

TOURING THE AMERICAS ON A FRIGATE:
 CLASSROOM CONVERSATIONS INSPIRED
 BY NORTHROP GRUMMAN SHIP SYSTEMS
 VERSUS THE MINISTRY OF DEFENSE
 OF THE REPUBLIC OF VENEZUELA

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Northrop Grumman Ship Systems v. Ministry of Defense of the Republic of Venezuela arose out of a 1997 contract under which Northrop Grumman Ship Systems Inc. was to refit two Venezuelan frigates. It was undisputed that the contract called for arbitration in Caracas. But, had circumstances in Caracas changed after the contract formed in such a manner that the ship builder would not be held to its arbitral bargain? And, if arbitration was not to take place in Venezuela, then where? Ultimately, an arbitration seated Rio de Janeiro, Brazil was held, but under Venezuelan arbitration law. That arbitration produced an award that U.S. federal courts enforced. When combined with an examination of the underlying arbitral proceedings themselves, a study of the two decades of federal court activity necessitated by the case reveals much of classroom interest: pathological arbitration clauses, distinctive choice of law issues, and a range of problems peculiar to sovereign contracts.

I.	INTRODUCTION	136
II.	THE SEAT OF ARBITRATION AND THE CURIAL LAW	139
	A. <i>The First Arbitration</i> (Pascagoula to Mexico City)	139
	B. <i>The Second Arbitration</i> (Washington D.C. to Rio de Janeiro)	140
	1. <i>The Arbitration Agreement Modified?</i>	140
	2. <i>The Seat and the Curial Law as Distinct</i>	142

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III.	CLASSROOM EXERCISES – WHAT IF?	143
A.	<i>Competent Authorities and Article VI</i>	143
B.	<i>Whether to Enforce an Award that has been Set Aside</i>	146
IV.	CONCLUSION	149

I. INTRODUCTION

Linda Silberman’s rich career has involved rigorous classroom teaching, authoritative writing, important law-reform work, and enviable consulting assignments. Although I have worked with Linda in all these spheres, I perhaps most enjoy sharing the classroom with her. In Malibu, this usually means conducting a seminar called “International Commercial Arbitration and the Courts,”¹ where we engage our students in mock exercises built upon real cases. To the short-list of those cases, I propose we add *Northrop Grumman Ship Systems v. Ministry of Defense of the Republic of Venezuela* (*Northrop* or *Northrop Grumman*).

The federal court docket-sheet associated with *Northrop* spans roughly twenty years, beginning in 2002.² The dispute arose out of a 1997 contract under which Northrop Grumman Ship Systems Inc. (*Northrop*) was to refit two Venezuelan frigates. The saga substantially ended with the Fifth Circuit’s March 2021 decision³ affirming the lower court’s enforcement⁴ of a \$129 million Panama Convention award in *Northrop*’s favor.⁵

1. The Pepperdine Law School catalog says that the course “[s]tudies the complementary and sometimes antagonistic role of national courts in the international arbitration process[.]”

2. *Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez.*, 2002 WL 35645986 (S.D. Miss. Oct. 25, 2002). The Ministry has been the party of record throughout, but in this essay, I will sometimes refer to Venezuela as the litigant.

3. *Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez.*, 850 F. App’x. 218 (5th Cir. 2021) [hereinafter *Northrop Grumman IV*]. The earlier visits these parties made to the Fifth Circuit were later styled by that court as *Northrop Grumman I*, *II*, and *III*, respectively: 575 F.3d 491 (5th Cir. 2009) (*Northrop Grumman I*); No 11-60001, slip op. (5th Cir. 2011) (*Northrop Grumman II*); 430 F. App’x. 271 (5th Cir. 2011) (*Northrop Grumman III*).

4. *Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez.*, No 02cv785, 2020 WL 1584378, at *6-7 (S.D. Miss. Mar. 31, 2020).

5. *Huntington Ingalls, Inc. v. Ministry of Def. of the Bolivarian Republic of Venez.*, Final Award of February 19, 2018 [hereinafter *Award of February 19*,

The full pre-award story involved two ad hoc tribunals (only the second of which produced an award), and five seats of arbitration.⁶

Given the frequency with which “changed circumstances” play a role in commercial disputes, one might regard the Fifth Circuit’s impracticability analysis to be the jurisprudential highlight of the Northrop/Ministry story.⁷ After all, the U.S. court changed the parties’ agreed-upon seat of arbitration under that doctrine. The dispute, however, is also capable of generating profitable classroom conversations about a range of other matters.

