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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION**

In re:	)	
	)	No. 2:18-mc-00364-DCN
Application of SERVOTRONICS, INC.	)	
for an Order Pursuant to 28 U.S.C. § 1782	)	
to Take Discovery for Use in a Foreign	)	<b>ORDER</b>
Proceeding	)	
_____	)	

The following matter is before the court on applicant SERVOTRONICS, INC.’s (“Servotronics”) Renewed Application for an Order Pursuant to 28 U.S.C. § 1782 to Take Discovery for Use in a Foreign Proceeding, ECF No. 13. On April 14, 2021, the court opted to hold the application in abeyance and stay proceedings pending the Supreme Court’s resolution of Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021). The next day, the Fourth Circuit granted Servotronics’ petition for a writ of mandamus and directed the court to “issue, without delay, the subpoenas to the witnesses within its jurisdiction[.]” ECF No. 46 at 2–3. Accordingly, the court lifts the stay, grants the application, and issues the requested subpoenas.

**I. BACKGROUND**

This application arises out of an arbitration related to a fire at The Boeing Company’s (“Boeing”) facilities in Charleston, South Carolina. On January 16, 2016, Boeing was conducting testing on a plane when a tailpipe fire occurred in the plane’s engine. The engine was manufactured by Rolls-Royce, PLC (“Rolls-Royce”), and it contained a valve manufactured by Servotronics. During testing, a piece of metal became lodged in the valve, which affected the engine fuel flow. As a result, the Boeing ground crew began troubleshooting the engine, and subsequently the fire occurred. The fire

damaged both the engine and the plane. Boeing sought compensation for the damage from Rolls-Royce, and Rolls-Royce settled the claim. Then Rolls-Royce demanded indemnity from Servotronics, which Servotronics refused. Servotronics maintains that it is not liable for the fire or the damage caused by the fire and claims that fault lies with Rolls-Royce and Boeing.

Rolls-Royce and Servotronics are parties to a Long-term Agreement that requires the parties to resolve any disputes through arbitration in Birmingham, England. Rolls-Royce served a notice of arbitration on Servotronics seeking approximately \$12.8 million. The parties have agreed to arbitrate in London instead of Birmingham as a matter of convenience. Servotronics now seeks testimony from two former and current Boeing employees to be used in the arbitration in support of Servotronics' defenses. The first employee, Alan Sharkshna ("Sharkshna"), participated in troubleshooting the plane's engine shortly before it caught fire. The second employee, Scott Walston ("Walston"), was the chairperson of the Boeing Incident Review Board that investigated the fire. Servotronics' application initially sought to depose a third Boeing employee, Terrance Shifley ("Shifley"), but, as the court explains below, Shifley is no longer included in the instant application.

Servotronics initially filed an ex parte application for an order pursuant to 28 U.S.C. § 1782 granting it leave to serve subpoenas upon the witnesses on October 26, 2018. ECF No. 1. The court denied the application, finding that the U.K. private arbitral tribunal was not a "foreign tribunal" as defined by § 1782. ECF No. 4. Servotronics appealed the order, and Boeing and Rolls-Royce (collectively, "intervenors") intervened in the appeal. The Fourth Circuit reversed the court's order, finding that the arbitral

tribunal was a § 1782 “foreign tribunal,” and remanded for further proceedings.

Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 216 (4th Cir. 2020). Concurrently with the instant proceedings before this court, Servotronics litigated another § 1782 application in the District of Illinois, where it sought to subpoena Boeing to produce certain documents for use in the same overseas arbitration. In re Servotronics, Inc., 2019 WL 9698535, (N.D. Ill. Apr. 22, 2019). The Northern District of Illinois initially granted the application but, upon reconsideration, vacated its order, denied the application, and quashed Servotronics’ subpoena. Id. The district court there reached the same conclusion that this court reached prior to Fourth Circuit reversal—that a private arbitral tribunal is not a “foreign tribunal” under § 1782. Servotronics appealed, and the Seventh Circuit affirmed, holding that private arbitration tribunals are not “foreign or international tribunals” under § 1782 and making explicit its departure from the Fourth Circuit’s recent interpretation. Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 691, 693–94 (7th Cir. 2020).

After the Fourth Circuit’s remand, Servotronics filed its renewed application on May 1, 2020. ECF No. 13. Intervenor filed a joint response on May 29, 2020, ECF No. 20, and Servotronics replied on June 5, 2020, ECF No. 21. The court held a hearing on June 30, 2020 and subsequently entered an order instructing the parties to submit supplemental briefing on issues raised at the hearing. The parties filed their first batch of supplemental briefs on July 21, 2020. ECF Nos. 32–33. On August 24, 2020, the court ordered a second batch of supplemental briefing, requesting that the parties analyze the test employed by the Second Circuit in In re del Valle Ruiz to determine “whether the court has authority over” the witnesses. ECF No. 34; 939 F.3d 520 (2d Cir. 2019). The



parties timely complied. ECF Nos. 35–36. On December 2, 2020, Servotronics filed a “modification” to its application, informing the court that one of the relevant witnesses, Shifley, “now resides in the District of Minnesota” and withdrawing its application with respect to Shifley. ECF No. 37. Intervenor responded, noting that Rolls Royce intends to use “detailed witness statements” of the remaining two witnesses at the arbitration hearing, meaning that Servotronics, “pursuant to the [arbitral panel’s rules of procedure], . . . will have the opportunity, if it elects, to examine Sharkshnas and Walston on any relevant topic at the arbitration hearing.” ECF No. 38 at 1.

On December 7, 2020, Servotronics petitioned the Supreme Court of the United States for a writ of certiorari, seeking review of the Seventh Circuit’s decision. On January 6, 2021, Servotronics again supplemented its application, requesting that the court issue an order so that Servotronics can “serve the subpoena(s), arrange the depositions, and obtain the[] testimonies before the arbitration hearing,” which is scheduled for May 10, 2021. ECF No. 39 at 1. On February 23, 2021, intervenors also filed another supplement, informing the court that they can no longer guarantee Sharkshna’s presence at the arbitration hearing. ECF No. 40. The next day, Servotronics put in its two cents about the legal implications of Sharkshna’s absence and informed the court that it had requested a continuance of the arbitration hearing with the arbitration panel. ECF No. 41. On March 11, 2021, Servotronics informed the court that the panel denied its request for a continuance. ECF No. 42. The next day, intervenors reported to this court the very same, adding that the arbitration panel ultimately found “that obtaining any evidence from the various § 1782 proceedings is not a compelling reason for adjournment.” ECF No. 43 at 1–2.

On April 14, 2021, this court issued an order holding Servotronics’ application in abeyance and staying proceedings pending Supreme Court guidance on the current circuit split. ECF No. 45. The court reasoned that because “[t]he Supreme Court granted Servotronics’ petition for certiorari on the issue, signaling that a binding resolution from the nation’s highest court is on the horizon,” “resolving Servotronics’ renewed application without that guidance would be an imprudent waste of judicial resources.” Id. at 8. In considering Servotronics’ petition for a writ of mandamus, the Fourth Circuit disagreed, holding that its “mandate remains in force until the Supreme Court rules otherwise.” ECF No. 46 at 3. Accordingly, the Fourth Circuit issued the writ, directing this court “to issue, without delay, the subpoenas to the witnesses within its jurisdiction and take their testimony for use in the UK Arbitration.” Id. at 3–4. Thus, this matter is ripe—and in the Fourth Circuit’s opinion, overripe—for the court’s review.

## **II. STANDARD**

“Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.” Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004). The statute permits “[t]he district court of the district in which a person resides or is found” to order that person “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.” 28 U.S.C. § 1782(a). Notably, “a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.” Intel, 542 U.S. at 263. In determining whether to grant an application, “district courts must exercise their discretion under § 1782 in light of the twin aims of the statute: ‘providing efficient means of assistance to participants in

international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.”” In re Application for an Order Permitting Metallgesellschaft AG to take Discovery, 121 F.3d 77, 79 (2d Cir. 1997) (quoting In re Application of Malev Hungarian Airlines, 964 F.2d 97, 100 (2d Cir. 1992)).

### **III. DISCUSSION**

Servotronics seeks leave to serve deposition subpoenas upon Walston and Sharkshna. The court first addresses its authority to issue subpoenas for these witnesses and then determines whether it should exercise that authority.

#### **A. The Court’s Authority Over Witnesses**

Section 1782 limits the reach of the court’s authority to only those persons who “reside[] or [are] found” in the court’s district. 28 U.S.C. § 1782(a). At the time Servotronics initially filed its § 1782 application, Servotronics believed that Walston and Sharkshna resided in South Carolina. ECF No. 1-1 at 6–7. However, upon Servotronics’ renewal of its application, intervenors drew the court’s attention to the fact that Walston lives in Washington.<sup>1</sup> As such, the court instructed the parties to determine, to the best of their abilities, where the witnesses live and how their locations affect the court’s authority under § 1782.

Intervenors filed the Declaration of David H. Koysza (“Koysza”), in which Koysza attests that based on Boeing’s Human Resources records, Sharkshna resides in South Carolina and Walston resides in Washington. ECF No. 32-4, Koysza Decl. ¶¶3–4.

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<sup>1</sup> Intervenors also reported that Shifley had moved to Virginia. As the court explained above, Servotronics has withdrawn its application with respect to Shifley.

Koyzsa also attests that Walston co-owns an investment property in South Carolina that he visits a couple of weeks each year, and that the Charleston County property records for that property lists Walston's mailing address in Washington. Id. ¶ 5. Servotronics submitted an affidavit of Ashley M. Henderson ("Henderson"), in which Henderson attests that her searches revealed an address for Sharkshna in South Carolina and a Title to Real Estate indicating that Walston owns property in South Carolina. ECF No. 33-2, Henderson Decl. ¶ 2–4. Accordingly, there is no dispute that Sharkshna resides in South Carolina and that Walston owns property in South Carolina. Intervenor argues that the court only has authority over Sharkshna, while Servotronics argues that the court also has the authority under § 1782 to issue a subpoena for Walston based on principles of personal jurisdiction.

As an initial matter, the court clearly has authority to issue a subpoena upon Sharkshna under §1782. There is no dispute that Sharkshna lives in South Carolina, meaning that he "resides or is found" in this state for the purposes of §1782, regardless of the jurisprudential gloss the court gives that phrase. 28 U.S.C § 1782(a). Indeed, intervenors concede that the court has authority over Sharkshna, although they dispute whether the court's exercise of that authority would be prudent. The question of the court's authority becomes more difficult with respect to Walston, who traveled to South Carolina in connection with Boeing's investigation into the fire, owns property in South Carolina, but seems to reside in Washington. The Second Circuit has held "that § 1782's 'resides or is found' language extends to the limits of personal jurisdiction consistent with due process." In re del Valle Ruiz, 939 F.3d at 528. It appears that the Fourth Circuit has not considered this issue, but the court finds the Second Circuit's reasoning

persuasive.<sup>2</sup> Therefore, the court must consider whether it could exercise personal jurisdiction over Walston consistent with his rights under the Due Process clause to determine its authority over him under § 1782.

The due process test for personal jurisdiction involves two components: minimum contacts and fairness. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Under the minimum contacts test, a nonresident defendant must have certain minimum contacts such that the suit does not offend “traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 316 (1945). Due process is satisfied if the court asserts personal jurisdiction over a defendant who “purposefully avails itself of the privilege of conducting activities within the forum state,” Hanson v. Denckla, 357 U.S. 235, 253 (1958), such that it “should reasonably anticipate being haled into court there,” World-Wide Volkswagen, 444 U.S. at 297. After a showing of the defendant’s

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<sup>2</sup> Intervenor’s urge the court to adopt a more restrictive test, interpreting § 1782(a)’s phrase “resides or is found [in]” to require physical presence. ECF No. 35 at 2–6. Ultimately, the court opts for the more expansive interpretation outlined by the Second Circuit in In re del Valle Ruiz. The court finds particularly convincing the reasoning of Hans Smit, a legal professor who had a hand in drafting amendments to § 1782:

The purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals. The language defining its in personam reach must therefore be given a liberal construction commensurate with that purpose. This means that a person should be regarded as residing in the district not only when it is domiciled there, but also when it is resident there in the sense of residing in the district for some not insignificant period of time. Indeed, if the relationship of the person addressed to the district is such as to warrant the exercise of in personam authority under the due process clause, it should be regarded as “resident” there.

Hans Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int’l L. & Com. 1, 9–10 (1998) (internal footnotes omitted) (emphasis added).

purposeful availment, the reasonableness inquiry balances any burden on the defendant against countervailing concerns such as the plaintiff's interest in obtaining relief and the forum state's interest in the controversy. See id. at 292.

Specific jurisdiction arises when a cause of action is related to the defendant's activities within the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). The Fourth Circuit applies a three-part test when evaluating the propriety of exercising specific jurisdiction: (1) whether and to what extent the defendant purposely availed itself of the privileges of conducting activities in the forum state, and thus invoked the benefits and protections of its laws; (2) whether the plaintiff's claims arise out of or relate to those forum-related activities; and (3) whether the exercise of jurisdiction is constitutionally "reasonable." Christian Sci. Bd. of Dirs. of the First Church of Christ v. Nolan, 259 F.3d 209, 215–16 (4th Cir. 2001) (citing Helicopteros, 466 U.S. at 414–16; Burger King v. Rudzewicz, 471 U.S. 462, 472, 476–77 (1985)).

The Second Circuit clarified several aspects of applying a specific jurisdiction analysis to § 1782. First, it noted that the "forum state" is the district in which the district court sits. In re del Valle Ruiz, 939 F.3d at 529 n.10. The Second Circuit also explained that "[t]ranslated to account for a § 1782 respondent's nonparty status, we thus hold that, where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery." Id. at 530. While acknowledging that "the use of terminology relating to causation is a somewhat awkward fit for discovery," the Second Circuit clarified that "the focus on the relationship between a § 1782 respondent's forum contacts and the resulting

availability of the evidence is a workable translation of the normal personal-jurisdiction framework.” Id. at 530 n.12. The court agrees and analyzes accordingly.

The discovery material sought here—deposition testimony of Walston related to his investigation into the incident at Boeing—resulted from Walston’s contacts with South Carolina. As the court discussed above, Walston came to South Carolina for around a week shortly after the fire for the purposes of heading up Boeing’s official investigation into the incident. Servotronics has made clear that the testimony it seeks deals exclusively with that investigation, which Walston conducted in South Carolina. Thus, the court finds that it has “specific personal jurisdiction” over Walston, at least for the purposes of ordering discovery under § 1782.<sup>3</sup>

#### **B. Servotronics’ Application**

Intervenors oppose Servotronics’ application on two grounds. First, they argue that § 1782 does not permit “full and probing U.S.-style discovery,” and by requesting to depose the three witnesses “in the style of Federal Rule 30,” Servotronics is asking for just that. ECF No. 20 at 2. Second, intervenors argue that even if this type of discovery

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<sup>3</sup> The Second Circuit seems to indicate in In re del Valle Ruiz that a court applying its test should also consider whether the court’s exercise of authority is “fair” in the same way that a court might resolve that issue in the context of a personal jurisdiction inquiry. 939 F.3d at 529. But there, the Second Circuit did not reach that consideration. Grafting the “fairness” test for personal jurisdiction onto the analogous test for the court’s authority under § 1782 is too awkward a fit to be much help in this analysis. For example, the court’s consideration of “the interests of the forum state” or “the efficient resolution of controversies as between states” makes little sense in the context of § 1782. Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 946 (4th Cir. 1994). The court declines to apply this second part of the traditional personal jurisdiction test, finding that fairness is an issue better resolved through application of the Intel factors, which are tailored to § 1782 and address more relevant concerns. The court considers those factors below.

were permitted by law, the discovery would be of no assistance to the U.K. arbitral panel and the depositions would be unduly burdensome to Boeing.

