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Supreme Court of Texas.
Nafta Traders, Inc., Petitioner,
v.
Margaret A. Quinn, Respondent.
No. 08-0613.

October 8, 2009.

Appearances:
Alan L. Busch, Busch & Myers, LLP, Dallas, TX, for petitioner.
Janette Johnson, Janette Johnson & Associates, Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnsonand Don R. Willett, Justices (Chief Justice Wallace B. Jefferson participating in deliberations despite absence during argument).

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JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in 08-0613, NAFTA Traders against Quinn.
MARSHALL: May it please the Court, Mr. Busch will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF ALAN L. BUSCH ON BEHALF OF THE PETITIONER

ATTORNEY ALAN L. BUSCH: May it please the Court and good morning. The Court of Appeals erred when it refused to enforce a critical provision of the parties' agreement to arbitrate, thereby undermining the parties' right to choose in contract how they wanted their dispute resolved. The arbitrator in this case ran wild, exceeded the authority that was given to him by the parties. He did so by taking an employment discrimination case, which falls in a very specific paradigm, a disparate treatment, a reduction in force case and treated it more like a sexual harassment case, got the totally wrong result, and then fashioned a remedy that does not exist either in law or in equity.
JUSTICE HARRIET O'NEILL: Which is exactly what happened in Hall.
ATTORNEY ALAN L. BUSCH: Absolutely, and obviously it's our position that, first of all, that Hall does not apply to the Texas Arbitration Act, obviously begging the question of which Act applies.
JUSTICE HARRIET O'NEILL: Well, let's agree it doesn't, but why

shouldn't we follow the same law, so that we don't have two separate bodies of law on the issue? What's different about the TAA that should mandate that we go a different direction?

ATTORNEY ALAN L. BUSCH: Well, Your Honor, consistency is an important value. I submit it's secondary to the value of honoring the parties' agreement because that underlines the whole public policy of arbitration, and why I think that the Hall rule, if carried too far, and the rule that the Respondent is asking you to do, will deeply damage arbitration in this state. If the NAFTA's Traders, the petitioners of this world, if the citizens of the State of Texas find that the Courts are not enforcing their agreements to arbitrate, the way they structured them, and only gives them part of what they thought they were getting and find that they are in a forum that can be more arbitrary than perhaps what they feared when they were in Court, the smart people who draft these arbitration clauses are going to quit drafting them. You will see jury waiver clauses In Re Prudential, you will find that you will be in court with contractual limitations on what the Court ought to do.

JUSTICE HARRIET O'NEILL: And what's wrong with that?

ATTORNEY ALAN L. BUSCH: Well, I think it's always been the express public policy of the State to encourage arbitration, and I think that if you don't give the parties what they ask for, you won't get it.

JUSTICE HARRIET O'NEILL: Well, it's not really been to encourage arbitration, it's been to put it on the same level as other contracts. And if parties then decide to go with jury waivers, then that's enforcing contracts as well. So I'm just trying to understand if I'm a litigant and I'm trying to decide whether it's the TAA or the FAA, why should it be different and have me buffeted between these two different systems, depending upon which one applies? I mean we may disagree with Hall, let's -- I mean I understand you do and let's say we do --

ATTORNEY ALAN L. BUSCH: All right.

JUSTICE HARRIET O'NEILL: -- but even if we disagree with Hall, why shouldn't we at least have a uniform policy?

ATTORNEY ALAN L. BUSCH: Well, first, let me say again that in our point of view, if the United States Supreme Court were hearing this case, it would also rule for Petitioner because our distinction in our arbitration clause and the clause in the Hall Street case is very importantly different on its unambiguous face. Having said that, let me get back to your question then about what are the differences between the Federal Arbitration Act and the Texas Arbitration Act. And obviously they're very similar. There are some differences. For example, one says "shall" and the other says "may" in terms of enforcement. One that I noticed more recently, for example, the Texas Arbitration Act is broader on whether an award should be vacated. The Federal Arbitration Act, for example, only cites two types of "misconduct" is the word, failure to hear evidence or postpone a hearing. The Texas Arbitration Act, in 1(2)(c) says, "Misconduct or willful behavior," and then subsequent Subsections 3(b) and (c) say, cite refusing to postpone or hear relevant evidence, implying therefore that misconduct in the Texas Arbitration Act must mean something broader beyond those two criteria. That's the best two I can come up with. Other than that, I think anyone who says that they're not very similar is going to have a difficult problem maintaining that, but there are differences and --

JUSTICE NATHAN L. HECHT: What is the advantage, if you know, from your client's point of view or from a business point of view, from a party's point of view, of having a provision that sends a dispute to

arbitration, but then leaves open basically full Appellate review? Why not just go to trial in the first place?