For example, lessons emerge under the evergreen topic of pathological arbitration agreements, given that the disputes clause required that: all the arbitrators be “members of the ICC,”⁸ the arbitration be completed within three months,⁹ and

2018]. The award, and the all-important Procedural Order No. 2 [hereinafter *P.O. No. 2*], are available at <https://perma.cc/8MSE-8VA6>.

6. The five seats are: Caracas (according to the parties’ contract); Pascagoula (a default seat under Judge Gex’s 2003 order compelling arbitration (but disallowing a Venezuelan seat)); Mexico City (designated by the first arbitral tribunal subsequent to the lower court’s 2003 order); Washington, D.C. (per the parties’ 2011 agreement, which Venezuela subsequently repudiated); and Rio de Janeiro (designated by the second tribunal).

7. In the Fifth Circuit, the leading case is *Nat’l Iranian Oil Co. v. Ashland Oil, Inc.* 817 F.2d 326 (5th Cir. 1987) [hereinafter *NIOC*]. Under *NIOC*, to justify enforcing an arbitration without its seat term involves three requirements: (1) circumstances at the designated seat so gravely difficult that a party would be deprived of a fair arbitration; (2) the conditions described in (1) above could not have been reasonably foreseen at the time of contracting; and (3) the seat term may properly be severed from the remainder of the arbitration agreement. See *Northrop Grumman IV*, 850 F. App’x. at 226-30. The Fifth Circuit treated the first two requirements as going to “impracticability,” but agreed that severability was a third requirement “for voiding an arbitral-forum clause.” *Northrop Grumman IV*, 850 F. App’x. at 226-28.

8. See *P.O. No. 2*, *supra* note 5, ¶¶ 1-17 (interpreting that the former Secretary General of the ICC is a “member of the ICC” within the meaning of the Arbitration Clause because the clause “only be understood in the proper context”). Venezuela interpreted the clause to require ICC Court membership, and challenged Northrop’s appointee (Dr. Horatio Grigera Naon) because he was not at the time an ICC Court member. Not surprisingly, the challenge of the Naon—a former Secretary General of the ICC Court—failed; it was decided by the two non-challenged tribunal members.

9. The arbitrators were to: “pronounce their decision within a maximum of three (3) months.” *P.O. No. 2*, *supra* note 5, at para. 108. See generally Victoria Clark, *Time Limits for Awards: The Danger of Deadlines*, PRACTICAL LAW ARBITRATION BLOG (Aug. 13, 2016), <https://perma.cc/U49Z-LWDC> (noting

the proceedings governed by provisions of the Venezuela arbitration law¹⁰ that were both unfriendly to arbitration and seemingly inconsistent with the Panama and New York Conventions.¹¹ Moreover, at least one party would later regret the limited scope for arbitrator challenges contemplated by the clause.¹²

There were also dispositive choice of law and proof of foreign law questions, not least those which led the Fifth Circuit in 2009 to resuscitate the dispute by applying a blend of Mississippi and Venezuelan law to a pivotal agent's-power-to-settle question.¹³ Additionally, before the arbitral tribunal (besides the noteworthy curial law question discussed below), there were also prosaic but important evidentiary matters to

the various deadlines for delivery of arbitral awards). The tribunal navigated this provision by relying in part on Venezuela's Model Law-based arbitration act (enacted subsequent to the Code of Civil Procedure), and its default six-month period; it allows the tribunal to order extensions, *ex officio*. The tribunal, ultimately, extended the period sixteen times.

10. See CODE CIVIL [CÓD. PROC. CIV.] arts. 608-629 (Venez.), <https://perma.cc/JK5L-JXPS> (The "arbitramento" section of the Code required, *inter alia*, that the parties' consent to arbitrate be affirmed in a post-dispute "compromise" executed by them (Art. 608) and that the claimant alone should initially bear costs of the arbitral proceedings (Art. 629)).

11. Both Conventions contemplate court enforcement of pre-dispute arbitration clauses subject only to certain qualifications set forth therein. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention] (outlining certain conditions for recognition and enforcement of arbitration agreements by Contracting States); see also Organization of American States, Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 [hereinafter Panama Convention] (also providing for qualifications in the recognition and enforcement of arbitration agreements).

12. The clause contemplated only a default appointment by the ICC of the tribunal Chair; the ICC Secretariat was unwilling to decide an arbitrator challenge, however, unless both parties consented.