**a. Scope of Discovery Permitted by Law**

Intervenors argue that the Fourth Circuit expressly forbade the type of expansive, “U.S.-style” discovery that Servotronics now seeks. They quote the following portion of the Fourth Circuit’s opinion:

Section 1782(a) is not designed to authorize full discovery in connection with a foreign arbitration proceeding, or any other proceeding of a foreign tribunal. Indeed, the provision does not even use the term “discovery.” It is much more limited. The statute authorizes a U.S. district court to function in the stead of a foreign tribunal and, on behalf of that tribunal, to take statements and receive testimony and documents or other materials intended “for use” in the proceeding before the tribunal. Moreover, the process must be administered in the discretion of the district court—not the parties, as is the case in discovery—to assist in the limited role of receiving evidence for use in the foreign tribunal proceeding.

Servotronics, 954 F.3d at 214–15. Intervenors’ reliance is misplaced. The Fourth Circuit made this point in response to Boeing’s concern that § 1782(a) could be used to conduct full discovery available under the Federal Rules of Civil Procedure in foreign arbitrations. The Fourth Circuit clarified that a court’s assistance under § 1782(a) is much narrower than discovery under the Federal Rules because the parties must receive permission from the court to conduct any evidence gathering and they may only do so for use in a proceeding. Id. at 215. In contrast, the Federal Rules allow parties to conduct discovery freely and without first seeking leave from the court, and evidence may be collected even if it is not used or admissible in the relevant proceeding. In other words, the Fourth Circuit’s opinion does not prohibit Servotronics from what it seeks to do here—take two depositions once the court grants its application.



Moreover, as Servotronics points out, § 1782 provides that any testimony permitted by the district court “shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.” 28 U.S.C. § 1782. Rule 30 permits depositions and Rule 45 permits the issuance of deposition subpoenas. Further, the Fourth Circuit’s recent direction to this court is directly at odds with the intervenors’ theory. In issuing the writ of mandamus, the Fourth Circuit directed the court to “issue the subpoenas . . . within its jurisdiction” without placing any procedural-based limitation on the court’s authority to do so. ECF No. 16 at 2. Thus, Servotronics’ requests for subpoenas falls comfortably within of the scope of assistance provided for by § 1782.

#### **b. Consideration of Discretionary Factors**

The Supreme Court has identified four factors to guide district courts’ discretion in ruling on a § 1782 application: (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding;” (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance;” (3) whether the § 1782 application is an attempt to “circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States;” and (4) whether the request for discovery is “unduly intrusive or burdensome.” Intel, 542 U.S. at 264–66. “The Intel factors are not to be applied mechanically, and a district court should also take into account any other pertinent issues arising from the facts of the particular dispute.” In re del Valle Ruiz, 939 F.3d at 533 (quoting Kiobel by Samkalden v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 244 (2d Cir. 2018) (internal quotation marks omitted)).

Oddly, the only factor discussed by intervenors is the final factor, whether the request is “unduly intrusive or burdensome.” Instead, intervenors primarily focus on the need, or lack thereof, for the deposition testimony. While this argument does not fit within the factors laid out by the Supreme Court, Intel does not suggest that those factors are exclusive, and courts have specifically instructed to “take into account any other pertinent issues arising from the facts of the particular dispute.” Id. Moreover, the court has wide discretion in considering Servotronics’ application. Therefore, the court indulges intervenors’ argument and then turns to the four factors discussed in Intel.

#### **i. Necessity of Deposition Testimony**

Intervenors argue that Servotronics has failed to show how the requested deposition testimony would be of assistance to the U.K. arbitral tribunal. They explain that Boeing has already produced written witness statements of Sharkshna and Walston (among others), which were taken contemporaneously with the January 2016 incident. Boeing has also produced the internal investigation report of the incident, surveillance video footage of the incident, and numerous other related documents. Finally, Boeing has agreed to produce the audio recordings of the incident from Sharkshna’s and Shifley’s headsets and its manufacturing and engine records related to the incident. There is no dispute as to the authenticity of this evidence. As such, intervenors argue that the original and best sources of facts about the incident are already available to the U.K. arbitral tribunal, making the deposition testimony unnecessary. Intervenors also argue that there is no dispute about the facts themselves and instead the case will be a “battle of the experts,” meaning that there is no reason to gather additional facts.

In response, Servotronics argues that the deposition testimony is necessary to its defense that the incident occurred as a result of Boeing and Rolls-Royce's negligent performance of their maintenance troubleshooting for fuel flow problems, not a malfunction of the Servotronics valve. Specifically, Servotronics contends that the witnesses have knowledge of facts highly relevant to its defense, including "the numerous improper, inadequate, and incorrect actions and failures to act of Boeing and Rolls-Royce employees in regard to the chain of causation leading to the tail pipe fire" and "Boeing's post-incident investigation, which is also relevant to the issue of its negligence and chain of causation." ECF No. 1-1 at 4. Servotronics explains that the previously provided witness statements are not a substitute for sworn testimony that is subject to direct and cross examination and that the statements are also fragmentary and at some points barely legible. With regard to intervenor's argument about experts, Servotronics notes that experts must use facts to form their opinions and that the experts may incorporate facts learned during the deposition into their reports.

While Boeing has shared a good deal of evidence, the court agrees with Servotronics that deposition testimony has considerably more evidentiary value than written statements, namely due to the opportunity for examination under oath. Moreover, Servotronics should be able to build its case with the evidence that it deems most helpful, and intervenors should not be permitted to decide for Servotronics that it has sufficient evidence without the depositions. Finally, while the dispute may come down to a "battle of the experts," experts use facts to form their opinions, and the court can easily imagine that additional deposition testimony about the circumstances of the incident could be

useful to an opinion. In sum, the court is unconvinced that the deposition testimony is unnecessary to the arbitration hearing.

**ii. Whether Proposed Deponents are Parties to the Arbitration**

Turning to the discretionary factors discussed in Intel, the court first considers whether the proposed deponents are parties to the arbitration because “when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.” Intel, 542 U.S. at 264. Servotronics explains that the only parties to the arbitration are Servotronics and Rolls-Royce, meaning that neither Boeing nor either of the two relevant witnesses are parties. Intervenor do not dispute this point. Moreover, while intervenors at one time contended that the witnesses would be available to examine at the arbitration hearing, they have informed the court that they can no longer stand behind that guarantee. In other words, Servotronics’ application may be the only means by which it can obtain testimony from Sharkshna and Walston. Therefore, this factor weighs in favor of granting Servotronics’ application.

**iii. The Nature of the Foreign Tribunal, Character of the Proceedings Underway, and Receptivity of the U.K. Arbitral Tribunal to U.S. Federal-Court Judicial Assistance**

With regard to the second factor, Servotronics explains that arbitration under the rules applied by the U.K. arbitral tribunal, the Chartered Institute of Arbitrators (“CIArb”) Rules, is not dissimilar from proceedings in an American court. The parties submit pleadings, briefs, and evidence. Servotronics submitted a declaration by Akhil Shah (“Shah”), one of Her Majesty’s Counsel, in which Shah attests that under CIArb

rules, parties gather evidence and submit it to the arbitrators, and that evidence obtained through discovery, including discovery conducted in foreign countries, may be submitted. ECF No. 1-6, Shah Declaration (“Shah Decl.”) ¶ 14. The arbitrators will then consider the evidence and arguments made by the parties. *Id.* ¶ 15. Again, intervenors do not address this factor or any of these arguments. Based on the U.K. arbitral tribunal’s seeming willingness to accept evidence collected during foreign discovery, this factor weighs in favor of granting Servotronics’ application.

**iv. Whether Servotronics’ Application is an Attempt to Circumvent Foreign Proof-Gathering Restrictions**

As to the third discretionary factor, Servotronics argues that the CIArb rules permit discovery and submission of testimonial evidence and that no judicial or arbitral authority in the U.K. has rejected Servotronics’ effort to obtain the testimony. Servotronics cites to the Shah Declaration for these points. *See* Shah Decl. ¶¶ 19, 22. Again, intervenors do not respond to this argument, leaving the court with no reason to find that Servotronics is attempting to circumvent foreign proof-gathering restrictions.

**v. Whether Servotronics’ Request is Unduly Intrusive or Burdensome**

With regard to the final discretionary factor, intervenors argue that these depositions would impose a burden on Boeing because the subject matter of the dispute is sensitive, and Boeing would have to closely review the depositions transcripts for proprietary information and export-control limitations. Intervenors further note that these depositions would be an unwarranted intrusion into Boeing’s business and place a burden on Boeing employees during an already difficult time for business, citing the COVID pandemic. In response, Servotronics argues that the evidence gathering will be narrow,

as it only entails two depositions related to facts and circumstances of a single incident that occurred over a couple days. Additionally, Servotronics notes that it is unlikely that any proprietary information would be disclosed, but if it were, there's a binding non-disclosure agreement already in place amongst the parties.

In the court's view, the two requested depositions seem neither unduly intrusive nor overly burdensome. Whatever burden Boeing might incur by reviewing only three deposition transcripts for proprietary information is likely minimal. Moreover, the non-disclosure agreement should protect any proprietary information that may be discussed in the depositions. And while the COVID-19 pandemic could complicate the deposition process, the pandemic alone is not a reason for disallowing the depositions to take place. The wheels of the justice system have continued to turn during the pandemic, and its participants have become accustomed to operating within the pandemic's limitations, utilizing technology that is fast becoming the norm. Likewise, Boeing has had over a year to acclimate to the conditions of COVID-19, and the court is confident that the burden imposed by the depositions will not significantly affect its business. In sum, all four factors weigh in favor of granting Servotronics' application and granting leave for Servotronics to serve its subpoenas.

### **c. Court Supervision**

Finally, intervenors argue that in the event the court grants Servotronics' application, the court should actively oversee the evidence-taking. Intervenors contend that instead of permitting depositions to be conducted as they usually are, the court should require Servotronics to submit its proposed witness questions to intervenors and give intervenors an opportunity to object on grounds of relevancy and privilege, to be

ruled on by the court. Rolls-Royce would also like the opportunity to submit questions following the same procedure, and have witnesses provide written answers to the questions. In arguing this position, intervenors cite to the Fourth Circuit's opinion, which states that "the process must be administered in the discretion of the district court—not the parties, as is the case in discovery—to assist in the limited role of receiving evidence for use in the foreign tribunal proceeding." Servotronics, Inc., 954 F.3d at 215. In response, Servotronics argues that the Fourth Circuit did not mandate any sort of process for evidence-gathering, explaining that "the Fourth Circuit expected this Court to consider the Intel discretionary factors, not conduct an independent inquisition, subject of course to the Court's own assessments of efficiency and legal requirements." ECF No. 21 at 2.

Courts frequently permit the issuance of deposition subpoenas when granting § 1782 applications. See In re Gorsoan Ltd., 2020 WL 3172777, at \*1 (S.D.N.Y. June 15, 2020) (noting that the court granted a § 1782 application, which included deposition subpoenas); In re Mother's Milk, Inc., 2020 WL 2514315, at \*2 (E.D.N.C. May 15, 2020) (same); In re Kidd, 2020 WL 2404928, at \*1 (D. Conn. May 12, 2020). These courts make no mention of any special, court-supervised procedure for conducting the depositions. Moreover, the court does not interpret the language quoted by intervenors to mean that the Fourth Circuit requires this court to adhere to any particular method of administering its assistance under § 1782. Again, this language from the Fourth Circuit was in response to Boeing's concern that applying § 1782 to foreign arbitration proceedings would result in full-fledged discovery permitted by the Federal Rules of Civil Procedure. The Fourth Circuit thought that this concern was unfounded because

§ 1782 simply permits a federal district court to serve the limited role of providing assistance with collecting evidence, while the Federal Rules of Civil Procedure allow parties to initiate and conduct discovery without court involvement. Further, the plain language of § 1782 indicates that it is completely acceptable to allow parties to conduct traditional depositions as opposed to the court-monitored process proposed by intervenors. The statute states that an order granting a § 1782 application “may prescribe the practice or procedure . . . for taking the testimony” but that “[t]o the extent that the order does not prescribe otherwise, the testimony or statement shall be taken . . . in accordance with the Federal Rules of Civil Procedure.” 28 U.S.C. § 1782. As such, the statute clearly contemplates depositions being taken in accordance with the Federal Rules.

And finally, the Fourth Circuit’s writ again undermines intervenors’ interpretation of the law. The Fourth Circuit directed the court to resolve Servotronics’ application “without delay,” out of a concern that the application may be mooted by the approaching arbitration hearing, scheduled for May 10, 2021. ECF No. 46 at 3. Thus, the court declines to invite further opportunities for delay by hamstringing the authorized discovery with red tape. Instead, the court grants Servotronics’ application and, in accordance with § 1782, grants Servotronics leave to serve the subpoenas there-attached upon Sharkshna and Walston. ECF Nos. 13-5, 13-7.



20a

**IV. CONCLUSION**

For the foregoing reasons the court **GRANTS** the application.

**AND IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read 'D. Norton', written over a horizontal line.

**DAVID C. NORTON**  
**UNITED STATES DISTRICT JUDGE**

**April 16, 2021**  
**Charleston, South Carolina**

FILED: April 15, 2021

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 21-1305  
(2:18-mc-00364-DCN)

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In re: SERVOTRONICS, INC.

Petitioner

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O R D E R

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In its petition for a writ of mandamus dated March 19, 2021, Servotronics, Inc. requested that we direct the district court “to promptly rule” on its renewed application, filed on May 10, 2020 under 28 U.S.C. § 1782, for assistance in connection with an arbitration in the United Kingdom, which is scheduled to begin May 10, 2021. After receiving a response to the petition, we communicated with the district court to afford it the opportunity to rule before we considered Servotronics’ petition. In response, the district court issued an order staying its proceedings pending the Supreme Court’s decision in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, 2121 WL 1072280 (U.S. March 22, 2021), where the

Supreme Court granted certiorari to review a decision from the Seventh Circuit, *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), that arose from the same incident and that addressed the same issue that underlies the petition here.

The petition before us arises out of Servotronics' application to the district court under 28 U.S.C. § 1782 to obtain testimony from three Boeing employees residing in South Carolina for use in a pending arbitration in the United Kingdom. The district court denied Servotronics' application, concluding that § 1782 was not applicable to a private arbitration. By a decision dated March 30, 2020, we reversed the district court's order and remanded for the court to conduct proceedings on Servotronics' application. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020). Since the issuance of that decision, however, the district court has conducted no further proceedings, despite Servotronics' renewed application filed on May 1, 2020, and its subsequent "Request for Ruling" filed on January 6, 2021.

While we recognize that the Supreme Court has determined to review the Seventh Circuit's decision on the same issue that we addressed in our earlier decision, our mandate remains in force until the Supreme Court rules otherwise. Moreover, to stay proceedings, as the district court seeks to do, could render moot our decision, as the UK arbitration remains scheduled to begin on May 10, 2021, despite efforts to postpone it.

Accordingly, we now grant Servotronics' petition for a writ of mandamus and direct the district court to issue, without delay, the subpoenas to the witnesses within

its jurisdiction and take their testimony for use in the UK Arbitration.

Entered at the direction of Judge Niemeyer with the concurrence of Chief Judge Gregory and Judge Harris.

Ordered this 15th day of April, 2021.

For the Court

/s/ Patricia S. Connor, Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION**

In re:	)	
	)	No. 2:18-mc-00364-DCN
Application of SERVOTRONICS, INC.	)	
for an Order Pursuant to 28 U.S.C. § 1782	)	
to Take Discovery for Use in a Foreign	)	<b>ORDER</b>
Proceeding	)	
_____	)	

The following matter is before the court on applicant SERVOTRONICS, INC.’s (“Servotronics”) Renewed Application for an Order Pursuant to 28 U.S.C. § 1782 to Take Discovery for Use in a Foreign Proceeding, ECF No. 13. For the reasons set forth below, the court holds the application in abeyance and stays proceedings pending the Supreme Court’s resolution of Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021) (“Servotronics, U.S.”).

