No. 20-794

IN THE

Supreme Court of the United States

SERVOTRONICS, INC.,

Petitioner,

v.

ROLLS-ROYCE PLC, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The International Chamber of Commerce (***ICC***) is the world's largest business organization representing more than 45 million companies in over 100 countries. Its members include many of the world's leading companies, small and mid-size enterprises, business associations and local chambers of commerce. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions, and standard setting, it promotes international trade, responsible business conduct, and a global approach to regulation, in addition to providing market-leading dispute resolution services. ICC aims to promote international trade and investment. ICC is the voice for international business on important issues in relation to international trade and investment.

Established in 1923, the International Court of Arbitration of the ICC (***ICC Court***) is the arbitration body of the ICC and the world's leading international arbitration institution. Since its inception, the ICC Court has seen a steady increase in its caseload, from around 30 new cases commenced in 1923, to a record 946 new cases commenced in 2020—the fourth consecutive year of robust and regular growth. *See* ICC, *ICC International Court of Arbitration Bulletin – 1998 Statistical Report*, Vol. 10 No. 1 (Jan. 1999), at pg. 3, https://library.iccwbo.org/dr-statisticalreports.htm; ICC, *ICC Dispute Resolution Bulletin - 2021*, Issue 1 (Feb. 2021), at pg. 6, https://library.iccwbo.org/dr-sta-

[1] All parties consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief. No counsel for a party in this case authored this brief in whole or in part. No one other than *amicus curiae* or its counsel contributed monetarily to the preparation and submission of this brief.

tisticalreports.htm. As of 2020, the ICC Court had administered over 25,000 cases internationally. ICC, *ICC Dispute Resolution Bulletin – 2019 ICC Dispute Resolution Statistics*, Issue 2 (2020), at pg. 1, https://library.iccwbo.org/dr-statisticalreports.htm. According to a recent global survey of users of international arbitration, the ICC Court is the most preferred arbitration institution in the world. Queen Mary Univ. of London & White & Case, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, at pg. 9 (May 6, 2021), https://www.whitecase.com/sites/default/files/2021-05/quml-international-arbitration-survey-2021-web.pdf (stating that 57% of respondents said the ICC was one of their preferred arbitral institutions, more than any other institution).

The ICC Court's purpose is "to ensure proper application of the ICC Rules [of Arbitration, further defined below], as well as assist parties and arbitrators in overcoming procedural obstacles," including ensuring the proper constitution of the arbitral tribunal formed for any particular case. ICC, *ICC International Court of Arbitration - Homepage*, https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration (last visited on May 12, 2021). Its key functions include "monitoring the arbitral process to make certain that it is performed properly and with the required speed and efficiency necessary." *Id.* To that end, the ICC Court has developed rules and standards which parties adopt voluntarily and incorporate into their dispute resolution agreements. These include the ICC Rules of Arbitration, which reflect current internationally accepted practice. *See* ICC, *International Chamber of Commerce Rules of Arbitration* (***ICC Rules of Arbitration***) (Jan. 1, 2021),

https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration.

As the leading international arbitral institution and a global thought leader in dispute resolution, the ICC Court has a strong interest in this case as the issues raised are of great importance to the conduct of international arbitrations worldwide. The ICC Court is concerned with ensuring that the Court's decision in this case has a positive impact, by sending the right message to the international business community and the international arbitral community.

As the world's leading international arbitration institution, the ICC Court has particular expertise in document production and evidence-gathering in arbitration, and seeks to provide valuable practical insight and assistance to the Court in considering the wider ramifications of the issues arising in this case.

SUMMARY OF ARGUMENT

The ICC Court is making this neutral submission without any vested interest in the outcome of the case itself.

The question presented in the case, as stated in the petition for writ of certiorari, is: "Whether the discretion granted to district courts in 28 U.S.C. §1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and, in the case below, the Seventh Circuit, have held." Petition for Writ of Certiorari at i, *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, No. 20-794 (Dec. 7, 2020).

The ICC Court is not taking a position in favor of or against the availability of 28 U.S.C. § 1782(a) (***Section 1782***) in private commercial arbitration.

