# A Guide to Third-Party Discovery in Arbitration

**By Hon. Jackson Lucky (Ret.)**

Both the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) limit discovery in arbitration.[1] For third-party discovery, the limits are profound. Federal and California courts have held that the FAA does not authorize any third-party discovery.[2] The CAA authorizes third-party discovery in arbitrations where (1) the claims involve wrongful death or personal injury or (2) the parties have provided for such discovery in their agreement.[3] Some arbitration rules expressly authorize third-party discovery.[4] Others do not.[5] Moreover, individual arbitrators might disagree on the scope of discovery they are authorized to order, as well as the amount of discovery they are willing to order. Consequently, obtaining third-party discovery in arbitration can require keen awareness of the nature of the dispute, contractual interpretation and statutory construction.

In 2020, the Sixth Circuit Court of Appeal issued the only published decision explicitly addressing an arbitrator's authority to order third-party discovery: *Aixtron, Inc. v. Veeco Instruments Inc.* In that arbitration, Veeco Instruments alleged that its former employee had breached his contract and stolen data when he left Veeco for Aixtron. Although Aixtron was not a party to the arbitration, the arbitrator issued a discovery subpoena duces tecum (SDT) for some of Aixtron's records. Aixtron unsuccessfully challenged the SDT at arbitration, then lost its petition to quash the arbitration SDT in the trial court. The Third Circuit reversed, holding that the discovery subpoena was not authorized by the FAA, the CAA or the JAMS rules.[6] Each step of *Aixtron's* analysis deserves attention.

First, *Aixtron* held that the FAA does not authorize third-party discovery. The court examined the federal case law addressing discovery from non-signatories under Section Seven of Title Nine in the United States Code. The federal appellate courts were split. The Sixth and Eighth circuits found an implicit right to third-party discovery under the FAA. The Second, Third, Eleventh and Ninth circuits held that the plain language of the statute prevented arbitrators from ordering discovery from third parties. The Fourth Circuit followed the majority view but held that third-party discovery could be available in "unusual circumstances." The *Aixtron* court followed the Ninth Circuit (and majority), holding that the FAA gave arbitrators no jurisdiction to order third-party discovery.

Second, the *Aixtron* court looked to the CAA. Unlike the FAA, the CAA explicitly authorizes third-party discovery in certain circumstances. Code of Civil Procedure (CCP) section 1283.05 defines the scope of third-party discovery available under the CAA. Section 1283.10 sets forth the conditions under which that discovery can be ordered. It's automatically incorporated into every arbitration dispute involving personal injury or death, but the dispute in *Aixtron* was breach of contract and data theft, not personal injury. In other cases, 1283.05 applies "[o]nly if the parties by their agreement so provide." The *Aixtron* court observed that the agreement did not incorporate section 1283.05, did not incorporate discovery under the CCP and did not mention "discovery." The court concluded that the CAA did not authorize the SDT, based on the nature of the dispute and the language of the agreement.

Lastly, the court looked to the JAMS rules. The court noted that the JAMS rules did not authorize third-party discovery subpoenas in Rule 17, but (like the FAA and CAA) authorized third-party hearing subpoenas in Rule 21. Moreover, as a nonparty, Aixtron had not agreed to arbitration under the JAMS rules. Because "Aixtron did not consent to be bound by the JAMS rules, the Arbitration Clause did not authorize discovery from nonparties, and neither the FAA nor the CAA authorize nonparty discovery in this case,"[7] the Court of Appeal directed the trial court to vacate the arbitrator's discovery order and quash the SDT.

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*Aixtron's* interpretation of section 1283.1 seems straightforward to apply: Look to the nature of the dispute. Does it involve personal injury or death? If not, look to the language of the arbitration agreement. Does the agreement explicitly incorporate section 1283.05? If not, does it implicitly do so by incorporating discovery under the Code of Civil Procedure? Does the agreement authorize third-party discovery or discovery under the Federal Rules of Civil Procedure or CCP? If so, then the CAA probably authorizes third-party discovery.

## "Personal Injury"

But the answers to some of these questions might be more nuanced than they seem. The California Supreme Court wrote some interesting dicta in

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*Armendariz v. Foundation Health Psychcare Services*.[8] "We note that one Court of Appeal case has held that a FEHA sexual harassment claim is considered an 'injury to … a person' within the meaning of Code of Civil Procedure section 1283.1, subdivision (a)."[9] That case, *Bihun v. AT & T Information Systems, Inc.,*[10] analyzed the meaning of "personal injury" under Civil Code section 3291, not CCP 1283.1, but the Supreme Court's observation signals (without explicitly holding) that "personal injury" means the same thing under both statutes. Consequently, the definition of personal injury in *Bihun* deserves some attention.

