

International mass claims programs are not a new phenomenon. Large-scale claims programs, known as mixed arbitral tribunals and claims commissions, were a standard method of resolving international claims in the late 19th century and after World War I. Examples are the Boxer Commission, the United States-Mexican Claims Commission, and the United States-German Mixed Claims Commission.¹

For a number of reasons, international claims commissions fell out of fashion after World War II.² They were largely replaced by lump-sum agreements, which dealt with claims arising out of the nationalization and expropriation of foreign property in the aftermath of the war and beyond. Things began to change in the 1980s, when the Iran-U.S. Claims Tribunal was established. By the 1990s, however, a whole series of new mass claims programs were set up.

Although international claims commissions have made a comeback, many things have changed in terms of how submitted claims are processed. One of the principal differences between the claims commissions of the early 20th century and those of today is the fact that most existing international claims programs are heavily computerized. This enables modern claims commissions to use innovative methods and techniques, particularly information technology.

However, modern mass claims processing tools are not unique to international claims programs. In fact, they have been borrowed from class action lawsuits as they are conducted in the United States.

There is a strong structural similarity between domestic class actions and international mass claims. Indeed, institutions such as the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT II), which is in its second phase,³ and the German Forced Labor Claims Program,⁴ have arisen out of the settlement of class action lawsuits in the United States.

Benefits of Information Technology

One of the effects of using mass claims processing tools has been the enhanced efficiency of international claims programs. For instance, the United States-German Mixed Claims Commission, one of the more successful claims programs at its time, spent some 17 years in resolving approximately 20,000 claims. Compare this with the United Nations Compensation Commission (UNCC),⁵ which processed approximately 2.6 million individual claims in less than eight years, and with the Bosnian Claims Commission,⁶ which processed some 250,000

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claims during a seven-year period since its establishment in 1996. The latter commission is slated to complete the processing of approximately 320,000 claims by the end of this year.

Both of these programs, like most others in existence, rely on extensive use of computers and related technology. Thus, one reason that international claims programs are back in vogue could be their enhanced efficiency. If a program is supported by an appropriate technical infrastructure and is well managed, it is now possible to process and resolve large numbers of claims within a reasonable period of time.

Computer technology is the key to mass claims processing in the sense that the use of other tools, such as statistics, grouping and standardized verification procedures and valuation methods often rely on the availability of information technology support. Computerized information technology facilitates and expedites claims processing and decision making in various ways.

The principal features of international mass claims programs are a high number of claims coupled with their factual and legal similarity. How many claims are necessary to have a “mass claims” situation? There is no definitive answer to this question, as the answer depends on the complexity and similarity of the claims. But normally a caseload of a minimum of 2,000-5,000 claims raise the type of management and organizational challenges that characterize mass claims processing.

An important identifier of mass claims is the fact that practically all mass claims arise out of one and the same incident—a war, a revolution or another similar extraordinary incident. As a consequence, most, if not all, of the claimants are similarly situated. This means that practically all of the claims arise at around the same time and are very similar in terms of the legal and factual issues that they raise. This is essential to a mass claims program and it provides the backdrop for the use of information technology in mass claims processing.

Information Technology Services

Information technology serves several purposes in the context of a mass claims program.

- It facilitates the management of the process.
- It permits computerized decision making under certain circumstances, and the use of

other mass claims processing tools, such as statistical sampling and modeling.

- It also enables decision making on a “wholesale” basis (as opposed to case-by-case), *i.e.*, by grouping larger and more complex claims together based on the similarity of factual and legal issues.

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Facilitating Management of the Process

Experience shows that the larger mass claims programs could not have been managed without computerizing the key claims data, and sometimes the evidentiary data. The need to computerize is a consequence of the sheer number of claims. Without computerization, the claims could not have been

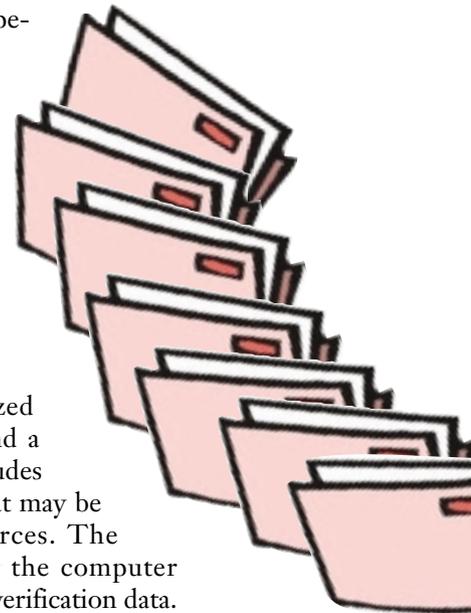
capable of completion within a reasonable period of time. This is why entering data about the claims and the evidence into a database (data entry), and the development of a claim-status tracking system are often the first steps in setting up a mass claims process.

