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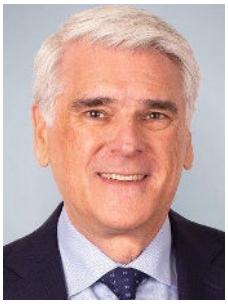
How Calif. Arbitrators Can Navigate Discovery Landscape

By **Greg Derin** (July 18, 2023, 3:14 PM EDT)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Is an arbitrator applying California law empowered to issue a subpoena to compel prehearing discovery?

For years, arbitrators routinely signed such subpoenas. They relied upon California Code of Civil Procedure Section 1282.6(a), which permits the issuance of subpoenas to compel the attendance of witnesses and for the production of documents and other evidence "at an arbitration proceeding or a deposition under Section 1283, and if Section 1283.05 is applicable, for the purposes of discovery."

Three years ago, the Court of Appeal of the State of California, Sixth Appellate District, concluded for the first time in Aixtron Inc. v. Veeco Instruments Inc. that Section 1282.6(a) did not permit arbitrators to issue prehearing discovery subpoenas unless a statute or the governing arbitration clause expressly provided such authority.[1]

Whether due to the exigencies of individual proceedings, arbitrator indifference or the mutual interests of litigants, enforcement of Aixtron's constraints has been inconsistent.

This article examines Aixtron and the Sixth Appellate District's June decision in McConnell v. Advantest America Inc.,[2] which held that the proscriptions recognized in Aixtron cannot be circumvented by convening a specially set hearing "for the limited purpose of receiving documents," and then adjourning to a later date.

Special attention will be paid to potential workarounds to the constraints created by these cases in drafting arbitration agreements and once proceedings have commenced.

Aixtron changed the landscape, although it has largely been unnoticed or ignored by litigation counsel. Vecco Instruments filed a Santa Clara Superior Court action "in furtherance of arbitration" against a former employee who went to work for a competitor, Aixtron.

Vecco obtained an ex parte order preserving evidence and directing the employee not to access or use data related to the subject of the litigation. It then initiated arbitration.

Vecco alleged that the employee had taken trade secrets and, while it did not name Aixtron as a party, it had reason to believe that its protected secrets were accessible to its competitor.

Vecco's experts opined that they could only access relevant files from the employee's cloud storage account by a connection to Aixtron's computer systems. Vecco sought a subpoena and discovery from Aixtron to ascertain facts in support of its claims.

Vecco and Aixtron engaged in extensive meet and confer processes. Aixtron made certain representations, which it deemed reasonable and not disruptive of its business activities. When Vecco discussions broke down with Aixtron, the arbitrator issued a subpoena.

Aixtron objected to the subpoena, arguing first that the parties had not incorporated Section 1283.05 into their arbitration agreement or made it applicable to their agreement as required by Section 1283.1(b) for discovery provisions.

Next, Aixtron argued that the pending dispute did not involve personal injury or wrongful death to which discovery provisions are deemed applicable under Section 1283.1(a). The arbitrator granted Vecco's motion to compel, and the superior court denied Aixtron relief without explanation.

The Sixth Appellate District parsed the language of the parties' arbitration agreement to determine what they had agreed to with respect to discovery.

The clause made no mention of discovery, noting only that any arbitration was to be conducted "in accordance with the National Rules for Resolution of Employment Disputes of the American Arbitration Association." The parties later stipulated to arbitrate the claims before JAMS.[3]

Reviewing the California Arbitration Act and the Federal Arbitration Act, the Aixtron court concluded that no authority existed for an arbitrator to issue prehearing discovery subpoenas.[4]

Arbitration is a creature of contract, and nonsignatory third parties do not agree to an arbitrator's jurisdiction. Limiting the exposure and expense of third parties lessens their burden and is consistent with the informality and expedition, which are primary purposes of arbitration.

While Section 1283.05 does create prehearing discovery rights, it limits such rights to those described in Section 1283.1, i.e., claims for wrongful death or personal injury.

