



# The Arbitration Review of the Americas

2022

**United States**

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.


Other nuggets include:

- helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
  - an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
  - a similarly helpful summary of recent Canadian court decisions;
  - another on Mexican court decisions that showed a rather mixed year; and
  - the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.
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# United States

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## Summary

IN SUMMARY

DISCUSSION POINTS

REFERENCED IN THIS ARTICLE

SUPREME COURT EXTENDS INTERNATIONAL ARBITRAL AGREEMENTS TO NON-SIGNATORIES

QUESTION OF WHO DECIDES ARBITRABILITY REMAINS UNRESOLVED

US SUPREME COURT DECIDES WHETHER DISCOVERY MAY BE OBTAINED IN THE US FOR USE IN INTERNATIONAL COMMERCIAL ARBITRATION

COVID-19 AND REMOTE HEARINGS IN ARBITRATION PROCEEDINGS

ENDNOTES

## IN SUMMARY

The US Supreme Court has presided over several cases of great interest to the international arbitration community over the past year. In *GE Energy*, it held that a non-signatory may participate in international arbitration if there is a basis to bring the non-signatory in under domestic state law. In *Schein*, it dismissed the case without deciding whether the incorporation by reference of the American Arbitration Association's rules into an arbitration agreement effectively delegates the question of arbitrability away from the courts and to the arbitrators. In *Servotronics*, it accepted a petition and will decide whether discovery may be obtained in the United States for use in foreign, private commercial arbitration. Remote hearings became the norm in 2020, and at least one US district court decided that it does not per se violate a party's due process rights.

## DISCUSSION POINTS

- US Supreme Court extends international arbitral agreements to non-signatories
- Question of who decides arbitrability remains unresolved by the US Supreme Court
- US Supreme Court to decide whether 28 USC section 1782 allows interested parties to obtain discovery in the United States for use in foreign, private commercial arbitration

## REFERENCED IN THIS ARTICLE

- *GE Energy Power Conversion France SAS v Outokumpu Stainless USA LLC*
- *Henry Schein, Inc, v Archer and White Sales, Inc*
- American Law Institute's Restatement of the US Law of International Commercial and Investor-State Arbitration
- 28 USC section 1782
- *Servotronics, Inc v Rolls-Royce PLC*
- *Intel Corp v Advanced Micro Devices, Inc*
- *Legaspy v Fin Indus Reg Auth, Inc*
- *Managed Care Advisory Group*
- *Broumand v Joseph*

## SUPREME COURT EXTENDS INTERNATIONAL ARBITRAL AGREEMENTS TO NON-SIGNATORIES

Can a non-signatory to an arbitration agreement participate or be compelled to participate in an international arbitration in the United States? Although it was generally believed that they could under certain circumstances, some courts required there be a signed agreement for a party to participate in an international arbitration.

On 1 June 2020, the US Supreme Court removed any lingering doubt that a non-signatory may participate in international arbitration if there is a basis to bring them in under domestic state law. In *GE Energy Power Conversion France SAS v Outokumpu Stainless USA LLC*

(*GE Energy*), the Court unanimously held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) does not preclude non-signatories from enforcing arbitration agreements based on the application of domestic equitable estoppel doctrines.<sup>[1]</sup>

The decision reversed an 11th Circuit Court of Appeals ruling that barred a subcontractor from participating in an arbitration because it did not sign the agreement between the owner of a project and the general contractor; thus, the absence of a party's signature will not disqualify that party from participating in an international arbitration where state law provides a right to or imposes an obligation on a non-signatory.

### The Scope And Reach Of The Decision

In the United States, where an arbitration provision is part of a contract affecting interstate and international commerce, it is governed by the Federal Arbitration Act, 9 USC, section 1 et seq (FAA).<sup>[2]</sup> Chapter 2 of the FAA grants federal courts jurisdiction over actions governed by the New York Convention.<sup>[3]</sup>

As a general rule in the United States, a party that has not signed an arbitration agreement is not bound by it and, therefore, cannot be compelled to arbitrate.<sup>[4]</sup> Moreover, the New York Convention obliges states to recognise certain agreements in writing whereby the parties agree to arbitrate, but defines 'agreement in writing' as 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'.<sup>[5]</sup>

Courts across the country have consistently found arbitration agreements to be binding on non-signatories in domestic arbitration on the basis of assignment, succession, merger, subrogation, agency, implied consent, estoppel, waiver or by piercing the corporate veil. It is also settled that an arbitration agreement is binding on a non-signatory where "traditional principles" of state law allow a contract to be enforced by or against non-parties to the contract.<sup>[6]</sup>

In *GE Energy*, the 11th Circuit, however, found that a party that had not signed an international arbitration agreement could not arbitrate because the New York Convention requires an agreement in writing that is 'signed by the parties'.