Computer-Aided Claims Processing

Although it sounds like heresy coming from a lawyer, it is also often possible to computerize the decision-making process itself. However, this can be done only for very simple claims involving fixed amounts of compensation. The amounts may be fixed in the constituent document of the mass claims program or in an administrative decision taken by a competent body of the program.

Computerized decision making may require reliance on other mass claims processing tools, such as statistical sampling and modeling; it may also require computerization of the evidentiary data against which the claims are verified. In other words, there are two databases—a claims database, which includes computerized information about the claims, and a verification database, which includes computerized verification data that may be collected from third-party sources. The claims are processed by having the computer match the claims data against the verification data.

This kind of computerized “matching” was used in several mass claims programs. The



UNCC matched claims data against computerized departure records; the Bosnian process matches claims data against computerized property and land records; CRT II matches claims against electronic bank records that were computerized during the “Volcker audit” of Swiss banks; and the German Forced Labor Claims Program matches claims against electronic data in certain German archives.

Importance of Grouping

Computerized decision making is possible for relatively simple, standard claims, but not for complex corporate or government claims for property damage or for compensation for commercial losses.

But information technology can expedite the process in these more complex cases, although its role is supportive to decision making.

The principal way of using information technology in larger and more complex claims is by “grouping” claims based on the similarity of their legal and factual issues. This requires computerization of certain key data about the claims, *e.g.*, the types of legal and evidentiary issues raised, the types of losses claimed, the circumstances in which the losses were incurred, and the types of evidence available. Once these categories have been created, it becomes possible to create groups consisting of very similar claims.

The consequence of grouping is that, instead of deciding individual claims, the decision-making body may concentrate on deciding the principal legal and factual issues raised by the claims. By resolving one issue that is common to a group of claims, the underlying claims are also resolved to the extent that they turn on that particular issue. Indeed, because the issues are similar, it does not necessarily make sense to decide the issues in the context of each individual claim, particularly when the number of claims is high. Resolving claims on a “wholesale” basis rather than on a “retail” or case-by-case basis, has two advantages: It enhances efficiency and the consistency of the jurisprudence.

Grouping also facilitates the use of standardized verification and valuation methods. These are customized programs developed by accountants, loss adjusters and other technical experts,

the aim of which is to standardize the verification and quantification of awards. The standards obviously must be approved by the decision-making body.

This is roughly how the UNCC has processed a great bulk of the larger, more complex corporate and government claims, many of which involved large amounts of money. The Property Claims Commission of the German Forced Labor Claims Program has applied a similar procedure. The Iran-U.S. Claims Tribunal also adopted this approach to the forum-selection clause cases. The Tribunal first identified a representative group of claims, which it then resolved, setting a precedent for the remaining claims.⁷ However, in this case, the representative group of claims was identified manually, as the Tribunal did not have a computer support system in place at the time.

Lessons for Arbitration

Are there any lessons to be learned from the use of information technology in mass claims that can be used in international litigation and arbitration? Before proposing any answers, it is important to understand the principal differences between international mass claims and traditional international commercial arbitration.

One of the features of international mass claims programs is that they tend to constitute self-contained *ad hoc* regimes. The processes have their own founding documents and their own procedural and substantive rules. To the extent appeals are allowed, they are also normally handled within the system.

This means that once the claims received are processed, the system withers away. The CRT appears to be the only existing mass claims programs that has been assigned another related task after completing its initial assignment. Another exception is the Permanent Court of Arbitration (PCA), which helped create the Iran-U.S. Claims Tribunal, and is now hosting the Eritrea-Ethiopia Claims Commission. But then again, the PCA is not really a mass claims program, but rather a permanent institution designated to administer a mass claims program.

