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I – JULGADO

U.S DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

13 Civ. 9044 (JGK).

J. 26 November 2014

Landmark Ventures, Inc. v. Stephanie Cohen and the International Chamber of Commerce

In a 26 November 2014 decision in *Landmark Ventures, Inc. v. Cohen*, the U.S. District Court for the Southern District of New York dismissed a lawsuit brought by a plaintiff financial services company against the International Chamber of Commerce (the "ICC") and the sole arbitrator who had presided over an ICC arbitration between an Israeli company and the financial services company[1]. In conjunction with the dismissal, the court sanctioned counsel for the plaintiff, ordering counsel to pay US$20,000 to the defendants' counsel[2].

The plaintiff, Landmark Ventures, Inc. ("Landmark"), is a financial services company incorporated and doing business in New York[3]. Landmark signed a letter of engagement (the "Agreement") to provide strategic banking and financial advisory services to InSightec, Inc. ("InSightec"), an Israeli developer of medical devices[4]. Under the terms of the Agreement, Landmark was to assist InSightec in finding strategic investors and partners and would receive certain fees for these services[5]. The Agreement was subject to New York law and contained an arbitration clause that called for the resolution of all disputes relating to the Agreement under the rules of the ICC[6].

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1 *Landmark Ventures, Inc. v. Cohen*, nº 13 Civ. 9044(JGK), 2014 WL 6784397 (S.D.N.Y. Nov. 26, 2014) [hereinafter *Cohen*].
2 *Id.* at 7.
3 *Id.* at 1.
4 *Id.*
5 *Id.*
6 *Id.*

A dispute arose between Landmark and InSightec over "minimum strategic partnership" fees allegedly owed to Landmark, following a third-party company's investment in InSightec[7]. The dispute hinged on an interpretation of the terms of the Agreement[8]. In July 2012, Landmark submitted a Request for Arbitration to the ICC, seeking US$450,000 in allegedly unpaid fees from InSightec[9]. Following the parties' failure to jointly select an arbitrator, the ICC appointed Stephanie Cohen (the "Arbitrator"), an independent arbitrator based in New York, as the sole arbitrator presiding over the case[10]. At the outset of the arbitration, the Arbitrator and the parties agreed to and signed the terms of reference, which outlined the procedure to be followed and the applicable law and identified the issues and the seat as New York[11].

In October 2013, the Arbitrator issued her award, finding no ambiguity in the terms of the Agreement and denying Landmark's claim in its entirety[12]. The Arbitrator also awarded InSightec more than US$200,000 in costs[13].

In November 2013, Landmark filed a suit against the Arbitrator personally and the ICC (the "Liability Action")[14]. Landmark alleged that procedural decisions taken by the Arbitrator, such as decisions on extensions of time, expert witnesses, and written submissions, unfairly prejudiced Landmark[15]. Landmark also alleged that the Arbitrator incorrectly assessed the arbitration costs and erroneously interpreted the Agreement[16]. Landmark asserted that the ICC should have corrected the award and improperly assessed additional legal fees and costs against Landmark[17]. In January 2014, Landmark filed a second action (the "Vacatur Action"), seeking to vacate the award on nearly identical bases as those alleged against the Arbitrator and the ICC in the Liability Action[18].

Upon initiation of the Vacatur Action, the Arbitrator and the ICC requested leave to move for dismissal of the Liability Action on the basis that Landmark's claims were barred by its contractual agreement that the Arbitrator and the ICC would not be subject to liability[19]. In that same request, the Arbitrator and the ICC notified the court that the law was so clear on arbitral immunity within

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7 *Id.*
8 *Id.*
9 *Landmark Ventures, Inc. v. InSightec, Inc.*, nº 14 Civ. 0233(JGK), 2014 WL 6683677, at * 2 (S.D.N.Y. Nov. 26, 2014) [hereinafter *InSightec*].
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 5.
14 *Cohen*, nº 13 Civ. 9044(JGK), 2014 WL 6784397, at *2 (S.D.N.Y. Nov. 26, 2014).
15 *Id.*
16 *Id.*
17 *Id.*
18 *InSightec, Inc.*, nº 14 Civ. 0233(JGK), 2014 WL 6683677, at * 6 (S.D.N.Y. Nov. 26, 2014). The U.S. District Court for the Southern District of New York denied Landmark's request for vacatur of the award and granted InSightec's cross-petition for confirmation of the award also on 26 November 2007, the same day that the court dismissed the Liability Action and ordered sanctions. *See generally InSightec*, 2014 WL 6683677.
19 *Cohen*, 2014 WL 6784397, at *2.

