CASE NO. 20-60347

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED
FORMERLY KNOWN AS INGALLS SHIPBUILDING INCORPORATED
Plaintiff-Appellee

v.

THE MINISTRY OF DEFENSE OF THE REPUBLIC OF VENEZUELA
Defendant-Appellant

On Appeal from the United States District Court
For the Southern District of Mississippi
Southern Division

BRIEF OF APPELLANT THE MINISTRY OF DEFENSE OF THE REPUBLIC OF VENEZUELA

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CERTIFICATE OF INTERESTED PERSONS

The style of this case is *Northrop Grumman Ship Systems, Inc. v. The Ministry of Defense for the Republic of Venezuela*. The number of this case 20-60347.

The Ministry certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Appellee: **Northrop Grumman Ship Systems, Inc.**, formerly known as Ingalls Shipbuilding, Inc.

Appellee's counsel:

- **Joseph F. Coyne, Jr.** (Sheppard, Mullin, Richter & Hampton)
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- **Rajat Rana** (Alston & Bird, LLP)
- **J. Thomas Hamrick, Jr.** (Huntington Ingalls Industries)

Bank of New York – **Bank of New York ("BONY")** was the trustee of a trust ("**BONY Trust**") that held money pursuant to a contract between Appellee and Appellant. The funds beneficially held by the trustee were distributed pursuant to an agreement between the Bolivarian Republic of Venezuela and Crystallex. If this

Court reverses the District Court, BONY may have an interest in how the funds it administered were distributed.

Counsel for BONY:

- **Eric A. Schaffer** (Reed Smith, LLP)
- **Christopher Neil Grey** (Reed Smith, LLP)

Crystallex International Corp. – **Crystallex** holds a judgment against Venezuela. In trying to collect on the judgment, Crystallex sought turnover of the funds in the BONY Trust. After Venezuela, Ingalls, and Crystallex reached a settlement regarding the funds in the BONY Trust, Crystallex retained certain obligations in relation to funds. If this Court reverses the District Court, Crystallex may have to take steps in relation to the funds from the BONY Trust.

Counsel for Crystallex:

- **Jason Myatt** (Gibson, Dunn & Crutcher, LLP)
- **Robert L. Weigel** (Gibson, Dunn & Crutcher, LLP)

Appellant: **The Ministry of Defense for the Republic of Venezuela**

Appellant's counsel:

- **Quinn Smith** (GST LLP)
- **Katherine Sanoja** (GST LLP)
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/s/ Quinn Smith
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Counsel for the Ministry

STATEMENT REGARDING ORAL ARGUMENT

The Ministry respectfully requests oral argument for this appeal as it will significantly aid the Court's deliberations. Although the errors raised below are glaring, the legal principles are nuanced and may warrant further explanation at oral argument. In addition, these errors touch on the concerns of a ministry of a sovereign state, heightening the need for careful deliberation. Given the rights at stake, the interest of international comity will be well-served by oral argument in open court.

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JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction pursuant to 9 U.S.C. § 302 (codifying the Inter-American Convention on International Commercial Arbitration, also called the "**Inter-American Convention**"). ROA.778. Section 302 incorporates 9 U.S.C. § 203, which states that the district courts have original jurisdiction, regardless of the amount in controversy, over actions or proceedings "falling under the Convention." Both of the parties to the arbitration agreement (Northrop Grumman (or "**Ingalls**") and the Ministry) are citizens of States that have ratified the Inter-American Convention (the United States and Venezuela) and are members of the Organization of American States. *See* 9 U.S.C. § 305(1). The Inter-American Convention therefore applies. Because this matter relates to an order to compel arbitration and then recognize an award falling under the Inter-American Convention, the District Court properly had subject-matter jurisdiction. In addition, the District Court had concurrent jurisdiction under 28 U.S.C. § 1330(a).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because it is an appeal of a final decision and a final judgment.

A final decision on Ingalls's enforcement petition was issued on March 31, 2020. ROA.6380. The Ministry filed a timely notice of appeal on April 27, 2020 ROA.6423. The District Court then issued a Final Judgment on June 4, 2020. The Ministry filed a timely amended notice of appeal on June 22, 2020.

ISSUES PRESENTED

The Ministry is appealing an order compelling arbitration, as well as the district court's decision to enforce the arbitration award. The appeal raises the following issues:

1. Did the District Court err in compelling arbitration at a place contrary to the parties' arbitration agreement?
    a. Did the District Court properly compel arbitration under Chapter 3 of the Federal Arbitration Act?
    b. Are the Chapter 1 standards for resisting or refusing an arbitration venue also applicable under Chapter 3?
    c. If so, did the District Court apply the Chapter 1 standard correctly?
2. Did the District Court err in enforcing an arbitration award rendered contrary to the parties' arbitration agreement?
    a. Did the District Court apply the proper standard of review for purposes of enforcement?
    b. Can the District Court enforce an award rendered outside the terms of the parties' arbitration agreement?

STATEMENT OF THE CASE

This is case relates to an arbitration agreement and award interpreted under Title 9 of the United States Code. Northrop Grumman, formerly known as Ingalls Shipbuilding, Inc. (hereinafter "**Ingalls**"), filed a complaint against the Ministry in 2002, ROA.54, after which the District Court compelled arbitration—twice. The first arbitration was discontinued, followed by an appeal to this court. ROA.2482 (the "**First Decision**"). On remand, the District Court ordered the case to arbitration a second time, ROA.4231, which produced an arbitration award (the "Award"). ROA.5421. The District Court recognized the Award, ROA.6380, and issued a Final Judgment thereafter. The Ministry now appeals (i) the (second) order compelling arbitration, (ii) the recognition order and (iii) the Final Judgment.

