President's Message

From Licence to Licence to Licence Points? (Yet Another Revolutionary Idea)

The Oxford English dictionary has two main definitions for the noun "licence". The first reads as follows: "*A permit from an authority to own or use something, do a particular thing, or carry on a trade (especially in alcoholic drinks)*".[1] The second defines the noun licence as "*[F]reedom to behave as one wishes, especially in a way which results in excessive or unacceptable behaviour*".

Let us get straight to the point: in international arbitration, it seems that more and more occurrences falling under the second definition flow from activity resulting from the first. Indeed, the licence to practice international arbitration (well, actually, none is needed but the author is indulging in artistic licence) all too frequently leads to behaviour that would, as a matter of general consensus, be characterised as "*excessive or unacceptable*".

Yes, oh reader, this President's Message is yet another lament about the uncivility to which arbitration practitioners sometimes stoop by way of endless procedural shenanigans. But, oh reader, bear with us, for this President's Message, instead of wailing, actually proposes a revolutionary remedy that is both devilishly simple and fiendishly efficient.

Allow the author's mind to wander, perhaps even meander. There is nothing wrong with that. On the contrary, how many of the world's most brilliant ideas and most ground-breaking inventions were the brainchild of daydreams, felicitous yet unexpected mental associations, even happenstance and serendipity? Think of Newton's laws of gravity – the fall of an apple changed the course of physics. Without the apparently random ramblings of Bertha Pappenheim (aka "Anna O."), there would be no Freudian psychology. The discovery of penicillin was fortuitous. Even Reese's Peanut Butter Cups® are the happy by-product of a collision between two sweets-loving pedestrians![2] Well, the Revolutionary Idea that you, reader, are about to discover, took shape in a traffic jam.

Yes, a traffic jam. More precisely, a traffic jam on a French road last November, caused by a group of "*gilets jaunes*" – the yellow vests (who presumably need no introduction in these lines). Sitting at the wheel,

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1 The portion in brackets is (regrettably?) without relevance for this President's Message.

2 If the script of particularly vacuous a 1970s'television advertisement is to be believed.

alternating between sympathy for (some of) the demonstrators' motives, admiration for the way ordinary folk were expressing long-repressed exasperation and grumbling about the fact that life is too short to be wasted in road congestion, the author began in his mind to braid together two apparently unrelated trains of thought.

The first train of thought was the author's home-grown armchair variety of socio-political musing. It went along the lines of something like this: "*Yes, I understand these people. Yes, if I were in their shoes I'd be fed up as well. Yes, of course they have a constitutional right to demonstrate.* (This particular bunch of *gilets jaunes* was admirably peaceful.) *But what is the cost of all this? What of the shopkeepers whose pre-Christmas weekends are being ruined? And by the way, doesn't blocking the road constitute a traffic offence? And if so, is it conceivable that if anyone gets charged with that offence, they would have points taken off their driving licence even if they're not actually driving?*" (And so forth…)

The second train of thought was a feeling of numbness[3], not of the kind due to the jumble of cars blocking a roundabout nearby a shopping centre, but rather the heartfelt irritation of an arbitrator who was grappling with the latest of what felt like an endless round of procedural objections, applications, motions, protests and requests exchanged between egregiously querulous counsel. The worst part was that the hearing was approaching, and by then that the advance towards the arbitrators' fees had been almost entirely gobbled up by the inordinate number of hours that they had already clocked resolving kindergarten-level procedural clashes (in addition to dealing with the usual matters that transpire in any arbitration up to the hearing). Worse, the arbitrators had spent so much time rendering procedural orders in the six or eight weeks before the hearing that their personal preparation for the hearing itself was suffering – there are after all only 24 hours in each day.

Then *Eureka*! What was happening on the road combined, in a Damascene flash, with what was going on in the author's mind! There it was, the Revolutionary Idea… *Procedural Licence Points*! The cure is here: Transpose licence points for drivers' licences to procedural licence points in arbitration!

Consider, reader, the simplicity of the scheme!

We all know that, in many countries, ignoring a red light or transgressing a speed limit (up to certain threshold, beyond which it is *adieu* to the driver's licence) results in points being deducted from an individual's

[3] The first word that came to the author's mind was stronger. However, the author's mother would disapprove his uttering it in public, not to speak of committing it to print.

driver's licence. Depending on the gravity of the offence, the driver loses one point, three points, ten points, etc. out of a given "capital" of points. Expend the capital – and your driver's licence is revoked for a time that is predefined by a regulatory schedule. Good behaviour over a subsequent predefined time results in the point capital gradually being reinstated. This scheme is sensible. It is predictable. It rewards commendable conduct and punishes reprehensible ways. Importantly, it is educational, in that it does not result in automatic forfeiture of the driver's licence. Instead of a thrashing, it is a sharp slap on the wrist to the beat of a wagging index finger.