the U.S. Court of Appeals for the Second Circuit[20] that courts in the past had ordered sanctions against plaintiffs bringing similar claims[21]. The parties and the court extensively discussed this law at a premotion conference[22]. Following the conference, the Arbitrator and the ICC sent a notice to Landmark, notifying it of their intent to seek sanctions if Landmark continued the action[23]. Landmark refused to dismiss the complaint without prejudice, and the Arbitrator and the ICC moved for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure[24] and for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure[25].

In assessing whether the action should be dismissed, the court noted that the Agreement between Landmark and InSightec included an arbitration clause that incorporated the ICC Rules by reference[26]. Under Article 40 of the ICC Rules, neither arbitrators nor the ICC shall be "liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by law"[27]. The court therefore concluded that Landmark contractually agreed not to sue either the Arbitrator or the ICC for acts done "in connection with the arbitration"[28]. The court also found that "under well-established Federal common law" arbitrators and arbitral institutions have "absolute immunity" for conduct in connection with an arbitration[29]. The court concluded that all of the acts alleged by Landmark that gave rise to liability were done "in connection with the arbitration" and that the Arbitrator and the ICC were therefore "absolutely immune from suit" by both the contractual agreement and arbitral immunity doctrine[30]. As a result, Landmark's suit was found to be "a clear attempt to circumvent the exclusive means to challenge an arbitration award and precisely the type of action an arbitral immunity was

20 The United States Court of Appeal for the Second Circuit includes the district courts for Connecticut, New York, and Vermont.
21 *Cohen*, 2014 WL 6784397, at *2.
22 *Id.*
23 *Id.*
24 The Federal Rules of Civil Procedure apply to all civil actions in U.S. federal district courts. FED. R. CIV. P. 1. Rule 12(b)(6) allows a court to dismiss an action where the plaintiff has filed complaint but failed "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This provision allows courts to dispose of actions that are facially without merit at an early stage of the proceeding, before the extensive exchange of evidence. At this stage, the court must accept factual allegations contained in the complaint as true but need not accept a plaintiff's legal conclusions. *See Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the tenet that a court must accept as true all of the legal allegations contained in the complaint is inapplicable to legal conclusions").
25 Rule 11 of the Federal Rules of Civil Procedure allows a court to order "an appropriate sanction" against any party, counsel, or law firm that presents claims to the court for an "improper purpose" or that are "frivolous" in light of established law. FED. R. CIV. P. 11(b)(1)-(2), (c)(1). A party that requests sanctions faces a high burden of establishing that it is "clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands." *Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp., Inc.*, 186 F.2d 157, 167 (2d Cir. 1999). Appropriate sanctions are those that would "suffice [...] to deter repetition of the conduct or comparable conduct by others similarly situated" and "may include [...] an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." FED. R. CIV. P. 11(c)(4).
26 *Cohen*, 2014 WL 6784397, at *3.
27 *Id.* (quoting Article 40 of the ICC Rules).
28 *Id.*
29 *Id.* at 4.
30 *Id.*

created to prevent"[31]. Finding no plausible claim against the Arbitrator or the ICC, the court granted the motion to dismiss the complaint[32].

