission acting alone. It will receive suggestions from its top legal officers on this. Rather than deciding individual cases, a meeting of a commission will focus on recurrent issues encountered by the staff.¹⁴

The commission's chief staff officers must be experienced specialists of mass claims.¹⁵

The next level are highly qualified younger lawyers with a hands-on approach and superior linguistic skills.¹⁶

to the money to be distributed, but it is well equipped to make that decision.

14. For example, the question will arise whether, when a value for a particular type of asset is assessed, there should be a premium in those cases where the claimant collected particularly good and convincing evidence, or a reduction for cases where the evidence is so particularly poor that the chances of obtaining compensation in a court of law appear much less. This poses an essentially philosophical question about the nature of the compensation which must be decided by the commission itself. In this particular instance, the Property Claims Commission's decision was that no such difference should be made. The payments that it certified were not exclusively in the nature of damages. They were not designed to anticipate the outcome before a state court of law. It further appeared that the reasons why in some select cases reliable evidence still existed, but in most cases did not, were essentially fortuitous. This reflects the subsequent fate of various archives in the sometimes unfaithful hands of former employees, as well as owing to the effects of war damage.

15. The Property Claims Commission had Dr. Norbert Wühler who in the course of the process became head of IOM's programs, and as its top officer for property claims, Ms. Anke Strauss.

16. The Property Claims Commission had such persons from Poland, the Czech Republic, Germany, the United States, and other countries. The actual staff officers were lawyers and historians ready to do some of the inevitable administrative work as well. Such staff must be people who have an excellent understanding of history, the necessary empathy and willingness to deal with difficult and unforeseen problems, and the ability to work in teams. All these people were put together on the same floor in an office building where it was easy to contact a colleague across the hall who had knowledge of a particular language or the specific conditions in a particular region at a given time.

At an early stage, telephone hotlines should be manned by people with specific interpersonal and language skills. Throughout, the necessary administrative support must be in place with sophisticated computer programs to deal with complicated texts in many different languages.

2.6.

One must computerize whatever one can. The internal budget for transferring information to a computer data base must be substantial from the very beginning.

2.7.

To design a claims form requires an understanding of the entire process and the specificities of the program. The emphasis should be on times, places, names, and relationships among persons. This is information that should be entered into a database through an automatized process. The forms that we all fill out at the border when we enter certain countries provide a good example: some countries are better than others in designing these forms.¹⁷

Why is this important? It is not so much for the primary decisions in individual cases. These must be made on the basis of a decision handbook and evaluation matrix established by the commission. Instead, this matters for the purpose of developing the decision handbook in the first place.

A claim form, even well designed and properly filled out, does not tell the whole story. One cannot enter everything in a claim file into a database and use it to decide cases. Staff members must actively take the case into their hands.

It is in the interest of the process to have well-presented claims and claim forms properly filled out. It is hard to achieve this without special assistance to claimants.¹⁸ Many mass claims processes discourage the use of lawyers as claimant representative, for instance by the simple device of not providing compensation for party representatives. Some lawyers work hard and prepare well-

17. For the Property Claims Commission process, it would have been extremely useful to receive not only the names of places, but also the postal codes, the name of the districts in which they were situated, the name of the nearest larger village or city, the full name of the person, written in all ways in which it may have appeared on other documents, and a precise indication of the time periods during which a particular person was at a particular location, the particular time when a person emigrated to another country (which?), when that person acquired citizenship in another country, lived in a particular country, et cetera. Likewise, the relationships among people (son/daughter, father/mother, brother/sister) must be given. Further elements possibly relevant for the decision of the claim should be provided on the claim form in a separate and objective manner independently from the claim. For instance: Does somebody describe himself as Jewish, a Jehovah's Witness, Sinti or Roma? On which grounds? Was somebody expelled from his or her home? When, and by whom? How many floors did the house have? Were there similar houses in the neighborhood? How many head of cattle were on the farm? Was somebody in a concentration camp? Which camp and from when to when? How would the camp be described? All this relatively objective information, once entered into a database, makes it possible to group cases efficiently.

18. The Property Claims Commission organized telephone hotlines in numerous languages. It also encouraged victim organizations in various countries to assist claimants. This is a task that should not be neglected by organizations once a process is in place following a lengthy legal and political struggle which may have put a substantial demand on an organization's resources.

documented, individualized claims. Many legal representatives however regrettably face a numbers problem, especially if they operate on a contingency fee basis. They may initiate “mass claims” by entire groups of claimants or even dump their entire worldwide client population into the program. This simply makes unnecessary work for others – the commission’s staff.

