**Issuance & Enforcement of Arbitral Subpoenas**

**Including Authority of Panels to Conduct Third-Party Pre-Hearing Discovery**

**By**

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## I. Introduction

This article examines an arbitration panels' authority to pursue third party pre-hearing discovery. Although the judicial trend is to deny enforcement,[1] some courts have recognized the express authority of panels to convene preliminary hearings for the purpose of taking witness testimony along with the production of documents. However, therein lies a potential minefield of issues for the arbitration panel, including the use of inconsistent language within and among the relevant statutes and conflicting institutional arbitration rules.

Significantly, we highlight the contrast between the authority of an arbitration panel to *issue* a subpoena with its authority to *enforce* a witness' compliance. This distinction raises a policy question for an arbitration panel—does the panel perceive their role with respect to the issuance of subpoenas as merely an administrative one, issuing the form and substance of the summons[2] as requested? Or should the panel examine any draft subpoena and its issuance, with an eye toward its ultimate enforcement?

## II. Circuit Court Split on Pre-Hearing Discovery of Non-Parties

Any analysis of an arbitration panel's authority to issue subpoenas must start with the Federal Arbitration Act ("FAA").[3]

Section 7 entitled "Witnesses before arbitrators; fees; compelling attendance" provides:

> The arbitrators . . . or a majority of them, 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 . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or

> neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Federal Circuits are split on whether this language permits an arbitration panel to issue a documents-only subpoena to a non-party in the course of discovery. The Second,[4] Third,[5] Fourth[6] and Ninth[7] Circuits have interpreted §7 to require the appearance of a testifying witness before one or more members of the panel, thus not permitting a pre-hearing documents-only subpoena.

These restrictive interpretations of FAA §7 stand in contrast to the more liberal view of the Eight Circuit[8] that the authority granted by §7 to subpoena relevant documents for production at a hearing includes the "implicit power" to subpoena relevant documents prior to the hearing. The Sixth Circuit, while declining to apply the FAA to the labor matter before it, expressly relied on a similar view of §7.[9]

While the Fourth Circuit adopted the interpretation that §7 precludes discovery subpoenas as a general matter and in the specific case that was before them, the Court noted in *dicta* that pre-hearing document subpoenas might be enforced upon a showing of special need or hardship, though the Court did not define the parameters of this exception except to observe that the information must, at a minimum, be otherwise unavailable. [10]

A joint committee report of the New York Bar is an excellent resource on arbitration subpoena issues, including a list of federal district court cases in other circuits following the restrictive interpretation of §7.[11]

There has also emerged a divergence of view between the Second Circuit and the New York state courts. Some of the state courts have taken a view similar to that of the Fourth Circuit. [12] For a discussion of the implications of this federal/state court split, *see* the *New York Bar Report*.[13]

## III. Obtaining Non-Party Compliance in the Face of the Circuit Court Rulings

*The Stolt-Nielsen Alternative*

Learning its lesson from a prior attempt, the arbitration panel in *Stolt-Nielsen Trans. Group, Inc. v. Celanese AG, ("Stolt-Nielsen")*[14] issued subpoenas to Stolt-Nielsen directing its custodian of records to appear and testify at an arbitration proceeding and to bring certain documents with him. The district court enforced these subpoenas and the custodian appeared before the entire panel bringing documents and providing testimony on evidentiary issues and objecting to certain questions on the grounds of privilege.

Stolt-Nielsen appealed the district court order arguing that Section 7 does not empower arbitrators to summon non-parties to testify and produce documents in advance of a "merits hearing" characterizing it as a "thinly disguised effort to obtain pre-hearing discovery." The Second Circuit rejected this argument, upholding the preliminary nature of the hearing citing three factors: (a) the custodian was not summoned to a deposition designed to elicit information in preparation for a hearing; (b) the custodian gave testimony directly to the arbitration panel and the panel ruled on certain issues and reserved others for later; and (c) the testimony of the custodian became part of the record to be used by the arbitrators to resolve the dispute. The court commented that the fact that the custodian's testimony was in advance of the final hearing on the merits was irrelevant since there may be preliminary matters to be determined and hearings are often continued for extended periods. The Second Circuit also made it clear that they were not suggesting that all three factors had to be present in other cases.[15]

The concurring opinion of Judge Chertoff in the Third Circuit's *Hay Group* decision discussed a similar procedure, whereby a single arbitrator may compel a third-party to appear with documents and then adjourn the proceedings.[16] The Second Circuit cited both the procedure outlined by Judge Chertoff's concurrence and its decision in Stolt-Nielsen as examples of how arbitration panels are not powerless to compel third party discovery under FAA §7**.**[17]