Let us apply these principles to the second definition of "licence" cited above, namely "*freedom to behave as one wishes, especially in a way which results in excessive or unacceptable behaviour*", as encountered in international arbitration. This "*excessive or unacceptable behaviour*" is well-known. It can consist in weekly eight-page long letters, brimming with self-righteous indignation, complaining of the opposite party's dastardly ways (for instance, the opposite party had the cheek to request a 24-hour time extension to file its Statement of Defence). To take another example, it can consist in a 780-page long Redfern Schedule allegedly "summarising" 250 requests for document production.[4] Interminable and sterile salvos of recriminations on whether a party complied with procedural orders are another favourite expression of "*excessive or unacceptable behaviour*". Procedural licence (within the meaning of the second definition) can also give birth to three exchanges of emails and/or letters per day over the course of two weeks because the parties cannot agree on a "script" for a site visit.[5] The structure and rules of hearings are also fertile ground. Worst of all, endless requests for supposedly "urgent" interim relief constitute perhaps the most time-consuming form of procedural licence (within the meaning of the second definition).

Oh reader, do not get us wrong! It is of course the basic function of any arbitral tribunal to deal with procedural matters as they arise. Arbitrators are selected not only for their knowledge of a given law or area of the law or for their experience in a certain sector; their skills in dispute management are at least as important. Thus, to put it bluntly, they are paid not only to render awards on the merits, but also to provide and enforce the procedural framework that will lead to that award in a fair and efficient way.

So, what then is the connection between this and the licence points?

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4 This is no invention. The author cites this example from memory. The numbers of pages and document production requests may not be accurate to a single digit, but they are correct with a margin of error of no more than 10 or 20.

5 This is another example taken from one of the low points in the author's arbitrator career.

It is axiomatic that the advances towards the arbitrators' fees cover the part of their job consisting in case management. However, that part of their mission should not degenerate into arbitrators having to resolve, at their own expense, procedural disputes that are licentious (pardon the pun). The words "*at their own expense*" are important here. The author circles back to his mind-wandering among the *gilets jaunes*: the problem was that the parties' procedural antics had taken so much time that, on the eve of the main hearing, there was practically nothing left of the advance to pay the remaining substantive work; and the arbitral tribunal was behind in its hearing preparation.

Hence the solution: a "procedural points capital" for each party to use as it sees fit for procedural requests, motions, applications, objections, etc. For example, issues relating to agreeing on terms of reference and the procedural rules of the case, to normal document production, to site visits, to unexpected difficulties such as the unavailability of a witness due to illness or legal obligations, etc. are included in this capital, which would be, say, 10 points at the start of the proceedings. That is a "procedural licence" within the meaning of the first definition cited above. By contrast, "procedural licence" within the meaning of the second definition, viz. unreasonable procedural conduct, results in a *deduction* of points from that capital. The number of points deducted will depend on the degree of unreasonableness and whether the unreasonable party is a recidivist.

The most important feature is that, once a party's procedural points capital is exhausted, that party will have to *pay to play*. Indeed, a schedule of fees would set out the additional advance that this party will have to pay for its next procedural requests to be considered at all. In other words, and to use rather colloquial language, the procedurally-minded party will have to "put its money where its mouth is". Parties will need to think twice before making procedural objections, requests, motions, etc. and will need to manage their procedural capital intelligently.[6]

Ah… but who is to determine what is "reasonable" – and is thus included in a party's procedural points capital – and what is not? Which arbitrator will have the courage to tell a party, "*You are being unreasonable, I'm taking two points off your procedural capital*"? And can we really picture an arbitral tribunal advising a party that, because that party's procedural points capital is exhausted, it will have to pay an additional advance for any new procedural motion to be considered at all? As for institutions, can they really be

[6] Perhaps this system sounds far-fetched, even ridiculous. But is it? Is it so different from the chess-clock system in hearings, which also forces parties to manage "their" hearing time intelligently?

expected to play that role? And who can say that this or that procedural excess carries a penalty of one, or two, or three or more points off a party's procedural capital? Finally, what if a party has exhausted its procedural points capital but later has an entirely justified and urgent issue that requires immediate attention: in that case can one really answer, "*Well I'm afraid you didn't pay!*"[7]

These difficulties may seem insuperable, but in truth the answer is easy: artificial intelligence! Yes: let the procedural history be fed into intelligent software, let that software assess the reasonableness of procedural motions; let that software perhaps warn a party that a given motion is borderline in terms of licence (within the meaning of either of the two definitions above) and spell out the potential consequences in terms of procedural points; let that software calculate each party's procedural capital continuously thereby ensuring maximum transparency. Reader: you may say, "*Is that possible? How can it be done?*" The author's unsophisticated answer to that last question is: "*With technology that was vastly inferior to the basics of today's average smartphone, we sent men to the moon!*"

So, what are we waiting for? Let's get working on this Revolutionary Idea now!

(And let us not forget to thank the *gilets jaunes* for their unwitting contribution to modern arbitration.)

ELLIOTT GEISINGER

SAVE THE DATE

2019 ASA Arbitration Practice Seminar, Vietnam
24 May 2019 – 26 May 2019

ASA General Meeting & Conference 2019, Bern
13 September 2019

For more information see www.arbitration-ch.org

[7] Some readers may have recognised a famous line from a no less famous Monty Python sketch.