In reversing the 11th Circuit, the Supreme Court noted that the New York Convention is silent on whether a non-signatory can enforce an arbitration agreement: 'This silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines.'<sup>[7]</sup> The Court concluded that nothing in the New York Convention conflicts with the application of domestic equitable estoppel doctrines. The Court also examined decisions from other contracting states and found that 'courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement'.<sup>[8]</sup>

The Court's decision is consistent with the position of most commentators in the area of international arbitration.<sup>[9]</sup>

The US public policy favouring arbitration was strengthened by the Supreme Court's decision in *GE Energy*. Affiliates, subcontractors, successors, etc, are now more likely to be covered by an arbitration agreement. Consent, however, remains an essential requirement under the FAA.<sup>[10]</sup> A party does not necessarily need to sign an agreement to be subject to arbitration.

This was uncontroverted for domestic arbitration and is now established law in the context of international arbitration.

### **The Importance Of Applicable Law, Place And Scope In The Arbitral Clause**

As business transactions become increasingly more complex, infrastructure projects include parties from all over the world, and the number of consolidations, outsourcing and mergers grow, the reach of an arbitration agreement will be of greater significance. Parties seek certainty and predictability through their agreements.

However, the arbitration clause is often referred to as the 'midnight clause' because it is frequently left for last and not given sufficient attention. In other cases, parties may be prone to overly complicate arbitration clauses, which may create enforceability issues or provide insufficient flexibility. Sometimes the arbitration clause is a product of negotiations that lead to what is commonly referred to as a 'pathological clause'. Regardless of the reason, attention is pertinent to ensure the parties adopt a dispute resolution mechanism that is appropriate for the transaction and avoids unintended consequences to the extent possible.

A question that should receive greater attention in light of *GE Energy* is which parties may be covered by the arbitration agreement. Engineering, procurement and construction contracts often specify that subcontractors are covered, but what if the contract is silent? Can parties contract around a state's doctrine of equitable estoppel if they do not want to subject themselves to arbitration with subcontractors?

A surviving entity in a merger should be subject to any arbitration agreement the same way they would be responsible for a predecessor's liability. But can a party in an asset purchase transaction be subject to arbitration under an equitable estoppel theory when it is well established that a party in an asset purchase transaction does not assume liabilities? Probably not, if the party does not perform or assume any responsibilities under a written agreement that includes an arbitration clause. These are examples of issues that may arise with greater frequency in the future.

The *GE Energy* decision opens international arbitration to non-parties in the United States. It will be difficult to exclude non-signatories if there is a basis to include them under state law. A non-party that performs obligations under a contract may become a party to an arbitration through implied consent. A party that has sought to shield itself of responsibility through elaborate corporate structures may be subject to arbitration if the elements exist to establish that it is an alter ego and warrant piercing the corporate veil. Third-party beneficiaries, guarantors, agents and affiliates may be more likely to become parties.

Laws in the United States vary from state to state and can result in different outcomes, depending on what state law is applied. Sometimes parties agree to the application of the 'law of the United States' without specifying a state. For example, if the seat of the arbitration is Miami, Florida, the law of the State of Florida may apply. Case law developed in the areas of equitable estoppel, implied consent, third-party beneficiaries, etc, however, may vary significantly from neighbouring Georgia. The law applicable in *GE Energy* remains unclear because the case was remanded for further findings.

The selection of the law applicable to the arbitration agreement and the place of arbitration within the United States or in foreign jurisdiction should be given greater attention to ensure the parties' expectations are met.

