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ICCA 2014. Standard of Proof: A Plea for Precision or an Unnecessary Remedy?

Francisco Rodriguez (Akerman LLP) · Thursday, April 10th, 2014

In the early stages of an international arbitration, the arbitral tribunal should make sure that the parties understand the standard of proof that applies to each claim in the arbitration and identify the party that has to satisfy this burden. The decision on the standard of proof should also be incorporated as a substantive decision in the final award.

This plea for more precision in arbitration was made by the first panel of the "Precision Stream" at the 2014 conference of the International Council for Commercial Arbitration ("ICCA") being held in Miami, Florida. The panelists were Jennifer M. Smith of Baker Botts in Houston, Richard Kreindler of Cleary Gottlieb Steen & Hamilton in Frankfurt, and Anne-Veronique Schlaepfer of Schellenberg Wittmer in Geneva. The moderator was David Brynmor Thomas, a counsel and arbitrator based in London.

The Panel, which was titled "Proof: A Plea for Precision," argued that the parties' failure to fully understand the standard to which their claims are subjected has the potential and has in fact undermined the integrity and fairness of the arbitration process. The panelists focused on the different understandings of the standard of proof across different legal cultures and systems to show the need for precision in this area. Ms. Smith explained that common law systems are very familiar with the standard of proof applicable in civil cases, which is predominately a "preponderance of the evidence" standard. Parties have to prove that their factual assertions are more likely than not truthful and sufficient to satisfy each element of their claims.The system is different in civil law countries where the concept of a standard of proof is, according to the Panel, foreign and not understood. Given this difference in legal cultures and traditions, international arbitrations are often riddled with uncertainty about the standard of proof that they have to satisfy to successfully prove their claims.

As is usually the case, this novel proposition became less attractive as the Panel delved into the subject of implementation. It soon became clear that a determination of the standard of proof would require the analysis of the proverbial and always controversial questions about the applicable law and the legal nature of the issue – the insatiable quest to categorize an issue as procedural or substantive. These questions forced the Panel to extend the scope of their plea for precision and argue that the issue of standard of proof may be stipulated in the arbitral clause – a proposition that I am sure made the transactional lawyers in the audience squirm.

The resistance of the arbitration community to impose another pseudo- requirement in the

international arbitration process – or the drafting of arbitral clauses – was evidenced as soon as the Panel opened up the floor for questions. The members of the audience questioned whether there was a real standard of proof problem in international arbitration, and whether the differences in the standard of proof were in reality significant enough to require the suggested changes.

The strong views on both side of this debate reflect what is self-evident to every international arbitration practitioner. The international arbitration system is a hybrid process formed by a delicate balance between different legal cultures and systems. The system has done extremely well in ensuring that this hybrid nature does not create an unleveled playing field. But the arbitration community should resist the temptation to address differences in the systems that although important, are not essential to the dispute adjudication process. The goal is not to address every difference between the systems – as such undertaking would be almost impossible and doomed to fail, but to bridge the gap between the legal issues that compromise the integrity of the adjudicative process. Therefore, before the plea for precision in the standard of proof is granted, the arbitration community must determine whether the perceived difference in the standard of proof in civil and common law systems is sufficiently significant to undermine the adjudication process. As Ms. Schlaepfer suggested, this difference may be significant in cases where there are claims of malice, corruption, or quasi-criminal conduct, which are generally subjected to a higher standard of proof. However, this difference does not seem to be a problem in the typical investment or contractual arbitration. Judging from the audience's reactions and my own experience, it seems that the standard of proof is one of those issues in which the perceived differences are differences in form and not in substance. Irrespective of whether the applicable standard is called "preponderance of the evidence" or any other balancing standard, the role of an arbitral tribunal is to look at the weight of the evidence and determine which side is correct. This is a task that can be performed by arbitrators from civil or common law backgrounds in most cases. Indeed, in most cases, this analysis is not affected by the standard.

Without a doubt, it is a laudable goal for every tribunal to issue an award explaining its reasoning and the legal framework applied to the factual findings, but I would be careful to take this laudable goal any further unless it is really warranted by extraordinary facts and claims.

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