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PERSPECTIVE

A few words can make a big difference in California arbitration discovery

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Arbitration is a much more economical and expedient way to resolve issues than litigation. As for discovery in arbitration, there can be anything from no prehearing discovery to the full range of discovery options. It all depends upon the arbitration agreement between the parties. Practically speaking, the amount of discovery allowed may be established by whatever the parties can agree to.

The arbitration clause determines what is permitted. Unless the parties provide for full discovery in their agreement, there is no right to prehearing discovery. *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 395-396. The agreement may state a choice of state jurisdiction or federal law governing the matter. It may incorporate the California Arbitration Act (CAA) or the Federal Arbitration Act (FAA); it may incorporate the rules of a private arbitration company, such as JAMS or the American Arbitration Association (AAA), or some other agreed-upon language.

There is a potentially greater scope of discovery in employment arbitrations, in which employers are deemed to have consented to reasonable discovery. Arbitrators must balance the need for adequate discovery with the goals of "simplicity, informality and expedition" regarding the arbitration process. This includes access to essential documents and witnesses. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1081.

The FAA provides that arbitrators may subpoena parties and nonparties to appear before them and to produce "any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7. However, this provision applies to the arbitration hearing itself; the FAA does not provide for prehearing discovery. *CVS Health Corp. v. Vividus* (9th Cir. 2017) 878 F.3rd 703; *Aixtron, Inc. v. Veeco Instruments, Inc.* (2020) 52 Cal.App.5th 360, 398.

Discovery under the CAA varies depending on the type of case. If the arbitration agreement incorporates California Code of Civil Procedure (CCP) § 1283.05 involving personal injury or wrongful death, discovery is permitted as if the matter were in court. This statutory grant of authority is subject to the limitation that "[d]epositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators."' *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 395-396, citing CCP § 1283.1(a)(e).

Note that under CCP § 1283.1, CCP § 1283.05's provisions are incorporated into and made a part of every arbitration agreement arising out of a claim for wrongful death or personal injury. In all other arbitrations, discovery may be granted only if the arbitration agreement so provides. Aixtron, Inc., supra at 396.

If the arbitration agreement specifies the rules of a private arbitration company, discovery is approached differently. For example, Rule 17(a) of the JAMS Comprehensive Arbitration Rules & Procedures provides for a voluntary and informal exchange, within 21

days, of all relevant, non-privileged documents and other information (including electronically stored information (ESI)) relevant to the dispute or claim that the parties may rely on in support of their positions. Further, the parties shall exchange the names of individuals whom they may call as witnesses at the arbitration hearing. JAMS Rule 17(b) allows each party to take one deposition of an opposing party or of one individual under the control of the opposing party. The arbitrator determines the necessity of additional depositions based upon the reasonable need for the requested information, the availability of other discovery options and the burden on the opposing parties and the witness.

Different rules apply to expedited procedures, consumer/employment matters and construction matters. Any of these obligations may be modified by the arbitrator. *See, e.g.,* JAMS Rule 17(a); JAMS Rule 17(c)(v) (Expedited Procedures); AAA Commercial Rules, Expedited Procedures, E-5 (no discovery); and AAA Employment Arbitration Rules and Mediation Procedures, Rule 5 (arbitrator may order depositions).

In AAA's recently updated Commercial Rules (Sept. 1, 2022), R-23 governs exchange and production of documents. The focus is first to exchange the documents on which each side intends to rely and then to require each party to turn over the documents in the responding party's possession that are "not otherwise readily available to the party seeking the documents, and reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues." (R-23 (b)(iii).) There is no mention of discovery or depositions. In contrast, in the AAA Procedures for Large, Complex Commercial Disputes (cases in which the amount in controversy is more than $1 million), the arbitrator has broad authority to control discovery and to allow depositions. (L-3.) In all instances, arbitrators are looking for proportionality.

Some rules require the parties to supplement their discovery responses. There is a duty to automatically supplement discovery responses under the Federal Rules of Civil Procedure; under California's Civil Discovery Act, no such obligation exists unless a formal request to supplement is served. Under AAA Rule R-23(b)(ii), the arbitrator may require the parties to update their exchanged documents. Under JAMS Rule 17(c), all parties are continually obligated to supplement new, unprivileged documents or information, along with the identity of experts and witnesses who may be called to testify, as they become aware of such information. Documents that were not previously exchanged, or witnesses and experts who were not previously identified, may not be considered by the arbitrator at the arbitration hearing unless the parties agree or upon a showing of good cause.

Third-party, or nonparty, discovery is currently restricted. JAMS Rule 17 does not by itself "authorize discovery from nonparties." The Aixtron court noted that JAMS Rules 17 and 21, without incorporation of the CAA, do not provide the broad discovery rights CCP § 1283.05 provides. Thus, unless the arbitration agreement adopted the CAA discovery provisions or otherwise provides for such discovery, a nonparty may not be subpoenaed for discovery purposes before the hearing. *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 395.

In the end, arbitration is a party-designed process. If the parties' relationship is lopsided, the arbitration agreement may reflect that, and the ability to get information before an arbitration hearing may be restricted. Unless JAMS Rule 17 governs or the case falls into the "large, complex case" category under the AAA Rules, where the arbitrator can order discovery (including depositions), that will be a problem for the weaker party.

Judge Nadler and Judge LaMothe will be presenting a webinar on this topic on March 5, from 12 p.m.- 1 p.m.

This content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or profession al advice, please contact an attorney.

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