### **QUESTION OF WHO DECIDES ARBITRABILITY REMAINS UNRESOLVED**

One of the most closely watched arbitration cases on the US Supreme Court docket evaporated into thin air in January, leaving uncertainty in its wake. The case? *Henry Schein, Inc. v Archer and White Sales, Inc* (*Schein*).<sup>[11]</sup>

On its second go around before the Supreme Court, the question many hoped would be answered in *Schein* was whether the incorporation by reference of the rules of the American Arbitration Association (AAA) into an arbitration agreement effectively delegates the question of arbitrability away from the courts and to the arbitrators.

As a general rule, courts decide ‘gateway’ questions of arbitrability, including whether an agreement to arbitrate is valid or whether the agreement covers a particular claim.<sup>[12]</sup> Arbitration, however, is a matter of contract and parties can agree to delegate such gateway questions of arbitrability to an arbitrator.<sup>[13]</sup> Specifically, gateway questions of arbitrability can be delegated to arbitrators where there is clear and unmistakable evidence that the parties agreed to the delegation.<sup>[14]</sup>

Like the rules of most major arbitral institutions, the AAA Commercial Arbitration Rules (the AAA Rules) provide arbitrators with the power to rule on their own jurisdiction and to decide questions concerning the existence, scope or validity of an agreement to arbitrate as well as concerning the arbitrability of claims brought thereunder.<sup>[15]</sup>

### The Schein Case

The arbitration agreement in question in *Schein* did not expressly delegate questions of arbitrability to the arbitrator; however, it did incorporate the AAA Rules by reference.<sup>[16]</sup>

On its first go around before the Supreme Court, the Supreme Court ‘express[ed] no view’ on whether the arbitration agreement in question ‘in fact delegated the arbitrability question to an arbitrator’ because that issue had not been decided by the appellate court below.

Instead, the question addressed was whether a court can override a contract delegating the issue of arbitrability where the court finds that the arbitrability claim is ‘wholly groundless’.<sup>[17]</sup> Various courts across the country had held that the wholly groundless exception ‘enables courts to block frivolous attempts to transfer disputes from the court system to arbitration’.<sup>[18]</sup>

Both the trial and appellate court below found that Henry Schein’s argument to arbitrate based on a purported agreement to delegate questions of arbitrability was wholly groundless because the agreement exempted ‘actions seeking injunctive relief’ from arbitration, and the underlying complaint sought injunctive relief as a remedy.<sup>[19]</sup>

The Supreme Court rejected the wholly groundless exception, concluding it is inconsistent with both the Federal Arbitration Act and with the Court’s precedent. The exception would allow courts to decide ‘frivolous merits questions that have been delegated to an arbitrator’, which a court is not permitted to do.<sup>[20]</sup>

The Supreme Court, thus, held that courts ‘must respect the parties’ decision’ where their ‘contract delegates the arbitrability question to an arbitrator’.<sup>[21]</sup> Accordingly, ‘if a valid [arbitration] agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue’.<sup>[22]</sup>

On remand, the appellate court below again refused to compel the dispute to arbitration, concluding that the arbitration clause in question did not clearly and unmistakably delegate

the question of arbitrability to the arbitrator because it contained the aforementioned carve-out clause exempting actions seeking injunctive relief from arbitration.<sup>[23]</sup> Specifically, the appellate court found that by incorporating the AAA Rules, the arbitration agreement provided 'clear and unmistakable' evidence of the parties' intent to delegate arbitrability 'for all disputes except those under the carve-out'.<sup>[24]</sup>

Henry Schein again appealed to the Supreme Court, arguing that '[i]f an agreement were to exempt from an arbitrability delegation the same claims that it exempts from arbitration altogether, there would never be any arbitrability dispute left for an arbitrator to resolve'.<sup>[25]</sup>

In response Archer and White challenged the arbitrability delegation, arguing that 'it is perplexing to think that merely incorporating the AAA Rules is itself sufficient to show a clear and unmistakable delegation' of the question of arbitrability.<sup>[26]</sup> Archer and White acknowledged that many courts have found that the general incorporation of the AAA Rules by reference clearly and unmistakably evinces an intent to delegate the question of arbitrability, but citing the proposed Final Draft of the American Law Institute's Restatement of the US Law of International Commercial and Investor-State Arbitration (the Restatement was approved in April 2019 and is set to be published later in 2021), it argued those decisions were 'misguided'.<sup>[27]</sup>