In determining whether sanctions were warranted under these circumstances, the court explained that the standard for ordering sanctions under Rule 11 of the Federal Rules of Civil Procedure is a party's "objective unreasonableness"[33]. The court noted that Landmark was repeatedly put on notice by the Arbitrator and the ICC that the claims were barred by contract and the doctrine of arbitral immunity[34]. Landmark had decided to ignore these warnings and simply persisted in its case, despite even conceding at the argument on the motions that the law was so clear on this point that the court would be required to dismiss the case[35]. Finding the law clear and no valid argument to reverse existing law, the court concluded that Landmark's claims were frivolous[36]. In order to protect the important policy reasons behind the doctrine of arbitral immunity – that arbitrators and institutions perform their functions without fear of suit from disappointed parties – sanctions against Landmark's counsel were deemed to be warranted to deter repetition of such suits[37].

The court explained that its sanctions should be limited to what is sufficient to accomplish the goal of deterrence[38]. The court in its discretion can order payment of all or part of a party's legal fees and expenses as a possible sanction[39]. The sanctions should not, however, become simply a fee-shifting order. In this case, the court observed that the Arbitrator's and the ICC's legal fees were well in excess of US$100,000, far more than would be necessary to sufficiently deter future conduct[40]. The court therefore exercised its discretion and set US$20,000 as a reasonable sanction sufficient for deterrence against Landmark's counsel to be paid to counsel for the Arbitrator and the ICC[41].

II – COMENTÁRIO

The court's sanction order in *Landmark, Inc. v. Cohen* is consistent with U.S. court precedent in two ways: (A) arbitrators and arbitral institutions enjoy near absolute immunity under U.S. law and (B) U.S. courts have become increasingly willing to grant sanctions against parties and attorneys that bring

31 *Id.*
32 *Id.* at 5.
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 4, 6.
38 *Id.* at 6.
39 *Id.*
40 *Id.*
41 *Id.* at 7.

frivolous arbitration-related court proceedings. Each of these points is analyzed below.

A – ARBITRAL IMMUNITY IN THE UNITED STATES

As the court in *Landmark, Inc. v. Cohen* observed, arbitrators and arbitral institutions have "absolute immunity" in the United States[42]. This doctrine of "absolute immunity" rests on the notion that arbitrators act as the functional equivalents of judges, in their quasi-judicial functions, and should therefore be granted protections similar to those of judges[43]. Similarly, arbitral institutions have been likened to "courts of law"[44] that are "integrally related to the arbitral process" and therefore entitled to arbitral immunity[45]. Arbitral immunity has been said to be "essential to protect the decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants"[46]. As long as the arbitrator or institution is acting with its decisional role as arbitrator or institution, arbitral immunity will apply to protect the arbitrator or institution from liability[47].

Courts that have been asked to limit the doctrine of arbitral immunity have found few exceptions in which an arbitrator or institution can be held liable[48]. Generally, U.S. courts have only allowed an exception to the absolute application of arbitral immunity where an arbitrator or institution altogether fails to issue a timely award[49]. For example, in *Morgan Phillips v. JAMS/Endispute L.L.C.*, a party to an arbitration brought negligence claims against an arbitrator and institution after the arbitrator withdrew without cause and refused to issue an award to try to force the parties to settle[50]. The California Court of Appeals concluded that neither the arbitrator nor institution were shielded by

42 *Cohen*, 2014 WL 6784397, at *4.
43 *See Olson v. Nat'l Ass'n of Secs. Dealers*, 85 F.3d 381, 382 (8th Cir 1996).
44 *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1159 (10th Cir. 2007).
45 *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990).
46 *New England Cleaning Servs., Inc. v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999).
47 *See Pfannenstiel*, 477 F.3d at 1159 ("The key question, we believe, is whether the claim at issue arises out of a decisional act.").
48 *See* SARA ROITMAN, Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?, *51 B.C. L. REV*. 557, 579-581 (2010) (surveying the few circumstances where U.S. courts found exceptions to the doctrine of arbitral immunity); MICHAEL HWANG ET AL., Claims Against Arbitrators for Breach of Ethical Duties, *in Contemporary Issues in International Arbitration and Mediation* 225, 234-44 (Arthur W. Rovine ed. 2007 (surveying claims against arbitrators for alleged breaches of ethical duties).
49 *See, e.g.*, *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977) (denying arbitral immunity to an arbitrator that failed to timely issue an award and explaining that an "arbitrator's 'quasi-judicial' immunity arises from his resemblance to a judge ... Where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decisionmaking (good or bad), he loses his claim to immunity because he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties.").