Arbitration panels should be aware that institutional arbitration rules have failed to keep abreast of developments in this area. For example, AAA Commercial Rules at R-34 (d) provide "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." Although the majority of Circuits have ruled that arbitrators cannot issue subpoenas for documents alone, this provision may be operative in the Eighth and Sixth Circuits as well as arbitrations conducted under some state statutes. Likewise, insurance/reinsurance arbitration rules permit panels to issue subpoenas for the production of documents in contravention of the rulings in the majority of Circuits.[18]

This brings us to the next questions regarding who and how to issue the subpoenas, how many arbitrators must attend a hearing, where the hearing can be held, and what other traps to avoid in the enforcement (as opposed to the issuance) of the summons.

## IV. Issuance of Subpoenas—Process & Procedure

### *A. Only Arbitrators Can Issue Summons*

Section 7 provides that "the arbitrators, or a majority of them" may summon any person to attend before them, as a witness and to bring documents. Unlike certain state statutes (*e.g.,* New York Civil Practice Law and Rules ("C.P.L.R.") §7505 that permits an arbitrator or any attorney of record the power to issue subpoenas), only the arbitrators can issue summons in an arbitration to which the FAA applies.

### *B. Opposing Party Objection to Issuance*

Typically, the requesting party presents the subpoena to the arbitration panel for its approval and signature.[19] Sometimes the opposing party raises objections to the issuance of subpoenas

generally, the authority or jurisdiction of the panel, or to the scope of the requested summons. The arbitration panel should carefully consider any authority or jurisdiction issues as the issuance of subpoenas not within the panel's authority or jurisdiction undermines the integrity of the process and the panel itself. However, issues of scope are generally beyond the ability of the opposing party to raise. Rather, the subpoenaed witness more properly brings such issues before the appropriate Federal district court by way of a motion to quash or to modify the subpoena.[20] A party does not have standing to assert any rights of the nonparty, absent a personal right or privilege.[21]

### *C. Nationwide Service of Process*

FAA §7 provides that witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." Rule 45 of the Federal Rules of Civil Procedure ("FRCP") provides for nationwide service of judicial subpoenas.[22] By extension, an arbitral subpoena can be served anywhere in the United States.

Two questions remain: Can an arbitral summons require the witness to appear at the location where the arbitration is pending even if it is far from the witness' domicile? And if the witness fails to appear, how and by whom is the subpoena enforced?

### *D. Location of Third Party Witness Compliance*

While an arbitral subpoena can be served anywhere in the United States, it can command compliance only within 100 miles of the witness, unless other conditions exist as noted below. FRCP Rule 45(c)(1) sets forth the territorial limits for complying with a subpoena, providing in relevant part:

> A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.

Thus, the subpoena should command the witness to appear and testify and bring the requested documents to a place within the geographical limit applicable to the witness, regardless of where the arbitration proceedings are otherwise pending.

### *E. Motions to Quash*

Courts have held that witness objections to relevancy, materiality, privilege and confidentiality should first be brought before the arbitration panel as the proper entity to determine evidentiary issues in the arbitration.[23] However, witness motions to quash based on the limitations imposed by FAA §7 (*e.g.*, the panel exceeded its authority) may also be properly brought before the court with jurisdiction to enforce the subpoena as discussed below.[24] Insurance/reinsurance industry procedures authorize panels to rule on the objections of either a party or a subpoenaed person without specifying the type of objection.[25]

The *New York Bar Report* offers a "Model Federal Arbitration Summons" ("Model Summons") that addresses this and other arbitration subpoena issues with helpful annotations. For example, the text of the Model Summons specifies the type of objections that should be made to the arbitration panel as opposed to the court. The Drafting Committees' purpose for including this language was to overcome any assumption that all objections are to be addressed to the court and thereby avoid the delay caused by unnecessary judicial intervention in the arbitration process.[26]

The Fourth Circuit has noted that the recipient of an arbitrator-issued subpoena is under no obligation to move to quash the subpoena and that by failing to do so, the recipient does not waive the right to challenge the subpoena on the merits. The FAA imposes no requirement on the subpoenaed party, the only remedy being a motion to compel compliance.[27]

## V. Enforcement of Arbitral Subpoenas

### *A. Court Enforcement at Place of Compliance*

An arbitration panel's authority to issue a non-party summons does not include the authority to enforce the subpoena—only a court can compel compliance under the FAA.

