

Arbitral Immunity

Reactions to Shamrock Fisheries, LLC v. Manning

Louis Epstein

January 21, 2022

MLA Arbitration & ADR Coffee Break

Shamrock Fisheries, LLC v. Manning, 21-cv-10689-ADB,
2021 U.S. Dist. LEXIS 233861 (D. Mass. Dec. 7, 2021).

- Suit against arbitrators by non-parties to the arbitration.
- Different from the usual scenario in arbitral immunity cases which a disappointed party sues the arbitrators based on adverse rulings in the arbitration.
- It's a bit scary for an arbitrator to contemplate suits by non-parties who may be affected in some way by their orders and awards.
- Fortunately, the court held that the common law doctrine of arbitral immunity applied, dismissed the lawsuit and denied the request for an injunction

Arbitral Immunity – Principles

Landmark Ventures, Inc. v. Cohen, No. 13 CIV. 9044 JGK, 2014 WL 6784397 (S.D.N.Y. Nov. 26, 2014)

[U]nder well-established Federal common law, arbitrators and sponsoring arbitration organizations have absolute immunity for conduct in connection with an arbitration. See Barbara v. New York Stock Exch., [99 F.3d 49, 58](#) (2d Cir. 1996) (citing Austern v. Chicago Bd. Options Exch., Inc., [898 F.2d 882, 885-87](#) (2d Cir. 1990)). The Court of Appeals for the Second Circuit has found such absolute immunity in the most unequivocal terms: "[w]e hold that arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process." Austern, [898 F.2d at 886](#). The Court of Appeals also made clear that this is the uniform rule accepted by every Court of Appeals to have considered the issue. Id. (collecting cases for the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeals)...

Arbitral Immunity – Principles

Landmark Ventures, Inc. v. Cohen, No. 13 CIV. 9044 JGK, 2014 WL 6784397 (S.D.N.Y. Nov. 26, 2014)

Such absolute immunity for actions done in connection with arbitration is "essential to protect the decision-maker from undue influence and [to] protect the decision-making process from reprisals by dissatisfied litigants." Austern, 898 F.2d at 886 (citation omitted). In adopting a law of absolute arbitral immunity, the Second Circuit Court of Appeals emphasized that "individuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit." *Id.* (citation omitted).

Restatement of the US Law of International Commercial Arbitration

§ 3.10. Arbitral Immunity

(a) International arbitrators are, to the same extent as judges, immune from civil liability for acts or omissions within the scope of their duties.

(b) Arbitral institutions and appointing authorities are immune from civil liability for acts or omissions within the scope of their duties as administrators of arbitral proceedings or in appointing arbitrators.

Comment:

No right of arbitrators to recover attorneys' fees

Consistent with the general “American rule” against fee-shifting, arbitrators have been held to have no right to recover the costs of legal representation incurred in resisting claims against them in U.S. courts (notwithstanding the arbitrator’s rights to immunity). *See, e.g., Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987); *Calzarano v. Liebowitz*, 550 F.Supp. 1389 (S.D.N.Y. 1982).

Revised Uniform Arbitration Act (RUAA)

Section 14e provides: If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or 50 produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization or representative reasonable attorney's fees and other reasonable expenses of litigation.

Landmark Ventures

- Sanctions of \$20,000 imposed

but

- Court declined to award attorneys' fees (> \$100,000)

Arbitration rules limiting liability

Article 41 of the ICC Rules entitled “Limitation of Liability”

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not 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 applicable law.

Limitation of Protection Afforded by Arbitral Rules

Do not protect against claims by non-parties to the arbitration

Also, to recover legal costs of defending a spurious claim by a disappointed party, the arbitrators would have to go through the unseemly process of asserting a counterclaim and expending time and money on litigation against the disappointed party. Not ideal.

Unseemly

Other means of protection

Professional liability insurance

Thank you!