The facts and early history of the dispute are set out in the First Decision. Ingalls entered into a contract with the Ministry to overhaul two navy frigates (the "**Agreement**"). ROA.2483. The parties agreed that any disputes would be subject to arbitration in Caracas, Venezuela, and under Venezuelan law. ROA.2483. Any dispute that was not subject to arbitration was to be resolved by the Venezuelan courts.

The First Arbitration and the First Appeal

After a dispute arose, Ingalls filed suit in the Southern District of Mississippi and moved to compel arbitration. ROA.138. Before the Ministry could appear, the

District Court compelled arbitration in Mississippi, finding that the parties' choice of venue (Caracas) was unenforceable. ROA.778. The arbitration was later moved to Mexico City.

While the Mexico City arbitration was pending, the Ministry appeared before the District Court and moved to vacate the court's order, objecting to any arbitration outside Caracas. ROA.784. The Ministry's motion was denied, ROA.2100, but the Mexico City arbitration was nevertheless discontinued pending settlement negotiations. The Ministry's attorneys purported to have reached a settlement, but the Ministry disagreed. The Ministry retained new counsel and opposed the settlement. The District Court enforced the settlement, and the Ministry sought vacatur. On appeal, this Court vacated the settlement that was purportedly reached. It further mooted the first arbitration order and remanded the case to consider the arbitration issue again.[1] ROA.2499. This appeal focuses on the decisions rendered after the case was remanded.

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[1] Towards the end of the First Decision, the Court described the District Court's ruling on venue to be "conclusory" and offered some "governing principles" on arbitration venue in the Fifth Circuit. Those principles are examined in detail below, but the relevant text of the First Decision is provided here for reference.

> The Supreme Court has held that courts may generally set aside forum-selection clauses where enforcement would be "unreasonable." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10–11 (1972). However, in several cases culminating in *Nat'l Iranian Oil Co. v. Ashland Oil, Inc,* 817 F.2d 326, (5th Cir. 1987), this Court has applied a heightened standard to arbitration forum clauses in particular. 817 F.2d 326, 332

On remand, both parties held to their positions. The Ministry demanded arbitration in Venezuela, while Ingalls pushed for arbitration in Mississippi. The District Court once again refused to compel arbitration in Venezuela, this time finding that enforcement would be "unreasonable" and "deprive [Ingalls] of its day in court." ROA.4238 ("**2010 Order**"). It then ordered the parties to agree on an alternate venue.

The Ministry appealed the 2010 Order (the second appeal), but the Fifth Circuit dismissed the appeal for lack of jurisdiction. ROA.4404. A telephonic hearing was then held where the Ministry agreed under protest to arbitrate in Washington DC, pursuant to the court's prior order. ROA.35 [*Minute Entry* dated March 30, 2011]. No transcript of the telephone hearing exists, but the Ministry's objection to arbitration outside Caracas had already been preserved. Had the parties

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(5th Cir. 1987) (holding that 15 arbitration-forum clauses "must be enforced, even if unreasonable"). Under *Nat'l Iranian Oil*, a "forum selection clause establishing the situs of arbitration must be enforced unless it conflicts with an explicit provision of the Federal Arbitration Act." *Id*. (internal quotation marks omitted). "Under the Act, a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or such grounds as exist at law or in equity for the revocation of the contract." *Id*. (internal quotation marks omitted). Within this framework, the contract doctrines of impracticability or impossibility "certainly suppl[y] an adequate predicate for finding the forum selection clause unenforceable." *Id*. However, in order to assert these defenses, the complaining party must not have had reason to know about the complained-of conditions at the time of the contract. *Id*. at 333. ROA.2499-500

not reached an agreement, the District Court would have chosen an arbitration venue itself. ROA.6358; ROA.4239.

The Second Arbitration

On May 24, 2012, a second arbitration began in Washington DC, with limited administrative support from the Court of International Arbitration of the International Chamber of Commerce. ROA.5968. From the beginning, the Ministry objected to the venue, also known as the "seat" or "place" of the arbitration. Referring to the provisions in the Agreement, the Ministry requested the Tribunal to uphold the terms of the Agreement and require arbitration in Caracas, Venezuela. ROA.5995. Ingalls opposed. The Tribunal rejected the Ministry's request. ROA.5998. But it did not stop there. The Tribunal moved the seat of arbitration, once again, to Rio de Janeiro, Brazil, concluding that the parties failed to agree on the place of arbitration. ROA.6000. Neither Ingalls nor the Ministry ever requested that Rio de Janeiro, Brazil, be the seat of the arbitration.

Recognition and Enforcement of the Award

An arbitration hearing was held in mid-January 2015. The Tribunal deliberated for over three years, issuing the Award on February 19, 2018. After the Award was rendered, Ingalls sought to enforce it outside the Fifth Circuit, presumably to avoid this Court's review. Ingalls tried to enforce the Award in the District Court for the District of Columbia (the "**DC Court**"), but its petition was dismissed in light of the District Court's continuing jurisdiction. ROA.6071. Ingalls

did not appeal the dismissal. The DC Court summarized its position at an oral hearing:

> I don't sit as a Court of Appeals over other district court judges to determine whether or not they've made a mistake about the law with respect to whether or not they should be in Venezuela or not. ROA.6128

Ingalls then came back to Mississippi and sought recognition and enforcement in the District Court. ROA.6093. The Ministry objected, arguing (i) that the District Court erred in compelling arbitration outside Venezuela, and (ii) that the arbitration tribunal erred in moving the arbitration to Rio de Janeiro. ROA.6309. The District Court rejected both arguments and enforced the award, ROA.6380 ("**Enforcement Decision**"), after which the Ministry filed a timely notice of appeal (the third appeal). ROA.6423. Upon Ingalls' request, the District Court entered a separate final judgment and dismissed any remaining claims from Ingalls' complaint. The Ministry then filed an amended notice of appeal to include the final judgment.[2]

[2] At the time of filing this brief, the Clerk had yet to supplement the record on appeal to include the Amended Notice of Appeal and Final Judgment. In an effort to avoid any delays in this appeal, the Ministry maintained the original deadlines and filed this appeal before the record could be supplemented. For reference, the Final Judgment is Docket Entry 425 on the district court's docket and the Amended Notice of Appeal is Docket Entry 426.