ATTORNEY ALAN L. BUSCH: Well, there are a lot of advantages, real and perceived, about arbitration, in terms of expense, in terms of how fast the process works, in terms of confidentiality and how less public it is, in terms of -- in certain types of arbitrations, in terms of expertise, and I'm thinking from my own experience, like there's a certain type of securities arbitration of customer complaints against their brokers, and there's a whole regime of expert panels dealing with securities and stock trading. So there are different reasons that the parties want to go to arbitration that are very practical. And let's be real, one of the really biggest ones is there's a fear of, if I may use the term, "arbitrariness" on the part of juries, and a lot of it's a fight from juries, and yet sometimes unfortunately the --

JUSTICE PAUL W. GREEN: But how about a jury waiver?

ATTORNEY ALAN L. BUSCH: Well, and that would be solution to that particular issue, but in response to the question of the various reasons why it makes sense for parties to agree to go to arbitration, that's one of several good reasons.

JUSTICE NATHAN L. HECHT: But it seems to me that much of those, or many of those are lost or at least compromised if you then go back into the legal system and go through the Appellate process.

ATTORNEY ALAN L. BUSCH: That's all outweighed by the benefit, I would think, for the parties of knowing that the arbitrator isn't totally free to be completely arbitrary. I mean let's face it --

JUSTICE DALE WAINWRIGHT: Completely arbitrary?

ATTORNEY ALAN L. BUSCH: I'm sorry?

JUSTICE DALE WAINWRIGHT: What was that you said?

ATTORNEY ALAN L. BUSCH: For the arbitrator to be totally arbitrary. If there's no check at all on what the arbitrator does, as there is for example with juries, then both parties, unless they agree to limit his powers which they have the right to do, but if they don't limit their powers, they're basically asking the arbitrator to do virtually anything the arbitrator wants. And if the parties agree to that, then they should get that. But in this case the parties didn't agree to that, they asked for something very different.

JUSTICE NATHAN L. HECHT: Do you know if there has been reaction to the Hall case contractually by waiving jury provisions, waiving juries and selecting particular forums, things like that?

ATTORNEY ALAN L. BUSCH: I can only tell you my practice, what I tell my clients, and that is that, frankly, particularly in light of the Hall case and even before the Hall case, you might seriously consider waiving a jury and staying within the Court system than going to the Arbitration system. Getting back to your previous question, a lot of the reasons the parties go to arbitration sometimes are perceived and not real. Arbitration, unfortunately, in many cases has become a process as expensive, as time consuming as litigation. You go to the triple A complex litigation rules, you're taking depositions, you're doing all the same stuff and you've got a decision-maker, assuming there's only one, who's charging about $400 an hour, and a clerk, if it's a big enough case, charging about $2,000, whereas we've got really good judges with clerks, and you get in there for 200 bucks. So, you know, again what the parties are or aren't doing is a, hopefully is a calculated decision based on the realities of arbitration and the realities of litigation. And if the system is to work and if arbitration is going to have a proper part in it, the parties have to have the freedom to craft the kind of arbitration that

they want, and you shouldn't --

JUSTICE HARRIET O'NEILL: Again --

ATTORNEY ALAN L. BUSCH: Yes, I'm sorry.

JUSTICE HARRIET O'NEILL: Again, I hear you, but my -- what I'm struggling with is it just sounds like a fundamental disagreement with Hall, and where is the textual hook within the TAA that would allow a departure from that sort of analysis?

ATTORNEY ALAN L. BUSCH: Well, I've answered the question as best I can on that, in terms of textual differences --

JUSTICE HARRIET O'NEILL: And that would be, 171088? Is that the Exceed Their Powers Provision?