In a few cases, U.S. courts have distinguished between claims for damages and claims for equitable relief, explaining that an arbitrator is immune to claims for damages but not for equitable relief. *See TransWorld Airlines, Inc. v. Sincicropi*, nº 93 CIV 3094 (CSH), 1994 WL 132233, at *2 (S.D.N.Y Apr. 14, 1994) (concluding that judicial immunity does not bar claims against an arbitrator for equitable relief). Not all courts have reached the same conclusion, however. *See, e.g.*, *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977) (rejecting a claim for injunctive relief against the arbitrators).
50 44 Cal. Rptr. 3d 782, 785 (Cal. App. Dep't Super. Ct. 2006).

arbitral immunity under those circumstances because an arbitrator's "failure to render an arbitration award is not integral to the arbitration process; it is, rather, a breakdown of that process"[51].

Parties have seized on the rationale behind this exception and frequently claimed that an arbitrator's or institution's alleged misconduct is a "nonjudicial act" outside of the arbitral process and therefore not protected by arbitral immunity[52]. U.S. courts have embraced a broad definition of protected "judicial acts," however, and refused to find exceptions to arbitral immunity in the majority of circumstances, including where a party alleges negligence[53], failure to comply with institutional rules or procedures[54], violation of the parties' agreement[55], failure to disclose a conflict of interest[56], that an arbitrator had no authority to resolve the dispute[57], and even corruption or fraud[58]. In many of these cases, just as in *Landmark, Inc. v. Cohen*[59], the courts have refused to allow a party to use an attack on an arbitrator as an additional means to challenge an award beyond the exclusive grounds allowed by the Federal Arbitration Act (the "FAA")[60]. For example, in *Wally v. General Arbitration Council of Textile & Apparel Industries,* the New York County court of first instance rejected defendant's claim that the arbitrator had committed fraud and explained that an allegation of fraud in procurement of the award should be brought pursuant to the FAA in a vacatur action, rather than as a "misconstrue[d]" action for arbitrator liability[61].

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51 *Id.*

52 *See, e.g.*, *Alexander v. Am. Arbitration Ass'n*, nº C 01-1461 PJH, 2011 WL 868823, at *3 (N.D. Cal. July 27, 2001) (rejecting plaintiff's attempt to characterize an institution's act as "nonjudicial" and noting that other plaintiffs have attempted the same tactic).

53 *See, e.g.*, *Olson v. Nat'l Ass'n of Secs. Dealers*, 85 F.3d 381, 383 (8th Cir. 1996) (rejecting a negligence claim against an arbitral institution).

54 *See, e.g.*, *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990) (rejecting a challenge where appellant alleged that the institution gave defective notice and constituted the tribunal improperly).

55 *See, e.g.*, *Thiele v. RML Realty Partners*, 18 Cal. Rptr. 416, 418 (Cal. App. Dep't Super. Ct. 1993) (affirming an institution's arbitral immunity even though the institution sent out an award that the parties had instructed should be kept confidential).

56 *See, e.g.*, *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126, 132 (Tex. Ct. App. 2003) (finding an arbitrator "immune from suit because the disclosure requirement was directly related to his function as an arbitrator").

57 *See, e.g.*, *Tamari v. Conrad*, 552 F.2d 778, 780-81 (7th Cir. 1977) (upholding arbitrators' right to arbitral immunity where respondent alleged liability because the arbitrators acted without authority).

58 *See, e.g.*, *Jones v. Brown*, 54 Iowa 140, 142-43 (Iowa 1880) (finding no exception to immunity where an arbitrator "conspired" with another arbitrator, without a regular meeting or the presence of the third arbitrator). *But see* Susan. D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 12-13 (2000) (nothing that, where a party alleges fraud, the award has been vacated, an arbitrator has been denied its fees, or, in a few circumstances, arbitrator liability has been found).

59 *Cohen*, nº 13 Civ. 9044(JGK), 2014 WL 6784397, at *4 (S.D.N.Y. Nov. 26, 2014) (finding the challenge to be "a clear attempt to circumvent the exclusive means to challenge an arbitration award and precisely the type of action an arbitral immunity was created to prevent").