13. Had the Fifth Circuit affirmed the lower court's dismissal of the case, Venezuela would have been bound by a \$70 million settlement. The Fifth Circuit, however, reversed. The reasoning had a *renvoi* flavor; it relied on the Conflicts Restatement Second and *Erie* analysis to determine that Mississippi's "public contracts doctrine" would apply, but in a manner that effectuated Venezuelan rules regarding government agents' settlement authority; those rules required the putative agent to have express written authority to settle, which was absent. See *Northrop Grumman I*, 575 F.3d at 499-502 (reversing the lower court's judgment based on references to the Mississippi courts' adherence to the public-contracts doctrine, the court's duty under the *Erie* doctrine, and the Venezuelan Civil Procedure Code).

study, such as whether to disregard written witness statements whose authors would not, or could not, attend the hearing.¹⁴

Finally, the case contains some interesting displays of deference between arbitrators and courts,¹⁵ and amongst courts *inter se*.¹⁶

II. THE SEAT OF ARBITRATION AND THE CURIAL LAW

Whatever dysfunctional features the disputes provision may have had, some of its terms were clear: Venezuelan law governed the contract;¹⁷ the seat of arbitration was Caracas;¹⁸ and the governing arbitration law was to be found in the Venezuelan Code of Civil Procedure.¹⁹ Each of these three elements raised controversy, but the question of the seat was foremost in Venezuela's several submissions before the courts in the Fifth Circuit and before the arbitral tribunal.

A. *The First Arbitration (Pascagoula to Mexico City)*

In 2003, soon after, *inter alia*, successfully suing to immobilize certain Venezuelan funds,²⁰ Northrop returned to the district court asking it to compel arbitration.²¹ The court did so, but not in Caracas. Rather, it agreed with Northrop that circumstances in Venezuela had changed since the date of contract-

14. One declarant refused to attend the hearing for fear of suffering employment repercussions (statement excluded); the other had died (statement included; weight subject to other evidence). *Award of February 19, 2018*, *supra* note 5, ¶¶ 58–74.

15. *See P.O. No. 2*, *supra* note 5, ¶¶ 87–97 (denying opportunity to relitigate issues previously decided in a U.S. court in an Arbitral Tribunal).

16. The law-of-the-case doctrine played a significant role before the Fifth Circuit. *See, e.g., Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venezuela (Northrop Grumman IV)*, 850 F. App'x. 218, 226 (5th Cir. 2021) (declining, based on law-of-the-case, to revisit lower court's determination that impracticability defense was available under the Panama Convention).

17. *P.O. No. 2*, *supra* note 5, ¶ 63.

18. *Id.* ¶ 87.

19. *Id.* ¶ 63.

20. *Northrop Grumman Ship Systems v. Ministry of Defense of the Republic of Venezuela*, 2002 WL 35645986, *1 (S.D. Miss. Oct. 25, 2002).

21. *Northrop Grumman Ship Systems v. Ministry of Defense of the Republic of Venezuela*, 2003 WL 273833249 (S. D. Miss. Apr. 16, 2003).

ing (1997) and that “the violently unstable political situation in Venezuela [had] rendered that country an unsuitable forum.”²² Accordingly, Judge Gex ordered arbitration to take place “in Pascagoula, Mississippi or such other place inside the United States chosen by the Ministry”²³ and provided that if the Ministry preferred a location outside the United States, it was entitled to return to the court, who would, for good cause shown, consider the request.²⁴ The Ministry had not yet participated in the proceedings.²⁵

Because the Ministry (still a non-participant) failed to appear, Judge Gex appointed an arbitrator on the Ministry’s behalf. Once constituted, the three-arbitrator tribunal formally moved the seat to Mexico City, although, again, the Ministry apparently did not participate in that decision.²⁶

Approximately five years and eight months later, the tribunal issued an order ending the proceedings. The arbitration had been in repose for over three years and eight months owing to several events, including a March 2005 stay of arbitration, issued by the same court that had originally ordered the arbitration.²⁷ No arbitral awards had been rendered.

B. *The Second Arbitration (Washington D.C. to Rio de Janeiro)*

1. *The Arbitration Agreement Modified?*

In 2009, the Fifth Circuit’s *de novo* choice of law analysis led it to vacate a settlement-based judgment entered against Venezuela.²⁸ Though it revived the case, that court did not rule on the enforceability of the seat clause, but remanded to allow the lower court to consider that question in light of updated facts and the doctrines of impossibility and impracticability.²⁹

22. *Id.*

23. *Id.* ¶ 8.