**I. BACKGROUND**

This application arises out of an arbitration related to a fire at The Boeing Company’s (“Boeing”) facilities in Charleston, South Carolina. On January 16, 2016, Boeing was conducting testing on a plane when a tailpipe fire occurred in the plane’s engine. The engine was manufactured by Rolls-Royce, PLC (“Rolls-Royce”) and contained a valve manufactured by Servotronics. During testing, a piece of metal got lodged in the valve, which affected the engine fuel flow. As a result, the Boeing ground crew began troubleshooting the engine, and subsequently the fire occurred. The fire damaged both the engine and the plane. Boeing sought compensation for the damage from Rolls-Royce, and Rolls-Royce settled the claim. Then Rolls-Royce demanded indemnity from Servotronics, which Servotronics refused. Servotronics maintains that it

is not liable for the damage caused by the fire and claims that fault lies with Rolls-Royce and Boeing. Rolls-Royce and Servotronics are parties to an agreement that requires the parties to resolve any disputes through arbitration in Birmingham, England. Rolls-Royce served a notice of arbitration on Servotronics seeking approximately \$12.8 million. The parties have agreed to arbitrate in London instead of Birmingham as a matter of convenience. Servotronics now seeks testimony from three former and current Boeing employees to be used in the arbitration in support of its defenses. The first two employees, Terrance Shifley (“Shifley”) and Alan Sharkshna (“Sharkshna”), are employees who participated in troubleshooting the plane’s engine. The third employee, Scott Walston (“Walston”), was the chairperson of the Boeing Incident Review Board that investigated the fire.

Servotronics initially filed an ex parte application pursuant to 28 U.S.C. § 1782, requesting leave to serve subpoenas upon the three witnesses on October 26, 2018. ECF No. 1. This court denied the application, finding that the U.K. private arbitral tribunal is not a “foreign tribunal” as defined by § 1782. ECF No. 4. Servotronics appealed the order, and Boeing and Rolls-Royce (collectively, “intervenors”) intervened in the appeal. The Fourth Circuit reversed this court’s order, finding that the arbitral tribunal is a § 1782 “foreign tribunal,” and remanded for further proceedings. Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 216 (4th Cir. 2020) (“Servotronics, 4th Cir.”). Concurrently with the instant proceedings before this court, Servotronics litigated another § 1782 application in the District of Illinois, where it sought to subpoena Boeing to produce certain documents for use in the same overseas arbitration. In re Servotronics, Inc., 2019 WL 9698535, (N.D. Ill. Apr. 22, 2019). The Northern District of Illinois initially granted the

application but, upon reconsideration, vacated its order, denied the application, and quashed Servotronics' subpoena. Id. The district court there reached the same conclusion that this court reached prior to Fourth Circuit reversal—that a private arbitral tribunal is not a “foreign tribunal” under § 1782. Servotronics appealed, and the Seventh Circuit affirmed, holding that private arbitration tribunals are not “foreign or international tribunals” under § 1782 and making explicit its departure from the Fourth Circuit's recent interpretation. Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 691, 693–94 (7th Cir. 2020) (“Servotronics, 7th Cir.”). As such, there exists a circuit split with respect to the same issue and, perhaps for the first time, with respect to the very same case.

After the Fourth Circuit's remand, Servotronics filed its renewed application with the court on May 1, 2020. ECF No. 13. Intervenors filed a joint response on May 29, 2020, ECF No. 20, and Servotronics replied on June 5, 2020, ECF No. 21. The court held a hearing on June 30, 2020 and subsequently entered an order instructing the parties to submit supplemental briefing on issues raised at the hearing. ECF No. 27. The parties filed their first batch of supplemental briefs on July 21, 2020. ECF Nos. 32–33. On August 24, 2020, the court ordered a second batch of supplemental briefing, requesting that the parties analyze the test employed by the Second Circuit in In re del Valle Ruiz to determine “whether the court has authority over” the witnesses. ECF No. 34; 939 F.3d 520 (2d Cir. 2019). The parties timely complied. ECF Nos. 35–36. On December 2, 2020, Servotronics filed a “modification” to its application, informing the court that one of the relevant witnesses, Shifley, “now resides in the District of Minnesota” and withdrawing its application with respect to Shifley. ECF No. 37. Intervenors responded, noting that Rolls Royce intends to call the remaining two witnesses, Sharkshnas and

Walston, at the arbitration hearing, meaning that Servotronics would have the opportunity to examine them at that time, if it so chooses. ECF No. 38.

On December 7, 2020, Servotronics petitioned the Supreme Court of the United States for a writ of certiorari, seeking review of the Seventh Circuit's decision. On January 6, 2021, Servotronics again supplemented its application, requesting that the court issue an order so that Servotronics can "serve the subpoena(s), arrange the depositions, and obtain the[] testimonies before the arbitration hearing," which is scheduled for May 10, 2021. ECF No. 39 at 1. On February 23, 2021, intervenors also filed another supplement, informing the court that they could no longer guarantee Sharkshnas's presence at the arbitration hearing. ECF No. 40. The next day, Servotronics put in its two cents about the legal implications of Sharkshnas's absence and informed the court that it had requested a continuance of the arbitration hearing with the arbitration panel. ECF No. 41. On March 11, 2021, Servotronics informed the court that the panel denied its request for a continuance. ECF No. 42. The next day, intervenors reported to this court the very same, adding that the arbitration panel ultimately found "that obtaining any evidence from the various § 1782 proceedings is not a compelling reason for adjournment." ECF No. 43 at 1–2.

On March 22, 2021, the Supreme Court granted Servotronics' certiorari petition in connection with its appeal from the Seventh Circuit's opinion. The issue on certiorari is as follows:

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.



Servotronics, U.S., 2021 WL 1072280, at \*1.<sup>1</sup>

## **II. DISCUSSION**

The court finds that it would be imprudent to resolve an issue while that exact same issue, in the exact same case, is pending before the United States Supreme Court. As the court mentioned above, Servotronics informed the court that one of the witnesses whose presence it initially sought to compel, Shifley, moved to Minnesota, likely beyond the reach of this court's grasp. Accordingly, Servotronics filed an application nearly identical to the instant application with the District Court for the District of Minnesota. Faced with an application nearly identical to the one pending here, and thus the same quandary as this court, the District Court stayed the proceedings before it under its inherent power to do so. Servotronics, Inc. v. Rolls-Royce PLC, 2021 WL 1221189 (D. Minn. Apr. 1, 2021) ("Servotronics, D. Minn"). Judge Katherine Menendez reasoned that a stay was the proper course because "the Supreme Court has accepted review of the Seventh Circuit's decision, and it is certain that the Court will address the very question now before this Court." Id. at \*2. Finding Judge Menendez's wisdom compelling, the court resolves to follow suit, hold the renewed application in abeyance, and stay proceedings pending Supreme Court guidance.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254–

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<sup>1</sup> The Supreme Court's statement of the issue on certiorari, along with other documents filed in connection with its review, can be found on the Supreme Court's website. <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-794.html>.

55 (1936); see also United States v. Oliver, 878 F.3d 120, 124 (4th Cir. 2017) (“The Supreme Court has [] recognized federal courts’ inherent authority to . . . stay an action pending the outcome of parallel proceedings in another court[.]”). A court may invoke this authority upon a party’s request or on its own accord. Crown Cent. Petroleum Corp. v. Dep’t of Energy, 102 F.R.D. 95, 98 (D. Md. 1984). Determining whether to issue a stay “calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” Landis, 299 U.S. at 255. The district court has discretion in issuing a stay, given that it is in the interest of “the expeditious and comprehensive disposition of the causes of action on the court’s docket.” United States v. Georgia Pac. Corp., 562 F.2d 294, 296 (4th Cir. 1977). With this law firmly in mind, the court determines that a stay is appropriate here.

The District Court in Minnesota rooted its issuance of a stay in sound logic. First, Judge Menendez noted that “there is a prominent split between the circuits [that] have addressed the precise issue before this Court—namely, whether foreign private arbitration falls within the purview of § 1782.” Servotronics, D. Minn., 2021 WL 1221189, at \*2. Of course, that is true. For one, there was an existing circuit split on this issue prior to Servotronics’ nationwide filings. See Nat’l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 188 (2d Cir. 1999) (finding that private arbitral panels are not “foreign tribunals” under § 1782); In re Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 714 (6th Cir. 2019) (finding that private arbitral panels are “foreign tribunals” under § 1782). More compelling though, and indeed extraordinary, there now exists a split among circuits on this issue within the very same case. See Servotronics, 4th Cir., 954 at 216 (finding that the U.K. private arbitral panel is a “foreign tribunal”

under § 1782); Servotronics, 7th Cir., 975 F.3d at 691 (finding that the U.K. private arbitral panel is not a “foreign tribunal” under § 1782). As the Judge Menendez put it,

this is not a stay pending resolution of a legal issue that merely has some possible bearing on this case. The matter before the Supreme Court is this case, albeit involving a different subpoena. The matter before the Supreme Court involves the same parties, seeking resolution of the same issue and for the same reasons, as here; and it is worth noting that this very question has already been addressed by two other circuit courts of appeals with contradictory results.

Servotronics, D. Minn., 2021 WL 1221189, at \*2 (emphasis added). The Supreme Court has granted certiorari on the issue, meaning that a decision from the highest court in the land on the very issue before this court is imminent. Accordingly, a stay under these unique circumstances best serves judicial efficiency. A hasty decision by this court may very well be contrary to a subsequent decision from the Supreme Court. Were this court to resolve Servotronics application in a way that conflicts with immediately successive Supreme Court precedent, the issue would more than likely end up back before the court, at the expense of considerable time and resources, expended for naught. Just like the District Court in Minnesota, the court finds “staying this matter until the Supreme Court answers the critical issue . . . more efficient and practical than the alternative.” Id.

Servotronics’ request that the court resolve its application, despite the current uncertainty of the relevant law and the promise of forthcoming clarity, stems from the facts that the arbitration hearing is set to occur on May 10, 2021 and the arbitration panel has decided to conduct the hearing with or without the evidence Servotronics seeks in American courts. In other words, less than a month from the hearing, Servotronics’ request to compel deposition testimony could be a now-or-never proposition. But, as Judge Menendez noted, “that is an issue on which the arbitration panel has the last word.”

Id. at \*3. As the court noted above, Servotronics requested that the arbitration panel continue the hearing, and the panel rejected that request, finding “that obtaining any evidence from the various § 1782 proceedings is not a compelling reason for adjournment.” ECF No. 43 at 1–2. While empathetic to Servotronics’ circumstances,<sup>2</sup> the parties contracted to have an arbitral panel settle their disputes, and the court must accord that panel its due respect. Judge Menendez put it best: “It is up to the panel to decide whether, in light of the Supreme Court’s decision, it should stay further proceedings, and that panel is in a far better position than this Court to understand the importance of the deposition at issue here to the matters on [its] plate.” Id. Again, the court agrees. Servotronics presented its procedural plight to the arbitral panel, and the panel deemed it unworthy of relief. As Judge Menendez noted, “If the panel decides that the deposition is necessary to a full and fair resolution, it can revisit its decision to go ahead with the hearing on May 10.” Id.

In sum, various Courts of Appeal have come down on either side of the issue at the heart of Servotronics’ application. And two Courts of Appeal, the Fourth and Seventh Circuits, have come down on different sides of Servotronics’ application in this very case. The Supreme Court granted Servotronics’ petition for certiorari on the issue, signaling that a binding resolution from the nation’s highest court is on the horizon. Resolving Servotronics’ renewed application without that guidance would be an imprudent waste of judicial resources. Accordingly, the court resolves to wait for an answer, rather than guess at it.

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<sup>2</sup> Since it was Servotronics who petitioned for certiorari, asking the Supreme Court to weigh in on an outcome-determinative issue for its applications, it could be seen that Servotronics is the author of its own demise.

### **III. CONCLUSION**

For the foregoing reasons the court **HOLDS IN ABEYANCE** Servotronics' renewed application and **STAYS** this matter pending the Supreme Court of the United States's review of Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794, 2021 WL 1072280 (U.S. 2021).

**AND IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read 'D. Norton', is written over a horizontal line.

**DAVID C. NORTON**  
**UNITED STATES DISTRICT JUDGE**

**April 14, 2021**  
**Charleston, South Carolina**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Servotronics, Inc.,

Case No. 0:20-mc-81-JRT-KMM

Petitioner,

**ORDER**

v.

Rolls-Royce PLC,

Intervenor.

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Currently pending before the Court is an application pursuant to 28 U.S.C. §1782 seeking an order permitting the deposition of a Minnesota resident for use in a foreign arbitration proceeding. Rather than rule on the pending request at this time, the Court has determined that a stay is appropriate in this matter for the reasons set forth below.

**Background**

This case concerns Servotronics, Inc.’s, application to take discovery for use in a foreign proceeding pursuant to 28 U.S.C. § 1782. [ECF No. 1]. In 2018, Servotronics filed a similar application in the district of South Carolina. *In re Servotronics, Inc.*, No. 2:18-mc-00364-DCN, 2018 WL 5810109 (D.S.C. Nov. 6, 2018). There, Servotronics sought to depose witnesses to an incident at issue in an ongoing arbitration action against Servotronics in London, England. [Pet. 2, ECF No. 1]. Holding that a United Kingdom private arbitration panel was not a “foreign or international tribunal” for purposes of § 1782, the South Carolina district court denied Servotronics’ application. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 209 (4th Cir. 2020). In 2020, the Fourth Circuit

reversed, holding that the language of § 1782 did in fact extend to the arbitration panel.  
*Id.*

After the Fourth Circuit remanded the case for further proceedings, Servotronics learned that one of the witnesses it was trying to depose had moved from South Carolina and now resides in Minnesota. [Pet’r’s Mem. 4, ECF No. 2]. Accordingly, Servotronics filed the instant application, seeking an order from this Court requiring the deposition. The claimant in the England arbitration—Rolls-Royce PLC—intervened in this matter and opposes the application. [Order, ECF No. 17].

In 2019, while the South Carolina applications were being litigated, Servotronics filed another § 1782 application in the District of Illinois, seeking an order allowing it to serve Boeing Company with a subpoena for documents for use in the same overseas arbitration. *In re Servotronics, Inc.*, No. 18-cv-7187, 2019 WL 9698535 (N.D. Ill. Apr. 22, 2019). The district court granted the application, but Rolls-Royce intervened and filed a successful motion to quash the subpoena. Following an appeal by Servotronics, The Seventh Circuit Court of Appeals affirmed, holding that private arbitration tribunals were not “foreign or international tribunals” under § 1782—expressly declining to adopt the Fourth Circuit’s recent interpretation. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 691, 693–94 (7th Cir. 2020). This created a circuit split where both competing decisions arise from a single foreign arbitration.

On December 7, 2020, Servotronics petitioned the Supreme Court of the United States for a writ of certiorari, seeking review of the Seventh Circuit’s decision. On March 16, 2021, this Court held a status conference, during which, “[b]ecause the arbitration

underlying the §1782 petition in this matter is scheduled to go ahead in just under two months, the Court determined that a stay would not be in the interest of justice.”

[Minutes, ECF No. 22].

After the status conference, Servotronics provided the Court with the arbitration panel’s decision to proceed with the final hearing on May 10, 2021—regardless of whether Servotronics obtains the deposition it seeks here. [Letter, ECF No. 23]. And, most relevant to this order, on March 22, 2021, the Supreme Court granted Servotronics’ certiorari petition. The question to be addressed by the Court 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.

*Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, 2021 WL 1072280 (U.S. 2021).<sup>1</sup> The Supreme Court’s decision to address the very issue now before this Court has changed the Court’s assessment regarding the propriety of a stay.

