

Norwegian Maritime Law Day 2022

**Does the current limitation regime provide sufficient
predictability for shipowners and their insurers?**

Commentary to testing of the limitation rules by Norwegian courts

By Gaute Gjelsten



Does the current limitation regime provide sufficient predictability?

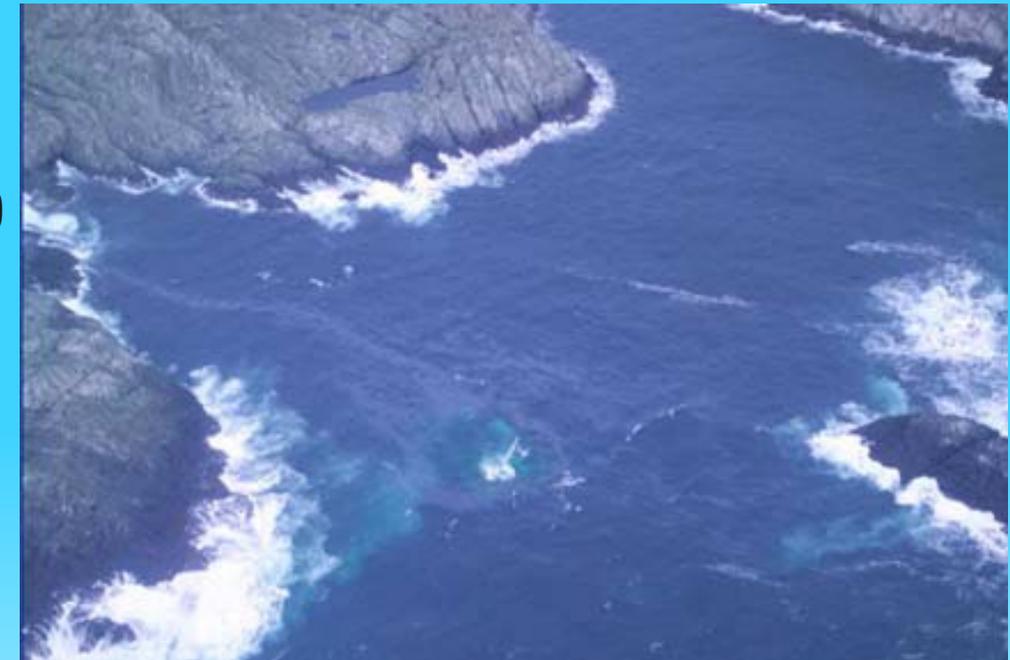
- Introduction:
 - Testing by Norwegian courts – will focus on "newer" time, i.e. after the Rocknes incident
 - Global limitation regime
 - Predictability vs. sufficient predictability
- Transformation of the 1976 Convention to Norwegian law (Ot.prp.nr.32 (1982-1983) p. 10-11 and 49-50):
 - Legislators: The Convention's mandatory substantive rules were (as before) inserted in a separate chapter (chap. 9)
 - The procedural rules were placed in a separate new chapter (chap. 12) and included only main rules
 - Procedural issues that the legislation did not address, were assumed to be decided by the courts
- Thus, legislators never intended to exhaustively regulate all (and especially procedural) issues
- Does the global limitation regime today provide sufficient predictability – what would the answer have been in 2004 (before Rocknes)? And now with hindsight after "Rocknes", "Fjord Champion", "Server", "Full City" and "Helge Ingstad"?
- Main topics: Fund administration, interest issues, distribution of fund, Lugano Convention

Common myths back in 2004

1. Limitation would prevail vis-à-vis the owner's duty to take action (Norw. tiltaksplikt).
Assuming costs involved would exceed the limitation amount, general assumption that the global limitation amount was owner's max exposure (assuming no conduct barring limitation)
2. No default interest would continue to run after constitution of limitation fund in cases where the limitation amount was paid to the court
3. No form of interest would apply until a claim had been made, i.e. no so-called "deprivation interest" (Norw. avsavnrente)
4. Applicability of the general tort principle that the injured party shall be put in the same position as if the tortious act had not occurred, i.e. restore claimant to his pre-incident position
5. The constitution of limitation fund in another country not party to same convention as Norway, would have limited, if any, legal relevance for enforcement against assets in Norway

List of cases post Rocknes (2004)