SUMMARY OF ARGUMENT

The 2010 Order, ROA.4231, should be reversed because it compelled arbitration in a place other than the parties' chosen arbitration venue (Caracas, Venezuela). As explained in Section I below, the District Court first erred by exercising authority to amend the venue under Title 9, Chapter 1, even though its jurisdiction was limited to Title 9, Chapter 3. Second, assuming that the Chapter 1 authority was applicable to Chapter 3, the District Court erred again by adopting the wrong Chapter 1 standard. Should the 2010 Order compelling arbitration be reversed, then the district court's enforcement order, ROA.6380, and the Final Judgment must naturally be reversed as well.

Separately, the enforcement decision should be reversed because it enforces an award that was rendered in violation of the terms of the parties' arbitration agreement. As explained in Section II, the seat of arbitration was not Caracas, like the parties had agreed. Nor did the arbitration take place according to the District Court's arbitration order. The arbitration tribunal (the "Tribunal"), once constituted, moved the seat of arbitration to Brazil, once again rejecting the Ministry's efforts to enforce Caracas as the place of arbitration. In light of the Tribunal's errors, the Award was thus entitled to no deference on enforcement. Rather, under Chapter 3, the District Court was required to deny enforcement. Here again, should the enforcement order be reversed, then the Final Judgment must also be reversed.

ARGUMENT

I. The District Court Erred by Compelling Arbitration Outside of Caracas, Venezuela.[3]

A. Standard of Review

In 2010, after the case was remanded, the District Court granted-in-part Ingalls' motion to compel arbitration; the Ministry's cross-motion to compel arbitration in Venezuela was denied. 2010 Order, ROA.4231. A district court's decision on a motion to compel arbitration is reviewed *de novo*. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 337 (5th Cir. 2004). Likewise, decisions related to the enforceability of an arbitration agreement are also reviewed *de novo*. *Id.*; *Dahiya v. Talmidge Intern., Ltd.*, 371 F.3d 207, 219 (5th Cir. 2004) (DeMoss, C.J., dissenting).

[3] The 2010 Order is the only decision subject to review under this Section I. The issues raised herein were raised again before the district court on enforcement, but the court simply referred back to the 2010 Order without addressing the arguments anew. Enforcement Decision, n. 3 ("The Ministry also argues at length regarding the Tribunal's decision to arbitrate outside of the contractually negotiated forum, Venezuela. This Court has already addressed the issue of the impracticability of conducting an arbitration in Caracas, Venezuela, and the parties agreed to move the seat of arbitration of Washington, DC. These issues have already been litigated and resolved. The Court declines to revisit them at this late stage of the proceeding.") ROA.6388.

B. The District Court could only compel arbitration in Caracas, according to the terms of the Agreement.

The District Court had jurisdiction over this dispute under Title 9, Chapter 3 of the Federal Arbitration Act (the "**FAA**"). The District Court made this finding in its first order compelling arbitration. ROA.778. But as explained below, the District Court compelled arbitration using authority from Chapter 1, not Chapter 3, and in doing so, it exercised powers it never had.

Chapter 3 codifies the United States' treaty obligations under the Inter-American Convention. 1438 U.N.T.S. 245 (1976). Under Section 203—incorporated by reference into Chapter 3, *see* 9 U.S.C. § 302—courts have "original jurisdiction" over any actions or proceedings "falling under" the Convention. Chapter 3 offers courts no choice but to enforce arbitration agreements by their terms. Under Section 303(a), the arbitration is to be held "in accordance with the agreement."

This language is obligatory, despite Section 303(a)'s use of the word "may."[4] Similar language from Chapter 2 (codifying the Convention on the Recognition and Enforcement of Arbitral Award, 330 U.N.T.S. 3 (1959) (the "**New York Convention**") has been interpreted to demand strict enforcement of the arbitration

[4] Section 303(a) reads: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States."

agreement. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 341 (5th Cir. 2004) ("The Convention imposes a mandatory obligation upon federal courts to enforce an arbitration agreement falling within its scope[.]"); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil*, 767 F.2d 1140, 1144 (5th Cir. 1985) ("[T]he Convention contemplates a very limited inquiry by the courts when considering a motion to compel arbitration[.]").

The Inter-American Convention (and Chapter 3) are to be interpreted the same way, where the text is similar. During drafting, Congress indicated that the two Conventions are "intended to achieve the same results," meaning both demand strict enforcement of the arbitration agreement. See *Energy Transp., Ltd. v. M.V. San Sebastian,* 348 F.Supp.2d 186, 198 (S.D.N.Y.2004) (quoting H.R.Rep. No. 101–501, at 4 (1990)); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2nd Cir. 1994) ("The legislative history of the Inter-American Convention's implementing statute, however, clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention."); *Dahiya*, 371 F.3d at 223 ("It is clear that both Congress, in enacting the FAA and the Convention, and the Supreme Court, in interpreting their application to arbitration agreements, have expressed a liberal federal policy favoring the enforcement of arbitration provisions.").

Here, the 2010 Order does not proceed exclusively under the Inter-American Convention and Chapter 3, despite its prior pronouncement. ROA.778.[5] The Ministry argued that the District Court's jurisdiction was limited to Chapter 3,[6] but the District Court paid no heed. The 2010 Order never once mentioned the Inter-American Convention or Chapter 3. Instead, the 2010 Order adopted a Chapter 1 standard for setting aside the terms of an arbitration agreement, and in doing so, improperly authorized itself to change the venue.