### **Analysis**

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936);

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<sup>1</sup> The Supreme Court’s statement of the issue presented, as well as other documents filed in connection with this review, can be found on the Supreme Court’s website at: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-794.html>



*Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 n.6 (8th Cir. 1979). A “federal court has inherent power to stay, sua sponte, an action before it.” *Crown Cent. Petroleum Corp. v. Dep’t of Energy*, 102 F.R.D. 95, 98 (D. Md. 1984) (citing *Landis*, 299 U.S. at 254–55). Whether to stay a proceeding is within the court’s broad discretion, so long as it comports with considerations of judicial economy and equity. *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 816–17 (8th Cir. 2006); see *Kircher v. Putnam Funds Trust*, Nos. 06-cv-939-DRH, 06-cv-1001-DRH, 2007 WL 1532116, at \*2 (S.D. Ill. May 24, 2007) (collecting cases). Against this backdrop, the Court determines that a stay is appropriate.

Admittedly, the Court recently determined that a stay of this matter would be improper. [Minutes, ECF No. 22]. However, it was unknown at that time when the Supreme Court would rule on Servotronics’ petition, and the odds of the Court granting review in any individual matter are not high. Now, however, the Supreme Court *has* accepted review of the Seventh Circuit’s decision, and it is certain that the Court will address the very question now before this Court. Therefore, the Court finds that a stay is proper.

First, there is a prominent split between the circuits to have addressed the precise issue before this Court—namely, whether foreign private arbitration falls within the purview of § 1782. See *Servotronics*, 975 F.3d at 693 (summarizing the split). Second, there is no Eighth Circuit precedent on this issue, so the Court would have to independently interpret the very same statutory language that is presently pending interpretation by the Supreme Court. Finally, this is not a stay pending resolution of a

legal issue that merely has some possible bearing on this case. The matter before the Supreme Court *is* this case, albeit involving a different subpoena. The matter before the Supreme Court involves the same parties, seeking resolution of the same issue and for the same reasons, as here; and it is worth noting that this very question has already been addressed by two other circuit courts of appeals with contradictory results. Moreover, it is very likely that, whatever decision this Court reaches, the losing party will appeal the order, first to the District Court, and then to the Eighth Circuit. Each level of review will be aware that, as it grapples with the application of § 1782 to the circumstances of this case, the Supreme Court does as well. Under these circumstances, the Court concludes that staying this matter until the Supreme Court answers the critical issue would be more efficient and practical than the alternative. Accordingly, the Court concludes that a stay is proper.

The Court is aware that this stay may increase the risk that Servotronics' § 1782 application becomes moot. The arbitration panel has determined, it seems, that it will proceed with the final hearing on May 10, 2021—with or without the discovery Servotronics seeks here or in the other pending proceedings. However, that is an issue on which the arbitration panel has the last word. It is up to the panel to decide whether, in light of the Supreme Court's decision, it should stay further proceedings, and that panel is in a far better position than this Court to understand the importance of the deposition at issue here to the matters on their plate. The Court declines to rush a decision here for the purpose of accommodating a schedule set by the arbitration panel in its discretion, particularly where the panel set that schedule with full awareness of the pending Supreme

Court petition. If the panel decides that the deposition is necessary to a full and fair resolution, it can revisit its decision to go ahead with the hearing on May 10.

**ACCORDINGLY**, this matter is stayed pending the Supreme Court of the United States' review of *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, 2021 WL 1072280 (U.S. 2021).

**IT IS SO ORDERED.**

Date: April 1, 2021

s/ Katherine Menendez

Katherine Menendez  
United States Magistrate Judge

**IN THE MATTER OF AN ARBITRATION**

**UNDER THE RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS**

**B E T W E E N:**

**ROLLS ROYCE PLC**

**Claimant**

**-and-**

**SERVOTRONICS INC**

**Respondent**

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**THIRD INTERIM AWARD**

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**Introduction**

1. This is the Third Interim Award in this arbitration. It is made in response to two sets of applications dated 20 January 2021:

- 1.1 An application by the Respondent for an adjournment of the final hearing of this arbitration, which was fixed on 7 April 2020 (confirmed by Amended Order for Directions dated 10 July 2020) to commence on 10 May 2021. The Respondent seeks an adjournment to a date not before 1 October 2021, so that the final hearing might take place in person and with the benefit of any evidence obtained from Boeing pursuant to the Respondent's applications under 28 USC §1782 in Illinois, South Carolina and Minnesota.

- 1.2 Applications by the Claimant for orders:

- (a) Confirming the existing dates of the final hearing (to take place wholly or partially virtually).
    - (b) Restraining the Respondent from taking any further step in, and requiring the Respondent to discontinue, its §1782 proceedings for document production in Illinois (the "Illinois Proceedings").

- (c) Restraining the Respondent from taking any further step in, and requiring the Respondent to discontinue, its §1782 proceedings to depose Mr Scott Walston in South Carolina (the “South Carolina Proceedings”).
  - (d) That the Tribunal does not require the documents sought in the Illinois Proceedings or the deposition of Mr Walston in this arbitration, and/or that any evidence so obtained by the Respondent shall not be admitted in this arbitration.
2. Each of the parties’ applications is supported by detailed written Skeleton Arguments dated 1 March 2021. The Tribunal is grateful to the parties and their legal representatives for those Arguments and for the oral submissions subsequently made on 4 March 2021 at the hearing of the applications, by Mr Shah QC on behalf of the Respondent and by Mr Dhar QC on behalf of the Claimant.
  3. The applications were accompanied by four lever arch files of documents, including legal authorities, relevant to the applications.

#### **Respondent’s Application for an Adjournment**

4. In the light of the COVID-19 pandemic and the lockdown restrictions currently in place in England and expected to be in place in the immediate future, it is almost certain that any hearing of this arbitration on 10 May 2021 will have to be virtual or, at least, partially virtual. It is extremely unlikely that an in-person hearing involving participants from the US and Canada on that date will be possible.
5. The Respondent suggests that, by contrast, it is reasonable to expect that the parties will be able to proceed with an in-person hearing in the autumn / fall.
6. It is against that background that the Respondent makes its application for an adjournment of the final hearing in this arbitration from the presently fixed date of 10 May 2021 to the first available date after 1 October 2021. Counsel have confirmed that both parties would be available for a final hearing for 10 days on and following 1 October 2021.

7. The Respondent bases its application on the submission that, for the reasons set out in its Skeleton Argument and spoken to by Mr Shah in his oral submissions, the dispute between the parties in this arbitration is not suitable for a remote hearing.
8. The Tribunal is guided by the principles that the parties should be treated with equality, that each party should be given a fair and reasonable opportunity of presenting its case, and that it is required, in the exercise of its discretion, so to conduct the arbitration as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The ultimate requirement is that the proceedings should be fair as between the parties.
9. The Respondent suggests that the Tribunal has a binary choice: either to hold a remote (or largely remote) hearing in May 2021 involving participants in several countries with different time zones or to grant a short five-month adjournment until October 2021 to allow for an in-person hearing. The premise of the Respondent's application is that there should be no difficulty in having an in-person hearing in London in October 2021.
10. In the Tribunal's view, that premise is fragile at best. There is no certainty that any hearing in October 2021 will or could be in-person. As the Respondent, itself, stresses in its Skeleton Argument, during the pandemic the English courts have stressed the need to assess the prevailing circumstances "from day to day" as these are likely to change "rapidly". While it is right that the roll out of vaccines in England and the current decline in hospitalisations and deaths from COVID-19 provide a real basis for optimism about the future, there is also no gainsaying the real possibility that things might change between now and October 2021. New and more transmissible variants of COVID-19, serious new outbreaks of the disease, and new local and/or national lockdowns following relaxations of the Regulations, cannot be discounted. Nor can it be assumed that travel restrictions between the United Kingdom and United States, or the attendant quarantine requirements, will have been lifted by October. It remains entirely and realistically possible that, if this arbitration were to be adjourned to October 2021, any such hearing would necessarily or sensibly still have to take place remotely.
11. If, however, the Respondent were right in its other overarching submission, that the dispute between the parties in this arbitration is not at all suitable for a remote hearing, that might warrant the adjournment of the May 2021 dates in any event, irrespective of what the position might be in October 2021. The Tribunal, however, has little hesitation in rejecting that submission.

12. The different locations of counsel, witnesses, parties and arbitrators, and consequential different time zones, obviously present a challenge to the fair and efficient conduct of a fully virtual hearing. The Tribunal is, however, firmly of the view not only that the challenge is capable of being met but also that a properly administered and managed fully virtual hearing will (i) treat both parties with equality, (ii) provide each party with a fair and reasonable opportunity of presenting its case, (iii) avoid unnecessary delay, and (iv) provide a fair and efficient process for resolving the parties' dispute. The Tribunal comes to its view for the reasons that follow.
13. The participants in the US and Canada can be accommodated, whether for the purposes of attending or of giving evidence or of making submissions, all remotely, by virtue of late starts in London for those in London, including the members of the Tribunal. By way of example, a start at 13.00 in London would be 08.00 EST. With two short 15-minute breaks and a longer 45-minute break, even a 6 hour day would finish by 19.00 in London, which would be 14.00 EST. If the parties were to request earlier starts or later finishes, or indeed later starts or earlier finishes, the Tribunal would be willing, within reason, to accommodate any such request if so doing was fair to the parties and those involved. If either party were to request the oral evidence of any particular witness to be taken at any particular time or times, again the Tribunal would be willing, within reason, to accommodate any such request if so doing was fair to the parties and those involved. This obviously includes the Respondent's expert, Mr Larry Vance, who is based in Ottawa in Canada, as much as any of the Claimant's witnesses of fact who reside in the US.
14. The Tribunal does not consider these hours or these proposals to be unduly burdensome or impracticable or at all unfair. One member of the Tribunal has recently conducted a fully virtual arbitration involving active participants in a wider range of time zones than the present matter, with arguably more complex issues and with greater sums at stake than in this reference, without difficulty or any unfairness resulting to any party. The Tribunal does not consider that this arbitration should be an exception.
15. The Tribunal has considered all the Respondent's arguments. The first relates to the eight factual witnesses whom the Claimant intends to call. The Respondent says that any impediment to effective cross examination caused by a remote hearing will disproportionately harm the Respondent. There is, in the Tribunal's view, no good reason to suppose that there will be any substantive impediment. While it is recognised that oral evidence given in cross examination is the gold standard and that any form of artificial intermediation is a derogation

from that standard, that does not necessarily entail the conclusion that requiring a party to cross examine witnesses remotely will result in unfairness or harm to that party. The use of a well-recognised and experienced platform such as Opus2 will limit, if not eliminate, any possible impediments. There is no reason to suppose that there will be technical hitches, delays in sound transmission, poor or inadequate visual quality, or other difficulties. If there happen to be any, then appropriate further arrangements will or might have to be made. The apprehension that such difficulties might, theoretically, arise is not a good reason to expect them to arise or to conclude that, if perchance they do arise, they will not be capable of being dealt with entirely satisfactorily.

16. The Respondent places considerable emphasis on the submission that its defence will depend heavily on the quality of the factual evidence obtained under cross examination, and for that reason it is very important that there should be an in-person hearing. The Tribunal disagrees. The events which occurred and have given rise to the dispute took place as long ago as January 2016. That is more than five years ago already. There will doubtless be debate as to how much the individual recollections of the Claimant's witnesses will or can add to the documentary record. There is no suggestion that the Claimant's disclosure has fallen short, and in the Tribunal's view there are no categories of documents relevant to the issues, for example from Boeing, which remain necessary to be disclosed for a fair hearing. It seems to the Tribunal that what is most likely to be controversial is not what happened or did not happen but the inferences to be drawn from well-documented events and the extent if at all to which the complaints of negligent failings are justified having regard to the narrative. These are primarily matters for expert evidence, regarding which it is not suggested that any inconvenience caused by a virtual hearing falls disproportionately on the Respondent.
17. The factual witness evidence which has been served by the Claimant in the form of Witness Statements is, moreover, relatively short (the longest Statement is only 15 pages long and the total of all the Statements is a mere 47 pages), and the need for cross examination as to matters falling outside the scope of those Statements is, in the Tribunal's view, limited. If there were to be an in-person hearing, the Claimant would be expected to apply for those of its witnesses who are based in the US and are or were employees of Boeing (five out of the eight fact witnesses, and the only witnesses to have been directly involved in the fire incident in January 2016) to give evidence by video link. If the Claimant were to do that, it is most likely that the Tribunal would give permission for their evidence to be given and taken accordingly. As noted above, in the Tribunal's view, the expert evidence in this case is likely to be much



more important than that of the fact witnesses. It would also, in the Tribunal's view, be disproportionately expensive and burdensome to require those witnesses, who are not even employees of the Claimant, to come to London to give their short evidence in person. A remote hearing in May 2021 would, therefore, have no impact on the manner those witnesses' evidence would be likely to be presented in any event. The Tribunal has no hesitation in rejecting the submission that, if the Respondent were required to cross examine the Claimant's fact witnesses remotely, the Respondent's ability or right to cross examine effectively would be hampered in any material respect.

18. The Respondent also raises the spectre that, if cross examination of the Claimant's fact witness evidence takes place remotely, the integrity of the witness evidence might be impaired. The Respondent raises concerns about remote and secret coaching, access to notes and other aids during cross examination, conferences between the witnesses and others about the evidence during breaks, and other forms of nefarious behaviour. There is absolutely no evidence whatever to suggest that any of this is a real possibility. Furthermore, steps can easily be taken to make sure that conduct such as that articulated by the Respondent does not occur, whether by sensible use of technology (cameras etc.) or by requiring all witnesses to give their evidence in the presence of a lawyer whose integrity is beyond question.
19. Turning then to the expert evidence, the Respondent submits that the volume, complexity and significance of that evidence is "plainly unsuitable for a remote hearing". While the expert evidence is, indeed, voluminous and significant, its complexity is by no means unusual or unmanageable, and the Tribunal foresees no material difficulty if it is given remotely. The Tribunal already has a flavour of the expert evidence (having read the reports of Mr Keeping, Mr Hogg, Mr Vance, and Mr Tattersall) and the suggestion that it would be more difficult to follow if tendered remotely than if given in person is unhesitatingly rejected. The idea that there might be time lags in audio exchanges or other technical issues, with the consequence that the Tribunal does not gain the full benefit of the expert evidence, should be capable of straightforward management. The difficulties proposed by the Respondent in this regard are speculative and exaggerated. Again, while the evidence of the experts is of great significance in this arbitration, if their attendance in a virtual hearing is properly arranged and well-managed, the Tribunal foresees no issue arising as to the witnesses' ability to do themselves full justice in the giving of their evidence, or as to the parties' ability to question those witnesses, or as to the Tribunal's own ability to evaluate and assess their evidence fully and fairly.

20. A further argument raised by the Respondent is its inability to sit alongside and give instructions to its appointed London counsel. The Tribunal is also conscious that all or some of the Respondent's experts will also not be able to sit close to the Respondent's London counsel during a fully virtual hearing either in relation to the making of submissions or in relation to the cross examination of the Claimant's witnesses or in relation to the examination of any witnesses. The Tribunal does not underestimate in its own mind the practical challenge that these factors might pose. It is, however, also conscious of the fact that, with various available methods of instantaneous communication, not limited to email or WhatsApp or Teams but including also the confidential facilities provided by such platforms as the OPUS 2 virtual platform (which the Tribunal proposes should be used), this challenge should be capable of being met satisfactorily and without any ensuing unfairness. If additional brief adjournments were required, in order to assist with the taking of instructions, the Tribunal would be reasonably flexible in this regard.
21. The Tribunal must also give proper weight to the demand upon it to conduct the arbitration so as to avoid unnecessary delay and expense. The Tribunal is conscious of the fact that the parties have been working hard towards a May hearing and, therefore, should be fully prepared for such a hearing. It is also conscious of the fact that, if it were to adjourn the hearing to a date not before 1 October 2021, as indicated above there is no guarantee, even with the recent arrival of various COVID-19 vaccines, that any such hearing will then be capable of proceeding on a fully physical basis in London.
22. It seems to the Tribunal for the reasons identified above that, if it were to accede to the Respondent's application to adjourn, that would constitute an unnecessary delay. That, together with all the reasons above, compels the Tribunal in the exercise of its discretion and in accordance with the jurisdiction conferred upon it, to reject the Respondent's application for an adjournment of the hearing in May 2021.
23. For completeness, we should add that the Respondent also relied, though very much as a subsidiary argument, on the possibility that an adjourned hearing might benefit from further evidence received in the §1782 proceedings. We doubt if this is a significantly more realistic prospect in October than it would be in May. In all the circumstances, this is not a compelling reason for an adjournment.
24. It follows, also for the reasons above, that the Tribunal concludes that the hearing should remain fixed for May 2021 and should proceed on a fully virtual basis.