ATTORNEY ALAN L. BUSCH: Well, no, actually, because both the Federal Arbitration Act and the Texas Arbitration Act contemplate limitations on the arbitrator's power, and Hall only decided that you cannot expand judicial review under the Federal Arbitration Act. It did not decide that the parties cannot limit the powers of the arbitrator, which is what happened in this case, which is why we feel that the result we are asking for in this case would be entirely consistent with the Hall opinion, and this Court need not necessarily disagree with it.

JUSTICE NATHAN L. HECHT: Do you think that the parties could agree that neither would try to confirm an award that if it had been the judgment in a case would not be affirmed on appeal?

ATTORNEY ALAN L. BUSCH: I'm sorry, ask the question again.

JUSTICE NATHAN L. HECHT: Could the parties agree that neither would try to confirm an award that had it been a judgment in a case would not have been affirmed on appeal, thus sort of importing all of the procedural and substantive law safeguards? But instead of the way you've done it here, trying to import some review. The way that you've done it, the parties would just agree to limit confirmation that way.

ATTORNEY ALAN L. BUSCH: I hadn't thought about it that way. I guess our position is the same thing that the Supreme Court said, which is is that you look at the text of Act that you're interpreting, you look at the text of the parties' agreement, and you see if the Act forbids it or not. There is nothing in either the Federal Arbitration Act or certainly not in the Texas Arbitration Act which says that the parties are forbidden from limiting the powers of the arbitrator. And there are cases out there, not that go to this extent, but there are certainly cases out there where you can limit what kind of evidence the arbitrator hears, you can limit what kind of remedy the arbitrator can render, in fact, that's specifically in the Texas Arbitration Act. And so there's certainly nothing from interpreting the Texas Arbitration Act and interpreting the agreement of the parties in this case that prevents the parties from doing so. And by extension, I think if the language are crafted the way you just suggested, Justice Hecht, I think that would also withstand scrutiny.

JUSTICE PHIL JOHNSON: It would also what?

ATTORNEY ALAN L. BUSCH: Withstand scrutiny, it would also be permissible under the Texas Arbitration Act.

JUSTICE PHIL JOHNSON: But that would be, as I understood Justice Hecht's question, your modification would be of the Court's ability to act. In other words, you would kind of be going against the statute if you precluded confirmation, whereas the statute says, "It shall confirm if..." You know, it's more or less that way. Whereas as I understand your provision in this case, you're not confronting the statute, but you're just saying that the arbitrators exceeded their powers which is one of the grounds in which the award could be vacated?

ATTORNEY ALAN L. BUSCH: You've helped me understand Justice

Hecht's question better.

JUSTICE PHIL JOHNSON: Well, I don't know if I understood it.

JUSTICE NATHAN L. HECHT: Let me clarify the question.

JUSTICE PHIL JOHNSON: And I frequently question Justice Hecht to try to understand his questions.

JUSTICE NATHAN L. HECHT: Oh. No, I was asking whether the parties could restrict themselves, that neither would apply for confirmation unless the judgment were such, unless the award were such that had it been the judgment in the case, it would be affirmed on appeal, and therefore if somebody did try, moved for confirmation, and you took the position that that wasn't the case, you'd sue them for breach of contract and then you would get your review.

ATTORNEY ALAN L. BUSCH: I think understand you better, and I think my answer is the same.

JUSTICE NATHAN L. HECHT: You think it is, okay.

ATTORNEY ALAN L. BUSCH: I'd like to briefly discuss an issue that came up very late in this case, and that is whether we're here under discussing the Texas Arbitration Act or the Federal Arbitration Act. It came up for the first time in this Court, and no doubt because while this case was pending on appeal, and to be more specific, after submission but before the opinion of the Dallas Court of Appeals was reached, the Hall Street opinion came down. It's our position quite obviously that it's too late to make an argument that the Federal Arbitration Act applies and preempts. I'm not sure either party has done a really good job of helping the Court deal with that distinction, I think we lumped them together. The Federal Arbitration Act does not apply in this case. The reason it doesn't apply at all much less preempt is, first of all, of course the defendants are judicially estopped from asserting it now. They didn't just make a legal conclusion to that effect, they specifically represented to the Court of Appeals, the courts below, that the contract that was being arbitrated did not affect commerce, that the transaction did not affect commerce. That's a factual assertion, that's the predicate on which the legal conclusion is reached. And whether a contract affects commerce or not can be a fact-specific inquiry. And so at this late date to go depriving the trial court and lower courts of making that determination because of that factual concession ought not allow the Respondents and the Texas Supreme Court to change the law.