On the issue of the seat of arbitration, Chapter 1 operates much differently than Chapter 3, and for good reason. Chapter 1 concerns itself with domestic arbitration, where the district courts have a different kind of authority. Section 4 of Chapter 1 enables a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" to petition any district court with jurisdiction under title 28. 9 U.S.C. § 4. In response to this request, Section 4 requires "[t]he hearing and proceedings . . . shall be within the district in which the petition for an order directing such arbitration is filed." *Id*. This is inherently a power that district courts can use

[5] For the avoidance of doubt, this district court's first order compelling arbitration is not subject to this appeal.

[6] *See* April 7, 2010 Hr'g Tr. 17-18 [ROA.6503]; *see also* ROA.3057 ("Today's case is a function of the Panama Convention, with FAA Chapter 3 in only an authorizing and auxiliary role.") (citing *Safety Nat'l Casualty Corp. v. Underwriters at Lloyds*, 587 F.3d 714, 725 (5th Cir. 2009); ROA.3067 ("The Panama Convention contains no pre-arbitration grounds for judicial intervention by a U.S. Court.") (emphasis in original).

without running afoul of any issues related to comity with foreign nations and the interests of international commerce. There is no also risk of violating an international treaty, such as the Inter-American or New York Conventions, and it upholds this Court's finding that the Inter-American Convention contain "no pre-arbitration grounds for judicial intervention by a U.S. Court." R0A.3067.

Chapter 3 does not have the same role for district courts as Chapter 1. Like Chapter 2, Chapter 3 demands that an arbitration take place "in accordance with the agreement." 9 U.S.C. 303(a). There is no fallback position where the arbitration must take place in the district where any petition was filed. Indeed, Chapter 3 takes a conflicting stance. Under Section 303, there are only two options. In Section 303(a), a court "may direct that arbitration be held in accordance with the agreement at any place therein provided for[.]" *Id*. The other option is Section 303(b), where the agreement is silent, and "the court shall direct the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention." *Id*. Article 3 of the Inter-American Convention refers to the "rules of procedure of the Inter-American Commercial Arbitration Commission," and there is nothing in those rules that directs a district court to take any steps. *See generally* Inter-American Commercial Arbitration Commission Rules, 22 CFR Appendix A to Part 194 (2002). In other words, where Chapter 3 applies, district courts can only

compel arbitration in accordance with the terms of the parties' agreement, nothing more.

With this direct conflict between Chapter 1 and Chapter 3, only Chapter 3 can control. The role of Chapter 1 is limited—it only applies to Chapter 3 to the extent the two do not conflict. 9 U.S.C. § 307. The 2010 Order does not engage with the conflict at all, opting instead for Chapter 1 and the greater powers there. This was an error.

On its own, this error should lead to a reversal of the 2010 Order compelling arbitration, along with the other two subsequent decisions. By proceeding under Chapter 1, the District Court asserted a power it did not have. Instead, the District Court could only compel arbitration in Caracas, Venezuela, in accordance with the terms of the Agreement. From that point forward, Ingalls could have made its arguments to an arbitration tribunal. Any other conclusion runs contrary to the statutory structure of the FAA and denies the Ministry a right guaranteed as a citizen of a State that has ratified the Inter-American Convention. The 2010 Order must therefore be reversed with instructions to compel arbitration in Caracas, Venezuela.

C. The District Court Applied the Wrong Test under Chapter 1.

Assuming that the standards from Chapter 1 apply in the Chapter 3 context, the District Court nonetheless applied the wrong Chapter 1 standard. Under Chapter 1, an arbitration agreement, and its chosen venue, "must be enforced, even if

unreasonable." *National Iranian Oil Co. ("**NIOC**") v. Ashland Oil, Inc.*, 817 F.2d 326, 332 (5th Cir. 1987).[7] This is especially true when, like here, the dispute is international. *Id*. (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974).[8] Chapter 1 sets a limited number of circumstances when an arbitration venue may be set aside. *NIOC*, 817 F.2d at 332; *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976). The standard is "stringent" and multi-layered. *Sam Reisfeld*, 530 F.2d at 681. The District Court below did not apply the correct standard.

[7] District courts throughout this Circuit have faithfully upheld *NIOC*. *See U.S. ex rel. On The Water, LLC v. Otak Group, Inc.*, 2010 WL 2044897, at *4 (S.D. Miss. 2010); *Ellefson Plumbing Co. v. Holmes & Narver Constructors, Inc.* 143 F. Supp. 652, 656 (N.D. Miss. 2000); *Antonio Leonard TNT Productions, LLC v. Goossen-Tutor Promotions, LLC*, 2015 WL 269147, at *7 (S.D. Tex. 2015); *Jireh Services Corp. v. Cooley Constructors, Inc.*, 2009 WL 487867, at *5 (W.D. Tex. 2009); *Terrell Independent School Dist. v. Benesight, Inc.*, 2001 WL 1636418, at *5 (N.D. Tex. 2001); *Triton Container Intern., Ltd. v. Baltic Shipping Co.*, 1995 WL 729329, at *3 (E.D. La. 1995) ("equitable concerns" cannot override a bargained-for choice of forum).

[8] The Supreme Court has explained why the test is so stringent. Choosing an international forum is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Choice of arbitration venue helps "obviate the danger" that a dispute might be submitted to a hostile forum. *Id*. Consequently, the parties' choice of venue "is to be respected and enforced." A refusal by the courts to do so is viewed as "parochial." *Id*.

1 The standard for changing the arbitration venue under Chapter 1

The FAA as a whole (Chapters 1-3) aims to enforce arbitration agreements according to their terms. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010). It does not force parties to arbitrate in ways they have not agreed. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). To that end, the chosen arbitration venue will be enforced under Chapter 1 unless it was procured by (i) fraud, (ii) coercion, or (iii) such other grounds exist at law or equity for the revocation of the agreement. *NIOC*, 817 F.2d at 332; *Sam Reisfeld*, 530 F.2d at 681 (both citing 9 U.S.C. § 2). The party resisting venue bears the burden to establish one of these defenses. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000). If none are established, then the venue "must be enforced," or the arbitration cannot proceed. *NIOC*, 817 F.2d at 332.