## **Claimant's Applications**

### **(a) Illinois Proceedings**

25. On 26 October 2018, the Respondent filed a subpoena in the US District Court for the Northern District of Illinois against Boeing to produce documents for use in this arbitration. The Respondent's application was made pursuant to USC §1782 (entitled "Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals", "§1782").
26. Both the Illinois District Court and the US Court of Appeals for the Seventh Circuit have rejected the Respondent's §1782 application on a jurisdictional basis, namely that §1782 does not apply to international private commercial arbitrations. Neither Court has answered the question of discretion as to whether, assuming jurisdiction, the document production sought should be granted.
27. On 7 December 2020, the Respondent issued a petition for a writ of certiorari to the US Supreme Court in respect of the US Court of Appeals' decision. On 10 February 2021, the Claimant and Boeing filed a joint brief in opposition to the Respondent's petition to the US Supreme Court.
28. There is almost no prospect of the Illinois Proceedings concluding in advance of the May Hearing. Even if the US Supreme Court were to grant permission to appeal and thereafter found in the Respondent's favour on the issue of law on which permission to appeal has been sought, the Supreme Court would be likely then to remit the question of discretion, as to whether or not actually to grant production of the documents sought by the Respondent, back to the District Court in the State of Illinois for determination. Assuming that the Respondent succeeds in the Supreme Court and the matter is remitted, there is no realistic prospect of the District Court coming to an adjudication by the time of the May hearing.
29. The documents sought by the Respondent in the Illinois Proceedings are in substance identical to those it sought by equivalent requests in its Redfern Schedule in this arbitration. As the Claimant submits, they fall into one of two categories: either (a) documents that the Tribunal ordered the Claimant to produce to the Respondent, and which now have been produced; or (b) documents requested by the Respondent, which the Tribunal rejected on the basis that those materials were not necessary for the fair disposal of this case.
30. The Claimant submits that the Illinois Proceedings are unconscionable and should be restrained; or, if not restrained, that the Tribunal should make a more nuanced order

restraining the Respondent from seeking to rely on any documents obtained by it in those Proceedings for the purposes of this arbitration. The Claimant submits, and there is no dispute, that the Tribunal has jurisdiction to grant an injunction in the terms it seeks (see sections 38(1) and 48(5)(a) of the Arbitration Act 1996); and further submits that, in accordance with the principles set out and applied by the Commercial Court in *Omega Group Holdings v Kozeny* [2002] C.L.C. 132 (Peter Gross QC, then sitting as a Deputy High Court judge), the Tribunal should conclude that the Illinois Proceedings are an attempt to interfere with the disclosure process in this arbitration by the attempted subversion of the orders and directions that this Tribunal has already made in relation to disclosure by the Claimant by its first Interim Award and its Ruling of 2 December 2020.

31. The Tribunal rejects the Claimant's application. The Tribunal refers to and relies on the principles set out in the judgment of Pomfrey J. in the analogous case of *Nokia Corp. v Interdigital Technology Corp.* [EWHC] 2920 (Pat) [26], [26], and [32].

32. As Pomfrey J. said,

*"It is for the US court hearing the section 1782 application to decide upon the merits of the application under US law and to determine the nature and scope of the relief to be granted. The fact that a party is enabled by exercising those rights to obtain documents and evidence which would not otherwise be available to it is not a ground for interference by the English court."*

33. Pomfrey J. continued,

*"... the English court should not seek to circumscribe the discretion possessed by the District Court by imposing its own view as to the appropriateness of the classes of documents sought by reference to the issues in proceedings as they stand. It is legitimate for the requesting party to use the request to ascertain facts and obtain documents of which the requesting party is unaware, but which may be in the future deployed in the English proceedings, if necessary, after appropriate amendment. ... The question of the extent to which the District Court should accede to the request is a matter for it alone, on the evidence made available, and the English court should only interfere if the invocation of the jurisdiction is either contrary to some legal or equitable right of the other party to the English litigation or is otherwise oppressive or vexatious or tends to interfere with the due process of the English court."*

34. The Tribunal is of the view that, by exercising a supposed right available to it under US federal law to obtain documents from a third party (as, in this case, from Boeing), a party to arbitration proceedings in England is not departing from or interfering with the procedure of the arbitration proceedings: see Lord Brandon's speech in *South Carolina Insurance Co. v Assurantie Maatschappij* [1997] A.C. 24. The Respondent's application in the Illinois Proceedings is not contrary to the Claimant's rights and, whatever Boeing might think about it, is not oppressive or vexatious or unconscionable so far as the Claimant and this arbitration are concerned.
35. There is, therefore, no good basis for the Tribunal to interfere with what the Respondent is seeking to achieve via USC §1782 in Illinois and now before the US Supreme Court. If, however, the Respondent succeeds in obtaining further material from Boeing in the US via the Illinois Proceedings before the conclusion of this arbitration, that will not mean that such material will necessarily be available for the Respondent to deploy in these proceedings. If that material is not admissible or relevant, it will, in any event, not be admitted in this arbitration. That, however, is not an issue upon which the Tribunal can or feels that it should pass any judgment now.
36. It is sufficient to say that the Claimant's application in relation to the Illinois Proceedings is rejected. If and to the extent that the Respondent succeeds in obtaining any material from the Illinois Proceedings which it then wishes to deploy in this arbitration (assuming that this arbitration will not already have been concluded), its admission into this arbitration will be a matter for the Tribunal then to decide.

**(b) South Carolina Proceedings**

37. On 26 October 2018, the Respondent filed an *ex parte* §1782 application to the US District Court for the District of South Carolina for subpoenas to take depositions of three Boeing employees, including Mr Walston. Shortly after the fire on 16 January 2016, which is the subject of this arbitration, Mr Walston was appointed by Boeing as the chairperson of the Incident Review Board convened to investigate the cause of the fire and to make recommendations for avoiding future similar events. As chairperson, Mr Walston led the investigation, coordinated the efforts of the Board's members and presented the Board's findings to Boeing leadership. Thus, Mr Walston had no involvement in the events that led to the fire. His role began only after the fire and was apparently confined to the specific tasks delegated to the Board by Boeing.

38. On 6 November 2018, the US District Court for the District of South Carolina Charleston Division denied the Respondent's application on jurisdictional grounds. The Respondent appealed to the US Court of Appeals for the Fourth Circuit. The Claimant's motion to intervene having been granted on 14 January 2019, on 30 March 2020 the Court of Appeals reversed the District Court and held that the District Court did have jurisdiction under §1782 to grant the order sought by the Respondent.
39. Since then, there has been no decision from the District Court. No order has been issued since August 2020 when the District Court judge requested a second supplemental briefing on a personal jurisdiction issue.
40. There is no current indication as to when a determination on the Respondent's application might be expected to emerge, although each of the parties has made an approach to the District Court as to when it would wish the decision to be made. The Tribunal is not aware of any reaction by the District Court to either approach.
41. In late September 2020, the Claimant served a seven-page witness statement of twenty-seven paragraphs from Mr Walston in this arbitration. It appears that the Respondent only learned that Mr Walston was to be called by the Claimant as a witness in this arbitration after the reversal by the Court of Appeals referred to above and during a renewed application on 30 June 2020 by the Respondent to the District Court under §1782 to take his deposition. During the course of that application, the Claimant and Boeing apparently said that they would ensure that Mr Walston and another witness, Mr Sharkshnas, (whose precise whereabouts are, in fact, presently unknown) would testify in the arbitration.
42. The Claimant says, relying on *Omega Group Holdings v Kozeny (loc. cit.)*, that the Respondent's application to depose Mr Walston in South Carolina is unconscionable and abusive because the Respondent will have the opportunity to cross examine Mr Walston at the May hearing, which, it says, is the proper forum for any questioning of the witness. It submits that there is, therefore, no need for the Respondent to depose Mr Walston in South Carolina. The Claimant also suggests that, if deposed in South Carolina, there is a real risk of Mr Walston being discouraged from giving evidence to the Tribunal in this arbitration in May of this year.
43. The launching by the Respondent of the §1782 application in South Carolina was plainly appropriate, given that, at the time when it was issued (and, it appears, until late June 2020) the Respondent did not know that the Claimant was proposing to call Mr Walston as a witness in this arbitration.

44. There is no reason to suppose that Mr Walston (unlike, apparently, Mr Sharkshnas) will not be produced by the Claimant to give evidence to the Tribunal in May of this year when the arbitration hearing takes place. Likewise, however, there is no reason to suppose (and no evidence has been produced to suggest) that, if Mr Walston were to be deposed by the Respondent in South Carolina ahead of the May hearing, he would be disinclined to give evidence at the arbitration or that Boeing, whose employee he is, would so act as to prevent him from then giving such evidence.
45. There is, in any event, no indication that the District Court will be coming to any decision on the Respondent's §1782 application in the near future, or at any time before the May hearing or the conclusion of this reference. Therefore, any forensic unfairness that might conceivably otherwise arise by permitting the Respondent some form of pre-hearing cross examination of Mr Walston is entirely speculative. Moreover, given (i) that the South Carolina Proceedings have been on foot for so long, (ii) that the District Court is fully seized of the Respondent's application and not only the Claimant's but also Boeing's opposition to it, and (iii) that the District Court has a discretion whether or not to grant the application in the light of the Claimant's avowed intention to call Mr Walston as a witness in the arbitration (in addition to other matters), it seems to the Tribunal that, if the Respondent is to be denied the opportunity to take Mr Walston's deposition, that is a decision more appropriately to be made by the District Court than itself. If, perchance, a deposition of Mr Walston is taken before the May 2021 hearing in this arbitration, the admission or non-admission of any evidence it contains will be a matter for the Tribunal then to determine. It is neither appropriate nor sensible for the Tribunal to entertain any speculative issue that might arise in relation to such evidence at this stage.
46. The Tribunal is, therefore, unpersuaded that it is appropriate or necessary or fair, applying the principles set out in *Omega Group Holdings v Kozeny* (*loc. cit.*), followed by Langley J. in *Benfield Holdings v Aon* [2007] EWHC 171 (QB), to grant to the Claimant the injunctive relief that it seeks. As in relation to Illinois (see paragraphs 35-36 above), the Tribunal is not going to rule now as to the usefulness or admissibility of any evidence that might be obtained.
47. Accordingly, for the reasons above, the Claimant's application in relation to the South Carolina Proceedings is rejected.

**Orders**

48. The decisions to which the Tribunal has come, and the Orders that it makes, are as follows:

- 1. The Respondent's application to adjourn the substantive hearing of this arbitration from 10 – 21 May 2021 to the first available date on and after 1 October 2021 is rejected.**
- 2. The Claimant's applications to restrain the Respondent from taking any further steps in, and to discontinue, its §1782 proceedings in the states of Illinois and South Carolina of the United States are rejected.**
- 3. The Claimant's applications in relation to the deployment by the Respondent, and the reception by the Tribunal, of any documents or evidence sought by the Respondent in the Illinois Proceedings or any deposition or evidence of Mr Walston in the South Carolina Proceedings are rejected.**

Dated in England: 9 March 2021



Gavin Kealey Q.C.

On behalf of the Tribunal: Gavin Kealey QC, Michael Crane QC and William Wood QC.



**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES**  
**OF THE CHARTERED INSTITUTE OF ARBITRATORS**

**BETWEEN**

**ROLLS-ROYCE PLC**

**Claimant**

**-and-**

**SERVOTRONICS INC**

**Respondent**

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**SKELETON ARGUMENT OF THE RESPONDENT**  
**for the application hearing on 4 March 2021**

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**Introduction**

1. There are two sets of applications before the Tribunal:

1.1. The Respondent applies for a short adjournment of the substantive hearing in this arbitration, from May 2021 to October 2021, so that it may take place in person and with the benefit of any evidence obtained from Boeing pursuant to the Respondent's outstanding applications under 28 USC § 1782 in Illinois, South Carolina and Minnesota.<sup>1</sup> In contrast, the Claimant seeks an order that the hearing takes place remotely on the existing timetable.

1.2. The Claimant also seeks an order restraining the Respondent from pursuing the Illinois and South Carolina Proceedings, even though the Claimant has been on notice of these proceedings since October 2018. Alternatively, the Claimant invites the Tribunal to rule, pre-emptively, on the necessity and admissibility of any documentary or witness evidence that might be produced by those proceedings. The Respondent opposes these applications such that the US Proceedings may continue and that it may apply to seek to adduce any relevant evidence that it obtains.

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<sup>1</sup> Respectively, the "**Illinois Proceedings**," the "**South Carolina Proceedings**," and the "**Minnesota Proceedings**," together the "**US Proceedings**."

2. In terms of pre-reading, the Tribunal is likely to be most assisted by reading the skeletons and authorities referenced therein. In addition, it is respectfully suggested that the Tribunal may wish to read the pleadings and the Illinois document subpoena.

### **Adjournment of the substantive hearing**

#### ***Background to the application***

3. The parties agreed to arbitrate the present dispute in London due to its geographical convenience for an in-person hearing.<sup>2</sup> However, England is currently under a nationwide “lockdown” and there are extensive restrictions on travel into the country.<sup>3</sup> The Prime Minister has warned that the current restrictions will be eased cautiously, and this has been reflected in the “road map” published by HM Government on 22 February 2021. While it is expected that lockdown restrictions will be relaxed to an extent in the coming months, it is extremely unlikely that a 10-day in-person hearing involving participants from the US and Canada could take place in London in early May 2021.
4. Yet, there does now appear to be a clear end in sight for England’s Covid-19 restrictions. A number of vaccines against Covid-19 have now been developed and approved, and a large-scale vaccination programme is underway. The UK has secured access to 367 million vaccine doses, including 100 million doses of the Oxford/Astra-Zeneca vaccine, which is being manufactured entirely in the UK.<sup>4</sup> More than 20 million vaccine doses have already been administered to those most at risk of severe infection<sup>5</sup> and the Department of Health and Social Care projects that, by the autumn of this year, all adults in the UK can be vaccinated.<sup>6</sup> Senior UK Government figures have expressed that the vaccination programme will permit the “*irreversible*” easing of Covid-19 restrictions in the coming months<sup>7</sup> and aim to resume “*normal*” life by 21 June 2021. In the circumstances, it is reasonable to expect that the parties will be able to proceed with an in-person hearing in the autumn.

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<sup>2</sup> Notice of Arbitration at para 7.3, Response to Notice of Arbitration at para J.

<sup>3</sup> <https://www.gov.uk/coronavirus>

<sup>4</sup> <https://www.gov.uk/government/publications/uk-covid-19-vaccines-delivery-plan> at pp.11-12, 15 and 21.

<sup>5</sup> <https://coronavirus.data.gov.uk/details/vaccinations>

<sup>6</sup> <https://www.gov.uk/government/publications/uk-covid-19-vaccines-delivery-plan> at paras 2.20, 5.10 and the Ministerial Foreword.

<sup>7</sup> Per the Prime Minister, quoted by the BBC: <https://www.bbc.co.uk/news/uk-56095552>. The Deputy Chief Scientific Adviser is quoted as using the term “*irrevocable*.”