- LG-2005-139341 Rocknes I (lis pendens)
- HR-2007-325-A Rocknes II (Interpretation of convention)
- HR-2007-2066-U General Grot (Lugano Convention art. 26)
- LG-2012-115462 Fjord Champion (duty to take action/claims)
- LB-2015-54634 Server I (damages/interest)
- LB-2015-174299 Full City I (deprivation interest)
- HR-2017-331-A Server I (damages/public law orders/limitation)
- HR-2018-1260-A Full City I (interest/fund distribution)
- LB-2019-122748 Full City II (NMC s. 241/timebar/appeal/settled)
- THOD-2021-58354 Helge Ingstad I (NMC s. 172 and 172a)
- LG-2021-159291 Helge Ingstad II (NMC s. 177)
- LB-2022-52501 Server IV (currency conversion)(appealed)



The fund's procedure – overview

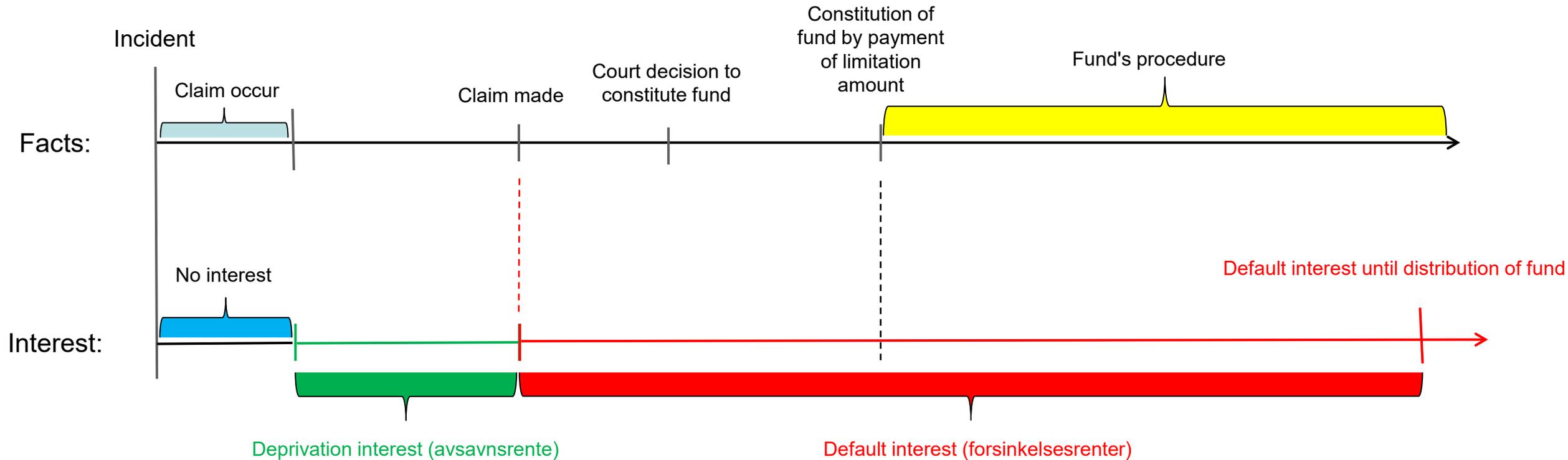
"Rocknes", "Server" and "Full City" have provided well-established and predictability fund procedures

1. Court order constituting limitation fund (NMC s. 234): Preliminary decision on limitation amount, security, appointment of fund administrator (NMC s. 236)
2. Initial Fund Meeting: Procedural details, submission of claims, payments on account etc. (NMC s. 243)
3. Standard Fund Phases:
 - a) Issue formal notices of constitution of fund and deadline to file claims (NMC s. 235)
 - b) Filing of claims (NMC s. 237)
 - c) Claims review by fund administrator/owner/insurers/other claimants
 - d) If disputed issues, fund administrator will opine
 - e) Fund administrator will issue recommendation to court (NMC s. 241, second para.)
 - f) Fund meeting to consider fund administrator's recommendation (NMC s. 241)
 - g) Prior to fund meeting involved parties (claimants, owner and insurer) will seek to agree on list of disputed items
 - h) If no dispute issues, fund will be distributed according to (amended) recommendation
 - i) If disputed issues, deadline given to commence court proceedings (NMC s. 242, ref. s. 240)
4. Final Fund Meeting: Fund will be distributed when all disputes are finalised (NMC s. 244)