Neither fraud nor duress are at issue here, leaving only the third defense, which comes directly from Section 2 of Chapter 1. This defense has (at times) encompassed doctrines such as "impossibility" or "commercial impracticability," *NIOC*, 817 F.2d at 332, but lesser excuses like unreasonableness or inconvenience have never met the "stringent" standard. *NIOC*, 817 F.2d at 332 ("[NIOC's] assertion of inconvenience or impossibility [to arbitrate in Iran] fails as a 'legal ground' for vitiating the freely chosen forum selection clause."); *Sam Reisfeld*, 530

F.2d at 681 (rejecting the resisting party's defense of inconvenience and expense to arbitrate in Belgium).[9] The Fifth Circuit has expressly rejected unreasonableness in this regard, deferring instead to the chosen arbitration venue in the arbitration agreement. *Sam Reisfeld*, 530 F.2d at 681; *see also NIOC*, 817 F.2d at 332 (holding the *M/S Bremen* (unreasonableness) standard "inapposite" to arbitration clauses); First Decision, ROA.2499.[10]

The Court's deference in this regard has strengthened over time. Courts around the country, and in this Circuit, are now enforcing the parties' chosen venue even if that venue no longer exists or is no longer available (the impossibility defense). *Ranzy v. Extra Cash of Texas, Inc.*, 2010 WL 936471, at *4 (S.D. Tex. 2010) *aff'd by Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir. 2010); *see also In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554 (2nd Cir. 1995) (affirming lower court's refusal to choose substitute arbitration forum after the chosen forum

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[9] *See also Mays v. National Bank of Commerce*, 1998 WL 930627, at *2 (N.D. Miss. 1998); *Barber v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 2002 WL 87349, at *5 (N.D. Tex. 2002); *Fletcher Mach. Co., Inc. v. Trent Capital Management, Inc.*, 2010 WL 520871, at *2 (M.D.N.C. 2010); *Al-Salamah Arabian Agencies Co., Ltd. v. Reece*, 673 F. Supp. 748, 751 (M.D.N.C. 1987) (discussing *Sam Reisfeld*).

[10] In *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972), the Supreme Court dealt with a choice of litigation forum. The Court held that a choice of litigation forum in an international agreement (i.e. the courts of the United Kingdom) should be enforced unless found to be unreasonable. The Fifth Circuit has since held that the *Bremen* standard does not apply to a choice of arbitration forum. *Sam Reisfeld*, 530 F.2d at 681; *NICO*, 817 F.2d at 332.

became unavailable). Courts faced with the issue do not select a new venue for the parties, or direct them to agree on a new venue, like the District Court did in this case. They simply declare that arbitration is not available. *Ranzy*, 393 Fed. Appx. at 176.

Should the Chapter 1 standard be met, and either fraud, duress or some other ground for revocation be shown, the analysis is not complete. Other conditions must still be met before an arbitration venue can be set aside. The chosen venue must be "severable from the rest of the arbitration agreement," and once again the burden rests on the resisting party. *NIOC*, 817 F.2d at 333. Severability turns on the parties' intent, "as determined from the language of the contract and surrounding circumstances." *NIOC*, 817 F.2d at 333. Even when the venue is impossible, courts will not sever venues that form an "integral part of the arbitration agreement." *Ranzy v. Tijerina*, 393 Fed. Appx. at 176. A classic example of this is when the contract's governing law matches the venue, *e.g.* arbitration in Iran under Iranian law. *NIOC*, 817 F.2d at 334.

2 The 2010 Order fails to meet the Chapter 1/*NIOC* standard

The District Court did not apply the correct standard. It erred in two ways. First, it used an unreasonableness standard—the *Bremen* standard—to set aside an arbitration venue (Caracas) when it should have used the "heightened standard" under Chapter 1 (assuming of course that Chapter 1 applies to Chapter 3). First

Decision, ROA.2499; *NIOC*, 817 F.2d at 332. Second, the Court failed to address whether the chosen venue could be severed from the rest of the arbitration agreement. The analysis is simply missing from the 2010 Order.

Each error, standing alone, should lead this Court to reverse the 2010 Order. Any purported agreement to arbitrate in Washington DC is nonetheless futile since, as explained below, the parties agree no such stipulation existed and the District Court was required to compel arbitration in Caracas, Venezuela.

i. The District Court did not apply the Chapter 1 standard.

The District Court adopted a standard that is inapposite to arbitration agreements: the unreasonableness standard under *Bremen*. Order, p. 7 ("A forum selection provision in a written contract is *prima facie* valid and enforceable unless the opposing party shows that enforcement would be unreasonable.") (emphasis added).[11] No explanation was given as to why *Bremen* applied over the Chapter 1 standard in this case. The court seems to have mistakenly believed that *Bremen*

[11] The cases cited by the District Court in this regard all adopt the *Bremen* standard for questions related to the litigation forum. *See Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 n. 4 (5th Cir. 1995); *Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991).

applied to arbitration agreements even though *NIOC* and the First Decision from this Court expressly rejected *Bremen* for purposes of an arbitration venue. *Id*.[12]

This issue was not one of mere syntax. The District Court did not use the wrong words to apply the right standard. The District Court made classic *Bremen*-style statements, such as: "enforcing the Caracas forum selection clause will for all practical purposes deprive Northrop Grumman of its day in court." 2010 Order, ROA.4237; *Bremen* 407 U.S. at 18 (requiring a showing that the party will be "deprived of his day in court"). It further found that "enforcing the forum selection clause would be unreasonable." 2010 Order, ROA.4238 (emphasis added).[13] Moreover, the District Court never used the words "impossibility" or "commercial impracticability." *See NIOC*, 817 F.2d at 332. The lack of these phrases confirms that the wrong standard was used.

ii. The facts do not satisfy the heightened standard under NIOC

Were this Court to apply the correct, heightened standard *ex post facto*, the 2010 Order would still fail because there is no sufficient basis under Chapter 1, either

[12] The Order appears to have misquoted *NICO* because the quoted language does not appear in the *NICO* decision. ROA.4237 ("Enforcement of forum selection clauses is improper if the party resisting the clause can 'clearly show that enforcement would be unreasonable and unjust.' *National Iranian Oil*, 817 at 335.").

