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PERSPECTIVE

Arbitration discovery: A new paradigm

California's SB 940 has transformed arbitration from a streamlined alternative to litigation into a process nearly as cumbersome and costly as trial preparation by expanding discovery rights to match those available in court.

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When SB 940 took effect at the beginning of this year, most of the attention was devoted to a new ADR certification program to be created and implemented by the State Bar. But while everybody was looking the other way, the bill introduced seismic changes into the way arbitration is conducted in the state.

A process that had for decades been touted as a good alternative to jury trials now threatened to become just as cumbersome and costly as the trials it bypassed. With a single stroke, legislators converted the arbitration discovery process into the same one used for trial discovery. How did this happen?

Code of Civil Procedure Section 1283.1 had precluded most plaintiffs in arbitration from obtaining third-party subpoenas and conducting other forms of prelitigation discovery, including deposing non-party witnesses. Litigants had generally been unable to obtain third-party documents or testimony until they were in front of an arbitrator, at which point it was often too late to change their strategy or demands. This section of the law was deleted, and updated CCP Section 1282.6, which allows all forms of discovery, was adopted.

A simple law grows complex

The Federal Arbitration Act (FAA), U.S. Code Title 9, was enacted in 1925. A simple, little-known law, it was intended to support business contracts that called for alternative dispute resolution. It required courts to stay litigation, upon motion, when a dispute involved a contract with a written arbitration clause. The original law presupposed that parties to the contract would understand its terms, would be in a position to negotiate those terms, and would willingly and knowingly agree to those terms.

How things have changed over the past century. Today, arbitration is ubiquitous, appearing not just in business transactions but in nearly every employment and consumer agreement. Even though arbitration provisions are frequently included in fine-print boilerplate that few read or understand, courts have ruled that ignorance about the provision is generally not enough to overturn its application. (*See B.D. v. Blizzard Entertainment, Inc.* (2022) 76 Cal.App.5th 931) The bar for proving lack of clarity or unconscionability of arbitration provisions is quite high (*See Keebaugh v. Warner Bros. Entertainment Inc.* (9th Cir. 2024) 100 F.4th 1005).

As it has been integrated into every type of contractual relationship, arbitration has become increasingly controversial. Plaintiffs contend that it favors corporate defendants; businesses argue that it keeps them in business. Most private arbitrators are retired judges; they have the education and experience to understand and evaluate evidence. But plaintiffs will assert that economics – who pays the arbitrator's bill – skews outcomes in favor of defendants. Defendants will say that having a former judge as

the trier of fact means that emotional factors will be discounted and the final award will be more reasonable than a runaway jury verdict.

Whichever side of the table you sit on, one point of general agreement has been that arbitration is a faster and more efficient process than a court trial. With limited discovery, motion practice and appellate review, it has produced quicker results than the judicial system.

That is no longer the case.

Limited discovery hurts plaintiffs

Before the legislature enacted SB 940, parties in arbitration were generally unable to issue third-party subpoenas or depose non-party witnesses. Unless they included special words in their agreements or the claims involved injury or death, plaintiffs were prevented from procuring critical evidence prior to the arbitration proceeding.

This meant that they would have to wait until they were before the arbitrator to fully understand the issues in their cases. With little opportunity to see the full picture in advance, they were at a distinct disadvantage as they presented and argued their cases in arbitration proceedings.

The new law levels the playing field by providing parties the same discovery rights as other litigants. It is a significant win for plaintiffs who can now seek out critical evidence in advance of arbitration. With limited appeal rights and no guarantee of a written decision or other support for the final arbitration award, they are no longer forced to fly blind. They can prepare for arbitration just as carefully and diligently as they would for a court trial.

Expanded discovery burdens arbitration

But this turning point in the practice of arbitration completely changes the ADR equation. A process designed to offer streamlined access to justice is now becoming almost as time-consuming as trial preparation.

The whole point of arbitration seems to have been lost. A process whose very existence was predicated on speed and efficiency is now just as cumbersome and costly as preparing to go to court. Parties must go through discovery as if they were getting ready for trial, but without the benefit of a written decision that can be appealed.

A trade-off?

As the arbitration process becomes slower and more tedious, is it in any way improved? It would seem that a less efficient process is contrary to the underlying principles of arbitration. When discovery takes just as long and is just as involved as trial discovery, who ultimately benefits?

Certainly plaintiffs will benefit from having early access to important evidence. They may not get their matters timely resolved, and their legal costs may be higher, but their cases will, presumably, have been better argued. The final arbitrator decision may therefore be better supported.

Conclusion

If the fundamental purpose of arbitration is to achieve just and fair resolution of disputes, expanding discovery to accord with the rights provided litigants in trial may align with that purpose. But the loss of speed and efficiency could have a price.

Parties could agree to forgo arbitration and head directly to trial. As long as they've already invested the time and expense to conduct significant discovery – avoidance of which was the whole point of arbitration – why shouldn't they just take their cases to court? Defense concerns about runaway jury verdicts could be what ultimately tips the scales in favor of arbitration. Only time will tell how this will play out.

Hon. Victor Bianchini (Ret.) *is a neutral with Signature Resolution. During his two decades on the Superior Court of San Diego, Judge Bianchini served extensively as the court's settlement judge. He then began a private mediation practice and was enlisted part-time by the Federal Courts in New York as a settlement judge for complex civil cases, including employment, commercial, medical malpractice, all manner of litigation, discovery referee assignments, and many hun-dreds of arbitrations through completion. Throughout his tenure on both state and federal benches and in private mediation practice, Judge Bianchini has mediated more than 3,000 cases, ranging from straightforward disputes to intricate, multi-issue complex cases.*