JUSTICE HARRIET O'NEILL: Let me just ask you real quick. Have any other states gone your way under their own arbitration statutes? Have any of them departed from Hall?

ATTORNEY ALAN L. BUSCH: Yes, both sides. In the form of an exhibit so I could get it in front of you right now is just a dead-on-point California Supreme Court case that came out, and I'll discuss it later if I have time. And last night I received -- I'm not complaining -- a supplemental brief in response from the Respondent, citing case law which, according to the email from my office is distinguishable. But basically the California Supreme Court case just came square down on every issue. I wish I'd seen it sooner because it would have written my brief for me. And as I understand, the Respondent's position, there's contrary post-Hall authority following Hall in Georgia and Tennessee, but in that case those clauses expressly expanded the scope of review instead of what the Petitioner did in this case, which is deal with the issue of whether or not the arbitrator exceeded his powers. I'll also point out to you that the California Supreme Court case that's before you as Exhibit A, is also a case where they dealt with both issues, it both expressly disagreed with Hall and came down on the side of the

"exceeding powers" language. It did both and it did it under the California Arbitration Act, specifically as in this case, noting that the person trying to defend the award had always presented it as the California Arbitration Act applying, until the Hall Street case came out. And then it did something really fascinating that I didn't think of, it pointed out that it also took the position that when the party elected to confirm the award in California state courts, it was in effect choosing California law and Federal law did not preempt. Not much left of my time.

JUSTICE NATHAN L. HECHT: Any further questions? All right, thank you, Counsel. The Court is ready to hear argument from Respondent.

MARSHALL: May it please the Court, Ms. Johnson will present argument for the Respondent.

ORAL ARGUMENT OF JANETTE JOHNSON ON BEHALF OF THE RESPONDENT

ATTORNEY JANETTE JOHNSON: Good morning.

JUSTICE: Good morning.

ATTORNEY JANETTE JOHNSON: As a plaintiff's employment lawyer, I'm learning arbitration as we go. As we can clearly indicate that when we started this case, Ms. Quinn, who is in the Court, came to my office six years ago come January, and Ms. Neill, my co-counsel and I have represented her since that time, and I'm learning as we go, but I'm trying to catch up as fast as I can. And having Mr. Busch clearly articulate to the Court where the plaintiff's attorney in the lower brief indicated that the contract was not in commerce, presented me with a very interesting issue. If I'm wrong do I just hide it and move on and just acknowledge it, or do I just try to grasp out of this law and present the Court with what I think the correct position is. And that's what we've done, because frankly as a lawyer I can't supplant or surpass the Commerce Clause, I can't do it. And so while I made a stab at it and I was wrong, I then present it to the Court. But let me indicate, as well, because I am not conceding that the FAA does not apply here. One has to understand that Mr. Busch and I are plaintiff's lawyers, we've been in the case from the beginning, Mr. Busch came in as Appellate law, we're not the arbitral lawyers that we're going to be in the next few years. But let me suggest, how did this case start? Well, we filed a court case petition straight TCHRA, no other claims. Prior counsel filed a petition moving for mandatory arbitration citing In re Halliburton, They moved under the FAA. They did not move under the TAA, they did not move under both the FAA and the TAA, they moved under the FAA, and this is in the record, of course, Volume 1, supported it by the affidavit of the owner, who clearly indicated commerce facts that the defendant is in the business of retailing new and used shoes primarily, Tennis Shoes, et al., not only in Texas but to the world. And of course there was lots of evidence at the trial about Mexican -- we're taking shoes, Nike shoes down to Mexico, we're getting African contracts. It's clear the Commerce Clause does apply, so I'm not going to stand and not tell you that I've changed my position because I learned, the Commerce Clause applies. Now, the other thing that's interesting though, is unfortunately I think it's a distinction without a difference. I think it's a tempest in a teapot, because I think this Court will only be faced with this issue in the future if solely the Commerce Clause does not apply. And I've done, of course, a lot of reading of this Court's cases, the other Court's cases, and they all come up under the FAA. Why? Because it's easier.

