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Chapter 17

"Redress": A Remedy for the Limits of Traditional Remedies

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1. THE ISSUE

Sometimes parties — or dispute resolution bodies — are faced with cases in which the traditional legal remedies do not provide an appropriate solution. This is the case where, as a result of a breach of its obligations by one party, another party finds itself in a situation which can be properly remedied neither by specific performance nor by the award of damages. Is this a fatal "impasse"?

The answer is no. As arbitration in yacht racing shows, an alternative relief exists and has indeed become a generally accepted solution in that environment. The solution is the concept known as "redress".

2. THE CONCEPT OF REDRESS

Redress is defined as being: "*aid* (. . .)"; "*Correction or reformation of something wrong* (. . .); *repair* (. . .); *cure* (. . .); *set upright again* (. . .); *re-establish* (. . .); *restore to proper order or a proper state* (. . .); *rectify (injury, a wrong, etc.)* (. . .)"¹ We believe that redress can be translated in French as "*redressement*".

The purpose and effect of redress is to put the party which has suffered an injury² in the situation in which it would have been in the absence of the breach. In other words, it answers the following question: where would the parties be had the breach not been committed? The answer to this question will dictate the relief to be granted.

As the example which will be outlined hereunder will show, redress innovates by, in essence, creating *a posteriori* a new set of facts. To that effect, the competent dispute resolution body will make the decision that it considers just and equitable. This gives considerable

¹ Shorter Oxford English Dictionary, Fifth Edition, Oxford University Press, 2002.

² In its English legal meaning: wrongful action or treatment.

power to the arbitrators but overcomes the limits which are inherent in ordinary remedies.

It is quite legitimate to wonder whether it is appropriate to go that far and give so much discretion to arbitrators. The question might be answered by another one, namely whether the outcome of the case would be more equitable with or without applying the redress concept?

3. REDRESS AND LOSS OF A CHANCE

Redress shows analogies with what is known as the "loss of a chance theory," which is gaining ground in the legal environment.³

The loss of a chance approach is not, *per se*, a remedy, but rather a way to assess the prejudice which has been suffered. It amounts to calculating the damages by proceeding as follows: (i) first, assessing, in absolute terms, the highest possible prejudice that the relevant party may have suffered in the case at hand; (ii) second, assessing the degree (percentage) of likelihood ("chance(s)") that, in the circumstances, the grounds on which the claim is being made have been the cause of such prejudice and (iii) third, calculating the damages to be awarded by applying that percentage (*i.e.*, (ii) above) to the total (highest possible) damages (*i.e.*, (i) above).

The similarity between redress and the loss of a chance theory is that, in both cases, the reasoning is hypothetical. Indeed, in both

³ See in this respect Art. 7.4.3 paragraph 2 of the UNIDROIT Principles "Compensation may be due for the loss of a chance in proportion to the probability of its occurrence". See also Thomas Kadner Graziano "La "perte d'une chance" en droit privé européen: "tout ou rien" ou réparation partielle du dommage en cas de causalité incertaine", in *Les causes du dommage*, Chappuis/Winiger (éds.), Schulthess, 2007, pp. 217ff, 222, 228ff, 247, 248; Nils Jansen "The idea of a lost chance", *Oxford Journal of Legal Studies (OJLSt.)*, 1992, p. 271; Gerald Mäsch "Chance und Schaden", Tübingen 2004; idem; Gredd v. Scott "Much about nothing? Entscheidung des House of Lords vom 27. Januar 2005, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2006, p. 656; idem: Anmerkung zu BGH 16.6.2005, *JZ* 2006, p. 198, 201; Christoph Müller "La perte d'une chance", Bern 2002; idem: "La perte d'une chance", in Bénédicte Foëx / Franz Werro (éds.), *La réforme du droit de la responsabilité civile*, Zurich 2004, p. 143; Hans Stoll "Schadensersatz für verlorene Heilungschancen vor englischen Gerichten in rechtsvergleichender Sicht", in E. Deutsch / E. Klingmüller / J.J. Kullmann (éds.), *Festschrift für Erich Steffen*, Berlin / New York 1995, p. 465; Luc Thévenoz "La perte d'une chance et sa réparation", in Christine Chappuis / Guy Chappuis / Pierre Tercier / Luc Thévenoz / Franz Werro (éds.), *Quelques questions fondamentales du droit de la responsabilité civile: actualités et perspectives*, Berne 2002, p. 237; François Perret "La jurisprudence arbitrale peut-elle donner une nouvelle chance à la théorie de la perte d'une chance ?", in Rita Trigo Trindade / Henry Peter / Christian Bovet, *Economie Environnement Ethique - De la responsabilité sociale et sociétale*, Liber Amicorum Anne Petitpierre-Sauvain, Zurich 2009, p. 289.