Rather, the ICC Court aims to assist the Court on the following sub-issue: Assuming the Court finds that Section 1782 is available in connection with private commercial arbitration, what degree of deference should a U.S. court give to an arbitral tribunal's views on the discovery sought before it decides whether to grant or deny a Section 1782 application?[2]

In order to effectuate the purpose of Section 1782 and properly apply the discretionary *Intel* factors (discussed further below), and further the pro-arbitration policy of the U.S., a U.S. court weighing a Section 1782 petition should afford a very high degree of deference to the arbitral tribunal's views on the discovery sought. The ICC Court respectfully urges the Court to take this opportunity to re-emphasize and make explicit the importance of doing so.

Professor Hans Smit, the "dominant drafter of, and commentator on, the 1964 revision of Section 1782," *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989), stated that "the rule in relation to international arbitral tribunals should be that American court[s] should honor an application under Section 1782 only if the application is approved by the arbitral tribunal." Hans Smit, *American Assistance to Litigation in*

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[2] While there are treaty and other public international law disputes administered under the ICC Rules of Arbitration, the question before the Court is limited to private commercial arbitration. For consistency, the ICC Court's views as set forth in this *amicus curiae* submission are also limited to private commercial arbitration.

Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 SYRACUSE J. INT'L & COMM. 1, 9 (1998).

Affording a very high degree of deference to the tribunal would also be in line with the fundamental principle in private international commercial arbitrations that the arbitral tribunal has the primary authority and control over the proceedings, including discovery matters. As a result of this authority and an arbitral tribunal's familiarity with the governing arbitration rules and the underlying dispute, the arbitral tribunal constituted for a particular dispute is best placed to assess the propriety and utility of evidence that may result from a Section 1782 application.

ARGUMENT

I. The ICC Court's position is supported under U.S. law.

Deferring to the arbitral tribunal's view on the propriety and utility of Section 1782 discovery is in line with the text and purpose of Section 1782 and plays a crucial role in the U.S. court's assessment of the discretionary *Intel* factors.

A. The text and purpose of Section 1782 support deference to the arbitral tribunal.

The statute's title, "Assistance to foreign and international tribunals and to litigants before such tribunals," underscores the importance of providing *assistance* to arbitral tribunals. 28 U.S.C. § 1782.

The statute's legislative history is also replete with references to providing *assistance* to foreign tribunals. *See* S. Rep. No. 1580, 88th Cong., 2nd Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788–89

(explaining that "the *assistance* made available by subsection (a) is also extended to international tribunals and litigants before such tribunals" and that "subsection (a) permits effective and desirable *assistance* to foreign and international courts and litigants before such courts") (emphasis added).

Moreover, as the Court has noted, the purpose of Section 1782 is "to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 (2004).

Because Section 1782 is designed to assist foreign tribunals, granting Section 1782 discovery without heavily weighing the views of the arbitral tribunal—which has primary authority over discovery and fact-finding in its own proceedings—would contravene the clear purpose of Section 1782. In fact, disregarding—or failing to assess—the arbitral tribunal's views would be assisting *a party* to the arbitral proceedings, but would *not* necessarily be assisting the arbitral tribunal.

B. *Intel* and its progeny support deference to the arbitral tribunal.

Following the arbitral tribunal's lead is also consistent with the Court's decision in *Intel*, where the Court outlined a four-factor analysis (the ***Intel factors***) under which a U.S. court—after determining that the statutory factors of Section 1782 have been met—then determine whether to exercise its discretion in favor of granting a Section 1782 application. Two of the four *Intel* factors (the 2nd and 3rd factors) are particularly relevant as indicators that U.S. courts

should consider and heed the arbitral tribunal's recommendation.

The ICC Court respectfully urges the Court to take this opportunity to re-emphasize the importance of considering the arbitral tribunal's views under the *Intel* factors, and to weigh the 2nd and 3rd *Intel* factors heavily in connection with Section 1782 applications that seek discovery in aid of private commercial arbitrations. Further, the ICC Court respectfully urges the Court to make it explicit that, once an arbitral tribunal is constituted, a very high degree of deference should be afforded to the views of that arbitral tribunal on the discovery sought.