### Analysis Concerning The Effect Of Competence-competence Clauses

To be sure, 11 of the 12 federal circuit courts of appeal have found that the incorporation by reference of arbitration rules into an agreement to arbitrate evidences the parties' clear and unmistakable intent to have the arbitrators, and not the courts, determine arbitrability.<sup>[28]</sup>

The Restatement, however, disagrees with these decisions to the extent that the chief reporter of the Restatement, Professor George A Bermann, filed an amicus curiae brief in the *Schein* case to address the very issue.

As Professor Bermann explained, the Restatement reached a different conclusion because the arbitral rules that empower arbitrators to determine their own jurisdiction (known as competence-competence clauses) 'do not make that authority exclusive' and do not 'negate judicial authority to make arbitrability determinations'.<sup>[29]</sup> Thus, the Restatement concludes that such competence-competence language does not clearly and unmistakably evidence an intent to delegate gateway questions of arbitrability away from the courts and to the arbitrator.<sup>[30]</sup>

Owing to the ubiquity of competence-competence clauses in arbitral institutions' rules, if those clauses alone delegate exclusive authority to the arbitrators to decide questions of arbitrability, in Professor Bermann's words, then 'the presumption that issues of arbitrability are "for judicial determination" will be largely eviscerated'.<sup>[31]</sup>

### The Unsettled State Of The Law

Unfortunately, on 25 January 2021, the Supreme Court dismissed the *Schein* case as 'improvidently granted', and neither the carve-out nor the delegation question was resolved.

On 21 March 2021, however, the Supreme Court of Florida accepted jurisdiction to decide a split between the Florida appellate courts on the question of whether the incorporation by reference of the AAA Rules operates as a clear and unmistakable delegation of the question of arbitrability from the courts to the arbitrators.<sup>[32]</sup>

Whether the Florida Supreme Court will deviate from the federal courts of appeals and follow the Restatement remains to be seen. If it does, it will send a shockwave throughout the international arbitration community as Florida has become one of the most popular venues for hearing international arbitration disputes in the country, particularly those involving Latin America.

### **US SUPREME COURT DECIDES WHETHER DISCOVERY MAY BE OBTAINED IN THE US FOR USE IN INTERNATIONAL COMMERCIAL ARBITRATION**

In March 2021, the US Supreme Court agreed to hear a petition that will determine whether discovery may be obtained in the United States for use in foreign, private commercial arbitration. In *Servotronics, Inc v Rolls-Royce PLC (Servotronics)*,<sup>[33]</sup> the Court will address the scope of 28 USC section 1782(a) (section 1782) and will resolve a split between five federal circuit appeals courts on the interpretation of section 1782. The decision has the potential to expand access to discovery in international arbitration beyond what is available to parties in US domestic arbitration.

The US Supreme Court last addressed the scope of section 1782 in its 2004 decision *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241 (*Intel*). In *Intel*, the Court broadened the scope of section 1782, finding that discovery 'for use' in foreign proceedings encompassed use by public agency with quasi-judicial authority.

#### **Statutory Framework**

Sections 1781 and 1782 of Title 28 of the US Code govern a federal district court's authority to provide discovery assistance in litigation in foreign and international tribunals. Section 1781 describes a formal judicial instrument known as a letter rogatory, which is a letter of request 'issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction ... and (2) return [it] ... for use in a pending case'.<sup>[34]</sup>

Section 1782 works together with section 1781, giving the district court the power to order a person within the district to give testimony or provide evidence for use in foreign litigation, either in response to a letter rogatory or on application of a person with an interest in the litigation. The key portion of section 1782<sup>[35]</sup> reads as follows:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

The link to section 1781<sup>[36]</sup> comes in the next sentence:

The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

Section 1782 requires an applicant to satisfy three statutory factors:

- the person from whom discovery is sought resides or is found in the district to which the application is made;

- the discovery is for use in foreign proceedings before a foreign or international tribunal; and
- the application is made by an interested person.

