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

THIRD INTERIM AWARD

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 up 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 of 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.