[13] The Order also cites to cases that all adopt *Breman*. *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 239 (5th Cir. 2009); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995).

in the 2010 Order or the record, to set aside the parties' chosen venue. The 2010 Order says nothing about whether the facts as described therein rise to the level of impossibility or commercial impracticability. It makes no comparison with the similar circumstances in *NIOC* whatsoever. The court made its factual finding in one sentence: "[C]ircumstances and diplomatic relations between the United States and Venezuela have changed considerably since the contract was formulated." 2010 Order, ROA.4237. That single finding, without more, does not satisfy Chapter 1.

Should this Court go beyond the Order and review the full record *de novo*, it would still not find sufficient circumstances to set aside the venue. Ingalls rested its case below on a theory of unlawfulness, namely that U.S. export restrictions would prevent Ingalls from presenting evidence in the arbitration. But that is nothing more than an argument for unreasonableness with a regulatory twist. The arbitration itself would have not been unlawful; nor would the Venezuelan venue be unlawful either.

The argument is also baseless. The place of arbitration, or its venue, does not require that hearings be physically held at the venue. *See* International Chamber of Commerce, *Arbitration Rules*, Article 18 (2017); ERIC BERGSTEN, INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE, AND EVOLUTION, p. 137 (2011). Ingalls could have requested the arbitral tribunal to hold hearings in Rio de Janeiro or the United States while maintaining the seat of

arbitration in Caracas. This would have satisfied the regulatory concern without forcing an amendment of the Agreement.

Further, assuming Ingalls's "unlawfulness" argument rises to the level of impossibility, trends in the case law suggest that the impossibility or failure of the arbitration venue is not sufficient grounds to set it aside. *Ranzy v. Extra Cash of Texas, Inc.*, 2010 WL 936471, at *4 (S.D. Tex. 2010) *aff'd by Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir. 2010); *see also In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554 (2nd Cir. 1995) (affirming lower court's refusal to choose substitute arbitration forum after the chosen forum became unavailable). Applying this line of cases—assuming, once again, that Ingalls made a claim for impossibility below—the District Court was still required to enforce the parties' chosen venue.

It is also worth analyzing the forceful factual scenario in *NIOC*, which rises far beyond anything Ingalls could have shown prior to the 2010 Order. In *NIOC*, this Court ordered arbitration in Iran, even though the underlying contract was signed in April 1979, when "the revolutionary government was in place — the same government that took power largely by 'mobilizing millions of Iranians against an America equated with satan.'" *NIOC*, 817 F.2d at 333. Americans had been taken hostage, and the two countries were engaged in an open conflict. Ingalls took a much lower risk.

In 1992, Hugo Chavez launched an unsuccessful *coup d'état*, and his followers attempted a second *coup d'état* later that year. Shortly thereafter, Ingalls began negotiating the Agreement. Venezuela is a country that has had a history of political turmoil, and from 1994 to 1998, Hugo Chavez publicly plotted his path to power. If Ingalls had any concerns about Caracas as the seat of arbitration, it never insisted on changing the venue of the arbitration. After 1997, with the Contract in hand, Ingalls and the Ministry engaged in a vibrant back-and-forth over the Contract and its execution. Scores of change orders were requested, and not once did Ingalls ever insist on changing the applicable law or the seat of arbitration. During this time and until Ingalls sued the Ministry, countless American companies continued to do business in Venezuela. Unlike Iran, Venezuelan forces were not attacking the US Embassy in Caracas, holding hostages, or mobilizing millions by equating America with Satan. If arbitration in Iran was proper during the Islamic Revolution, Ingalls certainly must live with its selection of arbitration in Venezuela.

In short, the 2010 Order did not adopt the Fifth Circuit's higher standard for setting aside an arbitration venue. And even if it did, the Order's factual findings are woefully inadequate to establish grounds to revoke the arbitration agreement.

iii. The District Court failed to assess whether the venue clause was severable

Even if this Court were to find that the heightened standard was properly adopted, and applied, the 2010 Order still falls short (once again) because it lacks

any discussion on whether the venue is severable. This is a key part of the Chapter 1 standard that is still applied today. *See LeJeune v. Cobra Acquisitions LLC*, 2020 WL 250560, at 3* (W.D. Tex. Jan. 16, 2020); *Inetianbor v. CashCall, Inc*., 768 F.3d 1346, 1350 (11th Cir. 2014); *Great Earth Companies, Inc. v. Simons*, 288 F.3d 878, 890 (6th Cir. 2002). As stated above, severability turns on the parties' intent, "as determined from the language of the contract and surrounding circumstances." *NIOC*, 817 F.2d at 333. When the governing law of the contract matches the arbitration venue, that venue is said to form an "important" or non-severable part of the arbitration agreement. *Ranzy*, 393 Fed. Appx. at 176; *NIOC*, 817 F.2d at 334.

Here again, the District Court ignored the issue. The Ministry had raised the severability issue in its papers, ROA.3090, and at the hearing. Hr'g Tr. 24:2-7, ROA.6510. But the 2010 Order makes no mention of whether the Venezuelan venue was severable from the rest of the contract.