In *Intel*, the Supreme Court established four additional factors for a district court to consider when deciding a section 1782 application:

- whether the person from whom discovery is sought is a participant in the foreign proceedings, which lessens the need for US discovery;
- the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government, court or agency abroad to US federal court judicial assistance;
- whether the section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions; and
- whether the request is unduly intrusive or burdensome.<sup>[37]</sup>

### The Seventh Circuit's Decision In *Servotronics*

The disputed legal issue in *Servotronics* is whether a private foreign arbitration constitutes a 'proceeding in a foreign or international tribunal' under section 1782.

The underlying dispute in *Servotronics* is a dispute over responsibility for losses incurred when an aircraft engine manufactured by Rolls-Royce PLC (Rolls-Royce) caught fire during testing, which damaged the aircraft owned by The Boeing Company (Boeing). Servotronics manufactured the engine valve that contributed to the fire.

Boeing demanded repayment from Rolls-Royce and, after settlement, Rolls-Royce sought indemnification from Servotronics. The agreement between these parties required any dispute to be submitted to binding arbitration in England under the rules of the Chartered Institute of Arbitrators.

After failing to resolve the dispute amicably, Rolls-Royce filed a private arbitration with the Institute. During the pendency of the arbitration, Servotronics filed an ex parte section 1782 application in the US District Court for the Northern District of Illinois, seeking authority to issue a subpoena compelling Boeing to produce documents for use in the arbitration. After initially granting Servotronics's application, the District Court reversed course, vacated its previous order and quashed the subpoena to Boeing.

On appeal to the Seventh Circuit, the Court focused on whether the institute constituted a tribunal under section 1782. The Seventh Circuit evaluated the statutory and dictionary definition of tribunal, the statutory context, a potential conflict with the FAA, the legislative history of section 1782 and the *Intel* decision, in holding that the institute was not a tribunal under section 1782.<sup>[38]</sup>

First, the Court concluded that in 'both common and legal parlance', the phrase 'foreign and international tribunal' could be understood to include state-sponsored tribunals and private arbitral panels, so both interpretations were plausible and did not resolve the issue.

Second, in reviewing the statutory context, the court held that reading section 1782 as a 'coherent whole suggests that a more limited reading of § 1782(a) is probably the correct one'.

Third, the Court held that the narrower understanding of tribunal foreclosed a serious conflict with the FAA. It contrasted the narrower discovery assistance rights in domestic arbitration under the FAA with the expansive rights afforded to a party seeking section 1782 discovery. Most significantly, the FAA permits only the arbitration panel – and not the parties – to compel witness testimony and the production of documents.<sup>[39]</sup> Conversely, section 1782 permits foreign tribunals, litigants and other ‘interested persons’ to procure discovery orders from district courts.

If section 1782 was ‘construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations.’ The Court found it ‘hard to conjure a rationale’ for affording parties to private foreign arbitration such far-reaching discovery assistance while precluding domestic parties from this assistance.

Finally, the Court held that the Supreme Court’s reference in *Intel* to a law-review article that defined tribunal under section 1782 to include ‘arbitral tribunals’ did not ipso facto include private foreign arbitral tribunals within the purview of section 1782.<sup>[40]</sup>

### The Circuit Split Concerning Whether A Foreign Private Arbitration Is A Tribunal

Five federal appeals courts have directly addressed whether a foreign private arbitration is a tribunal under section 1782. In addition to the Seventh Circuit, the Fifth Circuit and Second Circuits do not consider a foreign private arbitration to qualify as a tribunal under section 1782.<sup>[41]</sup> In denying the requested discovery for use in an international arbitration before the China International Economic and Trade Arbitration Commission, the Second Circuit upheld a pre-*Intel* 1999 decision,<sup>[42]</sup> finding that *Intel* did not directly address and determine the question of whether foreign private arbitral bodies qualify as tribunals.