This deference is supported by the second *Intel* factor, which is "the nature of the foreign tribunal, the character of proceedings underway abroad, *and the receptivity of the foreign government, court, or agency to federal-court judicial assistance*." *Intel*, 542 U.S. at 264 (emphasis added). The ICC Court submits that, generally, the discretion of the U.S. court should be exercised *against* Section 1782 discovery when there are concerns about the receptivity of an arbitral tribunal to the Section 1782 discovery. Applying the second *Intel* factor, U.S. courts have rejected granting a Section 1782 application in such circumstances. *See In re Bio Energias Comercializadora de Energia Ltda.*, No. 19-cv-24497-BLOOM, 2020 WL 509987, at *4 (S.D. Fla. Jan. 31, 2020) (denying Section 1782 request in part because "it is not evident that the [arbitral tribunal] would be receptive to documents obtained in the manner Bio Energias seeks to obtain them"); *In re Application of Technostroyexport,* 853 F. Supp. 695, 697–98 (S.D.N.Y. 1994) (in a pre-*Intel* case, denying Section 1782 petition where the petitioner "made no effort to obtain any ruling from the arbitrators" and noting

that "[w]hether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrators decide").

The ICC Court's position is also supported by the third *Intel* factor, which considers "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions." *Intel*, 542 U.S. at 265. Permitting discovery under Section 1782 despite an arbitral tribunal's wishes to the contrary runs the risk of allowing a party to circumvent proof-gathering restrictions that the arbitral tribunal has imposed. Such a result should be avoided. *In re Bio Energias Comercializadora de Energia Ltda.*, 2020 WL 509987, at *4 (denying Section 1782 discovery in part because "[a]s to the third *Intel* factor, and critical to the Court . . . it is not apparent that the [Section 1782] Application is anything less than an attempt to circumvent the arbitral panel in Brazil"); *see also In re Application of Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 108 (D.D.C. 2010) (finding that the third *Intel* factor weighed against granting Section 1782 petition where petitioner "side-stepped" the IBA Rules, which the arbitral tribunal and parties had adopted, "and ha[d] thus undermined the Tribunal's control over the discovery process"). Such proof-gathering restrictions may manifest as a discovery order that, for example, does not provide for Section 1782 discovery or sets certain parameters for discovery, such as limits on third-party discovery or other restrictions on the manner or volume of discovery. Such restrictions could also take the form of a scheduling order that provides a discovery deadline or a hearing date that would be inconsistent with providing discovery through the grant of a Section 1782 application. Thus, the determination

that an arbitral tribunal does not approve of the Section 1782 application does not necessarily hinge on an express statement about that particular application—it may be implied where granting a Section 1782 order would be inconsistent with the procedures and schedule established by the arbitral tribunal.

In sum, the ICC Court respectfully submits that when applying the second and third *Intel* factors in connection with a Section 1782 application seeking discovery in aid of private commercial arbitration, a U.S. court should give great weight to the arbitral tribunal's position on the discovery requested, whether that view has been provided expressly or impliedly.

II. Policy considerations support the ICC Court's position.

Policy considerations support the ICC Court's position.

First, considering the views of the arbitral tribunal supports the strong pro-arbitration policy embedded in the Federal Arbitration Act (***FAA***) and U.S. jurisprudence. *See*, *e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that the FAA evinces a "liberal federal policy favoring arbitration agreements"). The pro-arbitration policy includes recognition of the fundamental principle of party autonomy in arbitration: if parties agree to arbitrate their dispute, that choice should be respected, including the arbitration rules chosen by the parties and the concomitant primacy of the arbitral tribunal in managing its own procedure. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("We have described [Section 2 of the FAA] as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fun-

damental principle that arbitration is a matter of contract.'") (citation omitted); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) ("[T]he [Federal] Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify . . . *the rules* under which that arbitration will be conducted.'") (emphasis in original) (citation omitted); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("[Section 2 of the FAA] 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner.") (citation omitted). As discussed below, when parties agree to settle disputes through arbitration, they agree not only that the arbitral tribunal will adjudicate their dispute, but also that it will wield authority over the process through which that dispute is adjudicated.