24. *Northrop Grumman I*, 575 F.3d at 494–95 (retaining jurisdiction and mandating certain arbitral procedures and reporting activities).

25. *Id.*

26. *Id.*

27. *See id.* at n.3 (doing so at the behest of the Ministry, which, inter alia, alleged that the 2003 order was made without jurisdiction for want of proper service under the FSIA).

28. *Id.* at 501–02.

29. *Id.* at 503–04.

On remand,³⁰ Judge Gex faced competing requests to compel arbitration:³¹ the Ministry sought arbitration in Caracas and a dismissal of the case;³² and Northrop sought arbitration within the court's district, insisting that government interference with an arbitration seated in Caracas was likely, rendering Caracas an "unreasonable" situs.³³

Agreeing with Northrop on the impracticability question, Judge Gex would again find (this time with more detailed analysis) that circumstances in Venezuela, unforeseen at the time of contracting, precluded seating an arbitration there.³⁴ Instead of ordering arbitration to take place in his district, however, he invited the parties to agree on a seat of arbitration outside of Venezuela, and retained jurisdiction.³⁵

In what proved to be a critical event in the case, Venezuela agreed to Washington D.C. as the seat, presumably hoping to avoid a default seat such as Pascagoula.³⁶ The arbitration proceeded briefly in Washington D.C., but Venezuela soon purported to withdraw its consent to arbitrate there,³⁷ while renewing before the arbitrators its assertion that Caracas was

30. As a matter of disclosure, while the case was on remand, I prepared three expert opinions that were commissioned by, and filed on behalf of, Venezuela.

31. *Northrop Grumman Ship Systems v. Ministry of Defense of the Republic of Venezuela*, 2010 WL 5058645, at *5-6 (S.D. Miss. Dec. 10, 2010).

32. *Id.* at *1-3.

33. *Id.*

34. The Fifth Circuit had noted that to prevail, Northrop must not have, at the time of contracting, "known about" the conditions complained of. *Northrop Grumman I*, 575 F.3d 491, 503 (5th Cir. 2009).

35. *See* *Northrop Grumman Ship Systems v. Ministry of Defense of the Republic of Venezuela*, 2010 WL 5058645, at *5-6 (S.D. Miss. Dec. 10, 2010) (Court stating that they will retain jurisdiction and inviting the parties to decide the location for the arbitration).

36. Though repudiated by the Ministry, that agreement undercut its argument that it was incompetent under Venezuelan law to agree to a non-Venezuelan seat. Given the agreement to arbitrate in D.C., the Tribunal found the Ministry was estopped under the *venire contra factum proprium* doctrine from insisting on Caracas. *P.O. No. 2*, *supra* note 5, ¶ 94. Yet, the Ministry's disavowal of the modified seat term led the tribunal to conclude that the seat remained undecided; it then exercised its default powers to designate Rio de Janeiro. *Id.* ¶¶ 96-97.

37. *See id.* ¶¶ 81-97 (Court discussing place of arbitration and arguments put each way). It argued in part that it had agreed while under protest, citing court pressure. *Id.* ¶ 88.

the seat. Before the arbitral tribunal, the questions of arbitral seat and curial law were vigorously debated.³⁸

2. *The Seat and the Curial Law as Distinct*

The tribunal treated the questions of curial law and seat as analytically separate. Ultimately, it resolved that the arbitral proceedings would be governed by Venezuela's version of the UNCITRAL Model Law, as supplemented by the 1976 UNCITRAL Arbitration Rules³⁹ and that the seat of arbitration would be Rio de Janeiro.⁴⁰ Thus, what was ultimately presented for enforcement in the Fifth Circuit was an award rendered in Brazil under the arbitration law of Venezuela.⁴¹

The tribunal had determined that it could not follow the parties' original designation of Caracas as the seat, in light of the U.S. court's ruling that unforeseen circumstances precluded arbitration in Venezuela.⁴² By separating the questions of seat and governing arbitration law, the tribunal could nevertheless apply Venezuelan arbitration law (as called for in the arbitration agreement) without running afoul of the U.S.

38. *Id.* ¶¶ 87–97 (Court discussing its decision and the factors leading to such decision).