Rules on interest and distribution of fund

- Four factors that explain why interest issues have been in focus:
 1. Increased limitation amounts are significant (ca. MNOK 440 in "Helge Ingstad" for "Sola TS")
 2. Legal proceedings are required to constitute a limitation fund – may take years and therefore involve significant interest component
 3. High default interest rate – significantly higher than market interest ("good investment")
 4. Several years before funds are finally distributed – "Server" fund is ongoing more than 15 years post incident
- Default/deprivation interest and distribution of the fund, have been subjects in several cases
- Rules on distribution of the fund and calculation of interest are now settled law
- Statutory background:
 - NMC s. 232: The **global fund** shall **correspond** to
 - a. The total of the amounts which according to Sections 175 or 175a are the limits of the liability for the claims for which limitation of liability is being invoked, and which arose from one and the same event (**limitation amount**), and
 - b. Interest on the amounts mentioned under litra a. for the time from the incident to the constitution of the fund, calculated at default interest rate, ref. Default Interest Act of 1976 (Norw. forsinkelsesrenter) (**interest component**)
 - NMC s. 173 no. 6: "Claims for **interest** and legal costs" are "**excepted** from **limitation**"

Time-line: Calculation of interest based on single claim



Based on LB-2015-54634 "Server I" / LB-2015-174299 "Full City I"

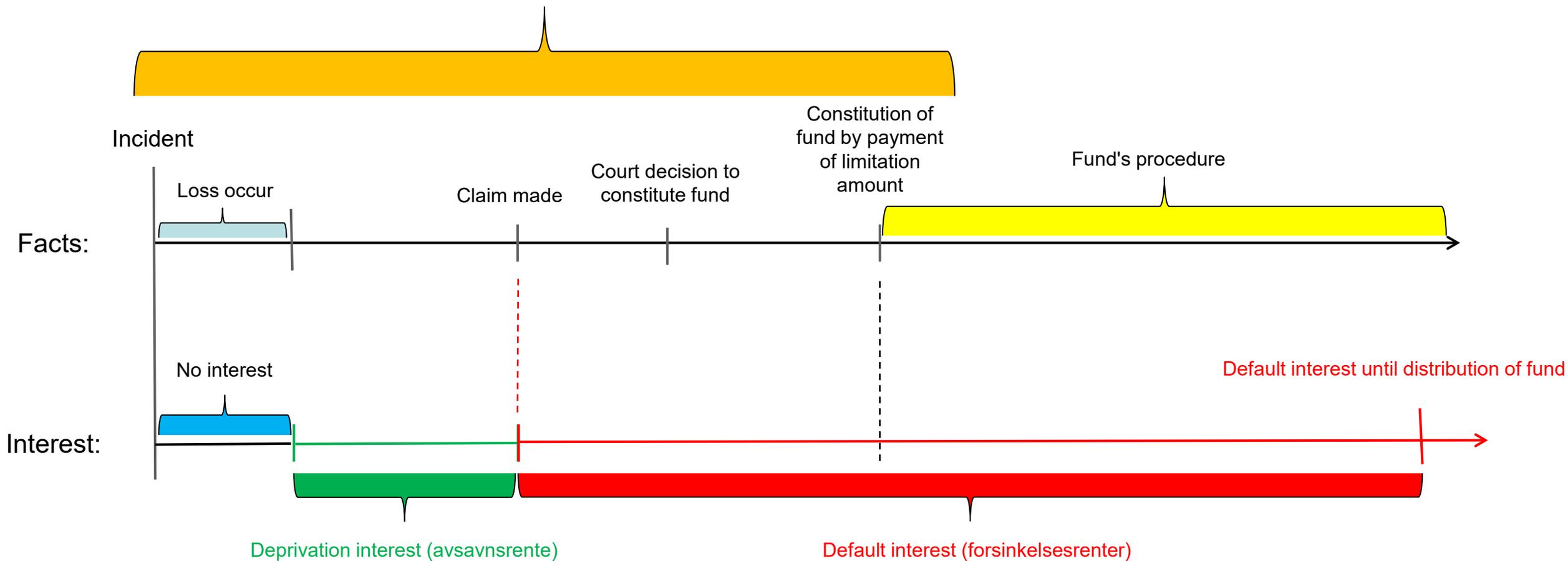
Distribution of the "fund"