In a similar vein, the International Organization for Migration (IOM), which handles a portion of the German Forced Labor Claims Program and the Swiss banks settlement, is an implementing organization that will continue to perform its other functions once these claims programs have come to an end. But again, the programs themselves (including their staff) will be gone once the claims are processed. This means that certain aspects of mass claims processing are

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unique and do not lend themselves to application in other contexts. This often holds true, in particular, of the applicable law, as often specific procedural and substantive rules are adopted for the purpose of the process.⁸

Another important feature of mass claims programs is that the driving force of the process is the administrator of the program, usually the secretariat, since the decision-making body (*i.e.*, the commissioners or arbitrators) are often not full time.

In international commercial arbitration as we know it, the parties normally drive the process. An arbitral tribunal may not even be established at the time when the parties start taking decisions on the collection of evidence and digitization and computerization of data. This means that the software used by the parties may not be compatible with the one preferred by the tribunal or the arbitral institution.

But even in international arbitration, the arbitral institutions, rather than the arbitral panels, could take a leading role in providing an information technology infrastructure for the parties and the tribunal. The fact that a tribunal may not even be formed at the time the dispute arises does not matter; often the parties know, by looking at the arbitration clause, which arbitral institution will host the eventual arbitration. When computerizing the claims documentation, the parties are in a position to use software and systems that are compatible with those of the chosen arbitral institution. This will facilitate making electronic filings with the tribunal and sharing files among the parties and the tribunal.

The compatibility of the software and systems used by the parties on the one hand, and the institution on the other, has become an issue in some mass claims programs. Problems will arise if the parties proceed with the computerization effort before they are provided with the appropriate technical specifications by the claims commission. This highlights the importance of early planning and foresight, both on the side of the parties and the arbitral institution.

The risk of incompatible systems also highlights the importance of technical standardization. Reliance on established technologies, such as the Internet and the World Wide Web, reduces the risk of incompatibility. Indeed, one can perceive a trend to rely to an increasing degree on Internet and Web-based technologies, both in mass claims processing and regular commercial arbitration. IOM, for instance, used Internet-based technologies to collect over 300,000 forced labor claims from more than 20 countries all over the world. Similarly, CRT II

uses a Web-based interface that allows off-site parties to access its database in Zurich through the Internet. Web-based "extranets" have also become common in complex commercial arbitration. The Internet and Web-based technologies seem to be the area where the information technology support systems for mass claims processing and commercial arbitration are converging.

It remains to be seen whether the technical convergence will be followed by convergence in other areas, including procedure. It is not unlikely that in a complex international arbitration involving thousands or hundreds of thousands of documents, mass claims processing tools such as sampling and standardization of certain aspects of evidentiary assessment may become relevant. After all, it is the numbers that tend to make the difference between arbitration and mass claims. If the number of documents one is dealing with reaches a critical mass, the application of mass claims processing tools cannot be excluded *a priori*. ■

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Endnotes

¹ The Paris Peace Treaties and other peace treaties concluded after World War I provided for the establishment of 57 mixed arbitral tribunals and claims commissions. Thirty-eight of these tribunals and claims commissions were actually established. See Norbert Wühler, "Mixed Arbitral Tribunals," in I R. Bernhardt (ed.), *Encyclopedia of Public International Law* at 143.

² Substantial delays in processing has often been cited as the principal reason. See, *e.g.*, David J. Bederan, "The United Nations Compensation Commission and the Tradition of International Claims Settlement," 27 *N.Y.U. J. Int'l L. & Pol.* 1, 18 (1994) ("The phenomenon of delay was undoubtedly the primary cause of disaffection with the institution of claims settlement by international tribunals.").

³ See <http://www.crt-ii.org>.

⁴ See <http://www.stiftung-evz.de>.

⁵ See <http://www.uncc.ch>.

⁶ See <http://www.crpc.org.ba>. This commission is officially referred to as the Commission for Real Property Claims of Displaced Persons and Refugees.

⁷ See Charles N. Brower & Jasn D. Brueschke, *The Iran-United States Claims Tribunal* 61 (1998).

⁸ Such rules may be adopted in the constituent document of the claims program, in its procedural rules, or by way of administrative decisions taken by the policy-making body of the program.

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