5. The Tribunal must therefore decide between holding a remote (or largely remote) hearing in May 2021 involving participants in several countries with different time zones, while still adhering to social distancing protocols in their respective homes, or granting a short adjournment of five months (it is expected) to allow for an in-person hearing in the autumn of this year. For the reasons set out more fully below, the Respondent submits that the most appropriate course would be to grant its application for an adjournment.

### **Framework for the Tribunal's decision**

#### ***Applicable rules and principles***

6. It is acknowledged that the Tribunal has broad powers to determine the form and timing of hearings under Arts. 17 and 28 of the CIArb Arbitration Rules dated 1 December 2015 (“**CIArb Rules**”) and s. 34(2) of the Arbitration Act 1996 (“**AA 1996**”). These powers, however, are subject to the Tribunal’s general duty under s. 33(1) AA 1996 to act fairly as between the parties and to adopt “*procedures suitable to the circumstances of the particular case,*” and to its duty under Art. 17(1) of the CIArb Rules to treat the parties equally. The Tribunal is also bound by Article 6 of the European Convention on Human Rights to ensure a fair trial between the parties. Whilst the Article refers to justice within a “reasonable time,” it is submitted that a hearing in October readily meets this requirement.
7. Overall, the Tribunal must ensure a fair hearing.

#### ***The burden of persuasion***

8. Where the parties disagree over whether there should be a remote hearing, it is important to determine which party has the burden of persuasion and what standard the Tribunal should apply in deciding whether to proceed remotely. These are not matters addressed by the CIArb Rules or AA 1996 and there is no consensus in the wider arbitration community as to the approach that should be taken.<sup>8</sup>
9. Some guidance may be drawn from the practice of the English courts. Prior to the Covid-19 pandemic, where an order was sought for a party to participate in proceedings by video

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<sup>8</sup> ‘Remote hearings in international arbitration—a practical guide’ Lexis PSL.

link, the courts required to be persuaded that there was a good reason for making the order.<sup>9</sup> The Respondent acknowledges that the courts have become more willing to hold remote hearings during the pandemic. However, they have not simply reversed the burden of persuasion. Rather, as the Court of Appeal explained in *Re A (Children)*,<sup>10</sup> the decision whether to proceed with a remote hearing requires a multi-factorial assessment to be carried out on a case-by-case basis. The need for social distancing in the current pandemic is plainly a significant factor in that assessment.<sup>11</sup> Yet, even in this context, the courts have recognised that there are cases where adjournment is more appropriate than proceeding remotely, particularly where the relevant hearing would involve live evidence from factual or expert witnesses.<sup>12</sup> In this case, there are substantial areas of factual and expert opinion disputes between the parties which this Tribunal will have to determine.

10. There is academic support for arbitral tribunals to undertake a similar “*overall balancing exercise*”, weighing the potential benefits of a remote hearing against the potential prejudice to any party.<sup>13</sup> The Respondent submits that this is the approach which should be adopted in order to be consistent with the Tribunal’s general duty under s. 33(1) AA 1996. This Tribunal must therefore be persuaded that a remote hearing should take place.
11. Whilst there have been decisions where remote hearings have been ordered, they are not necessarily comparable to the situation which arises in relation to the determination of this dispute. For example, whilst the Austrian Supreme Court recently held (in *Docket 18 ONc 3/20s*) that a hearing should go ahead remotely in the International Court of Arbitration of the Austrian Chamber of Commerce, this concerned with a one-day hearing that was not the final determination of the dispute. In *One Blackfriars (In Liquidation)* [2020] EWHC 845 (Ch) an adjournment was refused because the challenges presented by a remote hearing

<sup>9</sup> *The Three Mile Inn v Daley* [2012] EWCA Civ 970, per Kitchin LJ at paras 11-12.

<sup>10</sup> [2020] EWCA Civ 583, at paras 9-10; cited by Marcus Smith J in *Bilta (UK) Ltd (in liquidation) and others v SVS Securities plc and others* [2021] EWHC 36 (Ch). Note that although the decision not to adjourn this trial was overturned on appeal, that was on the very specific new development that a witness who was previously thought unable to give evidence had a change in prognosis that meant she would in fact be able to attend if the trial was adjourned past September 2021: [2021] EWCA Civ 221.

<sup>11</sup> As noted by Marcus Smith J in *Bilta (UK) Ltd (in liquidation) and others v SVS Securities plc and others* [2021] EWHC 36 (Ch), at [15] the pre-pandemic authorities on adjournment are not apposite to the question of adjournment in the pandemic.

<sup>12</sup> *Municipio de Mariana & Others v. BHP Group PLC (2020)* EWHC 928 TCC, at 24(v); *Bilta (UK) Ltd (in liquidation) and others v SVS Securities plc and others* [2021] EWHC 36 (Ch) at para 14(3)(a).

<sup>13</sup> Scherer, M. ‘Chapter 4: The Legal Framework of Remote Hearings’, in Scherer M., Bassiri N., et al. (eds), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020) pp. 65 - 104, at para 5.2.2.

<sup>13</sup> Notice of Arbitration at para 7.3, Response to Notice of Arbitration at para J.

applied to both sides equally; and in *Municipio de Mariana v BHP Group plc* [2020] EWHC 928 an adjournment was refused but in circumstances where there was no live evidence.<sup>14</sup> As set out in further detail in the following paragraphs, this is an evidence heavy dispute where the challenges of a remote hearing will fall disproportionately on the Respondent.

12. Moreover, some of these decisions were made when the end point of the pandemic was unknown, and any widely-available treatment, let alone a vaccine, simply did not exist. As discussed above, there is now a broad-based world-wide vaccine effort underway. Therefore, it is likely that travel restrictions will ease, and more importantly, travel will be safe, in the coming months.

### **The present dispute is not suitable for a remote hearing**

#### ***Cross-examination of factual witnesses***

13. In the present case there are eight factual witnesses, all of whom have been called by the Claimant.<sup>15</sup> As a result, any impediment to effective cross-examination caused by a remote hearing will disproportionately harm the Respondent. Taking account of the Tribunal's Art. 17 duty to treat the parties equally, this is factor which should be given substantial weight in assessing whether to proceed remotely.

14. It is well recognised that the remote cross-examination of witnesses is inferior to cross-examination in person as a means of taking evidence:

14.1. Even in the context of Covid-19, the English courts have commented that "*oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness*"<sup>16</sup> and, further, that "*any form of artificial intermediation interposed between the questioners of a witness and the judge*

<sup>14</sup> At [47] As HHJ Judge Eyre QC stated "the determination of the issue will involve judicial reading of that materials and of the parties' skeleton arguments with subsequent oral submissions and argument."

<sup>15</sup> Alistair Allan, Rolls-Royce employee, James Singleton, Rolls-Royce, Nick Salmon, Rolls-Royce, Scott Walston, Lead IRB Investigator Boeing (promised by counsel to appear in the procedures and recently noted as still employed by Boeing), Alan Sharkshnas, Boeing (promised by counsel to appear at the Hearing, but has since left Boeing's employ and cannot be located), Tom Altamuro, Boeing, Robert Hooze, Boeing, Sean Highsmith, Boeing.

<sup>16</sup> *R (Dutta) v. General Medical Council* [2020] EWHC 1974 (Admin) 414 at para 39(iii).

*hearing that witnesses evidence must be a derogation from the “gold standard”*” (original emphasis).<sup>17</sup>

14.2. Whilst the English Civil Procedure Rules (“CPR”) recognise the relative convenience and cost-effectiveness of videoconferencing, they warn that “[i]ts convenience should not ...be allowed to dictate its use,” since it compares unfavourably with the hearing of witnesses in a physical courtroom.<sup>18</sup> The CPR notes, in particular, the more limited degree of control that a court is able to exercise over a witness at a remote site and the “tendency to ‘speak over’ the witness” caused by sound delays “even with the most advanced systems currently available.”<sup>19</sup>

14.3. Such concerns have been borne out in practice, with Birss J recently criticising the “real flaws” in a remote cross-examination where “the system often had an appreciable delay, not always obvious to the cross-examiner, which meant that the witness and the cross-examiner were at cross-purposes.”<sup>20</sup>

14.4. The Federal Court of Australia has also commented that video link evidence presents the court with a less satisfactory environment in which to assess “the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court,” in part due to the loss of “‘chemistry’ in oral interchanges in a courtroom, whether between a judge and counsel ...or between cross-examiner and witness.”<sup>21</sup> It has also recognised that the technical difficulties associated with video link evidence “are considerable and markedly interfere with the giving of the evidence and, particularly, with cross-examination,” making it difficult for the tribunal to assess witness evidence and, in particular, issues of credibility.<sup>22</sup>

14.5. Making similar observations in 2018, the Singapore International Court stressed that effective cross-examination could be “frustrated” by video link evidence, giving the example that “it might be unclear whether the witness’s or expert’s delay in

<sup>17</sup> *Bilta (UK) Ltd (in liquidation) and others v SVS Securities plc and others* [2021] EWHC 36 (Ch) at para 14(4).

<sup>18</sup> Annex 3 to CPR Practice Direction 32, para 2.

<sup>19</sup> *Ibid*, paras 2, 5 and 6.

<sup>20</sup> *Invista Textiles UK Ltd v Botes* [2019] EWHC 58 (Ch) at para 72.

<sup>21</sup> *Campaign Master (UK) Ltd. v. Forty Two International Pty Ltd. (No 3)* [2009] FCA 1306 at para 77.

<sup>22</sup> *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd* [2007] FCA 1502, at paras 7-8.

*answering questions is due to his or her evasiveness or to technological issues and delay in signal.”*<sup>23</sup>

14.6. Users of remote hearings during the current pandemic have encountered these and further difficulties with cross-examination, due to the nature of videoconferencing as a “*single channel communication*” which lacks non-verbal cues, implies a “*take turn to speak*” process and impedes spontaneous interjection.<sup>24</sup> Concerns have also been expressed that witnesses who do not feel comfortable during cross-examination will “*hide behind bad connectivity or ‘unintentionally’ switch off their cameras.*”<sup>25</sup>

14.7. Within the arbitration community, there are also questions as to whether different approaches to how witnesses are seen and heard (i.e. the screen view, the use of different cameras and camera angles, lighting, backgrounds, the use of microphones/speakers/headsets, the quality or resolution of the image, and synchronization between the audio and video, etc.) could affect how those witnesses are perceived by the tribunal.<sup>26</sup>

15. These are concerns which the Tribunal should have at the front of its mind when assessing whether a remote hearing can be fair in these proceedings when such a lot will turn on the evidence that the witnesses have to give.

16. The fair presentation of the Respondent’s defence will depend heavily on the quality of factual evidence obtained under cross-examination. The Respondent’s case centres on the alleged negligence of a number of the Claimant’s witnesses, whose statements to the Tribunal not only extend beyond their own contemporaneous statements, but also conflict materially with the contemporaneous accounts of other members of the Boeing troubleshooting team who were present during the relevant events. For instance:

16.1. In his witness statement, Alan Sharkshnas the Lead Engine Runner, claims that everyone present during the Engine tests was “*fully briefed*” and “*experienced with*

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<sup>23</sup> *Bachmeier Capital Ltd. v. Ong Chih Ching* [2018] SGHC(I) 01 Suit No. 2 of 2017 (Summons No. 2 of 2018), para 18 (Singapore International Commercial Court).

<sup>24</sup> H Lal, ‘Virtual hearings: inflammatory markers in favour of in-person hearings’ (2020) 31 10 *Cons.Law* 4 (1), p. 7.

<sup>25</sup> *Ibid.*

<sup>26</sup> ‘Remote hearings in international arbitration—a practical guide’ Lexis PSL.

*engine runs*” and “*followed all standard procedures.*”<sup>27</sup> This flatly contradicts the contemporaneous accounts of Ben Williamson (who said he was “*not engine run trained*” and considered that he “*don’t need to know anything about [an] engine run [because he is] not touching switches*”), Anthony Massaro (who said he was “*not engine run trained,*” did not have any training to assist in an engine run and was “*not familiar with engine runs at Boeing*”), and Bruce Holden (whose described his total relevant experience as being “*involved [in] 2 other occasions on [the] Flight Deck*” and said he “*[didn’t] look at checklists*” and “*[didn’t] know [the engine start] sequence*”).<sup>28</sup> The Respondent’s human factors expert has described Mr Sharkshnas’s evidence on this point as “*totally misleading*”.<sup>29</sup>

16.2. The notes of a contemporaneous interview with another member of the Boeing team, Chris Neal, record his impression that there was “*pressure*” to fly on 16 January despite concerns about a fuel leak the previous day.<sup>30</sup> He also describes a disagreement between his immediate supervisor and more senior management as to whether the fuel leak on 15 January should be documented.<sup>31</sup> In sharp contrast, the Claimant’s witnesses have adopted the common position that there was no such pressure<sup>32</sup> and that there was never any need to document the fuel leak.<sup>33</sup>

17. The adequacy of the training and experience of the Boeing personnel involved in troubleshooting fuel flow issues with the Engine bears directly on the Respondent’s defence that the numerous negligent acts and omissions broke the chain of causation to the fire event involving the Engine.<sup>34</sup> Similarly, the Respondent specifically alleges that proper troubleshooting measures were not taken because of pressure from senior management at Boeing not to delay the delivery of the Aircraft.<sup>35</sup> It is vital that, on these contested matters, the Tribunal is properly able to scrutinise the demeanour and reactions of the witnesses under cross-examination and that, in the Tribunal’s assessment of their credibility, difficult

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<sup>27</sup> At para 23 (Tab 22).

<sup>28</sup> To be added to the bundle.

<sup>29</sup> (Tab 26).

<sup>30</sup> To be added to the bundle.

<sup>31</sup> To be added to the bundle.

<sup>32</sup> See, e.g. statement of Alan Sharkshnas (Tab 22) at para 20; statement of Tom Altamuro (Tab 21) at para 22; statement of Robert Hoodge (Tab 20) at para 14.

<sup>33</sup> See, e.g. statement of Alan Sharkshnas (Tab 22) at para 20; statement of Tom Altamuro (Tab 21) at paras 6-9; statement of Nicholas Salmon (Tab 24) at paras 15-19

<sup>34</sup> See, e.g. Statement of Defence (Tab 4) paras 4, 5, 19, 23, 29, 33, 34-46, 60-61.

<sup>35</sup> Statement of Defence (Tab 4), paras 24, 42.



or evasive witnesses do not benefit from any doubt that their testimony could have been affected by sound delays or other technological disruption.

18. This issue takes on greater importance in the wake of a filing by Rolls-Royce in the District Court of South Carolina informing the Court that Alan Sharkshnas left Boeing's employ on about 16 January 2021 and that as of 23 February 2021, counsel for Boeing and Rolls-Royce have been unable to locate or contact Mr. Sharkshnas.

19. In June 2020, Counsel for Rolls-Royce promised the District Court of South Carolina to produce Alan Sharkshnas and Scott Walston to testify during the hearing, stating:

*"And as party witnesses, the procedure in the arbitration would be that Rolls-Royce would present Servotronics with written statements of these witnesses in terms of the evidence Rolls-Royce intends to submit. Servotronics will then have the opportunity to cross-examine the witnesses, but at the actual arbitration hearing with the panel hearing the cross-examination, with the panel judging the demeanour of the witnesses during the cross-examination, and the panel will also have an opportunity to examine the witnesses as well."*<sup>36</sup>

20. These developments have the potential to severely hamper the Respondent's right to cross-examine Mr. Sharkshnas with respect to the conflicts in his post-event statement, but also those made by others on scene after the event. The Claimant's Expert, Martin Keeping, relies heavily upon the Tribunal Statement of Mr. Sharkshnas, and does not address the discrepancies between the post-event statements and those submitted to the Tribunal. He is a key witness.