The court's error in this regard cannot be remedied now since Ingalls failed to address the issue entirely both in its papers and at the hearing. It was Ingalls' burden to establish that the venue clause was severable from the rest of the agreement, *NIOC*, 817 F.2d at 333, and Ingalls in essence waived that defense by not raising it below. That waiver prevents Ingalls from raising the issue now.

Should this Court be inclined nonetheless to address whether the venue is severable, the only possible conclusion is that it is not. The severability question

"turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances." *NIOC*, 817 F.2d at 333. The governing law of the contract, Venezuelan law, matches the arbitration venue, Caracas, meaning that the parties intended Caracas to be an "integral" part of the arbitration agreement. That venue cannot be severed, and the 2010 Order compelling arbitration elsewhere must be vacated.

II. The District Court Erred by Recognizing the Award

A. Standard of Review

On March 31, 2020, the District Court granted Ingalls' Motion for Recognition of the Award. *See* ROA. 6380. The District Court's decision is reviewed *de novo*. *See PoolRe Ins. Corp. v. Organizational Strategies, Inc.,* 783 F.3d 256, 262 (5th Cir. 2015) citing to *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.,* 713 F.3d 797, 802 (5th Cir.2013) ("Our review of the district court's confirmation or vacatur of an arbitrator's award is *de novo*.") (internal quotations omitted); *Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322 (5th Cir. 2019) ("We review a district court's order confirming an arbitration award *de novo*.").

B. The District Court applied an overly deferential standard

The "principal purpose" of the FAA is to "ensure that "private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 469 (1989). *See also Dean*

Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220, 105 S. Ct. 1238, 1242 (1985) (the "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."). Hence, awards rendered in disregard of the parties' agreement must be given no effect. *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 263 (5th Cir. 2015) quoting *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 673 (5th Cir.2002). And "arbitral action contrary to express contractual provisions will not be respected." *Delta Queen Steamboat Co. v. Dist. 2 Marine Engineers Beneficial Ass'n, AFL-CIO*, 889 F.2d 599, 604 (5th Cir. 1989). Although awards are generally given a deferential review, "where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end." *See PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 262 (5th Cir. 2015) citing to *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n, Associated Mar. Officers, AFL–CIO,* 889 F.2d 599, 602 (5th Cir.1989) (internal quotations omitted)(emphasis added). Courts only give deference on questions that were "committed to arbitration" or "bargained for arbitral resolution." *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 33 (2014).

Undermining this limitation, the District Court applied "considerable deference" to the Award. *See* ROA. 6391. This approach missed the mark. The Agreement required arbitration in Caracas, and the Tribunal exceeded the

contractual limitations by changing the seat of arbitration. The parties did not give the seat of arbitration to the Tribunal to resolve. Indeed, they did the opposite. By stipulating to arbitration in Caracas, Venezuela, the parties removed this question from the Tribunal. In other words, once the Ministry presented a direct challenge to the Tribunal's respect for the Agreement, the District Court owed no deference to the Award or the Tribunal.

C. The District Court erred when it recognized an award rendered outside the terms of the parties' arbitration agreement

The District Court's task was to analyze if the Ministry had shown that the Tribunal did not carry out the arbitration procedure in accordance with the terms of the parties' agreement. 1438 U.N.T.S. 245, Art. 5(1)(d) (enforcement refused if "the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties"); *see also* New York Convention, 330 U.N.T.S. 38, Art. 5(1)(d). By finding that the Tribunal had the authority to change the seat of the arbitration, despite the text of the Agreement, the District Court impermissibly allowed the Tribunal to change mandatory terms in a contract, creating an unsettling result.

1. The mandatory language in the Agreement did not permit the Tribunal's decision

The Agreement used clear, mandatory language to establish the seat of arbitration. In Section 42, the Agreement stipulated that "[s]hould the parties fail to

resolve the matter within thirty (30) calendar days of the emergence of the dispute, then at the request of either party, the matter shall be submitted for arbitration according to this Clause." ROA. 5949-5950. The Agreement thus began with mandatory language, continuing that theme throughout. The Agreement stated that "[s]hould the matter still not be resolved through arbitration, both parties shall be entitled to resort to the competent Courts of the Republic of Venezuela." *Id*. When it came to the referral to arbitration, this mandatory language continued:

> **First Paragraph**: Any disputes, lawsuits, controversies and/or differences that arise from this Contract or related to its interpretation, fulfillment, completion or invalidation, shall be subjected to the rules provided herein and secondarily to the rules of the Civil Procedure Code of Venezuela. Arbitration actions shall take place in Caracas, Venezuela, in Spanish-English.

To remove any doubt, the Agreement required again that "[a]ny arbitration under this Contract shall take place in Caracas, Venezuela." *Id*. None of this language demonstrated an intent to place the question of the seat of arbitration into the discretion of the Tribunal. Rather, the parties excluded this question from the Tribunal, repeatedly reaffirming this requirement.

The parties also wanted to remove the possibility for informal amendments to the Contract. According to Section 45 of the Contract, parties can amend the Contract only if: i) it is "made through written documents," ii) "signed by the contracting parties," and ii) such amendment is approved by "the General

Controller's Office of the National Armed Forces." ROA. 5953. Through the mandatory language and rigid amendment procedures, the Agreement made the dispute resolution clauses off limits to the Tribunal.

2. The District Court did not identify any contractual amendment

Despite the Agreement's formal requirements, the District Court did not identify anywhere in the Award where the Tribunal found that the parties had agreed to put the question of the seat of arbitration before the Tribunal. Without a contractual amendment, the only option could be some sort of extra-contractual amendment derogating from Section 42 of the Agreement. But this does not come from the Award either. Instead, the Award used terms such as the Ministry's "initiative." This is far from sufficient.