approaches, the decision-making body is asking itself how things would likely have been in the absence of the facts of which the claimant has been the victim. Also, in both cases, the underlying concern is to endeavour to end up with an outcome which is as equitable as possible, a result which, by applying traditional schemes, would not – or could not – be achieved.

4. A REMEDY COMMONLY USED IN YACHT RACING

The yacht racing experience will help to clarify the concept. We will first outline the provision on the basis of which the sailing community operates, before giving an example in which redress has been applied, taking into consideration a case which occurred during the 2007 edition of the America's Cup.

4.1. The Rule

The relevant rule is to be found in the Racing Rules of Sailing ("RRS") which are periodically published by the International Sailing Federation ("ISAF"), the international authority for the sport.⁴ Under the title "Redress," Rule 62.1 RRS reads as follows:

62.1 A request for redress or a protest committee's decision to consider redress shall be based on a claim or possibility that a boat's score in a race or series has, through no fault of her own, been made significantly worse by

- (a) an improper action or omission of the race committee, protest committee or organizing authority;
- (b) injury or physical damage because of the action of a boat that was breaking a rule of Part 2 or of a vessel not racing that was required to keep clear;
- (c) giving help (except to herself or her crew) in compliance with rule 1.1; or
- (d) a boat against which a penalty has been imposed under rule 2 or disciplinary action has been taken under rule 69.1(b).

(. . .)

⁴ The RRS are revised and published every four years by ISAF. The edition quoted here is that of the years 2005 through 2008.

In substance, redress can thus be granted if the following conditions are met:

- (i) although there has been "no fault of her own,"
- (ii) a boat's score in a race or series of races has been made significantly worse by:
 - an improper action or omission by the race officials; or
 - the breach of a rule by another competitor.

4.2 The Consequences

If both conditions are met, the decision-making body is entitled to "redress" the outcome of the race, *i.e.* to order whatever is appropriate to restore things as they would have been in the absence of a breach or improper behaviour. As a matter of principle, redress is granted only if requested by the relevant party. Also, and obviously, the issue is dealt with only after having given all parties a chance to express their views.

4.3 An Example

During a regatta that took place in April 2007 in Valencia in the context of the 32nd America's Cup, one of the competitors, +39 Challenge (yacht ITA 85), alleged that another competitor, United Internet Team Germany (UITG, yacht GER 89), had breached sailing rules and that this had caused the masts of the two yachts to collide.⁵ As a consequence, ITA 85's mast broke in two places. ITA 85 was therefore unable to finish the race and lost the points that it would have most likely scored considering its position in the race when the incident occurred. Also, in the absence of an appropriate replacement mast, it had no alternative but to repair its mast, which meant that it