### ***The integrity of witness evidence***

21. Remote hearings necessarily reduce the tribunal's ability to supervise and control witness behaviour. Specifically, there is a risk that witnesses may be coached remotely, may have access to notes or other aids during their testimony, may confer with one another during video breaks, or may be the subject of undue influence by persons not visible to the tribunal (whether in person or by means of electronic communication). Such behaviour plainly threatens the integrity of witness evidence. Even the possibility that it might be taking place casts doubt on the soundness and utility of remote testimony. Again, these are matters

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<sup>36</sup> See Transcript of 30 June Hearing before Judge David Norton.

which disproportionately affect the Respondent, being the only party faced with cross-examining factual witnesses.

22. Practical measures have been suggested to address some of these concerns, such as requiring witnesses to turn their cameras around to display their surroundings. However, in circumstances where witnesses may have several screens in front of them, it is simply not possible to exclude the possibility of interference through instant messaging, a script, or other electronic means.
23. Such risks are judicially recognised<sup>37</sup> and, in the circumstances of the present dispute, are more than merely theoretical. There is a live issue between the parties as to the training and competence of the crew, and whether there was undue management pressure on Boeing personnel (including some of the Claimant's witnesses) not to document or address safety concerns prior to Flight C1.<sup>38</sup> The inability to control the witnesses is another matter which militates against a remote hearing.

### ***Effective presentation of expert evidence***

24. The parties propose to adduce the evidence of six experts in complex and technical fields. The expert reports served to date are voluminous, each with multiple figures, annexes and exhibits.
25. To engage with the experts' opinions and reach conclusions on the areas where they diverge, the Tribunal will need to be taken through a great deal of background information relating to the operation and maintenance of a Boeing 787 Dreamliner aircraft and the Rolls-Royce Trent 1000 engines. The Respondent expert witness, Larry Vance, has presented a detailed report of the chain of events leading to the Engine Tailpipe Fire demonstrated in two TELANS and a video and CVR transcript based on after-event statements from witnesses, EAFR data analysis of flights, Boeing Manuals, procedures and checklists.
26. Mr. Keeping has relied upon statements submitted to the Tribunal by several witnesses and his own experience in conducting engine runs.

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<sup>37</sup> *Navigators Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm), at para 9.

<sup>38</sup> Statement of Defence (tab 4), paras 24, 42; Reply (Tab 5), paras 12.5, 22.2, 25.4.

27. The differences in these two expert Reports highlight the need for in-person testimony. The Claimant and the Respondent dispute the cause of the tailpipe fire and the Respondent alleges that it was the Boeing Troubleshooting Team who caused the tailpipe fire event because of their negligent actions.
28. Proving causation will require presenting extensive, and highly technical, evidence to the Tribunal so that it can traverse the events of the 16 January, which will involve the configuration and working of the Hydro Mechanical Unit (HMU), the Fuel Metering Valve (FMV) of the Engine and the application of the various Manuals, including the Fault Isolation Manual (FIM) in regard to the Maintenance message displayed, the engine Autostart Procedure with the attendant notifications as to whether the engine was responding correctly, and the emergency procedures that should have been followed from the very beginning of the Engine Start.
29. These are not matters that are readily amenable to remote explanation. Time lags in audio exchanges between counsel and an expert, or between the Tribunal and an expert, are liable to reduce spontaneous questioning, with the attendant risk that the Tribunal does not fully obtain the benefit of the expert evidence in these proceedings. These risks are heightened by the fact that there are serious issues between the experts, as reflected in the supplemental reports served on 19 February 2021. Whilst it is hoped that the meetings and joint memoranda will reduce some of the issues between them before the hearing of this matter, the Tribunal will have to make a series of important decisions about which evidence to prefer.
30. A remote hearing threatens the efficient handling of exhibits with both experts and the Tribunal limited by their respective technological setups.
31. Given the volume, complexity and significance of the expert evidence in these proceedings, it is plainly unsuitable for a remote hearing. Whilst both parties may be impacted by the effect on expert evidence (assuming that the hearing was to be fully remote), that does not lessen its weight. That the expert evidence from each party would be equally difficult for the Tribunal to follow is no reason to support the Claimant's application.

### *Access to counsel*

32. The Claimant's representatives and its legal and counsel team are all based in the UK, as is the Tribunal. As such, the Claimant faces no difficulties with following the proceedings and giving instructions to its lawyers in real time. In fact, it would be straightforward for the Claimant's representatives to be gathered in the same physical location as its legal and counsel team for the duration of the hearing.
33. This is not an advantage shared by the Respondent, which is based in Buffalo, New York with a legal team split between London and New York City. Whilst it would theoretically be possible for the Claimant's representatives and solicitors to travel to London in order to follow the hearing live and consult with the counsel team in person, this assumes that this poses no health risk to any of the individuals who may not yet be able to travel in light of individual health concerns. Indeed, remote work and social distancing are still enforced in the State of New York
34. This assumption also presumes that any of the Respondent's representatives, counsel or expert witnesses will not have travelled through any country on the UK Government's "red list" (which is regularly updated at short notice) in the preceding ten days. Further, the travel restrictions currently in force in England would require each individual to self-isolate for a minimum period of between five and ten days upon arrival (or longer, depending on the results of compulsory Covid-19 tests taken during the initial isolation period).<sup>39</sup> As such, there is no guarantee that those individuals would even be able to meet with the counsel team in person. There would also be considerable difficulty involved in finding them suitable accommodation and working space at a time when most hospitality venues and offices in England are closed.
35. It is inherently unfair that one party should be able to consult with its legal and counsel team in person throughout the hearing, while the other cannot. Such unfairness is only exacerbated by the five-hour time difference between New York and London. With the majority of participants based in London, it is likely that the sitting hours would be closer to English business hours than to New York business hours, leaving the Respondent and its

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<sup>39</sup> <https://www.gov.uk/uk-border-control>

solicitors less able to follow the hearing and react in real time. Even if the sitting hours were significantly modified to accommodate the Respondent it is likely to lead to serious practical problems.

36. The impact of the Tribunal ordering that this hearing should go ahead is that it will put the Respondent's legal team in the deeply invidious position of deciding between whether they allow their client be disadvantaged by the split of their legal team or to put their health at risk by travelling to London to all be in one place.
37. If the hearing were to be conducted remotely, it is likely that shorter sitting days would be required, with more breaks, in accordance with The Vienna Protocol.<sup>40</sup> The sitting hours would also need to be amended to account for the time zones of the Respondent and the various factual and expert witnesses. As a result, the overall hearing length would need to be extended. Depending on the participants' availability outside the original hearing window, this could require the Tribunal to sit on non-consecutive days. It might even be necessary to hear evidence out of sequence in order to accommodate time differences, availability issues and technical problems.
38. In contrast, an in person-hearing could be expected to take place within the original time estimate of ten days and during ordinary London working hours, with all participants operating from the same time zone.

***A partially remote hearing would unfairly prejudice the Respondent***

39. As noted, in the present proceedings there is a natural geographical bias in favour of the Claimant, since its representatives, legal and counsel team are already based in the UK. Its expert witnesses are also based in the UK and it has no factual witnesses to cross-examine. Accordingly, in a partially remote hearing, the Claimant could conceivably present its entire case to the Tribunal in person. Even if the Respondent's expert witnesses were to appear remotely, the Claimant's cross-examination could be conducted from the same room as the Tribunal, with the Claimant's representatives and legal team able to observe the reactions of the Tribunal in person.

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<sup>40</sup> At III-1.

40. By contrast, the Respondent, whose representatives and solicitors are based in New York, proposes to call expert witnesses based in various locations across the UK, US and Canada and to cross-examine six factual witnesses based in the US, and two in the UK. A partially remote hearing which provides for the Respondent's experts and/or the Claimant's factual witnesses to appear by video-link would cause considerable procedural unfairness to the Respondent. The prejudice occasioned by remote cross-examination of the factual witnesses would be the same as under a fully remote hearing. However, the position with respect to expert evidence would be even worse if it were only the Respondent's experts who had to give evidence remotely. All of the disadvantages described above with respect to the difficulty of communicating complex concepts and managing documents remotely would apply to the Respondent's experts but not to the Claimant's. In the circumstances, it would be inconsistent with the Tribunal's mandatory duties of fairness and equal treatment to hold the substantive hearing on a partially remote basis.

### ***Conclusion of the Illinois and Minnesota Proceedings***

41. As explained more fully below, the Respondent seeks supplemental disclosure from Boeing for the purposes of this arbitration by means of the Illinois Proceedings. The Respondent's application in those proceedings was quashed and the US Court of Appeals for the Seventh Circuit affirmed that decision. However, at a conference on 5 March 2021, the US Supreme Court is set to consider the Respondent's petition for a review of the Seventh Circuit's decision. If the Supreme Court agrees to the review, this process is unlikely to conclude before 10 May 2021. However, there is a good prospect that it can be determined by the Fall Term of the US Courts. As such, if the Tribunal were to adjourn the May hearing, the rescheduled hearing could take place in the light of any further relevant evidence obtained from Boeing pursuant to the Illinois Proceedings.

42. In the recently filed Minnesota 1782 Proceedings, the Respondent seeks the oral deposition of Mr Terrence Shifley, who was the ground observer during the attempted Engine run prior to the tailpipe fire. Despite the obvious relevance of his testimony to these proceedings, and contrary to representations made by the Claimant's US counsel in the South Carolina proceedings, the Claimant has not called him as a witness. The Respondent is in the process of subpoenaing Mr. Shifley and is awaiting a decision from the District

Court. As such, a rescheduled hearing in the autumn could benefit from Mr Shifley's evidence on the contentious matters identified above.

***The Claimant would not be prejudiced by a short adjournment***

43. In the context of the present proceedings, an adjournment of five months poses no prejudice to the Claimant. As stated earlier, the claim is one of subrogation for a monetary award and the Claimant has not pursued it with any urgency, leaving eight months between the service of its Notice of Arbitration and its eventual Statement of Claim. The Claimant first sent a letter demanding payment on 26 April 2017. It was seventeen months after this in September 2018 that the Claimant filed its Notice of Arbitration.
44. The timetable to trial has not so far been affected by the Covid-19 pandemic, having been revised primarily to accommodate the Claimant's own failure to comply with an order to produce documents, including the EAFR data, until October and December of last year.
45. The Claimant has suggested that it would not be "*proportionate*" for witnesses located abroad to be required to travel to an in-person hearing. If this is a reference to the witnesses' travel and accommodation costs, such costs must be assessed in the context of the litigation as a whole, in which the Claimant seeks damages of more than USD 12 million.<sup>41</sup> Moreover, this position contravenes the Claimant's promises to the U.S. District Court of South Carolina to bring the witnesses in the U.S. to London for the Hearing, and its agreement to an in-person hearing in the first instance.
46. If it is a reference to the current requirements for travellers from the US to quarantine on arrival in England, this fails to engage with the strong prospect that such restrictions (which have already been reduced by the Test to Release scheme) will be lifted by October 2021 as the UK vaccination programme continues. In any case, it is always more onerous to require witnesses to attend a hearing in person, but this remains the preferred means of evidence taking in most proceedings for the reasons set out above. The Respondent relies on those reasons to object to any application by the Claimant that the witnesses of fact it is calling should give evidence by video link.

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<sup>41</sup> See, e.g. the approach of Stewart J in *Kimathi v Foreign and Commonwealth Office* [2015] EWHC 3684 (QB) at paras 26 and 30.

47. Nor does the timing of the Respondent's application cause the Claimant any prejudice. During the Covid-19 pandemic, the English courts have stressed the need to assess the prevailing circumstances "*from day to day*," as these are likely to change "*rapidly*".<sup>42</sup> The Respondent raised its concerns about the viability of the May 2021 hearing in December 2020, as London was placed into Tier 4 measures (largely approximating the current national lockdown).<sup>43</sup> Prior to this, London had seen months of relaxed restrictions and overseas travel, with a short "circuit-breaker" lockdown followed by a return to Tier 2 measures in early December. The Prime Minister's announcement on 19 December<sup>44</sup> that a highly transmissible new variant of Covid-19 was spreading rapidly in London changed the landscape for the months ahead. Any suggestion that the Respondent could or should have raised concerns about the May hearing at an earlier stage is misguided. In any case, the effect of the Respondent's application (i.e. to adjourn the hearing) would have been the same whenever it was raised.

***Adjournment comports with notions of equity and fairness***

48. Whilst it is understood that the tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference),<sup>45</sup> and the powers granted to the Tribunal under AA 1996 to decide matters of evidence and procedure are expansive, there remains the direction that the Tribunal exercise those "*general powers as it considers appropriate...and to provide a fair and efficient process for dispute resolutions where the parties have equal opportunity to present their respective cases.*"<sup>46</sup>

49. The Respondent has made its application to ensure that the Hearing is conducted fairly, efficiently, and without prejudice. The Claimant and the Respondent agreed to an in-person hearing for a period of 10 days, knowing that there would be complicated technical factual details and processes to present.

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<sup>42</sup> The President's Guidance on Remote Hearings, COVID-19: National Guidance for the Family Court issued on 19 March 2020 ([2020] Fam Law 550), at para 10.

<sup>43</sup> <https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-19-december-2020>

<sup>44</sup> *Ibid.*

<sup>45</sup> CI Arb Art. 28

<sup>46</sup> CI Arb Art. 17



50. Moreover, it must be considered that whilst some guidance on the factors relevant to the Tribunal's decision can be taken from recent court decisions, there remains a difference in nature between court proceedings, which are public and mandatory, and arbitral proceedings, which are private and consensual.
51. The fundamental importance of party consent in English arbitration is apparent from section 1(b) AA 1996, which provides that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. The DAC report which preceded AA 1996 recorded the rationale for this provision as follows: “...*An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen means. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted.*”<sup>47</sup>
52. The same principles underpin the CIArb's Guidance Note on Remote Hearings, published on 8 April 2020. This provides that “[i]n the context of both current and future proceedings it is important to demonstrate parties' affirmative agreement to the use of a particular type of remote proceeding.”<sup>48</sup> Further, the appended checklist for parties contemplating remote proceedings includes making “[a] record of parties' affirmative agreement to use remote proceedings.”<sup>49</sup>
53. Whilst the Tribunal must of course resolve the immediate case management dispute between the parties, it should be mindful that what the Claimant proposes is a deviation from the (expressly) agreed position to hold an in-person hearing in London and that the Respondent does not consent to a hearing that is remote in nature. The Respondent's application does not involve any deviation from the agreed nature of the arbitration, only a short postponement, so that the arbitration can take place in person as has been agreed, in the most effective and efficient manner, and ensuring the integrity of the proceedings.

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<sup>47</sup> The 1996 DAC Report on the English Arbitration Bill, at para 19.

<sup>48</sup> At para 7.1.

<sup>49</sup> Appendix I to the CIArb Guidance at para 4.

### *Consequential matters*

54. The remaining procedural directions to the substantive hearing should be amended in light of the new hearing date.

### **Continuation of the US Proceedings**

#### *Background and current status*

55. Prior to serving its Statement of Defence in these proceedings, the Respondent issued applications under 28 USC § 1782 (“**Section 1782**”) in Illinois and South Carolina. Section 1782 permits “interested parties,” including parties to a “foreign proceeding,” to apply to a US district court for an order compelling a person residing or found in the district to produce documents or give testimony for use in the foreign proceeding. At Appendix 1 there is a timeline of these proceedings.
56. There are now three separate Section 1782 proceedings pending. One was commenced in the Northern District of Illinois on 26 October 2018, where Boeing is headquartered, seeking leave to serve a document Subpoena upon Boeing. On the same day, the Respondent also commenced another proceeding in the District of South Carolina, seeking leave to serve deposition Subpoenas on three Boeing employees it believed resided in South Carolina. Two of the prospective deponents (Alan Sharkshnas and Terrance Shifley) were eyewitnesses to the events at the Boeing “campus” in North Charleston, South Carolina in January 2016 that gave rise to the claim in these proceedings. The third (Scott Walston) chaired Boeing’s investigation into the Incident. After learning that Mr Shifley had moved to Minnesota, the Respondent dropped the request to serve Mr. Shifley in South Carolina and commenced a third proceeding to serve him in the District of Minnesota.
57. In November 2018, the US District Court for the Northern District of Illinois (Eastern Division) granted leave to serve the document Subpoena. The Subpoena was served but the Claimant intervened and, joined by Boeing, moved to vacate the court’s order and quash service. The court granted these motions in April 2019. In September 2020, the decision to quash the Subpoena was affirmed by the US Court of Appeals for the Seventh Circuit. On 7 December 2020 Servotronics petitioned the U.S. Supreme Court to review the decision by writ of certiorari, which is due to be considered on 5 March 2021.

