

THE RECORDER

IN PRACTICE

Securing nonparty discovery

In arbitration, ability to seek information from nonsignatories to the contract may depend on how it was drafted



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Alternative Dispute Resolution

Parties to contractual arbitration possess a limited right to discovery in California. See California Code of Civil Procedure §1282.2(a)(2) (where amount in controversy exceeds \$50,000, parties may demand an exchange of witness lists and copies of the documents to be presented at the hearing). The full range of discovery devices contained in California's Civil Discovery Act are only available under two specific sets of circumstances: (1) where the arbitration agreement expressly provides for incorporation of §1283.05 of the California Code of Civil Procedure; or (2) where the dispute involves a tort claim for personal injury. More limited party discovery

also may be permitted by contract (e.g., "the parties to this contract may conduct x number of depositions and propound y and z forms of discovery"), pursuant to the rules of the arbitration organization handling the matter (e.g., AAA or JAMS), or where statutory claims are involved.

Nonparty discovery is not available under California law unless the arbitration agreement specifically incorporates CCP §1283.05 or the dispute involves a tort claim for personal injury.

But when it comes to nonparty discovery, the only clearly permissible basis in contractual arbitrations is through incorporation of CCP §1283.1 into the arbitration

agreement. This is not to say that an arbitrator lacks authority to order witnesses — including nonparty witnesses — to attend and produce documents at an arbitration hearing or attend a deposition for use later as evidence (but not for purposes of discovery). Though this is not discovery, it is much the same as a trial court's authority to issue subpoenas requiring witnesses to appear at trial and bring documents. Moreover, as opposed to the corresponding provision of the Federal Arbitration Act (9 U.S.C. §7), no California court has construed CCP §1282.6 as allowing arbitrators to order pre-hearing discovery.

Notwithstanding the forgoing, parties to an arbitration routinely seek discovery from nonparties even though their arbitration agreement does not incorporate CCP §1283.05. For example, a party will complete an arbitration subpoena asking for documents from a nonparty even though there is no statutory or contractual authority to do so. The

party then serves the arbitration subpoena on a nonparty as almost a *fait accompli* because the subpoena was issued with the imprimatur of the arbitration body. Under these circumstances, many nonparties will respond in good faith while under the mistaken impression that the subpoena is legitimate because they are unaware that the subpoena is defective unless §1283.05 is incorporated.

Thus, an initial step for any nonparty responding to an arbitration subpoena is to request a copy of the applicable arbitration agreement in order to determine whether it in fact incorporates CCP §1283.05. If not incorporated, the subpoenaing party still may try to argue that regardless of what actually is set forth in the arbitration agreement, now that the arbitration has begun, the parties have determined that nonparty discovery is essential to resolving their claims and defenses. But parties cannot reach an agreement to permit nonparty discovery after the fact —

regardless of whether their arbitrator concurs — because “[i]t goes without saying that a contract cannot bind a nonparty.”

Quite simply, nonparty discovery is not available under California law unless the arbitration agreement specifically incorporates CCP §1283.05 or the dispute involves a tort claim for personal injury. To find otherwise and permit nonparty discovery in a business dispute at the parties’ discretion would run counter to long held tenets of contract law, as well as the central public policy consideration promoted by arbitration — speedy dispute resolution.

It therefore is entirely appropriate for nonparties to take a hard line here. For one thing, as opposed to parties, nonparties are entitled to full judicial review of the arbitrator’s decision because they were not parties to the contract. Thus, nonparties need not fear that they are without recourse if they are unfortunate enough to run across an arbitrator who chooses to ignore California law while attempting to stand their ground. Additionally,

monetary sanctions are available to nonparties, consisting of attorney fees and costs for successfully moving for a protective order or opposing a motion to compel.

For parties, the takeaway is they must add yet one more item to their already extensive “to do” list at the time of contract formation: determine the amount of discovery necessary in case of arbitration and then expressly incorporate that into the arbitration agreement. Depending on the type of contract, the parties involved, and likely litigation, it may or may not make sense to incorporate all or part of CCP §1283.05. At a minimum, parties should make their decision knowingly before relinquishing their ability to obtain nonparty discovery later at arbitration.

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