Second, affording the views of the arbitral tribunal a very high degree of deference promotes efficiency by ensuring that the arbitral tribunal would readily admit evidence discovered pursuant to a Section 1782 request. *See AT&T Mobility*, 563 U.S. at 544 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."). If a U.S. court fails to consider or disregards an arbitral tribunal's views, the U.S. court runs the risk of ordering discovery that will ultimately be useless. The U.S. court can avoid taking unnecessary steps and imposing unnecessary costs by considering and deferring to the arbitral tribunal's views on the discovery sought. Doing so would have the practical benefit that any information obtained would be utilized and useful to the arbitral tribunal in the arbitration proceedings.

Third, considering the views of the arbitral tribunal ensures an enforceable award. *See*, *e.g.*, ICC Rules

of Arbitration, art. 42 (Jan. 1, 2021). Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(d) (June 1958) (the ***New York Convention***), https://www.newyorkconvention.org/english, the recognition and enforcement of an arbitral award may be refused if "the arbitral procedure was not in accordance with the agreement of the parties." In circumstances where the agreed procedure requires the arbitral tribunal's consent for discovery from a third party but a party to the arbitration makes a Section 1782 request without consent from the arbitral tribunal, there may be a risk of a challenge to the arbitral award under Article V(d) of the New York Convention. This risk can be avoided if the U.S. court affords significant deference to the views of the arbitral tribunal on the discovery sought.

Considering the important policy factors at play, U.S. courts should afford a very high degree of deference to the views of the arbitral tribunal on the discovery sought.

III. The arbitral tribunal has primary authority and control over discovery.

One of the foundational elements of the international arbitral process is that the arbitral tribunal has primary authority over the conduct of the proceedings, including discovery. The rules that typically govern international arbitrations recognize this authority. Providing significant weight to an arbitral tribunal's views on the discovery sought in a Section 1782 petition, once the tribunal has been constituted, will reinforce the imperative of this fundamental principle that an arbitral tribunal should manage discovery.

A. The ICC Rules of Arbitration grant the arbitral tribunal primary authority and control over discovery.

Parties who agree to arbitrate under the ICC Rules of Arbitration recognize, and consent to, the arbitral tribunal's sovereignty over the proceedings, including discovery. The ICC Rules of Arbitration do not grant the parties an automatic right to discovery. Under Article 22 of the ICC Rules of Arbitration, "the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties." ICC Rules of Arbitration, art. 22(2) (Jan. 1, 2021).

This extensive authority of the arbitral tribunal, which is agreed to by parties arbitrating under the ICC Rules of Arbitration, includes the arbitral tribunal's authority over discovery and testimony from parties and third parties. Specifically, the arbitral tribunal is tasked, in as short a time as possible, with "establish[ing] the facts of the case by all appropriate means" and may "[a]t any time during the proceedings . . . summon any party to provide additional evidence." *Id.*, arts. 25(1), 25(4).

B. Other major arbitration rules grant the arbitral tribunal primary authority and control over discovery.

The ICC Rules of Arbitration are not an outlier. The International Bar Association's Rules on the Taking of Evidence in International Arbitration (the ***IBA Rules of Evidence***) and the rules of other leading arbitral institutions adopt a similar approach.

The IBA Rules of Evidence, for example, "are intended to provide an efficient, economical and fair pro-

cess for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions." IBA, *IBA Rules on the Taking of Evidence in International Arbitration*, Preamble, art. 1 (Dec. 17, 2020), https://www.ibanet.org/Document/Default.aspx?DocumentUid=def0807b-9fec-43ef-b624-f2cb2af7cf7b. The IBA Rules of Evidence outline a detailed process for document discovery between the parties, overseen by the arbitral tribunal. *Id.*, arts. 3.2–3.8. They also allow a party to seek third-party document discovery by "seek[ing] leave from the Arbitral Tribunal" and provide that the arbitral tribunal "shall decide on this request" and take "such steps as the Arbitral Tribunal considers appropriate." *Id.*, art. 3.9. While the IBA Rules of Evidence are not binding *per se*, they are a valuable resource and reflect best practice. Parties and arbitral tribunals frequently adopt them or use them as guidelines for the conduct of arbitral proceedings, including in arbitrations administered by the ICC Court.