39. The original (1976 version), and not the 2010 version of the UNCITRAL Arbitration Rules, was chosen because the 2010 version “was not in effect when the request for arbitration was filed.” *Id.* ¶ 80. The tribunal did not address the potential applicability of the IACAC Rules relied upon by the first tribunal. *Id.*

40. The parties' contract identified as the governing arbitration law certain provisions of Venezuela's Civil Procedure Code. The tribunal, however, interpreted that reference to allow application, as *lex specialis*, of Venezuela's subsequently enacted version of the UNCITRAL Model Law. *Id.* ¶¶ 69–70 (Derogating the Civil Procedure Code to the Arbitration Act).

41. *Id.* ¶¶ 64–80, 97; *See also* RESTATEMENT OF THE U.S. LAW OF INT'L COM. AND INV.-STATE ARB. § 4-14(d) cmt. *d* (Am. L. Inst., Proposed Final Draft Apr. 24, 2019) [hereinafter RESTATEMENT] (discussing the consequences of the parties' designation of an arbitration law other than that of the seat and referring to that situation as “rare”).

42. The tribunal wrote in pertinent part:

There is no room available to the parties to re-litigate before this Arbitral Tribunal if the proceedings will be held outside or within the territory of the Republic. The U.S. Court in a reasoned decision clearly stated that the arbitral proceedings shall be held outside the territory of the Republic. Such decision has the force and effects of *res judicata*.

P.O. No. 2, supra note 5, ¶ 94.

court's order (requiring arbitration outside of Venezuela). As to the curial law, the tribunal wrote:

[W]hat [...] has to be decided [...] is the curial law of the arbitral proceedings, i.e., the procedural provisions governing the conduct of this arbitration by and before this arbitral tribunal [i.e.,] the relationship between the parties and the arbitral tribunal and in between the parties within the four corners of the arbitral procedure. By deciding this issue the arbitral tribunal does not make any determination, nor advances any opinion, regarding the legal regime concerned with the external supervision of these arbitral proceedings or other matters external to it.⁴³

The tribunal sought to do no more than what was required and thus the question of whether Venezuelan courts or Brazilian courts, or perhaps both, had supervisory power was expressly excluded.

The tribunal's appraisal of the curial law did not affect the U.S. court's eventual handling of the award. Both Brazil or Venezuela are parties to the Panama Convention, and the Fifth Circuit applied it.⁴⁴ Nevertheless, no set-aside procedure had been initiated in either State; nothing therefore turned on the precise nationality of the award (or on which courts had supervisory jurisdiction). In the classroom, however, one can invent further developments, discussed next.

III. CLASSROOM EXERCISES – WHAT IF?

Venezuela never really abandoned its view that Caracas was supposed to be the seat of arbitration. It raised the argument many times. For classroom purposes, a cluster of interesting questions could be pursued by positing that upon receiving the award in February 2018, the Ministry attempted to annul it.

A. *Competent Authorities and Article VI*

Suppose, for example, that the Ministry sought set-aside in Venezuela, relying on Caracas having expressly been designated as the seat. Under the Model Law, its theory would be that the arbitral procedure did not accord with the parties' agreement

43. *Id.* ¶ 65.

44. *See Northrop Grumman IV*, 850 F. App'x. at 224–29.

and presumably also that this particular departure from the parties' agreement violated Venezuelan public policy.⁴⁵

Assume also that, concurrently, rather than seeking enforcement in the United States, Northrop sought enforcement under the New York Convention in a third state, Ruritania.⁴⁶ Because of the pending set aside proceeding in Venezuela, the Ministry might ask the Ruritanian court to suspend the enforcement action under Article VI of the Convention,⁴⁷ thus raising whether Venezuelan courts were "competent" within the meaning of the Convention. After all, the prerogative to postpone enforcement during a set-aside action assumes that it is pending before "a competent authority referred to in article V(I) (e)" of the Convention, that is, in the country "in which, or under the law of which" the award was rendered (to use the New York Convention's phraseology).⁴⁸

Would it be open to Ruritania's courts to accord article V(I) (e) competency to the Venezuelan courts based either on the express designation of the seat in the arbitration agreement or the fact that the award was rendered under Venezuelan arbitration law? Does it matter on which of those two bases it does so? The question invites others.

First, should the Ruritania court, as the arbitral tribunal had done,⁴⁹ give some form of preclusive effect to the U.S.

45. Cf. U.N. COMM'N ON INT'L TRADE, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at arts. 34(2)(a)(iv) and (b)(ii), U.N. Doc. A/40/17, Annex I (1985) [hereinafter MODEL LAW]. I am assuming that the putative modification of the seat term (changing it to Washington, D.C.) relied on by other courts would not stop a Venezuelan court from exercising set aside jurisdiction; it could legitimately reason that even if the seat was Washington, D.C., the arbitration law of Venezuela was applied by the Tribunal, thus making Venezuelan courts competent. For its part, the tribunal did not consider itself bound to treat Washington, D.C. as the seat.