60 *See Olson v. Nat'l Ass'n of Secs. Dealers*, 85 F.3d 381, 383 (8th Cir. 1996) (rejecting a liability claim against an arbitrator and institution and explaining that the decision "does not leave [plaintiff] without redress [because c] ourts can vacate tainted arbitration decisions").

61 165 Misc. 2d 896, 898 (N.Y. Sup. Ct. N.Y. Cnty. 1995).

As a result, conscious of policy concerns for preserving the integrity of the arbitral process and enforcing the limited means for challenging an arbitral award under the FAA, U.S. courts will afford near absolute immunity to arbitrators and arbitral institutions that face liability for damages[62]. Indeed, as long as an arbitrator's or institution's act is connected to the arbitral process, U.S. courts, as in *Landmark, Inc. v. Cohen*, will affirm the doctrine of arbitral immunity.

B – SANCTIONS FOR FRIVOLOUS ARBITRATION-RELATED COURT PROCEEDINGS

The *Landmark, Inc. v. Cohen* decision also reflects the increasing willingness of U.S. courts to grant sanctions against parties and attorneys that bring frivolous arbitration-related court proceedings. The need for a sanction regime that can compensate a winning party for its legal fees and expenses in the United States is, in part, due to the "American Rule" on payment of a party's legal fees and costs. In the United States, the losing party is not required to pay the attorney's fees and litigation costs incurred by the winning party, unless a statute, contract, or decisional authority provides otherwise[63].

Despite the "American Rule," U.S. courts have been reluctant to order sanctions in arbitration-related cases in the past due to the policy tensions between the goals underlying a strong pro-arbitration stance in the United States and a party's right to pursue challenges to arbitral awards and proceedings on limited grounds. In recent years, however, U.S. courts have expressed concern over the growth in frivolous arbitration-related court proceedings and parties that adopt a "never-say-die attitude" in arbitration[64]. Such frivolous proceedings not only abuse the dispute resolution process, but also inject additional time and costs into the arbitral process, undermining the goals of arbitration to provide parties with an alternative dispute resolution means that may be faster and cheaper than litigation and to alleviate congestion in the courts[65].

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62 Many other jurisdictions, such as Canada, Australia, Belgium, Germany, and Turkey, afford arbitrators and institutions qualified immunity, as opposed to the absolute immunity enjoyed by arbitrators and institutions in the United States. *See* FRANCK, *supra* note 58, at 33-40 (explaining express and implied qualified immunity in other jurisdictions). Certain jurisdictions, most notably in Arab countries, expressly or impliedly allow for arbitrator liability in certain circumstances. *See id.* at 40-47 (discussing jurisdictions with arbitrator liability).

63 *See Aleyska Pipeline Serv.Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (explaining the "American Rule" on fee and cost allocation). The sanction regime under Rule 11 is one example of an exception to the "American Rule." *Sw. Elec. Co-op., Inc. v. Int'l Bhd. of Elec. Workers, Local nº 702*, nº 11-CV-1047-DRH, 2012 WL 3705181, at *5 (S.D. Ill. Aug. 27, 2012). This system differs from the traditional allocation of costs in many other countries, where the winning party is generally entitled to payment of its costs and fees by the losing party. *See generally* Werner Penningstorf, "The European Experience with Attorney Fee Shifting", 47 Law & Contemporary Problems 37 (examining the different approaches to fee shifting in European countries). The sanction regime under Rule 11 is on example of an exception to the "American Rule." *Sw. Elec. Co-op., Inc. v. Int'l Bhd. of Elec. Workers, Local nº 702*, nº 11-CV-1047-DRH, 2012 WL 3705181, at *5 (S.D. Ill. Aug. 27, 2012).

64 *See, e.g.*, *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006), *abrogated on other grounds by Frazier v. CitiFinancial Corp.,* 604 F.3d 1313 (11th Cir.2010) ("this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards").

65 *Id.* at 907.