The arbitration rules of other leading international arbitral institutions also make clear that the arbitral tribunal overseeing a proceeding controls discovery. *See, e.g.*, LCIA, *London Court of International Arbitration - Arbitration Rules*, art. 22.1 (Oct. 1, 2020), https://www.lcia.org/Dispute_Resolution_Services /lcia-arbitration-rules-2020.aspx ("The Arbitral Tribunal shall have the power . . . (v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant; (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in

which such material should be exchanged between the parties and presented to the Arbitral Tribunal[.]"); SIAC, *Singapore International Arbitration Centre Rules*, art. 27 (Aug. 1, 2016), https://siac.org.sg/our-rules/rules/siac-rules-2016 ("[T]he tribunal shall have the power to . . . (f) order any Party to produce to the Tribunal and to the other Parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome[.]"); HKIAC, *Hong Kong International Arbitration Centre Administered Arbitration Rules*, art. 22.3 (Nov. 1, 2018), https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 ("At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence.").

These arbitral rules reflect the parties' agreement to grant their arbitral tribunal authority to manage discovery. When parties agree to arbitration, they agree not only that the arbitral tribunal will decide the case, but that the arbitral tribunal will govern pre-hearing proceedings as well. To undo this private agreement once the arbitral tribunal is constituted is to undo the dispute resolution system to which the parties have agreed. By ensuring that U.S. courts carefully consider the arbitral tribunal's position on the discovery requested, the parties' common will is preserved in relation to the taking of evidence and the procedural conduct of the arbitral proceedings is maintained.

IV. The arbitral tribunal is best placed to assess a discovery request.

Not only does the arbitral tribunal have primary authority and control over discovery, but from a practical standpoint, the arbitral tribunal is also best placed to assess any discovery request from the parties in an arbitration before it.

First, the arbitral tribunal constituted for a particular dispute is most familiar with that dispute's agreed procedural rules. Thus, that arbitral tribunal would be best placed to determine whether or not a party is seeking the specific discovery sought by a Section 1782 application in order to circumvent the rules in place in the arbitration.

Second, the arbitral tribunal is in the best position to evaluate whether the discovery sought will have a bearing on the dispute. The arbitral tribunal is constituted for the sole purpose of presiding over and deciding the dispute in relation to which the Section 1782 request is brought and as such, it will be well placed to determine the disclosure that will best serve the interests of the arbitral tribunal and the arbitrating parties. Because of its familiarity with the specific dispute, the arbitral tribunal is also best placed to ensure that the request is not a guerrilla tactic by a party to gain leverage through the cost of parallel proceedings, or to disrupt the arbitration by requesting irrelevant materials.

Finally, because the arbitral tribunal conducts the arbitral proceedings pursuant to the parties' agreement, the arbitral tribunal is best placed to consider the effects of granting a Section 1782 application on the basic procedural principles of giving all parties a fair opportunity to present their case and treating

them equally. *See*, *e.g.*, ICC Rules of Arbitration, art. 22(4) (Jan. 1, 2021) ("In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."). The parties' agreement allocates that task to the arbitral tribunal.

Thus, based on practical realities, the arbitral tribunal is best placed to assess any discovery request from the parties in an arbitration before it.

CONCLUSION

For the avoidance of doubt, the ICC Court does not express a view on the outcome of the present case on the particular facts of this case, or whether Section 1782 applies generally to private commercial arbitrations. Rather, for the aforementioned reasons, assuming the Court holds that Section 1782 is available in aid of private commercial arbitrations, the ICC Court respectfully requests that the Court re-emphasize and make it explicit that the views of the constituted arbitral tribunal should be given a very high degree of deference under the *Intel* factors.

Respectfully submitted,

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