And In re Nexion is a good example of what happens when you have a balancing of the two, this Court's decision in In re Nexion. Basically it started with the defendant trying to move the mandatory arbitration to the TAA, and they lost. Why? Because of course the plaintiff's attorney, it was a tort case, had not signed off previously, which is a requirement for torts under the TAA because they opposed arbitration, they weren't going to sign anything. Defendant came back again, this time under the FAA, in other words, like a lot of us who are changing horses in midstream. This horse was FAA from the beginning, but in Nexion they changed horses in midstream and said, FAA, and this Court said fine. And the Court, this Court said, really, if you have FAA and TAA, you have to look at a four-point factor, which opposing counsel did indicate in his reply brief. We agree, Nexion I think squarely controls here, the problem is we disagree with the application in their reply brief. Because there's four criteria in Nexion, and of course why this case is important, not just for the humble little plaintiff's bar, this case encompasses that we're here, could encompass mandatory arbitration for all sorts of industries and all sorts of contract construction, the whole nine yards.

JUSTICE NATHAN L. HECHT: It doesn't seem to me that whether you could appeal, have a broader appeal from an arbitration award, would necessarily favor a plaintiff or a defendant or work one way in an employment case differently from another case.

ATTORNEY JANETTE JOHNSON: I don't know per se. I will say this, I think the whole judicial history of arbitration has been a dramatic 180. In 1967 I think was the Gardner case at the Supreme Court, absolutely no arbitration that was in a union context. Gilbert came, yes, and so we've been buffeted back and forth. And now the Supreme Court has said, "Look, it's either fish or fowl. If you go to arbitration, this is what you're going to get, you're going to get fast, you're going to get speedy, and you're going to get a very limited review under the statute," so we live with it.

JUSTICE NATHAN L. HECHT: Well, tell me what they meant, what the Supreme Court meant when it said, "The FAA is not the only way into Court. For parties wanting review of arbitration awards, they may contemplate enforcement under state statutory or common law, for example, where judicial review or a different scope is arguable."

ATTORNEY JANETTE JOHNSON: Well, a very careful Court left an opening. There's fifty states with 50 state AAs. We have ours. We pointed in the brief, and this is in answer to Justice O'Neill's questions, the striking similarity. I have not researched all 50 states, there's about five or six that fell in, and then there's California. Now I remember Justice Brister in the, I think it was the Poly-America dissent saying, "Crazy California, they've always disliked arbitration in California." But I'm a member of the California Bar, I'm not going to go there, but I will say this. That California had a unique history where they had a judicial commission, and I think it was like in 1964, and they went to the Legislature after they made recommendations, and the Legislature adopted them, and so they've had a very strong differing view on arbitration, which answers, I hope, Justice Hecht's question. Whereas the rest of us, we had a legislator legislate four reasons. Okay. Most of the cases, most of the courts are going to be on one side and California is going to be over there, and that's what turning out. We submitted, and I apologize for the lateness of the day, but I think it's interesting, I don't think it's dispositive. We pointed to the five or six courts, state courts, who fell right under Hall. I think we do too because our statute is so

identical. If you have an independent state such as California with an independent judicial history that they're trying to reconcile, you're going to fall within that exception perhaps.

JUSTICE HARRIET O'NEILL: Can you tell me, when our statute says under 171088(3)(a), the arbitrators exceeded their powers. What does that mean? The powers conferred by the arbitration agreement?

ATTORNEY JANETTE JOHNSON: I didn't catch the last part.

JUSTICE HARRIET O'NEILL: Well, what is, when do arbitrators exceed their powers, when they exceed the powers that are conferred in the arbitration agreement?

ATTORNEY JANETTE JOHNSON: When they exceed the powers granted by the Legislature.

JUSTICE HARRIET O'NEILL: Well, how do we know that? How do we know that that's implied in the statute, it just says, "exceeded their powers."

