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Revisiting familiar assumptions about California arbitration

California courts and legislation have narrowed several long-held assumptions about arbitration–including its confidentiality, limited discovery and enforceability of procedural restrictions–making careful drafting more important than ever.

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California arbitration law has evolved considerably over the past several years. Legislative reforms have altered certain aspects of arbitration practice, while courts have continued to define the limits of what parties may accomplish through arbitration agreements. Those developments are a useful reminder that arbitration is more nuanced than many assume.

Arbitration is often described in broad terms. It is confidential. Discovery is limited. The parties can largely design the process for themselves. Those descriptions remain useful shorthand, but they are also incomplete. Each is subject to important qualifications that can materially affect the drafting of arbitration agreements and the conduct of arbitration proceedings.

These three assumptions deserve a closer look.

Confidentiality is not automatic

Confidentiality is often cited as one of arbitration's principal advantages. Yet many lawyers and parties assume arbitration provides a level of confidentiality that California law and the arbitral rules do not automatically guarantee.

Arbitration proceedings generally are private. Unlike court proceedings, arbitration hearings are not open to the public and uninvited third parties may be excluded. Privacy, however, is not the same as confidentiality. Privacy concerns who may attend the proceeding; confidentiality concerns what the participants themselves may disclose. The fact that an arbitration occurs behind closed doors does not necessarily prevent a party from discussing the dispute, evidence or even the outcome.

That distinction is reflected in the rules of the major arbitration providers. JAMS, for example, requires JAMS and the arbitrator to maintain the confidential nature of the proceeding, but does not prohibit the parties themselves from disclosing information. *See, e.g.*, JAMS Comprehensive Rule 26(a). Unless the parties' initial agreement or a subsequent protective order provides otherwise, arbitration may offer less confidentiality than many expect.

Even a carefully drafted confidentiality provision and protective order have limits. When an arbitration concludes, a party may seek judicial confirmation of the award, or the losing party may ask a court to vacate or correct it. *See* Cal. Civ. Proc. Code § 1285. Once arbitration returns to court, the award — and potentially other related information — may become public. Accordingly, parties for whom confidentiality is important have responded by drafting provisions addressing not only confidentiality during the arbitration itself, but also what happens after an award is issued. For example, some parties have begun including provisions that parties may not seek judicial confirmation if the award has been fully satisfied within a specified period.

The lesson is straightforward. Confidentiality should be viewed as a product of the parties' agreement rather than an inherent feature of arbitration. Parties who simply assume arbitration is confidential may discover that California law and the arbitral rules provide less protection than they expect.

Limited discovery should no longer be assumed

Another principal attraction of arbitration is the promise of limited discovery. For decades, parties selecting arbitration expected a narrower discovery process than they would encounter in court. For arbitrations governed by the California Arbitration Act, however, that expectation is no longer as reliable as it once was.

Effective Jan. 1, 2025, Senate Bill 940 substantially expanded discovery in arbitrations governed by the CAA. As a baseline, parties now have access to the same discovery rights and procedures available in California civil litigation, including third-party discovery, with depositions subject to arbitrator approval. The Court of Appeal recently recognized that change in *Vo v. Technology Credit Union*, observing that parties "can now obtain third party discovery under the CAA without explicitly incorporating section 1283.05 into their arbitration agreement."

In practice, an arbitration involving broad document requests, mutiple depositions and third-party subpoenas may begin to resemble civil litigation more closely than parties anticipate.

This does not mean that arbitration can no longer provide a streamlined discovery process. The expanded statutory framework establishes a default, but parties remain free to try to negotiate reasonable limitations on discovery, subject to further guidance on this issue from the California courts. The bottom line is that lawyers should no longer assume that choosing California arbitration alone will accomplish that objective.

Not every procedural restriction will be enforced

Arbitration's contractual nature gives parties substantial freedom to shape the procedures that will govern their disputes. But that freedom is not unlimited. California courts routinely scrutinize provisions that unduly favor one party or interfere with a party's ability to fairly pursue or defend a claim.

Discovery restrictions provide one example. While parties traditionally could agree to narrower discovery than would be available in court, even before SB 940's enactment, there were limits to how far those restrictions could go. California courts have long recognized that arbitration agreements must provide sufficient discovery to permit parties to vindicate their claims. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court held that employees pursuing statutory claims in arbitration must have access to discovery sufficient to adequately arbitrate their claims. Later decisions, including *Fitz v. NCR Corp.*, demonstrate that courts will not enforce discovery restrictions that go beyond what fairness permits. There, for example, the court found unconscionable an agreement that limited each side to two depositions and effectively eliminated written discovery.

The same principle extends beyond discovery. California courts have likewise scrutinized provisions pertaining to limitations periods, fee-shifting, confidentiality and availability of statutory remedies. The common thread is that the parties are free to craft arbitration agreements with bespoke and reasonable procedures, but courts have held they may not unduly deprive a party of certain meaningful rights. Notably, for arbitration agreements governed by the Federal Arbitration Act, the FAA may preempt some of these California-specific limitations.

Ultimately, the strongest arbitration agreements are rarely those that seek every conceivable procedural advantage. They are the ones that preserve arbitration's efficiencies while providing a balanced process that courts and arbitrators are likely to enforce.

Arbitration remains an effective means of resolving disputes and its familiar descriptions remain useful shorthand. But shorthand is no substitute for careful drafting. As California arbitration law continues to evolve, lawyers who periodically revisit both familiar assumptions and the arbitration provisions built upon them will be better positioned to ensure that arbitration delivers on the expectations that led the parties to choose it in the first place.

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