However, since 2019, the Fourth and Sixth Circuits have held that a foreign private arbitration constitutes a tribunal under section 1782.<sup>[43]</sup> The Fourth Circuit reached the opposite conclusion to the Seventh Circuit when evaluating a request for discovery for use in an international arbitration. The Sixth Circuit, much like the Seventh Circuit, discussed at length the applicable dictionary definition of tribunal, the ‘use of the word tribunal in legal writing’, the statutory context and the *Intel* decision in holding that a foreign private arbitration constituted a tribunal.<sup>[44]</sup>

### COVID-19 AND REMOTE HEARINGS IN ARBITRATION PROCEEDINGS

Although remote hearings were available in arbitration proceedings before 2020, they were not commonplace. The covid-19 pandemic tested arbitral tribunals and parties, particularly where a party sought a remote hearing while the other preferred to postpone the hearing until in-person meetings resumed. Without an express agreement of the parties, is the tribunal allowed to conduct the hearing remotely?

The answer depends on, among other things, the language of the arbitration agreement and the arbitration rules applicable to the dispute. Two contested issues in 2020 were whether a party to an arbitration has a right to an in-person hearing absent an express agreement between the parties, and whether a violation of this right is a violation of due process.

The US Supreme Court has certainly not addressed the issue, and we know of only one US court that has decided it: the US District Court for the Northern District of Illinois in *Legaspy v Fin Indus Reg Auth, Inc (Legaspy)*.<sup>[45]</sup>

In *Legaspy*, the plaintiff (and the respondent in the arbitration) brought motions for a temporary restraining order and a preliminary injunction against the Financial Industry Regulatory Authority (FINRA) after the arbitral tribunal ordered the hearing to be conducted remotely via FINRA's virtual hearing services. The plaintiff claimed that FINRA breached its Code of Arbitration Procedure and denied it due process by ordering that a hearing be conducted remotely. The plaintiff requested injunctive relief and moved for a temporary restraining order to stop the scheduled remote arbitration.

The Court held that '[r]emote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses.'<sup>[46]</sup> The Court dismissed the plaintiff's argument that a FINRA arbitration hearing cannot be held remotely because parties are entitled to an in-person hearing under the FINRA Rules. The plaintiff's argument was based on the language of FINRA Rule 12602(a), which allows parties to 'attend all hearings', but the Court concluded that the plaintiff could still attend the hearing remotely, 'just as he did for the telephonic temporary restraining order hearing' before the Court.<sup>[47]</sup>

The plaintiff also argued that the FINRA Rules' specification that the hearing will take place at a 'location' prevents remote hearings. The Court reasoned that 'the parties, witnesses, and arbitrators are still "located" somewhere in a remote proceeding, it is simply not all the same location.'<sup>[48]</sup> Notably, it relied on its experience 'holding several remote evidentiary hearings since the pandemic began (once with an interpreter), all of which permitted the parties to air their claims and defenses fully.'<sup>[49]</sup>

A different but related issue is whether arbitral subpoenas, modified to require video testimony at a remote hearing, are enforceable in view of the language of the FAA.

Section 7 of the FAA allows an arbitrator to 'summon in writing any person to attend before them. . . as a witness and in a proper case to bring with him. . . any book, record, document, or paper which may be deemed material as evidence in the case.'<sup>[50]</sup> Based on this provision, a non-party to the arbitration may be called to appear in the presence of the arbitrator and to hand over documents at that time. The issue is whether the arbitrator's authority extends to remote hearings.

The 11th Circuit decided the issue before the covid-19 pandemic. In September 2019, the Court of Appeals decided in *Managed Care Advisory Group, LLC v CIGNA Healthcare, Inc (Managed Care)* that 'a court order compelling the "attendance" of a witness "before" the arbitrator meant compelling the witness to be in the physical presence of the arbitrator.'<sup>[51]</sup> For the Court, 'before' means 'in the presence of', and 'presence' means 'place where person is'.<sup>[52]</sup> On this basis, the Court concluded that arbitral subpoenas requiring appearance by videoconference are unenforceable.<sup>[53]</sup>

Citing *Managed Care*, a US district court for the Southern District of New York reached a similar conclusion in February 2021 in *Broumand v Joseph (Broumand)*.<sup>[54]</sup> In *Broumand*, the party petitioning a remote hearing argued that in the times of the covid-19 pandemic, 'videoconferencing is now a necessity, not a convenience'.<sup>[55]</sup> The Court held that these 'policy concerns' cannot 'trump the plain meaning of Section 7 of the FAA'.<sup>[56]</sup> For the Court, the FAA presence requirement seeks to make arbitrators 'think twice' before issuing a subpoena directed to third parties. Making it easier to issue an arbitral subpoena without requiring a physical hearing would undermine that goal. Accordingly, the Court concluded that arbitral subpoenas, as modified to require video testimony, are unenforceable in New York.