46. Ruritania is not a party to the Panama Convention.

47. Panama Convention, *supra* note 11, at art. VI (authorizing discretionary adjournment—instead of immediate enforcement—when set aside actions are pending before a "competent authority").

48. *Id.* at arts. V(I) (e), VI.

49. The Tribunal wrote:

There is no room [...] to re-litigate before this [...] Tribunal if the proceedings will be held outside or within the territory of the Republic. The U.S. Court in a reasoned decision clearly stated that the arbitral proceedings shall be held outside the territory of the Republic. Such decision has the force and effects of *res judicata*.

P.O. No. 2, supra note 5, ¶ 94.

court's determination that the arbitration may not be seated in Venezuela? If so, to what end? A facially appealing, if technical, answer might be that to recognize set-aside power in Venezuelan courts based strictly on the arbitration law under which the award was rendered does not conflict with a ruling that the arbitration must be *seated* outside Venezuela. Likely not to be overlooked by the Ruritanian court, however, the U.S. court's intention was to prevent Venezuelan courts from exercising supervisory power (such as in a set-aside action).⁵⁰

Second, if pressed by Northrop, would the Ruritanian court not have to decide whether Brazilian courts (as courts of the seat), rather than Venezuela's courts, were *exclusively* competent, irrespective of Venezuela's arbitration law having governed the arbitration?⁵¹ Northrop might well lose that argument; many authorities would concede that the tribunal's application of Venezuelan arbitration law (per the parties' arbitration agreement) conferred on Venezuelan courts competency—either exclusive or concurrent—under the Conventions, based on the “or under the law of which” alternative (to use the New York Convention's formulation again).⁵²

If the Ruritanian court treated the set-aside action in Venezuela as permissible, the subsequent question whether to stay Northrop's enforcement action would be a matter of discretion under the Conventions. For their parts, courts in the U.S. have consulted various factors in proceeding under article VI.⁵³

50. See *Northrop Grumman IV*, 850 F. App'x. at 221–22 (describing partiality of Venezuelan courts and their ability to affect arbitration); *P.O. No. 2*, *supra* note 5, at ¶¶ 94, 96 (relying on the U.S. court's decision regarding forum neutrality).

51. Given the conjunctive phrasing of the New York Convention's article V(1)(e) formula, Ruritanian courts might treat the courts of either (or of both) Brazil or Venezuela as having set-aside authority. Recognizing two courts as having annulment power, of course, invites inconsistent judgments.

52. See RESTATEMENT, *supra* note 41, § 4-14(d) (the state whose arbitral laws are applied has authority to set aside). In turn, changing the hypothetical so that the set aside is pending in Brazil instead of the Venezuela raises whether the parties' choice of Venezuelan arbitration law renders Brazilian courts incompetent. The Restatement advises U.S. Courts to consider the courts in the system whose arbitration law was chosen to be exclusively competent. See *id.*, Reporters' Notes b(ii) (stating that if arbitral law other than the law of the seat is applied, the state whose arbitral law is applied has the exclusive authority to set aside an award).

53. See 1958 New York Convention Guide, *Article VI*, <https://perma.cc/8AK7-3REG> (stating that article 6 gives courts discretion on what is to be

B. *Whether to Enforce an Award that has been Set Aside*

Essentially the same initial competency issue would arise if the Ruritanian court was confronted with both a Venezuelan judgment setting aside the award and a request to enforce the Brazilian award. This time the question would arise directly under article 6(1) (e).⁵⁴ Northrop's argument would be that the purported set-aside was *ultra vires* and that, even if it was not, the award should be enforced nevertheless.

In considering its options, a Ruritanian court could not do better than to consult Linda's writings.⁵⁵ As she and her co-authors report, there are several approaches the court might adopt.