FAA §7 provides that

> . . . upon petition the United States district *court for the district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in *the same manner provided by law* for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." (emphasis added)

Additionally, Rule 45 makes it clear that the federal district court *at the place of compliance* with a judicial subpoena is the court in which enforcement should be sought as long as the district court has subject matter jurisdiction.[28] In the absence of jurisdiction, enforcement would be proper in the state court at the place of compliance.[29]

In the event that an arbitration panel opts to hold a Stolt-Nielsen preliminary hearing with non-party testimony and production of documents, the proper court for enforcement of the subpoena would be the district court (or state court) within the 100-mile radius of the witness specified in FRCP Rule 45.

### *B. Relocating the Panel to Another Jurisdiction*

At least one court has upheld a subpoena requiring a non-party to appear and testify before a panel relocated for that purpose.[30]

Additionally, institutional arbitration rules permit panels to conduct hearings at locations other than where the arbitration is pending. For example, AAA International Dispute Resolution

Procedures Article 17 Rule 2 states that a "panel may meet at any place it deems appropriate for any purpose" including conducting hearings. The AAA Commercial Arbitration Rules at R-11 authorizes the arbitrator, in his/her sole discretion, to "conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process." By contrast, insurance/reinsurance industry procedures require that the location of "all proceedings" shall be as agreed by the parties with the ability of the panel to change the location only in the absence of agreement.[31]

Panels should be aware of any restrictions in the arbitration agreement and the applicable institutional arbitration rules, if any, that might require consent of all parties to change the location of a hearing. A recalcitrant party could use this provision to preclude court enforcement of a subpoena.[32] Depending on the wording of the arbitration agreement, the panel might be able to relocate for purposes of a preliminary hearing, interpreting the location provision in the parties' agreement as referring only to the merits hearing. Alternatively, the panel may be able to apply an adverse inference against the party refusing to agree to the panel's attempt to relocate for purposes of hearing testimony and obtaining documentary evidence.[33]

Additionally, serious consideration should be given to changing industry insurance/reinsurance arbitration rules so that they no longer impose an impediment to parties and panels attempting to relocate proceedings for the purpose of obtaining non-party documents.

### *C. How Many Arbitrators Is Enough?*

FAA §7 provides that the arbitrators "may summon in writing, any person to attend before them *or any of them* as a witness." (emphasis added) Courts have cited the ability of a single arbitrator to hear testimony of a witness.[34] By contrast, when it comes to enforcement of a subpoena, §7 provides for enforcement in the district of compliance upon petition to the district court "in which such arbitrators, or a majority of them, are sitting." Thus, while §7 seems to permit the taking of testimony by a single arbitrator, the same section seems to suggest that enforcement is available only where a majority of them are sitting.

The taking of testimony by less than the entire panel of arbitrators could also raise questions under the parties' arbitration agreement that may require that evidence be heard by the entire panel. Additionally, some arbitration rules require that all arbitrators be present for the taking of evidence. For example, AAA Commercial Arbitration Rules at R-34 (a) provide in relevant part: "All evidence shall be taken in the presence of all the arbitrators and all the parties . . ." Some state statutes may have similar impediments. For example, N.Y. C.P.L.R. §7506 (e) provides: "The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award."

The International Commercial Disputes Committee of the Association of the Bar of the City of New York recommended:

> . . .while Section 7 provides that non-party evidence may be taken 'before [the arbitrator] or any of them,' the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is 'really needed' (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.[35]

In our view, best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose. By requiring the presence of a majority, the enforceability provision of FAA §7, which is not subject to waiver by the parties, is clearly met and the parties are thereby precluded from attacking the ultimate award on this basis.

