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The arbitration discovery thicket of SB 940

California's new Senate Bill 940, effective January 1, 2025, expands discovery rights in arbitration, aligning them with California court procedures, but raises significant legal questions about its scope, conflicts with federal law, and the burden on arbitrators to manage increased discovery requests.

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Arbitration users in California have operated for decades under a system, common throughout the arbitration world, in which discovery was not expected. Some discovery rights were added, including in employment arbitrations; however, as more disputes find their way into arbitration, litigators have pressured the arbitration system to become more like court. A chief component is discovery, including depositions. California Senate Bill (SB) 940, passed in 2024 and now effective, permits in California arbitrations the full discovery allowed by California Code of Civil Procedure (CCP) §1283.08. What is the law's scope, and what issues does it raise for arbitrators presiding over California arbitrations?

Under SB 940, an arbitration involving a "consumer contract" (defined as a contract prepared by a seller and signed by a consumer for the sale or lease of goods, or for credit, for personal services) must be arbitrated in California under California law if the claim arises in California. And now, the consumer may also choose to litigate the matter under the small claims procedures. California Civil Code §§ 1799.201 and 1799.208.

The earlier version of CCP § 1283.05 generally permitted arbitration discovery if the parties incorporated § 1283.05 into their agreement, or if incorporation was implied for matters involving personal injury or wrongful death.

SB 940 revised CCP § 1283.05 to extend these discovery rights to all arbitration claims in California. Parties in arbitration enjoy the full panoply of discovery as if the subject matter of the arbitration were pending before a California Superior Court. It applies to all civil matters other than limited civil cases. Under the revised statute, arbitrators are permitted to issue subpoenas for discovery in any California arbitration.

The parties' agreement: The parties' arbitration agreement continues to be the starting point in the analysis. Sometimes their agreement simply adopts California law. In that case, we expect California Arbitration Act (CAA) § 1283.05 to govern, along with California substantive and procedural rules. Under this scenario, in which the parties have chosen state law to govern, there is no federal preemption issue. "There is no federal policy favoring arbitration under a certain set of procedural rules...." *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University* (1989) 489 U.S. 468 at p. 477.

The parties' arbitration agreement may adopt arbitration rules such as those of AAA or JAMS, or it may list specific allowable discovery. If the parties' agreement fails to mention any governing law, or if it states only that California substantive law governs, and is silent on procedural law, does the new California statute allowing full discovery govern? Does the California statute supersede the arbitration agreement?

Does it matter if the parties' agreement mentions the procedural rules of an ADR provider organization, such as JAMS or AAA? The earlier version of CCP § 1283.05 implied discovery into the arbitration agreement for personal injury and wrong-

ful death cases. The new version of the statute fails to mention the relationship of the statute and the parties' agreement. Moreover, if the parties' agreement adopts AAA or JAMS rules, are these superseded by the new §1283.05?

Federal preemption: The most frequent statutory framework we see in arbitration agreements references the Federal Arbitration Act. The FAA does not provide for discovery. Rather, arbitrators have the power to require attendance of witnesses only at evidentiary hearings. 9 U.S.C.A. § 7. No depositions of third-party witnesses are permitted, as recent circuit court decisions have held. *See, e.g., CVS Health Corp. v. Vividus* (9th Cir. 2017) 878 F.3d 703; *Managed Care Advisory Group LLC v. CIGNA Healthcare, Inc.* (11th Cir. 2019) 939 F.3d 1145

If the arbitration agreement adopts the FAA, and nothing else, preemption issues potentially arise. Under amended CCP § 1283.05, the previous limitations precluding discovery would be abrogated for a case governed by the CAA. However, the California Supreme Court has granted review of two cases addressing the issue of preemption: *Hernandez v. Sohnen Enterprises* (2024) 102 Cal.App.5th 222 (failure of employer to pay arbitration fees) and *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319 (late payment of arbitration deposits). As relevant here, these cases address whether, when an arbitration agreement adopts the FAA, it preempts state substantive law (including § 1283.05).

What is the reach of the new statute? Does it apply to existing arbitrations? SB 940, filed Sept. 29, 2024, does not contain an explicit effective date for amendments to CCP §1283.05. The statute took effect on Jan. 1, 2025, and there is no mention of retroactivity. There is no guidance on whether it is intended to apply to arbitrations already in progress.

Does the new statute apply to any arbitration, no matter where sited, if connected to California?: If the claims arose in California, or if one or more parties is domiciled in California, an argument may be made that the California statute applies. Conflicts are certain to arise about this if the parties' agreement provides another state's law applies.

How the new statute burdens arbitrators: JAMS Rule 17 and AAA Rule 23 already provide for the arbitrator to manage the exchange of information; however, this new statutory provision gives the arbitrator power virtually as broad as that granted to a judge in a civil action. As a result, we envision a significant increase in party requests to the arbitrator for discovery. The new statute provides at §1283.05 (b): "The arbitrator or arbitrators themselves shall have power, in addition to the power of determining the merits of the arbitration, to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court of this state under the provisions of this code, except the power to order the arrest or imprisonment of a person."

Moreover, the new statute also provides in subparagraph (e): "Depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators." Arbitrators should expect that we will be asked to permit depositions and control them under the new statute.

This tangle of issues will take some time to resolve. Stay tuned, for there is more to come!

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

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