3. HOW SHOULD A MASS CLAIMS COMMISSION DEVELOP ITS APPROACH?

Step by step.

3.1.

In an initial phase, the commission must study a representative sample of claims files, the raw material that will be put into the hands of its case officers. This will help it reach its first important decision; namely, the decision of where it must set-up its administration and what the working language of the administration must be.¹⁹

3.2.

The importance of drafting supplemental procedural rules may easily be overestimated. Drafting procedural rules is an exercise which brings people together as they develop their working procedures, but drafting something else will be at least as useful.

Procedural rules are usually helpful for the parties in arbitral proceedings. They provide a general background on the procedure adopted. By contrast, in a mass claims process, after a first claim has been submitted, there normally are no further exchanges with claimants, and thus there is no need for procedural rules as such. Where by way of exception a deficiency letter is sent to a particular claimant, the procedure becomes so highly individualized that rules are of little help.

3.3.

The next task of a mass claims commission is then to develop an internal decision handbook and evaluation matrix. It should determine how it will operate, e.g., whether a file will be translated and the extent to which the commission will supplement the file with information from other sources. It should finally describe the end result of its work, how its decisions will be presented.

19. For example, the Property Claims commission had this decision practically made when it came into operation. It spent little time in deciding that its seat should be Geneva and not, for instance, Berlin. It also was clear without discussion that it should work in English, and not in German, though its members were fluent in both languages. The Property Claims Commission could never have assembled the qualified staff that it had in a place less international than Geneva, with fewer expatriate families living locally. It could not have worked in another language than English, not just for psychological reasons, but also for staff recruiting reasons.

3.4.

Above all, a mass claims commission must make a fundamental decision as to the standard of proof to be applied. Shall it be the normal standard used by State courts and arbitral tribunals? In many cases, a relaxed standard of proof will apply.²⁰

3.5.

Moreover, a mass claims commission will establish presumptions of fact; namely, the presumption that if a particular fact was established under the applicable standard of proof, then another relevant fact is rebuttably presumed to have been present. To achieve some measure of fairness, these decisions must be made on the basis of historical research. The notion that a mass claims commission could investigate each individual case in inquisitorial fashion, thus doing the work that the parties and the organizations assisting them did not do, is an illusion.²¹

3.6.

Before issuing any primary decisions, one should test one's approach on a sample. The sample must of course be representative of the entire claims population, and it must be large enough to allow a reliable forecast of the entire outcome.²² This may be necessary for further purposes, for instance if the amount of money to be distributed is pre-set.²³

3.7.

Then only, at long last, should the primary decisions be issued without delay.²⁴

4. SHOULD THE PRIMARY DECISIONS BE ISSUED IN GROUPS AND IF SO, HOW SHOULD THE GROUPS BE COMPOSED?

Yes, the groups should be composed depending on psychological factors.

4.1.

It may be important to issue a first batch of decisions which, in numbers and in money distributed, is representative of the entire claims population as deter-

20. The Property Claims Commission announced that it would apply a relaxed standard of proof.

21. The Property Claims Commission covered the entire territory of Nazi-occupied Eastern Europe.

22. The Property Claims Commission used a sample of 1,000 claims out of its total of 34,945 claims.

23. Since the Property Claims Commission was using about one eighth of the available funds for the process, it could expect to have seven eighths to distribute. From this, the value of a "point" could be determined. *See supra* note 12.

24. The Property Claims Commission rendered its primary decisions over a year and a half.

mined by the sample just mentioned. It may be sensible nevertheless to issue the first batch of decisions in cases not identical with those in the sample. It may be preferable to group the decisions in the first and in later batches following special considerations, such as whether the claimants are individuals, particularly elderly people, or legal entities, or in the same geographical location, or whether the same issues are raised.²⁵

4.2.

The period over which decisions are rendered should be as short as possible for reasons that will become evident forthwith. Still, because of limited manpower and the need to use the staff efficiently, the decisions cannot all be issued at the same time.

5. WHAT IF THE COMMISSION CHANGES ITS MIND?

The long decision-making period makes it inevitable that, on some issues, the thinking of the commission may evolve. In newly considered cases, issues not included in the sample or new evidence may surface. New historical research or new *amicus* briefs may lead to new ideas. This may lead to an adjustment of the approach that the commission takes.

