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McConnell v. Advantest America, Inc. – California Court of Appeal Finds Subpoena of Nonparties for Production/Appearance at Discovery Hearing Exceeds Arbitrator's Power

Anlin Ye (Pepperdine Caruso School of Law) · Wednesday, January 17th, 2024 · Young California Arbitration (Young CalArb)

In *McConnell v. Advantest Am., Inc.*, the 4th District Court of Appeal in California (the "Court") vacated an arbitral order compelling nonparties to appear at a discovery hearing for the sole purpose of receiving documents allegedly in their possession. 92 Cal. App. 5th 596. The subpoenas asked the nonparties to produce their communications with the respondent on seven different messaging and email platforms over a 43-month period. Previously, the 6th District Court of Appeal in *Aixtron, Inc. v. Veeco Instruments Inc.* had held that the U.S. Federal Arbitration Act does not give the arbitrator the power to order nonparty discovery and the California Arbitration Act does not authorize prehearing discovery from nonparties. *See* 52 Cal. App. 5th 360, 393-95. Relying upon *Aixtron*'s reading of § 1282.6 of the California Code of Civil Procedure, the Court found subpoenas for nonparties to appear and produce documents at a hearing for the purpose of discovery to be unauthorized. This blog post provides a brief overview of the underlying dispute and the Court's reasoning in making its decision.

Summary of the Dispute

In the arbitration, Advantest America, Inc. and Advantest Test Solutions, Inc. (together "Advantest") brought claims against their former senior executive, Samer Kabbani, alleging that he used his position at Advantest to benefit Lattice Innovation. Inc. ("Lattice"), a company he allegedly managed and majority-owned during his employment with Advantest. Advantest also asserts claims against Lattice for "aiding and abetting" Kabbani's wrongdoing.

During his deposition, Kabbani admitted to Advantest's lawyers that he had tampered with the evidence collection process by deleting WhatsApp from his phone before handing it over for forensic imaging. When asked whom he could have exchanged WhatsApp messages with regarding Lattice's affairs, Kabbani identified five current and former Lattice employees and board affiliates. Based on that testimony, Advantest requested that the arbitrator issue an order authorizing it to subpoena the WhatsApp messages between Kabbani and each of the identified individuals, none of whom were parties to the arbitration. Lattice objected. The arbitrator then granted Advantest's alternative request to subpoena those five nonparties to produce any messages

exchanged with Kabbani.

The subpoenas requested that the five nonparties appear at a discovery hearing "for the limited purpose of receiving documents" from each of them. The requested documents included all WhatsApp messages exchanged with Kabbani, as well as messages from other messaging platforms and emails over a period of 43 months. These individuals were asked to comply with the request almost a year before the scheduled merits hearing, and the website to upload the requested documents was maintained by counsel for Advantest.

They refused to comply with the subpoenas, and the arbitrator issued an order to compel their compliance. The subpoenaed nonparties petitioned to vacate the order and the trial court ruled in Advantest's favor, finding the subpoenas were statutorily authorized subpoenas under § 1282.6 of the California Code of Civil Procedure which provides:[1)]

> *A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, 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, shall be issued as provided in this section. In addition, the neutral arbitrator upon their own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents, and other evidence.*

<u>Statutory Basis of Permitted Circumstances for Issuing Nonparty Subpoenas</u>

Previously, in *Aixtron,* the 6th District Court of Appeal parsed out the language in § 1282.6(a) to authorize nonparty subpoenas under three circumstances: (1) at an arbitration proceeding, (2) at a deposition under Section 1283, and (3) if Section 1283.05 is applicable, for the purposes of discovery. The Court held that the subpoenas were precluded under § 1282.6 as they were issued with no hearing or deposition scheduled, and the case did not involve wrongful death or personal injury.

In contrast, in *McConnell*, the subpoenas requested the nonparties to appear and produce the documents at an arbitral hearing, which technically should fall within the circumstances outlined in the *Aixtron* test. However, the Court was concerned that, without further limitations on the types of arbitral proceedings for which subpoenas could be issued, arbitrators would essentially have unlimited power to issue discovery subpoenas as long as they are labeled "hearing subpoenas." This would be contrary to the general prohibition of discovery in arbitration as provided in § 1283.1, as well as the strong public policy favoring arbitration as a cost-efficient and speedy means of resolving disputes. The legislative history of § 1282.6 shows that the statute intended to compel the attendance of witnesses and evidence production at the arbitral hearing only and not for discovery purposes.[2)] Therefore, the Court found that the analysis of whether a subpoena is a statutorily authorized "hearing subpoena" does not end at the title of the subpoena but must consider the purpose of the hearing to which the nonparties are called.