ATTORNEY JANETTE JOHNSON: Well, I would think that if someone wants to draft more branches on that tree, they would go back to the Legislature. We have a legislative statute that we're seeking to have you enforce, and opposing counsel is adding little Christmas ornaments on the tree.

JUSTICE HARRIET O'NEILL: No, but I mean let's say that the arbitration agreement says, "If any dispute arises concerning compensation and only compensation, that will go to arbitration." And let's say that goes to arbitration and the arbitrator not only decides the compensation that you're entitled to, but decides another issue entirely, decides a tort claim in addition, do they exceed their powers because they've gone beyond the terms of the agreement?

ATTORNEY JANETTE JOHNSON: Well, I think the answer to that could very well be yes, since that it was one of the four areas that are consonant in both statutes that "exceeded their powers" is something for review. But what's happened is the Fifth Circuit is now moved away from, for example, manifest disregard. Where it used to be -- and Justice Hecht's thing is, my God, it's a horrible decision. Well, it's not, it's manifestly in disregard of the law. But the Fifth Circuit is now saying no, that's not a specific exception. Let me say something that just gets under my skin a little bit as a plaintiff's lawyer, we are not the party's crafting these agreements. So when I hear that the parties have the judicial right to craft these agreements, we are forced participants at the party under In Re Halliburton. We don't craft these agreements. The --

JUSTICE PHIL JOHNSON: But on the other hand, the agreement, an arbitration agreement is an agreement is it not?

ATTORNEY JANETTE JOHNSON: Well, it's like this case, it's in the handbook for an at-will employee, and this Court squarely said In re Halliburton that the employee by continuing employment abides by that, yes, sir. But what I'm saying is we're not there at the drafting table saying, "You know, let's craft it this way."

JUSTICE HARRIET O'NEILL: But that's a different issue. I mean there are defenses based on unconscionability, and that's not really before us. We have to presume that it's an arm's-length transaction that was freely bargained.

ATTORNEY JANETTE JOHNSON: I don't see it being arm's length. It's not completely before you, but the practicality of the matter is that when we're trying to interpret contract agreements, if one side did not bargain in good faith at arm's length but had it imposed on them, I don't see how we can just say the parties can agree, the parties can agree.

JUSTICE DAVID MEDINA: That is a completely different issue, though, that's not before us. These agreements are imposed upon consumers all the time.

ATTORNEY JANETTE JOHNSON: Yes, that's correct, but there seems to be some -- I just want to call your attention to the fact that it's not -- and I've already made the point, it's not an arm's length thing. But this area is very interesting, and I appreciate the Court's interest in it. I will say that Ms. Quinn now has been buffeted for five years. We have gone through four proceedings, we went to the district court, and then the district court judge changed. The new judge was kind enough to give opposing counsel full briefing, even though the first one had ruled. That was a Judge Jordan, and then we went to the Fifth Circuit, a full briefing. This is what we call like the full bore appellate briefing, so I have the worst of both worlds. I have not the procedural rights that I would have had in court with a jury, and a potential larger jury award, but then I'm faced, if you think this was a good idea, with extensive appellate review and jurisdiction. And I would like to say that this is not an arbitrator who has gone wild. This was voluntarily selected by the parties because Mr. Cloutman has 35 years of experience in labor and employment. He was not imposed on the parties. We got together after they filed their FAA petition, we -- and Ms. Neill says, "Well, look at, your thing" --

JUSTICE HARRIET O'NEILL: Well, when you say FAA petition and they moved under the FAA --

ATTORNEY JANETTE JOHNSON: Yes, ma'am.

JUSTICE HARRIET O'NEILL: -- you're only basing that on the fact that the cited Halliburton, right?

ATTORNEY JANETTE JOHNSON: No, ma'am. And I'll have to direct your attention to the defendant's verified motion to compel arbitration that moved solely May 31st, 2005, which is in the record, and which was cited by the defendant in its --

JUSTICE HARRIET O'NEILL: So both sides have switched positions here?