### *D. Testimony by Electronic Means*

Some commentators have suggested, and institutional arbitration rules permit the taking of testimony by electronic means instead of requiring physical presence. For example, AAA Commercial Rules at R-32 (c) permit video conference, internet communication, telephonic conference and other such means as long as the parties are afforded the opportunity to present evidence and cross examine witnesses. Similarly, insurance/reinsurance arbitration rules expressly authorize this practice.[36]

However, the *New York Bar Report* cautions panels that providing for other than physical presence of the arbitrators could provide a recalcitrant witness the opportunity to argue that the panel is not "sitting" in the federal district where the witness is located. Noting that the "touchstone of Section 7" is the *adjudicative* presence of the arbitrator, not the physical presence, the joint committees believe it is "prudent to avoid controversy on this point." [37]

## VI. Conclusion

In summary:

- The majority of courts hold that FAA §7 requires that non-party documents be produced by a testifying witness;
- The arbitration panel may convene a preliminary hearing for the purpose of taking testimony and receiving documents as §7 does not limit a panel's authority to a merits hearing;
- Although an arbitration panel has the ability to issue a summons anywhere in the United States, it can command compliance, in accordance with FRCP Rule 45, only within a 100 mile radius of the non-party witness' location;
- Parties have no standing to object to the scope of the subpoena, only the subpoenaed witness has such standing, absent a personal right or privilege;
- Motions to quash based on irrelevancy, materiality, privilege, and confidentiality should be brought before the arbitration panel though challenges to the panel's authority/jurisdiction may be brought before the court ultimately responsible for enforcement of the subpoena;

- The appropriate court to seek compliance with a non-cooperative witness is the district (or state) court where compliance is sought;
- The panel may temporarily relocate for the purpose of taking testimony and receiving documents, except beware of arbitration agreement wording as well as insurance/reinsurance industry procedures that might impose impediments; and
- FAA §7 is internally inconsistent permitting a single arbitrator to hear testimony but providing for subpoena enforcement only where a majority of the panel is "sitting." Testimony before less than a full panel may violate requirements of certain institutional arbitration rules and raise questions of enforceability under the FAA and the New York Convention (in the case of international arbitrations). The best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose.

As noted in the Introduction, some panels perceive their role with respect to subpoena issuance as administrative, leaving questions about the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge. Commentators have suggested that the preferred approach is for arbitration panels to:

> . . . consider carefully the enforceability of proposed subpoenas as a condition of issuance . . . by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance."[38]

**ENDNOTES**

[1] *See Life Receivables, infra*, Note 4. *Hay Group* signaled what one commentator has called an "emerging rule . . . This growing consensus is evidenced by the wide array of district court decisions – including those within this Circuit – that have adopted *Hay Group's* holding." *Life Receivables* at 215.

[2] The Federal Arbitration Act, 9 U.S. Code §§ 1 – 16 refers at §7 to the issuance and enforcement of arbitral "summons." This article uses the terms "summons" and "subpoena" interchangeably as both refer to "an arbitrator's compulsory process to a non-party witness." *See* New York Bar Report, *infra*, Note 11, at Annotation A.

[3] *Id.*

[4] *Life Receivables Trust v. Syndicate 102 at Lloyd's of London,* 549 F. 3d 210 (2d Cir. 2008) ("Life Receivables").

[5] *Hay Group, Inc. v. E.B.S. Acquisition Corp*., 360 F. 3d 404 (3d Cir. 2004) ("Hay Group"). The opinion of the Court was issued by then Circuit Judge Samuel Alito (before his appointment to the U.S. Supreme Court).

[6] COMSAT Corp. v. National Science Found., 190 F. 3d 269 (4th Cir. 1999) ("COMSAT").

[7] *CVS Health Corp. v. Vividus,* LLC 2017 U.S. App. LEXIS 26236 (9th Cir.) ("CVS Health").

[8] *In Re Sec. Life Insurance of America*,228 F. 3d 865 (8th Cir. 2000)("Security Life").

[9] *American Federation of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F. 3d 1004 (6th Cir. 1999).

[10] *COMSAT*, 190 F.3d *at* 276. The Third Circuit rejected this exception, *Hay Group,* 360 F.3d at 410.

[11] Report of the International Commercial Disputes Committee and the Arbitration Committee of the Association of the Bar of the City of New York, 26 Am. Rev. Int'l Arb. 157 (May 2015) ("New York Bar Report").

[12] In *ImClone Sys. Inc. v. Waskal*, 22 A.D. 3d 387, 388 (1st Dep't 2005), predating the Second Circuit decision in *Life Receivables*, the Appellate Division of New York Supreme Court, First Department, held that in a case governed by the FAA, it would apply §7 to permit discovery depositions of non-parties upon a showing of special need or hardship. The court in *Connectu v. Quinn Emanuel Urquhart Oliver & Hodges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. March 11, 2010) followed *ImClone* after and notwithstanding the Second Circuit's decision in *Life Receivables.*

[13] *New York Bar Report* at Annotation E.

[14] 430 F.3d 567 (2nd Cir. 2005).