One approach is to regard an award that has been set aside as no longer existing so that there is nothing to enforce.⁵⁶ A second approach occupies the other end of the continuum by giving no effect to a set-aside judgment, leaving enforcement to depend on the remaining Convention refusal grounds.⁵⁷ In

considered when deciding to adjourn enforcement of foreign arbitral awards). In the United States, to varying degrees, the list of considerations set forth in *Europcar Italia, S.P.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317–18 (2d Cir. 1998) has been influential. These considerations (to summarize) are: (1) the goals of expedition and the avoidance of protracted litigation; (2) the status of, and estimated time remaining in, the set aside proceeding; (3) the comparative levels of scrutiny the award will receive in the two courts; (4) the characteristics of the foreign proceedings; (5) the possible hardships to the respective parties; and (6) any other circumstances bearing on whether to adjourn. *Europcar*, 156 F.3d at 317–318. Recent examples of Article VI cases include: *Hulley Enterprises Ltd. v. Russian Federation*, No. 14-1996, 2022 WL 1102200 (D.D.C. Apr. 13, 2022) (further adjournments not warranted); *CC/Devas (Mauritius) Ltd. v. Republic of India*, No. 1:21-cv-106-RCL, 2022 WL 873620 (D.D.C. Mar. 24, 2022) (adjournment warranted).

54. Here, I am using Panama Convention numbering.

55. I have in mind, e.g., Linda Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgments*, in *Forum Shopping in the International Commercial Arbitration Context* 313 (F. Ferrari, ed., 2013) (discussing the options of national courts asked to enforce foreign judgements); and Linda Silberman & Robert Hess, *Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration*, NYU Sch. Law, Public Law Research Paper No. 22-14 (2022), <https://perma.cc/YM3P-DY37> (discusses what happens when a party seeks to enforce a judgement that has been set aside by a foreign court).

56. Silberman & Scherer, *supra* note 55, at 315–17.

57. *See id.* at 318–21 (explaining the unattractive features of such an approach through a French illustration). The Panama and New York Conventions set forth nearly identical refusal grounds in their respective fifth articles.

such a jurisdiction, it might be that refusal to enforce the award will occur for the same reasons that led to the set aside, but perhaps not.

A third approach would be to adopt some *via media*. For example, the treatment of the set-aside judgment could be made to depend in part on whether Venezuela's court applied grounds and interpretations thereof considered by Ruritania to be sufficiently mainstream (perhaps by adopting a list of acceptable grounds).⁵⁸ Thus, an award that had been set aside would not be enforced if the set-aside court had applied an authorized ground while adopting an unremarkable interpretation of it (in contrast to reasoning that the Ruritanian court deemed unduly idiosyncratic or parochial).⁵⁹ As a supplemental measure, the Ruritanian court could test the set-aside judgment against its own law of foreign judgments generally.⁶⁰ Also between the extremes are the approaches adopted by the Restatement⁶¹ and

58. "Mainstream" can be given meaning by consulting, for example, the grounds listed in: the New York Convention, Article V, the UNCITRAL Model Law, Article 36, or the European Convention on International Commercial Arbitration 1961, Article IX (1); the latter with commentary is available at <https://perma.cc/Q7WX-ZHYQ>. To limit the acceptable grounds to those in the texts above would preclude crediting set aside judgments that were based on a merits review. Cf. Silberman & Scherer, *supra* note 55, at 322–23 (citing GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2691 (2009)) (providing basis on judicial review of the merits or on other grounds not included in the New York Convention as possible criteria for denying effect to an annulment decision).

59. See Silberman & Hess, *supra* note 55, at 25–26 (comparing outcomes and underlying circumstances of two set-aside judgements, one of which is characterized as parochial and idiosyncratic). The public policy ground for annulment is an example of a potentially acceptable ground that might nevertheless effectuate local peculiarities, thus producing a set-aside that a Ruritanian court may decline to recognize.

60. A set-aside issued in favor of a local government entity ought to be disregarded if, in the specific case, or on a system-wide basis, the judiciary demonstrably lacked independence, even if the set-aside court purported to apply, e.g., the Model Law's Article 34 grounds. Cf. *DeJoria v. Maghreb Petrol. Expl., S.A.*, No. A-13-CV-654-RP-AWA, 2018 WL 1057029, at *6 n.5 (W.D. Texas Feb. 26, 2018) (refusal on one ground but not the other; quoting comments to the 2005 Uniform Act: 'the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration').