⁵ See the 32nd America's Cup Jury Decision ACJ025 issued on 6 April 2007 published in Henry Peter (éd.) / Bryan Willis / Gabrielle Kaufmann-Kohler / Graham McKenzie / Henry Menin / David Tillet. *THE 32ND AMERICAS CUP JURY AND ITS DECISIONS*, Kluwer Law, 2009 (hereinafter "32ND AMERICAS CUP JURY"). Other cases where redress was claimed (but not granted) during the 32nd edition of the America's Cup are: ACJ009: a request for redress regarding spinnaker sheet entanglement with an Umpire boat; ACJ010: a request for redress regarding an alleged error by the Race Committee in calling a very close finish of a race; ACJ016: a request for redress regarding an alleged error by the Regatta Director in how he applied the rules in resolving a tie; ACJ027: a request for redress regarding an alleged action by the Organising Authority in the installation of television equipment on a boat which caused the failure of the electronic system on the boat; ACJ028: a request for redress regarding an alleged error by the Race Committee in calling whether a boat had finished properly after completing her penalty at the finishing line.

would be unable to take part in the forthcoming regattas with the same degree of competitiveness. +39 Challenge therefore filed a claim before the Jury⁶ requesting redress pursuant to the abovementioned Rule 62.1 of the RRS.

The Jury found that UITG had broken two RRS Rules; that serious damage had occurred; that, as a result, +39 Challenge's score had been made significantly worse and that, as this was through no fault of her (+39 Challenge) own, the requirements for awarding redress were met.

The redress awarded was:

- (i) +39 Challenge is to be awarded points for place 5 in Race 3 of Act 13. No other yachts' scores are to be affected.
- (ii) Two bonus points are to be awarded to +39 Challenge at the conclusion of Act 13 (unless they earn more through their own results). No other yachts' scores are to be affected.
- (iii) With regard to the matter of the damaged mast, the Jury considered that the fairest arrangement for all Competitors was to allow +39 Challenge to accept the offer by UITG of a Version 5 mast (. . .).⁷

What the Jury endeavoured to achieve was, to all possible extents to put +39 Challenge back in the position in which it would (most likely) have been in the race and series of races had it not been for the breach of the RRS Rules by UITG.

Point (i) of the decision regards the race during which the infringement occurred. In that respect, the Jury granted to +39 Challenge the points that it would have likely scored had it been able to finish the race. The number of points was assessed by the Jury on the basis of those which, in its reasonable discretion, it deemed +39 Challenge would have obtained taking into account the performance of +39 Challenge in previous regattas and its position during the relevant race. Undoubtedly this was not an easy task for the Jury.

Point (ii) of the decision is not retrospective but prospective: two additional bonus points were awarded to +39 Challenge in order to compensate it for the loss of competitiveness that it had likely suffered and that would persist during the forthcoming races because of the damage caused to its mast, thus affecting its final ranking. This was, however, only done provided that +39 Challenge would not have, at

⁶ The dispute resolution body set up during the 32nd edition of the America's Cup.

⁷ ACJ025 decision (see footnote 5 above) paragraph 59.

the end of the series, "earn[ed] more [points] through its own results." In other words, no double dip.

Finally, in point (iii) of the decision, the Jury authorised +39 Challenge to use a mast belonging to another competitor. This part of the award was necessary because mast replacement was not allowed under the applicable rules. That point of the decision was thus aiming at enabling +39 Challenge to possibly resume racing with no disadvantage during the following races.⁸

Interestingly, the Jury decided that the score of all other yachts would not be affected. Although mathematically illogical, the aim was to avoid withdrawing points from other – innocent – yachts.

The redress granted by the Jury to +39 Challenge was thus composed of 3 parts (remedies). Each of them was carefully thought through by the Jury and could have been granted separately and not necessarily cumulatively. We believe that none of them belongs to the type of remedies applied in other sports, let alone in classical (and in particular commercial) arbitration.

5. CONCLUSION

Recourse to redress enables decision-making bodies to remedy the limits inherent in traditional remedies. It is normal practice in "sailing arbitration" where it provides equitable solutions in sometimes very controversial and important cases. Why not in commercial arbitration?

⁸ This eventually proved impossible to achieve since it required the approval of all other competitors; some objected.