[15] *Stolt-Nielsen* at 578 (". . . although we hasten to add that we do not suggest that all these factors need be present in every case in order to justify the arbitration subpoenas under Section 7.").

[16] *Hay Group*, 360 F.3d at 413. To the extent that Judge Chertoff's concurrence could be interpreted as compelling the witness to appear with documents, and not taking testimony, it would be contrary to the majority trend that requires the witness to appear for the purpose of taking testimony. See *Life Receivables* at 218 (". . .those relying on Section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.")

[17] *Life Receivables*, 549 F.3d at 218.

[18] Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999) at 14.5 ("1999 TF Procedures"); Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 2009) at 14.5 ("2009 TF Procedures"); ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (2014) ("ARIAS U.S. Rules") at 14.5.

[19] FAA §7 requires that a summons issue in the name of and be signed by a majority of the arbitrators. Does this require the panel to circulate the subpoena for signature by multiple panel members? It is difficult to believe that in today's electronic environment that one panel member cannot sign on behalf of the panel. Common practice suggests that a single arbitrator may sign the subpoena, listing the arbitrators by name under the signature line and clearly noting that the signature is "on behalf of a majority of," or if applicable, "on behalf of a unanimous panel."

[20] 9 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE, par. 45.50 at 3. (3d ed. 2000).

[21] *Id.* at Note 10.

[22] FRCP 45(b)(2) was amended effective December 1, 2013 providing for nationwide service. *See* New York Bar Report at Annotation F (noting that the FRCP 45(b)(2) amendments remove at least one procedural hurdle to arbitral subpoena enforcement raised by cases like *Dynegy Midstream Servs., LP v. Trammochem*, 451 F. 3d 89 (2d Cir. 2006) and *Legion Ins. Co. v. John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002)).

[23] *See New York Bar Report* at Annotation I citing *Security Life*, 228 F.3d at 871 (Section 7's requirement that information sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration, and compromise the panel's presumed expertise in the matter at hand").

[24] *See New York Bar Report* at Annotation I citing *Ware v. Peacock, Inc*. 2010 WL 1856021 at 3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitration-issued deposition subpoena based on *Hay Group*

and *Life Receivables*); *In re Proshares Trust Sec. Litig*., 210 WL 4967988, at 1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash document discovery subpoena based on *Life Receivables*).

[25] *1999* TF Procedures at 14.5; 2009 TF Procedures at 14.5; *ARIAS U.S. Rules* at 14.5.

[26] New York Bar Report at Annotation I.

[27] COMSAT, 190 F.3d at 276.

[28] New York Bar Report at Annotation F.

[29] Subject matter jurisdiction is beyond the scope of this article. For a discussion of the topic, see New York Bar Report at Annotation H.

[30] *In re National Financial Partners Corp*., 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. April 21, 2009).

[31] 1999 TF Procedures at 9.1; 2009 TF Procedures at 9.1; ARIAS U.S. Rules at 9.1.

[32] Teresa Snyder, "The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act", 34 TORT & INS. L.J. 101, (1998).

[33] "Adverse Inferences in International Arbitral Practice", ICC International Court of Arbitration Bulletin Vol 22/November 2 – 2011 at 44 ("An arbitral tribunal's power to draw adverse inferences is well established as a matter of international arbitration practice."). Likewise, the International Dispute Resolution Procedures provide that "In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs." International Centre for Dispute Resolution and American Arbitration Association. Article 21.9.

[34] *Hay Group*, 360 F.3d at 413.

[35] *Obtaining Evidence From Non-Parties in International Arbitration in the United States,* The International Commercial Disputes Committee of the Association of the Bar of the City of New York at II. C.. Reference to Judge Chertoff is to the concurrence opinion in *Hay Group*.

[36] *1999* TF Procedures at 14.6; 2009 TF Procedures at 14.6; *ARIAS U.S. Rules* at 14.6.

[37] *New York Bar Report* at Annotation F. While not determinative, in the concurring opinion in *Hay Group,* Judge Chertoff noted that obtaining non-party documents through witness testimony requires the arbitrators to decide if they too, are prepared to suffer some inconvenience in order to mandate what is in reality, an advance production of documents. *Hay Group*, 360 F.3d at 413. Obviously Judge Chertoff contemplated physical presence of the arbitrator(s). *See also,* the Second Circuit in *Stolt-Nielsen*, 430 F.3d at 580 ("Nor should we assume lightly that that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable.")

[38] *Id.* at Annotation K.