ATTORNEY JANETTE JOHNSON: Yes, yes. We would, as the horse is crossing the stream, we're all switching. Now --

JUSTICE PHIL JOHNSON: But the Court of Appeals did not make a decision on which, which statute it was proceeding under, because of a concession, so we didn't -- the Court of Appeals had actually not considered the issue because of your position there?

ATTORNEY JANETTE JOHNSON: That's correct. It basically went with the Hall argument. I argued in the Court of Appeals --

JUSTICE PHIL JOHNSON: I mean as to FAA or TAA --

ATTORNEY JANETTE JOHNSON: That's correct.

JUSTICE PHIL JOHNSON: The Court of Appeals simply made no decision because you, you at that point just said the FAA does not apply, so it did not actually pass on that?

ATTORNEY JANETTE JOHNSON: That's correct. But I did make an argument that we need not reach the Hall decision because there was no, no substantive errors. And I would like to present to the Court this --

JUSTICE NATHAN L. HECHT: You made that argument in the Court of Appeals?

ATTORNEY JANETTE JOHNSON: Yes, sir.

JUSTICE NATHAN L. HECHT: Did you make it to the trial court?

ATTORNEY JANETTE JOHNSON: This is what I'm getting to. I believe we did. The problem here is that the way their appellate section works, they had no opportunity to say to the, after they got the decision, "Well, this is wrong." Now if they'd been smarter, they would have said

within 10 days we can file a reconsideration motion to the arbitrator, bringing these arguments. What, what is frankly I find offensive judicially is the fact that, and its new counsel it's not anything, you know, in personal intent here, but they're making arguments that were never presented to the arbitrator. They're saying, "State law applies, and it's a horrible mistake, that he didn't use state law," when the first counsel only submitted federal law to the arbitrator. And then they're saying, "It's sex harassment." Well, no one has argued sex harassment. I mean we've argued the Price Waterhouse type of gender-infused bias, as the example of --

JUSTICE NATHAN L. HECHT: But if, if we thought that a wider review were required by the parties' agreement, where do you think that review has to take place? Here, or in the Court of Appeals, or back in the trial court?

ATTORNEY JANETTE JOHNSON: At the first level with the arbitrator by some sort of reconsideration, the bare minimum at the trial court as the second level. But there is a presumption, of course, if you're going to draft a contract and it's unclear that it's going to be presumed drafted against you, and this is frankly unworkable, because what happens is, if you, if you went for this larger review, what you would do is you pull the rug out from the arbitrator. We don't -- this is their argument, not mine. We don't have to tell the arbitrator all our, our cases. We're going to give them to the district court, which is what happened here. Federal law to the arbitrator. Then we're going to go over to the district court and say "That wasn't fair because they didn't cite state law." Well, we didn't. It's fundamentally unfair to the arbitrator, and he has been, I think, unfairly maligned in this case. But I also want to bring back one point on the Nexion case. I think this is a distinction without a difference, because if the Court -- I surely do not recommend that you allow him to craft stuff onto a statute that a legislator had given its imprimatur to, but assuming that you decided that that was a good idea, and so that you join California, and abandon the rest of the states that are falling under Hall. I think your Nexion case would preclude enforcement because you, you're saying that if the Texas AA, the TAA, is not consonant with the FAA, the FAA will preempt, and that's what Nexion was. Nexion had one extra step, and so you found that was preempted. So if it's consonant, you can go with the TAA, or if there is no commerce whatsoever, it's just a little mom-and-pop shop.

JUSTICE HARRIET O'NEILL: But didn't Hall expressly say with the quote that Justice Hecht just read, I mean it kind of said states can interpret their own TAAs, I mean the Supreme Court seemed itself to say it doesn't preempt.

ATTORNEY JANETTE JOHNSON: As careful lawyers, they left the door open for the Californias of the world. I think if you look at your own case law, including the In re Nexion, and D. Wilson, I believe it is, you will find that you've already said in the context not of employment but of other arbitrations that, if it's congruent, TAA works. But if it's extra plus or not consonant with the FAA, it's preempted by the FAA. So your, your prior case law, I think, makes this just a tempest in a teapot. But it's been a pleasure being here to answer your questions.

JUSTICE NATHAN L. HECHT: Any further questions? Thank you, counsel.

ATTORNEY JANETTE JOHNSON: Thank you.