- Backdrop: NMC s. 232 – the global fund consists of two parts;
 - a. "**Limitation amount**" (based on tonnage) and
 - b. "**Interest component**" (default interest from incident until constitution)
- HR-2018-1260-A "Full City I": Shall dividends on principle claims (without interest) be calculated from only the "limitation amount" or shall also the "interest component" be included in the distribution basis
- Claimant: Injured party entitled to full compensation. The "fund" is the sum of the limitation amount and interest component. The constituted fund must be distributed proportionately
- Owner: Entitled to limit pursuant to substantive rules in NMC chap. 9. Cannot be diluted by procedural rules in chap. 12. NMC s. 176: Only the liability amount is to be distributed. The interest component shall cover applicable interest on the dividends
- Supreme Court: As a starting point claimant is entitled to full compensation, but the right to limit liability alters this starting point materially. Undisputed that owner may limit liability, irrespective of whether limitation fund is constituted
- Held: Creditors' dividends are only to be calculated from the amount allocated under NMC s. 232 litra a. the "liability amount". Amounts allocated for payment of interest under litra b. ("interest component"), shall not be included in the distribution base. This amount is exclusively allocated for payment of interest

Time-line: Calculation of interest

1. Normally a number of losses occur: It is necessary to consider (i) when each loss occurred, (ii) when the individual claims were made (default interest), and (iii) whether there in the intervening period was basis for deprivation interest

2. Interest will then be calculated on the limited principal loss amount (i.e. the dividends) for each individual loss



Deprivation interest – "interest" or "damages"

- In LB-2015-174299 "Full City I", the Appeal Court held that the claimant could claim deprivation interest in tort
- Owners: If the claim is based in torts, then it is subject to limitation as other tort claims, i.e. not fall within the interest exemption in NMC s. 173 no. 6
- Appeal Court held that NMC s. 173 no. 6 applies under any circumstances with respect to interest, irrespective of the basis for the interest
- Basis for calculating deprivation interest:
 - Shall as a starting point reflect claimant's actual loss
 - If no proof of actual loss, ordinary market interest (2,5%)
- As a result of the Court's findings, Norway did in 2021 adopt new rules for state claims, ref. Norwegian Pollution Act s. 76, second paragraph: Market interest + 4% (Prop. 87 L (2020-2021) p. 10-11)



Calculation of claimable loss – restitutio in Integrum?

- General rule in tort: The injured party is entitled to full compensation, i.e. to be put in the same position as he would have been in but for the tortious act (restitutio in integrum). Economic advantages and/or reduced expenses shall be deducted
- This does not apply for specific types of claims made by the state in respect of for instance oil pollution clean-up operations, ref. LB-2015-54634 "Server I" and costs for Coast Guard vessels
- Owner accepted to cover all extraordinary expenses, i.e. expenses incurred due to the relevant incident, but disputed to cover expenses that the state would have incurred regardless of the incident
- Appeal Court: The question governed by ordinary tort principles. Decisive whether the relevant expenses were incurred as a result of the incident in question, and not whether they would have been incurred irrespective to protect another state purpose
- More convincing arguments made by the state: Incident related operations temporarily remove state assets from ordinary objective. The latter objective will need to be met at a later stage and may thus involve increased costs for the state. If the latter may be proven, (better) legal basis for the claim

The Lugano Convention and limitation funds

- HR-2007-2066-U General Grot case
- 02.03.07 arrest of vessel in Norway to secure collision claim. 31.01.07 owners sued in France and 07.03.07 limitation fund constituted in France according to the 1976 Convention
- Main issue whether constitution of a fund in France with retroactive effect prevented arrest in Norway
- Pursuant to the NMC s. 178 only a limitation fund constituted in accordance with corresponding provisions (as in Norway) of another Convention State would prevent arrest
- Since Norway at the time was party to the 1976 Convention as amended by the 1996-protocol, only a 1976 Convention limitation fund constituted of behalf of a party domiciled in a 1976 Convention state would prevent arrest. Thus, the NMC did not prevent arrest
- However, the Lugano Convention applied and according to art. 26 a judgment made in a convention state shall be recognize in another convention state
- Under French law arrest would be barred and since the constitution of a limitation fund was regarded as a judgment under art. 25, the arrest had to be revoked

Concluding remarks

- Difficult to conclude that the rules as such do not provide sufficient predictability when the legislators never intended to exhaustively regulate every question and assumed issues would need to be settled by the courts
- On the other hand reason to note that:
 1. The constitution of limitation funds have maybe produced an unforeseen number of cases
 2. The number of cases have further resulted in an unexpected prolongation of the fund procedures
 3. Judgments only provide answers to individual questions, and some have been criticised
 4. The overall process is time-consuming and costly for all parties
- Maybe the question should rather be whether it is time for the legislators to revisit the procedural fund rules as a whole



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