Indeed, such policy concerns were certainly behind the Southern District of New York's sanction order in *Landmark, Inc. v. Cohen*. In concluding that the Liability Action was a "clear attempt to circumvent the exclusive means to challenge an arbitration award"[66], the court repeatedly stated that sanctions were necessary to deter similar frivolous suits in the future[67]. Explaining the policy reasons for the doctrine of arbitral immunity, the court stated that the doctrine is "essential to protect the decision-maker from undue influence and [to] protect the decision-making process from reprisals by dissatisfied litigants"[68]. The court cautioned that individuals and institutions would unlikely be willing to engage in the arbitral process if they faced the threat of litigation without absolute arbitral immunity[69]. Arbitration – as a process that can provide parties with an alternative dispute resolution means and that can alleviate congestion in the courts – cannot continue to function without individuals willing to sit as arbitrators and institutions willing to assist with the process.

U.S. courts will not impose sanctions "lightly", however, and are conscious that the imposition of sanctions "should not chill parties' good-faith challenges to arbitration awards where there are serious questions of the tribunal's impartiality or authority"[70]. But, when a party pursues unnecessary arbitration-related court proceedings, the party deprives "the judicial system itself of the principal benefits of arbitration. Instead of costing less, the resolution of [the] dispute [...] cost[s] more than it would [...] had there been no arbitration agreement. Instead of being decided sooner, it [takes] longer than it would [...] to decide the matter without arbitration. Instead of being resolved outside the courts, [the] dispute [...] require[s] the time and effort of the [courts]"[71]. As the U.S. Court of Appeals for the Tenth Circuit[72] noted, such frivolous court proceedings "destroy the 'promise of arbitration'"[73].

Whether in response to frivolous challenge proceedings against arbitrators and institutions or against arbitral proceedings and awards, U.S. courts have aimed to strike a balance between competing policy goals by awarding sanctions only in situations where a party's claim is devoid of legal and/or

66 *Cohen*, nº 13 Civ. 9044(JGK), 2014 WL 6784397, at *4 (S.D.N.Y. Nov. 26, 2014).
67 *Id.* at *5-6
68 *Id.* at *4 (citing *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990)).
69 *Id.* at *4.
70 *Digitelcom, Ltd. v. Tele2 Sverige AB*, nº 12 Civ. 3082 (RJS), 2012 WL 3065345, at *7 (S.D.N.Y. July 25, 2012).
71 *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006), *abrogated on other grounds by Frazier v. CitiFinancial Corp.,* 604 F.3d 1313 (11th Cir.2010).
72 The United States Court of Appeal for the Tenth Circuit includes the district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
73 *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1346 (10th Cir. 2009) (citation omitted); *see also Digitelcom, Ltd.*, 2012 WL 3065345, at *7 ("litigants must be discouraged from defeating the purpose of arbitration by bringing such petitions based on nothing more than dissatisfaction with the tribunal's conclusions").

factual support[74], as was the case in the *Landmark, Inc. v. Cohen* action[75], or filed for the purpose of harassing the other party[76]. For example, in *CUNA Mutual Insurance Society v. Office & Professional Employees International Union, Local 39*, the United States Court of Appeals for the Seventh Circuit[77] concluded that appellant's claims regarding vacatur of an arbitral award were "meritless" due to the "straight-forward" existing case law and affirmed the district court's order for sanctions, awarding the winning party reimbursement of its attorney's fees[78]. In *Success Village Apartments, Inc. v. Amalgamated Union United Automobile Aerospace & Agricultural Implement Workers of America, UAW*, however, the U.S. District Court for the District of Connecticut found that sanctions under Rule 11 were not warranted[79]. The court noted that plaintiff cited two cases to support, albeit weakly, its application to reconsider a motion for vacatur of an arbitral award and that there was a legitimate dispute over whether the defendants were allowed to file a contested cross-motion[80]. Plaintiff's claim was, therefore, neither "so clearly in error" or "utterly lacking in support" as to warrant Rule 11 sanctions[81].