61. RESTATEMENT, *supra* note 41, § 4.14(b) ("Even if a Convention award has been set aside by a competent authority, a court of the United States may recognize or enforce the award if the judgment setting it aside is not entitled

those evident in certain U.S. cases;⁶² the analysis again would focus on the judgment of set-aside as tested against Ruritania's law on the recognition of foreign judgments.⁶³

If one changes the hypothetical such that Northrop's Brazilian award and the Venezuelan set-aside judgment have both been presented to a U.S. court, the U.S. court would start with the familiar question of Venezuelan court competency (given that the seat was in Brazil),⁶⁴ except with the added consideration that a U.S. court had ruled that the parties should not arbitrate in Venezuela. A U.S. court cannot of course dictate how a Venezuelan court interprets the Panama Convention's "or according to the law of which" clause, but it can protect its own judgments as a matter of public policy.⁶⁵

to recognition under the principles governing the recognition of judgments in the court, or in other extraordinary circumstances."). The Restatement approach would not axiomatically refuse recognition to a set-aside judgment merely because it resulted from a merits review.

62. *See, e.g.* *Corporacion Mexicana De Mant. v. Pemex-Exploracion*, 832 F.3d 92 106–107 (2d Cir. 2016) (finding that the lower court had not abused its discretion by choosing not to recognize the judgement on public policy grounds); *Thai-Lao Lignite (Thailand) Co. Ltd. v. Government of Lao People's Democratic Republic*, 492 Fed. Appx. 150 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (Feb. 21, 2013) (affirming a district court decision to recognize an arbitral award issued in Malaysia); *Getma International v. Republic of Guinea*, 862 F.3d 45, 47, 50 (D.C. Cir. 2017) (choosing to uphold an international court's decision to set aside an arbitral award, on the basis that only "scant evidence" evidence of unfair proceedings was presented). These cases are thoughtfully examined in Silberman & Hess, *supra* note 55, at 21–7.

63. The Restatement proposes that there may be "extraordinary circumstances" in which the set-aside judgment was procured in a manner that does not accord with formal non-recognition grounds, such as system-wide deficiencies, but may nevertheless properly be declined recognition (due process deficiencies in the specific case). RESTATEMENT, *supra* note 41, § 4.16(b). It is a safety-valve tailpiece that is not intended to be invoked very often.

64. Putting aside the possible impact of law-of-the-case, the Restatement suggests that Venezuelan courts and not Brazilian courts were not only competent, but singularly competent, because the parties had expressly subjected their arbitration proceeding to Venezuelan arbitration law. *See* RESTATEMENT, *supra* note 41, § 4.14(d) (stating that when parties "designate an arbitration law to govern," it is a court within that jurisdiction that is competent to set aside the award).

65. It seems likely that the U.S. court would not recognize the Venezuelan set-aside and instead would enforce the award. The same law-of-the-case doctrine applied earlier in the case should foreclose recognizing set-aside powers in Venezuelan courts. The U.S. court's ruling sought to prevent those courts from having supervisory jurisdiction, so that treating them as "competent"

Additionally, under a judgments approach, a U.S. court would be entitled to entertain such other judgment non-recognition grounds as exist under the law of the forum.⁶⁶

IV. CONCLUSION

The above introduction to *Northrop Grumman v. Ministry* touches on a few of the classroom possibilities that caught my eye. More, of course, could be said. For example, the FSIA's provisions were important parts of the proceedings.⁶⁷ And to quibble a bit, the Fifth Circuit's severability analysis (reasoning that the Ministry's consent to arbitrate was not conditioned on Caracas being the seat) seemed to beg some essential questions.⁶⁸ In any event, I have no doubt that Linda could improve upon what I have sketched above, both in crafting classroom exercises and in critically analyzing all that went on in connection with Venezuela's two frigates and the dispute to which they gave rise.

would conflict with the spirit, and perhaps the letter, of an earlier U.S. judgment involving the same two parties.

66. See generally S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45 (2014) (discussing the current status of U.S. law concerning the recognition of foreign judgements). For example, if Northrop was never notified of the set-aside proceeding either actually or constructively, it would have a defense to recognition in a U.S. court. A refusal ground of this type is exemplified by article 7(1)(a) of the Convention of July 2, 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, although it is unclear if the Convention applies to set-aside judgments. 41 H.C.C.H. See *id.* at art. 2(3) (providing grounds for non-recognition when the proceeding "was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence").

67. See *Northrop Grumman IV*, 850 F. App'x. 218, 224–25 (5th Cir. 2021) (invoking the FSIA's commercial activity exception as grounds for the court's jurisdiction).

68. The Fifth Circuit found in *Northrop Grumman IV* that the lower court had impliedly dealt with severability, and with sufficiency. But the contract's suite of dispute resolution terms—seat, governing arbitration law, applicable substantive law and reserve choice of court designation—gives the strong impression of being an interconnected package that was central to the Ministry's promise to arbitrate. See *id.* at 226–28.