## Endnotes

- 1 590 U.S. \_\_\_, 140 S.Ct. 1637 (2020). [^ Back to section](#)
- 2 Shaw Grp Inc v Triplefine Int'l Corp, 322 F.3d 115, 120 (2d Cir. 2003). [^ Back to section](#)
- 3 GE Energy, 140 S.Ct. at 1644. [^ Back to section](#)
- 4 See United Steelworkers of Am v Warrior & Gulf Nov Co, 363 U.S. 574, 582 (1960). [^ Back to section](#)
- 5 New York Convention, articles II(1) and II(2). [^ Back to section](#)
- 6 Griswold v Coventry First LLC, 762 F.3d 264, 271 (3d Cir. 2014) (citing Arthur Andersen LLP v Carlisle, 556 U.S. 624, 631 (2009) (noting, specifically, assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel)). [^ Back to section](#)
- 7 GE Energy, 590 U.S. at 1645. [^ Back to section](#)
- 8 Id. at 1646 (citing Gary Born, International Commercial Arbitration, 2nd ed (Kluwer Law International: 2014) § 10.02, pp. 1418–1484). [^ Back to section](#)
- 9 See, for example, Edna Sussman, in International Arbitration in the United States, eds Laurence Shore, Tai-Heng Cheng, Jenelle E La Chiusa et al (Kluwer Law International: 2018), 212; Julian David Mathew Lew, Loukas A Mistelis and Stefan Kröll, Comparative International Commercial Arbitration (Kluwer Law International: 2003), pp. 99–164; Keechang Kim and Jason Mitchenson, 'Voluntary Third-Party Intervention in International Arbitration for Construction Disputes: A Contextual Approach to Jurisdictional Issues', Journal of International Arbitration 30, issue 4: 407–30; Gary Born, International Commercial Arbitration, Vol. 1 (Kluwer Law International: 2009), pp. 1142–1211. [^ Back to section](#)
- 10 See Stolt-Nielsen SA v AnimalFeeds Int'l Corp, 559 U.S. 662, 681 (2010). [^ Back to section](#)
- 11 Henry Schein, Inc v Archer & White Sales, Inc, 592 U.S. \_\_ (2021). [^ Back to section](#)
- 12 Rent-A-Center, West, Inc v Jackson, 561 U.S. 62, 68-69 (2010) (citing Howsam v Dean Witter Reynolds, Inc, 537 U.S. 79, 83-84 (2002)). [^ Back to section](#)
- 13 Howsam, 537 U.S. at 83. [^ Back to section](#)
- 14 First Options of Chicago, Inc v Kaplan, 514 U.S. 938, 947 (1995). [^ Back to section](#)

- 15 See, for example, Rule 7 of the AAA Commercial Arbitration Rules (2013); article 6 of the ICC Rules of Arbitration (2021); article 23 of the LCIA Arbitration Rules (2020); Rule 28 of the SIAC Rules 2016; article 19 of the 2018 HKIAC Administered Arbitration Rules; article 21 of the ICDR Dispute Resolution Procedures (2021); Rule 8 of both the 2019 CPR Rules for Administered Arbitration and the 2019 CPR Rules for Administered Arbitration of International Disputes; and Rule 11 of the JAMS Comprehensive Arbitration Rules and Procedures (2021). [^ Back to section](#)
- 16 586 U.S. \_\_\_, 139 S. Ct. 524, 528 (2019). [^ Back to section](#)
- 17 Id. at 531. [^ Back to section](#)
- 18 Id. at 528-29, [^ Back to section](#)
- 19 Id. at 528. [^ Back to section](#)
- 20 Id. at 530. [^ Back to section](#)
- 21 Id. at 529. [^ Back to section](#)
- 22 Id. at 530. [^ Back to section](#)
- 23 Archer & White Sales, Inc v Henry Schein, Inc, 935 F.3d 274, 283 (5th Cir. 2019). [^ Back to section](#)
- 24 Id. 281-82. [^ Back to section](#)
- 25 Petition for Writ of Certiorari at 21, Schein, 592 U.S. \_\_\_ (No. 19-963). [^ Back to section](#)
- 26 Brief for the Respondent at 19, Schein, 592 U.S. \_\_\_ (No. 19-963). [^ Back to section](#)
- 27 Id. [^ Back to section](#)
- 28 See Blanton v Domino's Pizza Fran LLC, 962 F.3d 842, 846 (6th Cir. 2020) (finding that 'every one of our sister Circuits to address the question — eleven out of twelve by our count — has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability") (citations omitted), cert. denied sub nom. Piersing v Domino's Pizza Fran LLC, 20-695, 2021 WL 231566 (U.S. Jan. 25, 2021). [^ Back to section](#)
- 29 Brief of Amicus Curiae Professor George A Bermann 14, 21 (citing Restatement § 2-8, art. b, Reporter's n. b (iii), (Am. L. Inst. 2019)). [^ Back to section](#)
- 30 Id at 25. [^ Back to section](#)
- 31 Id at 2. [^ Back to section](#)

