November 23, 2022

**ADR Case Update 2022 - 21**

## Federal Circuit Courts

- **ARBITRATOR TO DETERMINE WHETHER RETIREES ARE "EMPLOYEES" COVERED BY CBA**

  *Local Union 97, International Brotherhood of Electrical Workers, AFL-CIO v NRG Energy, Inc.*
  United States Court of Appeals, Second Circuit
  2022 WL 16842399
  November 10, 2022

  NRG's 2003 CBA with the Union eliminated life insurance benefits for new hires. A 2003 MOA provided that current employees would be "grandfathered" into NRG's existing 2-plan life insurance program. In a 2019 CBA, NRG eliminated the 2-plan life insurance program, providing a $10,000 lump sum benefit instead. Although this provision applied only to post-2019 retirees, NRG notified pre-2019 retirees that they, too, would receive only the $10,000 lump sum payment. The Union submitted a grievance on behalf of the pre-2019 retirees and, when the grievance was rejected, sued to compel arbitration under the 2019 CBA. The court dismissed the complaint, holding that the 2019 CBA applied only to employees, not retirees; that there was no presumption in favor of arbitration because the 2019 CBA did not affect the pre-2019 retirees' life insurance benefits; and that the MOA, which was not incorporated in any of the CBAs, was not subject to arbitration under the 2019 CBA's arbitration clause. The Union appealed.

  The United States Court of Appeals, Second Circuit, vacated and remanded. The CBA's broad arbitration provision raised a presumption of arbitrability, allowing the Union to arbitrate whenever it "merely claimed" there was a dispute over any provision of the CBA. Whether retirees were "employees" for purposes of the CBA was a question going to the merit of the dispute, as it concerned interpretation of the CBA itself. Although the MOA itself contained no arbitration clause, it constituted an "arbitrable side agreement," as it was executed in connection with the parties' negotiation of the 2003 CBA, and all subsequent CBAs until 2019 stated that all MOAs were continued "with the understanding that there may be requirements for modification." The MOA's provision "grandfathering" the life insurance rights of pre-2003 employees constituted sufficient evidence to "get the Union to arbitration," and NRG's arguments as to interpretation of that term raised arbitrable issues going to the merits of the dispute.

## California

- **ARBITRATOR TO DECIDE WHETHER STATUTE ENTITLES PARTY TO VOID ARBITRATION PROVISIONS**

  *Zhang v Superior Court of Los Angeles County*
  Court of Appeal, Second District, Division 8, California
  2022 WL 16832570
  November 9, 2022

  Dentons law firm fired Jinshu Zhang, an equity partner in Dentons' Los Angeles office, during an acrimonious dispute over Zhang's share of a $35 million contingency fee. Dentons requested emergency arbitration in New York under Zhang's partnership agreement, which required all disputes to be arbitrated in Chicago or New York City. The arbitrator issued several emergency awards regarding disclosures and confidential information. Zhang notified the arbitrator that he was withdrawing from arbitration and filed a wrongful termination action in Los Angeles, requesting a TRO and order to show cause why a preliminary injunction should not issue to restrain the New York arbitration. Zhang argued that New York did not provide a court of competent jurisdiction, as California Labor Code § 925 prohibits an employer from requiring in-state employees to adjudicate claims outside the state or to otherwise deprive employees of the "substantive protection of California law." Meanwhile, Dentons sued in New York to confirm the emergency awards and compel arbitration, then moved to stay Zhang's action in Los Angeles. An independent calendar court granted Dentons' motion to stay, holding that it was for the arbitrator to determine whether Zhang was an "employee" protected by § 925. The Court of Appeal, Second District, Division 8, California, denied Zhang's petition for a writ of mandate. The Supreme Court granted review and transferred the case back to the Court of Appeal with directions to vacate the mandate denial and issue an order to show cause.

  The Court of Appeal, Second District, Division 8, California, issued an order to show cause and, after receiving further briefing, again denied Zhang's mandate petition. By signing the partnership agreement, which "expressly vests jurisdiction in New York courts," Zhang consented to that court's jurisdiction. § 925 did not entitle Zhang to "unilaterally deprive the New York courts of jurisdiction" by "merely invoking" its requirements. Under § 925, any violative contract provision "is voidable by the employee," – meaning that a court or arbitrator must decide whether a party is entitled to void those provisions. Here, that determination belongs to the arbitrator, as the Agreement's delegation clause and provision for arbitration according to CPR Rules constitute "clear and unmistakable" evidence of the parties' intent to delegate arbitrability. This conclusion is consistent with the FAA: it would undermine the right to enforce arbitration agreements if § 925 enabled parties to disregard those agreements.

## New York

- **ARBITRATION AWARD DID NOT EXCEED ARBITRATOR'S POWERS OR VIOLATE PUBLIC POLICY**

  *Knights v City University of New York*
  United States District Court, E.D. New York
  2022 WL 16829678
  November 8, 2022

  Rogelio Knights, Jr. worked as a substitute athletic manager at a City of New York (CUNY) community college. When a student accused Knights of sexual harassment, a CUNY Title IX investigator interviewed Knights in the presence of his union representative, presenting the evidence against Knights and giving him an opportunity to respond. The college terminated Knights thirteen days before the end of his six-month employment period. Knights filed grievances and submitted to CBA arbitration, claiming a lack of process and entitlement to a name-clearing hearing. Before any award issued, the College rescinded Knights' termination and agreed to pay him for the last thirteen days. The arbitrator then dismissed Knights' process claims as moot but ruled that Knights was not entitled to a name-clearing hearing because he did not hold a civil service position. Knights sued CUNY and two CUNY employees (together, the

CUNY Defendants) for depriving him of property and liberty without due process, and challenged the arbitrator's name-clearing ruling. The CUNY defendants moved for summary judgment on Knights' claims, and Knight filed a cross-motion for summary judgment on his deprivation of property claim.

The United States District Court, E.D. New York granted the CUNY Defendants' summary judgment against all but Knights' deprivation of liberty claim against CUNY and denied Knights' summary judgment cross-motion. Knights' nearly "de minimis" property interest in thirteen days remaining in a temporary position was adequately protected pre-termination by notice and the Title XI interview and post-termination by CBA arbitration and access to an Article 78 proceeding. Knights failed to state deprivation of liberty claims against the two CUNY employees, but a reasonable jury could find that CUNY had made false statements and that the Title IX report constituted dissemination of such false statements. The Court rejected Knights' claim that the arbitrator exceeded her powers and violated public policy by holding that he was not entitled to a name-clearing hearing. The arbitrator's decision was not "irrational," as she acknowledged the entitlement and denied it based on position type. Her decision did not violate public policy, as Knights failed to establish that a name-clearing guarantee is a strong public policy in New York.

*Case research and summaries by Deirdre McCarthy Gallagher and Rene Todd Maddox.*

**Contact Information**
David Brandon
Program Manager
JAMS Institute
415-774-2648
**DBrandon@jamsadr.com**