*Bihun* analyzed whether Fair Employment and Housing Act (FEHA) sexual harassment complaints were personal injury claims, even though they involved economic loss like lost wages. Were emotional distress damages incidental to the economic damages of lost wages? Or was it the other way around? Did the decision depend on the ratio of general to economic damages? The court determined that the nature of the action controlled, not the nature or amount of relief. Because the gravamen of a sexual harassment complaint is conduct that "offends, humiliates, distresses, [and] intrudes upon its victim," consequently interfering and undermining a sense of well-being, the *Bihun* court concluded the injury was personal.[11]

The holding in *Bihun* involved FEHA sexual harassment, but its application to other forms of harassment and retaliation is clear. Moreover, *Bihun's* analysis relied on other case law holding that defamation was a personal injury action.[12] Defamation torts are rarely, if ever, the subject of arbitration, but *Bihun's* broad definition of personal injury, combined with *Armendariz's* tacit approval of its holding, means that CCP 1283.1 might comprise a broad range of disputes.

For lawyers handling FEHA claim arbitrations, third-party discovery can affect both sides. Employees seek depositions of former employees and records from the employer's contractors. Employers subpoena medical and mental health records.

Distinguishing *Aixtron* and *Bihun* is key. Both were employment-related cases. In *Aixtron,* the employer pursued breach of contract claims against a former employee, so CCP 1283.1 didn't apply. *Bihun* involved personal injury because the claim was FEHA sexual harassment.

However, not all employee claims against employers are personal injury claims. One court has held that wrongful termination in violation of public policy is an economic injury, not a personal one.[13] The nature of the wrong controls, and the characterization of its nature, is the controlling factor for CCP 1283.05's automatic application.

## Implied Consent

Although the *Armendariz* court noted the *Bihun* decision, it declined to adopt the reasoning in *Bihun* and define the scope of CCP 1283.1. On the other hand, *Armendariz* did hold that "the employer, by agreeing to arbitrate the FEHA claim, has already impliedly consented to such discovery."[14] This statement, taken alone, seems to open up CCP 1283.05 to all FEHA claims, but the context of the statement suggests a narrower scope.

In the preceding paragraph, after noting that the scope of CCP 1283.1 was not before it for decision, the *Armendariz* court assumed that CCP 1283.1 did not cover the dispute. Nevertheless, it observed that parties could agree to incorporate CCP 1283.05. It inferred that CCP 1283.1 and the contractual nature of arbitration permitted the parties to "agree to something less than the full panoply of discovery" under 1283.05.[15] It further inferred that when parties agree to arbitrate statutory claims, they must also agree to sufficient discovery "necessary for vindicating" that claim, including access to "essential documents and witnesses."[16]

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This qualified language—"less than" the full discovery, "necessary" to vindicate statutory claims, with access to "essential" documents—shows that the *Armendariz* court contemplated a narrower scope of discovery under its implied consent analysis than 1283.05 allows. Significantly, the *Armendariz* court says nothing about nonparty discovery in its discussion. As a result, parties seeking third-party discovery under *Armendariz's* implied consent doctrine may face disappointment.

## Amendment to JAMS Rule 17

As discussed earlier, Aixtron examined the JAMS rules in effect at the time:

> Veeco argues that its arbitration agreement with Saldana provided for section 1283.05 discovery rights as required by section 1283.1, subdivision (b) "by incorporating in their Agreement arbitration rules that offer discovery rights like those that section 1283.05 confers." That assertion is not supported by a citation to the record or any legal authority.[17]

The court was correct. At the time, JAMS rules had no provisions for nonparty discovery. After *Aixtron*, JAMS amended all its arbitration rules to allow third-party discovery (with arbitrator approval) in consumer and employment cases.[18]

But even if parties adopt JAMS' new rules, the *Aixtron* court seemed skeptical that such an agreement would be effective, because an arbitrator's authority comes from party consent and third parties have not consented to that authority. On the other hand, CCP 1283.1(b) permits nonparty discovery if the contracting parties provide for it in their agreement. Would the *Aixtron* court have decided the case differently with different arbitration rules and legal authority? Perhaps.

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There seems to be no authority holding that an arbitration agreement lacking third-party discovery provisions can impliedly incorporate CCP 1283.05 by incorporating certain arbitration rules. However, there is plenty of authority that holds that adopting arbitration rules clearly and unmistakably incorporates those rules.