In all other cases, discovery may only be permitted if the parties have provided for it in their agreement.[5] The court also found Section 1282.6(a) unavailing. Had the parties sought testimony or documents for use as evidence and not discovery, such a subpoena might have been valid.[6]

As strict statutory interpretation, some of the Aixtron reasoning is intuitive. However, other portions are hard to justify. While consistent with the above statutory provisions, parties incorporating the power to conduct broad discovery, including that directed to nonparties, create an imposition on those who do not contractually consent to an arbitrator's jurisdiction.

Even post-Aixtron, by amending an extant arbitration agreement, entering into an arbitration agreement for the first time, or settling a jurisdictional dispute and stipulating to move a matter from court to arbitration, parties may agree to engage in third-party discovery when none was contemplated by an original arbitration clause.

Similarly, both before and after Aixtron, with the acquiescence of arbitrators, parties regularly jointly agree to engage in third-party discovery despite the lack of foundation in their arbitration agreements.

This last practice may become less common if third parties object or arbitrators refuse to exercise jurisdiction that they believe to be problematic.

An arbitrator does not commit error justifying vacatur by disallowing prehearing discovery of a third party post-Aixtron, especially as it remains in the power of the parties to request a subpoena for testimony or documents from a witness at the evidentiary hearing.[7]

Several cases, although none published in the official reports, have considered whether vesting discretion in the arbitrator under tribunal rules as to the quantum of permitted discovery, and the issuance of subpoenas to appear and produce evidence at an evidentiary hearing, overcomes a plaintiff's claims of substantive unconscionability.[8] This remains an area to watch for future developments.

In the meantime, in June, the McConnell court considered the propriety of an arbitrator convening a hearing for the limited purpose of having two third parties produce documents in response to a subpoena, and then adjourning until the evidentiary hearing, at which time the nonparties would be summoned to appear and testify.

After an extensive review and affirmation of Aixtron, the court found that such a procedure was an impermissible artifice designed to circumvent Aixtron's proscription on prehearing discovery of third parties.

These developments make clear the importance of considering the need for prehearing discovery when drafting arbitration clauses, or taking action to attempt to remedy the absence of such authority if both parties seek such discovery after an action commences.

While difficult to anticipate all needs in advance, and cognizant of the attendant costs and inconveniences, it is now difficult to rectify such an omission in hindsight.

Greg Derin is a mediator and arbitrator at Signature Resolution.

[1] Aixtron, Inc. v. Veeco Instruments, Inc., 52 Cal. App. 5th 360, 370 (2020).

[2] McConnell v. Advantest America, Inc., 2023 WL 4014295 (May 24,2023).

[3] The Court found that the discovery provisions in the JAMS applicable JAMS rules were unavailing. To the extent to which such rules may provide for a form of pre-hearing discovery not otherwise expressly provided by the agreement of the parties, future case developments may consider whether incorporation of tribunal rules confer jurisdiction in an arbitrator to issue discovery subpoenas to third parties.

[4] Although concluding that application of the Federal Arbitration Act or the California Arbitration Act might have been relevant, in the present case, the Aixtron Court determined that the result would have been identical under either. Federal Circuit Courts are split as to whether Section Seven, of U.S.C. Title

Nine permits discovery from non-signatory third parties in arbitration. The Ninth Circuit has definitively determined the issue in the negative. See, CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017).

[5] An ambiguity created by the case law arises primarily in the employment area with respect to the definition of "personal injury." To the extent to which certain damages arising from certain types of sexual harassment claims are deemed to constitute personal injuries, they may be embraced by the discovery provisions of Code of Civil Procedure §1283.05. See, Code of Civil Procedure §1283.1(b).

[6] See, Code of Civil Procedure §1283.

[7] See, e.g., Powell v. Public Storage, 2023 WL 3107718 (April 27, 2023, Not Certified For Publication).

[8] See, e.g., Kessler v. Oakwood Worldwide (US) LP, 2021 WL 5414323 (N.D. CA 2021).