Landmark, Inc. v. Cohen and other recent cases show that a U.S. court will not be afraid to sanction parties or counsel that bring truly frivolous claims related to arbitration proceedings – whether they be against an arbitrator, an

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74 *See CUNA Mutual Ins. Society v. Office & Professional Employees Int'l Union, Local 39*, 443 F.3d 556, 561 (11th Cir. 2006) (explaining that the "filing of meritless suits and appeals in arbitration cases warrants Rule 11 sanctions") (quotation omitted); *Int'l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 86 (2nd Cir. 1996) (summarizing that Rule 11 sanctions are appropriate only if a party's claims have "no chance of success"); *W.K. Webster & Co. v. Am. President Lines, Ltd.*, 32 F.3d 665, 670 (2nd Cir. 1994) (rejecting a request for Rule 11 sanctions where the claim was "colorable" and "plausible"); *York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2nd Cir. 1991) (rejecting a request for Rule 11 sanctions where at least one of the claims was "colorable"); *Success Vill. Apartments v. Amalgamated Local 376*, 234 F.R.D. 36, 40 (D. Conn. 2006) (stating that sanctions should not be imposed unless a claim "is utterly lacking in support") (quotation omitted).

75 *See Cohen*, nº 13 Civ. 9044(JGK), 2014 WL 6784397, at *4 (S.D.N.Y. Nov. 26, 2014).

76 *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1111 (9th Cir. 2003) (finding that Rule 11 sanctions were warranted where the losing party's attorney filed successive motions based on legal arguments that had already been rejected by the court and affirming the district court's finding that this conduct was intended to harass the winning party).

77 The United States Court of Appeal for the Seventh Circuit includes the district courts in Indiana, Illinois, and Wisconsin.

78 *CUNA Mutual Ins. Society*, 443 F.3d 556 at 561.

79 234 F.R.D. at 40.

80 *Id.*

81 *Id.* Sanctions for frivolous arbitration-related court proceedings have primarily been discussed under the regime of Rule 11 within this article. Courts in the United States have also found legal bases for ordering monetary sanctions in Rule 38 of the Federal Rules of Appellate Procedure, Section 1927 of Title 28 in the United States Code ("28 U.S.C. § 1927"), and the courts' inherent powers. *See, e.g.*, *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1346 (10th Cir. 2009) (ordering sanctions of the winning party's legal fees under Rule 38 of the Federal Rules of Appellate Procedure where appellant sought vacatur on grounds not allowed by law and "[n]o objectively reasonable interpretation of [existing] case law" could justify the claim); *Digitelcom, Ltd. v. Tele2 Sverige AB*, nº 12 Civ. 3082 (RJS), 2012 WL 3065345, at *6-7 (S.D.N.Y. July 25, 2012) (ordering sanctions under 28 U.S.C. § 1927 where plaintiff's counsel acted for improper purposes and misrepresented the facts and the record of the arbitral proceedings to the court); *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 146 (2nd Cir. 2012) (ordering sanctions under the court's inherent powers where a party made a motion "in bad faith" and with "persistent misrepresentations" to avoid an order to compel arbitration); *World Bus. Paradise, Inc. v. Suntrust Bank*, 403 F. App'x 468, 470-71 (11th Cir. 2010) (ordering sanctions under the court's inherent powers where appellants submitted no evidence or controlling authority to support their challenge to the arbitral award, the opposing party moved for sanctions, and appellants had notice that sanctions for frivolous court proceedings related to arbitration cases were possible).

institution, or an award. While courts cannot prevent parties from delaying the final resolution of an arbitral dispute by initiating court action, the increasing willingness of U.S. courts to order sanctions for frivolous court proceedings is intended to dissuade parties from persisting in meritless challenges, or at a minimum, to save an immune arbitrator or institution or a winning party from paying for unnecessarily incurred expenses in defending against suits with no merits[82].

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82 *See B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006), *abrogated on other grounds by Frazier v. CitiFinancial Corp.,* 604 F.3d 1313 (11th Cir.2010). ("Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions. A realistic threat of sanctions may discourage baseless litigation over arbitration awards and help fulfill the purposes of the pro-arbitration policy contained in the [Federal Arbitration Act].")