- 32** Airbnb, Inc v John Doe, et al, Mar. 21, 2021 Order, Case No.: SC20-1167. [^ Back to section](#)
- 33** 975 F.3d 689 (7th Cir. 2020), cert. granted, --- S. Ct. ---, 2021 WL 1072280 (Mem.) (Mar. 22, 2021). [^ Back to section](#)
- 34** Letter of Request, BLACK'S LAW DICTIONARY (11th ed. 2019). [^ Back to section](#)
- 35** 28 U.S.C. § 1782(a). [^ Back to section](#)
- 36** Id. [^ Back to section](#)
- 37** Intel, 542 U.S. at 264. [^ Back to section](#)
- 38** 975 F.3d at 692-696. [^ Back to section](#)
- 39** See 9 U.S.C. § 7. [^ Back to section](#)
- 40** Servotronics, 975 F.3d at 696 (quoting Intel, 542 U.S. at 258) (citation omitted). [^ Back to section](#)
- 41** See In re Guo, 965 F.3d 96, 105-108 (2d Cir. 2020); Republic of Kazakhstan v Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999). [^ Back to section](#)
- 42** Nat'l Broad Co, Inc v Bear Stearns & Co, Inc, 165 F.3d 184 (2d Cir. 1999). [^ Back to section](#)
- 43** See Servotronics, Inc v Boeing Co, 954 F.3d 209, 214-16 (4th Cir. 2020); In re Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 717-732 (6th Cir. 2019). [^ Back to section](#)
- 44** Application to Obtain Discovery, 939 F.3d at 717-732. [^ Back to section](#)
- 45** Legaspy v Fin Indus Reg Auth, Inc, 20 C 4700, 2020 WL 4696818 (N.D. Ill. Aug. 13, 2020), appeal dismissed, 20-2535, 2020 WL 8509843 (7th Cir. Sept. 23, 2020). [^ Back to section](#)
- 46** Id at \*4. [^ Back to section](#)
- 47** Id at \*3. [^ Back to section](#)
- 48** Id. [^ Back to section](#)
- 49** Id at \*4. [^ Back to section](#)
- 50** 9 USC § 7. [^ Back to section](#)

- 51** Managed Care Advisory Group, 939 F.3d at 1160 (11th Cir. 2019). See similar results in Dodson Int'l Parts, Inc v Williams Int'l Co, Inc, 2019 WL 5680811 (E.D. Mich. Jun. 26, 2019); Westlake Vinyls, Inc v Cooke, 2018 WL 4868993, at \*4 (W.D. Ky Aug. 21, 2018) report and recommendation adopted by 2018 WL 5306665 (W.D. Ky Oct. 16, 2018). [^ Back to section](#)
- 52** Managed Care Advisory Group, 939 F.3d at 1160 (11th Cir. 2019). [^ Back to section](#)
- 53** Id. [^ Back to section](#)
- 54** Broumand v Joseph, 20-CV-9137 (JSR), 2021 WL 771387 (S.D.N.Y. Feb. 27, 2021). [^ Back to section](#)
- 55** Id at \*11. [^ Back to section](#)
- 56** Id. [^ Back to section](#)

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