58. In South Carolina, the district court denied the *ex parte* Application for leave to serve the deposition Subpoenas, citing two 1999 decisions, one from the United States Court of Appeal for the Second Circuit and another from the Fifth Circuit Court of Appeals, which concluded that Section 1782 only authorizes applications in connection with proceedings before a governmental body, which could include a government sanctioned arbitration but not one constituted pursuant to a commercial contract between private parties. On appeal to the US Court of Appeals for the Fourth Circuit, it was held that that a district court could consider a Section 1782 application made in connection with a private commercial arbitration and accordingly reversed and remanded so the district court could properly consider whether to grant the Respondent's Application as a matter of discretion.
59. On 22 April 2020, Respondent renewed its Section 1782 Application to depose Messrs Sharkshnas, Walston and Shifley in the South Carolina district court. No order has been issued since August 2020, when Judge Norton requested a (second) supplemental briefing on a personal jurisdiction issue.
60. Having learned of Mr Shifley's move to Minnesota, the Respondent instituted Section 1782 proceedings in the Minnesota district court for an order granting leave to Subpoena him in that state. The Application has been fully briefed and is under consideration by a Magistrate Judge.
61. In late September 2020, nearly two years since the Respondent commenced the South Carolina Proceedings, and just over three years since the Respondent first requested information from Claimant, the Claimant served witness statements from Mr Sharkshnas and Mr Walston in these proceedings. On 20 January 2021, the Claimant advised the Tribunal that Mr Sharkshnas had left Boeing's employment with effect from Saturday 16 January 2021, and on 23 February, the Respondent (and Boeing) informed the South Carolina district court, that they were no longer in communication with Mr. Sharkshnas.
62. The Claimant has been on notice of the Illinois Proceedings and South Carolina Proceedings since 2018, having intervened in both cases.<sup>50</sup> The Claimant is also an active respondent in the petition currently before the US Supreme Court in respect of the Illinois

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<sup>50</sup> The Claimant intervened in the Illinois proceedings on 19 November 2018

Proceedings, having co-authored and filed a Brief in Opposition dated 10 February 2021. The Claimant now seeks an order restraining the Respondent from pursuing the Illinois Proceedings and the South Carolina Proceedings and asks this Tribunal to order the Respondent to discontinue them. In the alternative, the Claimant seeks orders that any evidence obtained in those proceedings is not required by the Tribunal “*in advance of the May hearing*” and/or that such evidence will not be admitted in this arbitration.

63. The Respondent at present seeks no order in relation to any evidence that may come from its pursuit of the US Proceedings, but seeks liberty to adduce such relevant evidence as may be obtained in those proceedings.

***Preliminary note: the Claimant’s misconception of the Respondent’s Adjournment Request***

64. The Claimant’s applications appear to be based on a misconception. It is not the Respondent’s submission that any evidence from the Illinois and South Carolina Proceedings must be obtained before the substantive hearing of this arbitration can take place. The Respondent submits that the hearing should be adjourned because a remote (or partially remote) hearing would be procedurally unfair. It is merely a relevant consideration that the rescheduled hearing could benefit from evidence obtained in the Illinois (and Minnesota) Proceedings. As explained below, there is no guarantee that any of the Boeing witnesses will give evidence, and the Respondent has been prejudiced by the Claimant’s late (and “drip-feed”) production of documents. Specifically, the Respondent has lost the time it should have had to analyse these documents before having to serve expert evidence. The Respondent has always been transparent with the Claimant and the Tribunal of its intention to use Section 1782 proceedings to obtain evidence (see the Defence served on 12 July 2019, and the Amended Order for Directions dated 10 July 2020).
65. The Respondent instituted, justly, the Section 1782 proceedings against Boeing in order to obtain the necessary and required evidence for its defence. It is the Claimant, by its intervention in those proceedings that has sought to prevent the Respondent from obtaining evidence from Boeing and those employees involved.

## The proposed injunctions

### *Applicable rules and principles*

66. The Claimant purports to invoke the Tribunal's power to grant interim relief pursuant to Art. 26(3) of the CIArb Rules and s. 38(1) AA 1996. However, Art 26(3) makes clear that this is a power to grant temporary measures. The effect of the Claimant's application (i.e. to require the discontinuance of the South Carolina and Illinois Proceedings) would be permanent. As such, Art. 26(3) is inapplicable.
67. The alternative basis for the Claimant's application is s. 48(5)(a) AA 1996. This provides that the Tribunal has "*the same powers as the court*" to order a party to do or refrain from doing anything. Importantly, it does not provide for the Tribunal to have any power to enjoin a party where the English courts would not have the power to do so.
68. Also relevant to the Claimant's application is Art. 32 of the CIArb Rules, which provides as follows: "*A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such a party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.*"
69. The Claimant therefore effectively seeks an anti-suit injunction from the Tribunal in order to prevent the Respondent from pursuing legitimate lines of evidence gathering. The jurisdiction for granting an order of this nature was discussed by the House of Lords in *South Carolina Insurance Co. v Assurantie Maatschappij "de Zeven Provinciën" N.V.*<sup>51</sup> Here, the Respondent applied for documentary discovery under 28 USC § 1782 prior to filing its Statement of Defence in the arbitration that was the subject of these proceedings; and informed the Tribunal shortly after its constitution of the proceedings. At that time, the Tribunal had not made any order or considered any application for the production of documents. In the interim, the arbitration had advanced, with the Tribunal ruling on the parties' respective Redfern schedules and documents being produced thereunder. The underlying proceedings in *South Carolina* were at a similar stage when it came before the House of Lords.<sup>52</sup>

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<sup>51</sup> [1987] A.C. 24.

<sup>52</sup> Per Lord Brandon of Oakbrook at 38H.

70. The House of Lords held that, before the court should restrain a party's use of the 28 USC § 1782 procedure to obtain documents, it has to be satisfied that the use being made is either a breach of some legal or equitable right of the objecting party or is vexatious or oppressive or is in some other way unconscionable.<sup>53</sup> Under s. 48(5)(a) AA 1996, the Tribunal has no broader power to make such an order. Given that such an order would cut across the jurisdiction of the US courts, for reasons of comity, it is submitted that it is right that an injunction of this nature should only be obtained in narrowly defined circumstances.
71. The injunction was refused in South Carolina because there was nothing objectionable about a party availing itself of lawful evidence-gathering procedures in another jurisdiction in order to prepare for proceedings in the English court.<sup>54</sup> South Carolina's pursuit of those proceedings could not be said to interfere with the procedures of the English court or the English court's control of its own process.<sup>55</sup>

### ***The Illinois Proceedings***

72. In the current proceedings, the suggestion by the Claimant that the Respondent's continued pursuit of the Illinois Proceedings "*is likely to cause prejudice to the arbitral process itself*" simply cannot be sustained.<sup>56</sup>
73. The Claimant suggests that continued pursuit of the Illinois Proceedings meets the high standard of unconscionability because the categories of documents sought from Boeing materially overlap with categories of documents which the Tribunal has already ruled not to be necessary to the fair disposal of this arbitration. This is simply incorrect and ignores the point of principle, approved by Pumfrey J in Nokia Corporation v Interdigital Technology Corporation,<sup>57</sup> "*the fact that a party is enabled by exercising those rights to obtain documents and evidence which would not otherwise be available to it is not a ground for interference by the English court.*"
74. Nokia Corporation,<sup>58</sup> also concerned an application to restrain proceedings under Section 1782 and Pumfrey J noted that, as a matter of US law, requests under Section 1782 were

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<sup>53</sup> Per Lord Brandon of Oakbrook at 41B-D.

<sup>54</sup> Per Lord Brandon of Oakbrook at 41G-H, 42A-C.

<sup>55</sup> Per Lord Brandon of Oakbrook at 42E-G.

<sup>56</sup> Grounds in Support of the Claimant's Application dated 11 January 2021, para 1.

<sup>57</sup> [2004] EWHC 2920 (Pat).

<sup>58</sup> [2004] EWHC 2920 (Pat).

not circumscribed by the issues at stake in the foreign proceedings in support of which they were made.<sup>59</sup> He also noted that the US Supreme Court had ruled that unduly burdensome requests under Section 1782 were liable to be trimmed.<sup>60</sup> In those circumstances, despite concluding that the classes of documents sought under Section 1782 would not be ordered by way of disclosure in the English proceedings,<sup>61</sup> and despite being “*privately sceptical*” as to the likelihood that the Section 1782 discovery would turn up additional relevant material,<sup>62</sup> Pumfrey J concluded that the English court “*should not seek to circumscribe the discretion possessed by the district court by imposing its own view as to the appropriateness of the classes of documents sought by reference to the issues in proceedings as they stand*”<sup>63</sup> In any case, the final decision on admissibility was for the English court.<sup>64</sup>

75. Applying the reasoning in *Nokia Corporation*, it is plainly not for the Tribunal to determine whether the US Supreme Court should overturn the Seventh Circuit’s decision and restore the document Subpoena in the Illinois Proceedings. Should the Claimant’s concerns about the breadth of the Respondent’s Section 1782 requests be well-founded (which is denied), the relevant US courts have the power to trim them. Boeing is not a party to these proceedings, it has no obligation to this Tribunal, and the Respondent has no visibility on what communications have passed between Boeing and Rolls-Royce.

76. The Respondent repeatedly requested the Claimant to exercise its rights under Article 7.i. of its Mutual Release and Settlement Agreement with Boeing, and the Claimant steadfastly denied exercising that right until this Tribunal required the Claimant to do so. The Respondent’s exercise of its rights under Section 1782 derived from the Claimant’s actions. The Respondent’s Application in the Illinois proceeding is directed to the Boeing Co. (who itself promised to produce documents, largely consisting of the documents requested in the Section 1782 application, and then did not). The Claimant sought to intervene in that action (and in the one in South Carolina; and in opposition to the Respondent’s petition for certiorari to U.S. Supreme Court).

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<sup>59</sup> At para 32(a).

<sup>60</sup> At para 22(e).

<sup>61</sup> At para 30.

<sup>62</sup> At para 31.

<sup>63</sup> At para 32(b).

<sup>64</sup> At para 32(d).

77. The Tribunal retains the ultimate power to determine the admissibility of any evidence thereby obtained – such that should the Respondent seek to adduce documents that are not relevant to the issues in these proceedings, the Tribunal can at that stage refuse to admit them.
78. Even if the Claimant could establish that the Tribunal should usurp the US Supreme Court’s jurisdiction, it has not sought to explain what harm it would suffer from the continued pursuit of the Illinois Proceedings, nor why any such harm would not be adequately reparable by damages. That is because the Claimant would suffer no such harm. The Respondent’s document requests are directed at Boeing and not the Claimant. Any “harm” to the Claimant from its involvement in the Illinois Proceedings is attributable to its choice to intervene and not to any action by the Respondent.
79. In any case, in circumstances where the Claimant has been on notice of the Illinois Proceedings for more than two years and has actively participated in the same, the Claimant has plainly waived any objection to the Respondent’s pursuit of those proceedings under Art. 32 of the CI Arb Rules.

### ***The South Carolina and Minnesota Proceedings***

80. During the 30 June 2020 hearing before Judge David Norton, in opposition to Servotronics’ renewed Application under Section 1782 to take the depositions of Alan Sharkshnas, Scott Walston, and Terrance Shifley, the Respondent and Boeing argued that such testimony was not necessary because Rolls-Royce, and Boeing would ensure that Messrs. Sharkshnas and Walston would testify during the Hearing. While Mr. Shifley has left Boeing and moved to Minnesota (discussed above) the South Carolina proceeding remain relevant and ongoing in Servotronic’s application for deposition Subpoenas; there is currently no guarantee that Mr Sharkshnas or Mr Walston will in fact give evidence to the Tribunal. The Respondent has little confidence that the Claimant will produce these witnesses for cross-examination. As noted above, the position with Mr Sharkshnas is particularly unclear.
81. As for the Minnesota Proceedings, the Claimant has not adduced a witness statement from Mr Shifley (despite indicating at a hearing on 30 June 2020 in South Carolina that it intended to) and so can have no legitimate objection to his being deposed such that his evidence can be obtained. In those circumstances, there is no credible suggestion of



prejudice in the Respondent being able to continue the proceedings; or of any harm occurring to the Claimant. The Claimant seemingly recognises this, as its application does not seek to enjoin the Minnesota proceedings.

### **The Claimant's proposed directions on the necessity and admissibility of evidence**

#### ***Applicable rules and principles***

82. The Tribunal has broad powers to determine the admissibility, relevance and weight of evidence under s.34 AA 1996 and Art. 27(4) of the CIArb Rules. However, these must be exercised in accordance with its general duty under s33(1) AA 1996 to act fairly as between the parties.

#### ***Proposed direction on necessity***

83. The Claimant invites the Tribunal to rule that it does not “require” the evidence from the US Proceedings for the hearing of these disputes to take place. The Respondent does not suggest that the Tribunal does “require” it, such that should it not be obtained then the hearing of this dispute could not go ahead. However, that does not mean that it will not be probative to the issues in these proceedings should it be obtained. The test of the admission of evidence is not necessity and the Tribunal should decline to make any such order, holding the matter over to be assessed if the Respondent brings an application to adduce in these proceedings any evidence so obtained.

#### ***Proposed direction on admissibility***

84. Should its injunction application fail, the Claimant asks the Tribunal to order, preemptively and in the abstract, that any evidence obtained by the Respondent in the Illinois proceedings will not be admitted as evidence in this arbitration.<sup>65</sup> The same approach was taken by the applicants in *Bankers Trust International plc v PT Dharmala Sakti Sejahtera (No. 1)*, which also concerned Section 1782 proceedings.<sup>66</sup> That approach was unsuccessful. Mance J held that the court could not make “any such prospective

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<sup>65</sup> It is understood that, in para 2(ii) of the Grounds in Support of the Claimant's Application, where the Claimant uses the phrase “shall not be admitted as evidence in this arbitration in advance of the May hearing,” the words “in advance of the May hearing” are superfluous.

<sup>66</sup> [1996] C.L.C. 252.

*declarations in respect of... evidence not yet identified.*” For the same reason, the Claimant’s alternative application should be rejected and the question of admissibility held over to see if any evidence becomes available.

### **The Respondent’s proposal for liberty to apply**

85. The Respondent recognises that the outcome of the Illinois, South Carolina and Minnesota Proceedings is presently uncertain and does not at this point propose any directions order in relation to the evidence that may come from those proceedings. However, the Respondent seeks liberty to apply to adduce such relevant evidence as may later be obtained in those proceedings.

### **Conclusion**

86. In the circumstances, the Respondent seeks:

86.1. Directions that the hearing in the above matter is adjourned from 10 May 2021 to a date not before 1 October 2021;

86.2. Corresponding changes to the remaining procedural directions;

86.3. Dismissal of the Claimant’s applications in relation to the US Proceedings;

86.4. Liberty to apply to adduce such relevant evidence as may be obtained in the US Proceedings; and

86.5. Costs of the applications.

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**1<sup>st</sup> March 2021**