For years, the Ministry has fought for its contractually guaranteed right to arbitration with Caracas as the seat of arbitration. The Ministry requested the District Court to compel arbitration in Venezuela in accordance with the Contract. *See* ROA. 4234 ("The Republic asserts that the agreement to arbitrate in Caracas should be enforced."); ROA.2509. Despite compelling grounds, the District Court rejected the Ministry's request. And it ordered the parties to "find a mutually agreeable alternation forum" outside Venezuela and notify the Court within 15 days. ROA.4238. The District Court had no discretion to force the Ministry to reach a separate agreement. The District Court even cautioned the parties that if they are

unable to agree on the place of arbitration, it will take on the task of selecting the place of arbitration.

The Ministry firmly opposed this pressure. Soon after, the Ministry appealed the District Court's decision. At the same time, it did not want to flagrantly disobey the District Court's direction, and it agreed under protest to arbitrate its dispute in Washington D.C. *See* ROA.35 [*Minute Entry* dated March 30, 2011].

From this, the Tribunal claimed that parties selected Washington DC upon the Ministry's "initiative." The Award does not cite to any authority that support this assertion. Nor could it. There is no transcript of the minute entry recording the selection of Washington. And even if there was, it would have only indicated that the Ministry agreed to Washington under protest and with the understanding that, had it not agreed, the District Court would have chosen the place of arbitration.

Ingalls's later conduct further supports the absence of any extra-contractual or informal agreement to give the Tribunal blanket discretion to change the seat of arbitration. In the arbitration, Ingalls did not insist on Washington DC but instead sat silently as the Tribunal moved the seat of arbitration to Rio de Janeiro—a modification that none of the parties consented to. And when Ingalls appeared in the DC Court, it affirmatively waived any argument that the parties' agreed to Washington DC.

In its application before the DC Court, Ingalls sought relief under alternative grounds, either to confirm the Award or have the Award recognized. These two claims are independent of each other. Confirmation is exclusively when a party seeks enforcement at the seat of arbitration. Recognition is only for an award rendered in a jurisdiction whose seat of arbitration is outside of the United States. After the Ministry moved to dismiss, Ingalls dropped its claim for confirmation, thereby agreeing that Washington DC was not the seat of arbitration, and it continued this position before the District Court, seeking recognition instead of confirmation.

The effect of this argument does not presume two modifications of the Agreement, as the District Court appeared to conclude. Instead, this argument shows the Tribunal's failure to follow neither the Agreement nor the alleged modification. Even if the District Court concluded that there was a modification of the seat of arbitration in favor of Washington DC, this would only require the Tribunal to follow this alleged agreement, not arbitrarily change the seat of arbitration again.

There was no point at which the parties' presented the question of the proper seat of arbitration that would permit the Tribunal to impose Rio de Janeiro. No party advocated for this location, and neither party gave the Tribunal discretion to select whatever city in the Western Hemisphere it wanted. At worst, the Ministry was willing to arbitrate in Washington DC—at no point was the question merely open or Rio de Janeiro offered as an alternative. The Tribunal thus failed to carry out the

arbitration procedure in accordance with the parties' agreement, and the recognition of the Award should be reversed.

3 Enforcement of the Award will have a destabilizing effect on the certainty of the enforcement of contracts

The Tribunal's analysis to unjustifiably move the seat of arbitration is particularly concerning. The Tribunal provided two reasons for its conclusion, at paras. 95-96 of its Order: the parties had failed to agree on the place of arbitration (*see* ROA.6000), and Article 9 of the Venezuelan Commercial Arbitration Law allows a Tribunal to select the place of arbitration when there is no agreement between the parties. *See* ROA.6000. Neither position is tenable.

Arbitration tribunals should not be at liberty to merely state there is an absence of agreement as a pretense to changing a contractual term, especially one that has mandatory language. This same reasoning would allow arbitration tribunals to arbitrarily change the price or quantity of goods sold, despite a contrary stipulation. If one party presents a disagreement, an arbitration tribunal could essentially re-work any clause in a contract—no contractual provision would be safe. This is precisely the problem that this Court and many others have cautioned against by requiring that an arbitration tribunal adhere to the procedure agreed by the parties.

The applicable law also did not allow this result. Article 9 of the Venezuelan Commercial Arbitration Act creates two options for determining the place of arbitration: the parties can agree, or if there is no agreement, the arbitration tribunal

can make the determination. ROA.6302. The natural consequence is that Article 9 can only grant an arbitration tribunal discretion to decide the issue where there is no agreement. Otherwise, the parties are back in the same, unsatisfying place—if one party alleges, for any reason, the absence of an agreement, then an arbitration tribunal can re-write the parties' agreement. This is the absence of the rule of law, and there should be no enforcement of an arbitration award where an arbitration tribunal asserts such powers.

4 The enforcement of the Award does not further the policy in favor of arbitration

While there is a favorable policy towards arbitration, such policy cannot be invoked to "stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement." *Smith v. Transp. Workers Union of Am., AFL-CIO Air Transp. Local 556*, 374 F.3d 372, 375 (5th Cir. 2004) c*iting to Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App. 1993), *writ denied* (June 22, 1994). *See also Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 559 U.S. 662, 684 (2010) ("It falls to courts and arbitrators to give effect to the parties' contractual limitations on arbitration, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.").

This case presents precisely the kind of decision that endangers the federal policy in favor of arbitration. The terms of the parties' contract should be respected,

not dismissed with a conclusory finding that it is "reasonable" to assume that the parties have submitted the question to the Tribunal. And no other factors should interfere in the decision.

CONCLUSION

For the reasons above, the Court should reverse or vacate (i) the district court's 2010 Order compelling arbitration, ROA.4231; (ii) the Enforcement Order, ROA.6380, and (iii) the Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing brief has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on June 29, 2020, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(A)(7)(B) because it contains 9,215 words not including the parts of the brief exempted by FED. R. APP. P. 32(f).

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