The Court also considered Section 7 of the Federal Arbitration Act (FAA) in finding a limited

scope of authorized nonparty hearing subpoena under § 1282.6. The statute provides:

> *"The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."*

The Court Drew A Distinction Between an Evidential Hearing and a Discovery Hearing

The majority of federal courts read Section 7 of the FAA as requiring the witness to be physically present before the arbitrators for the purpose of providing testimony while the minority believes it gives arbitrators the implicit power to order production of documents before the hearing. As one federal court found, the presence requirement on nonparties to produce documents is in the interest of disincentivizing "fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration." *Hay Grp. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004). The *McConnell* Court found the majority's view persuasive, deciding that arbitrators have limited power to order nonparties to produce documents at an arbitral hearing.

In reaching this conclusion, the Court distinguished between deposition hearings for evidentiary purposes and discovery hearings. Deposition hearings are authorized within the second scenario under § 1282.6(a), while discovery hearings are authorized under the third scenario only with respect to wrongful death and personal injury cases per § 1283.05. The hearing is a deposition hearing if it asks for specifically described evidence or testimony of identified individual and the evidentiary value of the intended evidence is not speculative. On the contrary, speculation about the potential to generate evidence from the documentary or witness requests indicates a discovery hearing.

The Court also reversed the trial court for not meeting the evidentiary value based on which Section 1282.6(a) authorizes subpoenas ordering for the witness to appear and present documents. In *McConnell*, the subpoenas were too broad and the evidentiary value of the requested documents was speculative. The Court held:

> *The subpoenas turned into discovery when they were expanded to seek, among other things, "all messages sent to or from" unidentified employees or independent contractors associated with Kabbani, Lattice, and three other entities on WhatsApp, to messages sent on seven other messaging applications and "any other messaging service or platform" concerning or relating to "(i) Lattice's finances, (ii) Lattice's business in the semiconductor test industry, (iii) ATI-related technology, (iv) semiconductor test technology, or (v) Advantest or Astronics."*

McConnell, 92 Cal. App. 5th at 613-14.

The Court considered the following factors in finding that the subpoenas attempted discovery: the website for uploading the requested documents was maintained by counsel for Advantest, there was no indication that the arbitrator had access to an online portal, and the nearly 12-month gap

between the date of compliance and the merits hearing was significant. The Court found that, as the underlying arbitral hearing was for the limited purpose of receiving the subpoenaed documents, the subpoenas were not authorized under § 1282.6(a) of the California Code of Civil Procedure. Neither did the parties agree to the full scope of discovery under California rules in their arbitration agreement. Therefore, the Court found the arbitrator's order for compliance with the subpoenas exceeded his power and vacated the order.

Conclusion

As a matter of first instance, the Court held that, under California law, arbitrators are not authorized to issue subpoenas to a nonparty for production or appearance at a discovery hearing. *McConnell* suggests that, in addition to the narrow scope of the requested production, requesting parties must demonstrate that the purpose of the hearing is not simply to obtain discovery. Addressing the public policy concern for speedy and cost-effective arbitration proceedings, the Court ensured that nonparty subpoenas cannot be issued for discovery when the parties had not agreed to do so. In the Court's analysis, it sided with the more restricted approach under the FAA regarding the power of an arbitrator to order prehearing document production from nonparties.

The McConnell decision provides persuasive authority and guidelines for restricting arbitrator's powers to order nonparty subpoenas in California, which were previously thought to be broad and unlimited. This decision mirrors the approach in other states, such as New York,[3] and reflects assimilation with wider trends and application of the FAA.

Anlin Ye is a member of Young California Arbitration (Young CalArb), who assisted in the preparation of this article. Young CalArb believes that the future of international arbitration in California lies in the hands of our promising young professionals. Its mission is to provide a dynamic platform that nurtures their growth and strengthens their network within the arbitration community. Young CalArb is committed to advancing the cause of California Arbitration in developing and promoting California as a hub for international arbitration. Its vision is to shape a progressive future for international arbitration in California. Young CalArb is sponsored by California Arbitration.

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References

?1 Section 1283.1 provides that discovery is authorized in arbitration only in cases involving wrongful death and personal injury and to other cases if parties have agreed so. Section 1283.05 provides for the way to conduct document discovery in an arbitral proceeding.

?2 *Aixtron*, 52 Cal. App. 5th at 401.

?3 See the 2014 New York Supreme Court Ruling to quash nonparty subpoenas in *Empire State Building v. New York Skyline, Inc.*

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