This conjures up a dilemma which is well known to state courts but unfamiliar to arbitral tribunals, which are all set up to decide just one case. Three routes are possible, none of which appears particularly attractive.

5.1.

First, the commission may choose to continue its practice and decide, for the sake of consistency, as it had decided in earlier cases—in other words, persist in the error against better knowledge. This is a course sometimes taken by state courts before they change their case law to allow the participants in a legal process to adjust their behavior in the future, but without surprising them with a change of practice which may be unfair to them if they rely on an earlier practice.²⁶

5.2.

The second position would be that, once the commission changes its mind on an issue, it would revisit the issue in already-decided cases. While there is no difficulty with the correction of clerical errors in a decision, done *sua sponte* by the commission once the error is discovered, the position is far more difficult here: there is no clerical error. There is a change of view on a legal issue, or new facts have emerged.

The question of a *reformatio in peius* arises. This is perhaps not a legal

25. The approach just described was taken by the Property Claims Commission.

26. A typical example is the shortening of deadlines or changes in the recognition of public holidays. There, the judiciary may be led to make an announcement of a future change.

problem if the parties are on notice that a *reformatio in peius* might occur *sua sponte* by the commission under certain circumstances. Still, psychological difficulties remain.

Another difficulty is simply practical: with a claim form designed with this possibility in mind, it may become possible to identify claims arising from conditions at a particular time and place, but identifying cases involving the same issue of law or a similar pattern of facts if the difficulty was not anticipated is extremely costly and the process will generate further unequal treatment. Above all, with complex cases, issues could be revisited and reconsidered again and again. There must be an end, subject to legal remedy.

5.3.

The third possibility is to leave the earlier decisions unchanged but to adopt the new policy from then onwards. This admittedly results in unequal treatment. In the cases where the new policy worsens the position of claimants, a claimant who benefited from the earlier practice will simply be lucky in an administrative process because there is no counterparty interested in overturning the earlier decision. Conversely, if earlier decisions favored claimants less than the new policy now provides, the unlucky claimants may have a remedy against the decision that burdened them. If that remedy is timely taken, the case will be reconsidered in the light of the new policy, which will bring it in line with the later decisions. The difficulty, however, is that the time within which a decision may be challenged is limited. It would not be a satisfactory solution to lengthen that time too much since it must be the same in all cases and the time within which the last decisions may be challenged may then seem very long indeed. In fact, the entire process may be held up if payment is made only once the entire process is completed. This makes it necessary that decisions on the same issue be rendered in as short a time as possible.

On balance, this third approach appears best for primary decisions.²⁷

6. SHOULD THERE BE A REVIEW OF DECISIONS BASED ON A LEGAL REMEDY?

Yes.

6.1.

Some mistakes happen that should be corrected, particularly when the administrative burden of a correction is not particularly heavy. This suggests that the grounds for review should be strictly limited, and limited to easily ascertainable cases.²⁸

27. The Property Claims Commission rejected the first and second possibilities and chose this approach.

28. For instance, the Property Claims Commission reviewed decisions only for alleged

6.2.

The question arises again whether a correction once made should be subject to a further correction. The answer should be no.

6.3.

For the same practical reason as for the primary decisions, decisions raising the same type of issues should be made at the same time.²⁹

7. SHOULD THERE BE CONFIDENTIALITY OR AN EFFORT TO PUBLICIZE THE WORK OF A MASS CLAIMS COMMISSION?

7.1.

In each individual case, confidentiality is required.

7.2.

The work should not be publicized while the primary decisions are still rendered since interference in individual cases by interested circles or even high-placed backers should not be encouraged, and one should avoid giving an unfair advantage to claimants who have not yet received their decisions.

7.3.

However, once the first phase has been completed, namely from the time when all primary decisions have been rendered, an effort to publicize the work of a mass claims commission must be made to advance the acceptance of its decisions by the parties involved and by wider circles.

As part of this effort, it is a particular pleasure for me to dedicate this article to my co-commissioner and friend, Richard Buxbaum, at the close of the work of the Property Claims Commission and on occasion of his special birthday.

manifest error of facts, manifest error of law, or new evidence not reasonably available before. It adopted, also on review, the third of the three approaches just discussed.

29. The Property Claims Commission followed this method. It rendered all its reconsideration decisions over a period of only four months.