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In the context of determining the arbitrability of a dispute, jurisdiction lies with the court, unless the arbitration agreement "clearly and unmistakably" delegates the arbitrability decision to the arbitrator.[19] However, even if the arbitration agreement is silent on the question, incorporation of arbitration rules that delegate the arbitrability decision satisfy the "clear and unmistakable" delegation requirement:

Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.[20]

If incorporation of AAA arbitration rules alone is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability, then it seems that incorporation of JAMS arbitration rules (as amended) would be clear and unmistakable evidence that the parties agreed to third-party discovery.

There are a few caveats. First, *Armendariz* held that parties could agree to a subset of CCP 1283.05's panoply of discovery. JAMS' amended rules do not expressly adopt 1283.05, and the language of the rules is less comprehensive than the statute. Second, if the arbitration agreement expressly provides for discovery and the agreement conflicts with the JAMS rules, the agreement controls. Nevertheless, there is a colorable argument that any arbitration agreement that incorporates JAMS rules (or other arbitration rules providing for nonparty discovery) would effectively confer jurisdiction on the arbitrator to order such discovery.

## Hail Marys

In American football vernacular, a Hail Mary is a last-ditch attempt to snatch victory from the jaws of defeat. Even in situations where there the arbitration agreement does not explicitly or implicitly authorize third-party discovery, there may be options. There are some late-game strategies to use when the arbitration agreement fails.

First, if the case is before the trial court on a petition to compel arbitration, many parties agree to incorporate discovery under CCP 1283.05, statutory discovery under the CCP or FRCP, or a stipulated discovery plan in exchange for a stipulation and order for arbitration.

Second, CCP 1283.1 has no temporal limitation. Although no court has held that parties may incorporate 1283.05 after arbitration has commenced, many arbitrators allow that practice.

As discussed earlier, arbitration discovery is limited, but there are tools available to get the discovery that's necessary.



***Hon. Jackson Lucky (Ret.)*** *is a JAMS neutral and previously served as a judge with the Riverside County Superior Court for 13 years, where he presided over thousands of family law and unlimited civil cases.*

1. *Aixtron, Inc. v. Veeco Instruments Inc.,* 52 Cal.App.5th 360, 394–95, 265 Cal. Rptr.3d 851, 875–877 (2020).
2. *CVS Health Corp. v. Vividus, LLC,* 878 F.3d 703, 708 (9th Cir. 2017)
3. *Aixtron, supra,* 52 Cal.App.5th at 396, 265 Cal.Rptr.3d at 878.
4. See, e.g., JAMS Comprehensive Arbitration Rules & Procedures, Rule 17(e), JAMS Employment Arbitration Rules & Procedures, Rule 17(e), JAMS Streamlined Arbitration Rules & Procedures, Rule 13(d).
5. See, e.g., AAA Commercial Arbitration Rules and Mediation Procedures, AAA Employment Arbitration Rules and Mediation Procedures, AAA Consumer Arbitration Rules.
6. *Aixtron, supra,* 52 Cal.App.5th at 396, 265 Cal.Rptr.3d at 878.
7. *Id.*
8. *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 104, 6 P.3d 669, 683 (2000).
9. *Id.* at 105.
10. *Bihun v. AT & T Information Systems, Inc.,* 13 Cal. App. 4th 976, 1005, disapproved on other grounds in *Lakin v. Watkins Associated Industries,* 6 Cal.4th 644, 664 (1993).
11. *Bihun,* 13 Cal.App.4th 976, 1004, 16 Cal.Rptr.2d 787, 803.
12. *Id.* at 1004, 16 Cal.Rptr.2d at 804, citing O'Hara v. Storer Communications, Inc., 231 Cal.App.3d 1101, 1118–1119, 282 Cal.Rptr. 712 (1991).
13. *Holmes v. Gen. Dynamics Corp.,* 17 Cal.App.4th 1418, 1437, 22 Cal.Rptr.2d 172, 184 (1993).
14. *Armendariz, supra,* 24 Cal.4th 83, 106, 6 P.3d 669, 684.
15. *Id.* at 105, 6 P.3d at 684, emphasis original.
16. *Id.* at 106, 6 P.3d at 684, emphasis added.
17. *Aixtron, supra,* 52 Cal.App.5th 360, 402–03, 265 Cal.Rptr.3d 851, 883.
18. JAMS Comprehensive Arbitration Rules & Procedures, Rule 17(e), JAMS Employment Arbitration Rules & Procedures, Rule 17(e), JAMS Streamlined Arbitration Rules & Procedures, Rule 13(d).
19. *Oracle Am., Inc. v. Myriad Grp. A.G.,* 724 F.3d 1069, 1072 (9th Cir. 2013).
20. *Id.* at 1074, internal citations omitted.