REBUTTAL ARGUMENT OF ALAN L. BUSCH ON BEHALF OF PETITIONER

ATTORNEY ALAN L. BUSCH: Briefly in response, on a couple of points I think I can at least give a clear answer to. The Texas Arbitration Act in Section 171.089 specifically says that if the arbitrator's award is vacated, the Court may order a rehearing before new arbitrators. Whether that means, you know, whether that may mean "should" or if it just, you just should go to the district court, that's something I'm not sure has to be decided today, but that's what the TAA says.

JUSTICE NATHAN L. HECHT: Well, your review issues are briefed, but I'm -- but they weren't decided by the Court of Appeals.

ATTORNEY ALAN L. BUSCH: That's right.

JUSTICE NATHAN L. HECHT: Were they reviewed by the trial court?

ATTORNEY ALAN L. BUSCH: Couldn't get an answer. Specifically I asked for findings of fact and conclusions of law so I could tell, are you just saying that we can't do this at all, or are you looking at the award and agreeing with it, and --

JUSTICE NATHAN L. HECHT: So you presented them to the trial court, you didn't get a ruling --

ATTORNEY ALAN L. BUSCH: Right.

JUSTICE NATHAN L. HECHT: -- and/or you couldn't tell whether you did or not. And is it your understanding of your agreement of your arbitration agreement that that review would first take place in the trial court, if you're correct about the agreement.

ATTORNEY ALAN L. BUSCH: I guess I never thought about that. That seems to be the next place to go, after arbitration would be the district court.

JUSTICE NATHAN L. HECHT: Well, somebody has to move to confirm the award or vacate it?

ATTORNEY ALAN L. BUSCH: That's right, and that's what happened in this case is, is that the -- excuse me, the respondent filed their lawsuit in state court under state law. We moved to compel arbitration and in In re Halliburton, and --

JUSTICE NATHAN L. HECHT: So you would argue under -- so you would think under your agreement that the place to argue reversible error would have been the trial court?

ATTORNEY ALAN L. BUSCH: I think that has to be it. It raises an interesting question where, are the trial court almost superfluous if the Court were to grant appellate review, when it almost would make more sense to go straight to an Appellate Court or something, but then I thought more, well, that's what happens when bankruptcy appeals a noncourt proceedings, and stuff like that, so I think that's probably the way it ought to go. If that's the way this Court chooses to go, I still contend that it's still perfectly appropriate to not actually go the extra step of California and specifically hold directly contrary to U.S. Supreme Court that, that you can expand the scope of review, although it does indirectly lead to the same result, as the Dallas Court of Appeals pointed out. In this case we can just hold that the Texas Arbitration Act allows you to limit the powers of the arbitrator, which was clearly [inaudible] in this case.

JUSTICE PHIL JOHNSON: Now, Counsel, if we go under 171.088(3)(a) saying that we're trying to determine here whether the arbitrator exceeded the powers granted in the agreement. If you read your agreement here, as I understand, the arbitrator does not have authority to render a decision containing a reversible error of state or federal law, among other things. Now, it might be troublesome to some that if

that is a standard, the arbitrator may not even be a lawyer. How do we take, how do we take a nonlawyer and grant that nonlawyer authority bound by reversible error that he or she or the panel may not even have a clue about what we're talking about? And that seems if we're going to just make it up as far as what their powers are, how do, how does that really help the parties out? It seems like you almost are always asking for one side or the other to get this thing remanded to a new arbitrator, if we give them that kind of power.

ATTORNEY ALAN L. BUSCH: I can see how in the hypothetical you presented that would be troublesome, and I can only submit to you in response that the arbitrator's powers does come from the agreement of the parties from the contract. --

JUSTICE PHIL JOHNSON: Right.

ATTORNEY ALAN L. BUSCH: And I can only presume that if the parties are going to agree that a nonlawyer be the arbitrator, that it's unlikely they are also going to have the clause in asking for a very legalistic type limitation on that arbitrator's authority. They would be contracting --

JUSTICE PHIL JOHNSON: Well, that clause is in before you select the arbitrator.

ATTORNEY ALAN L. BUSCH: True.

JUSTICE PHIL JOHNSON: And looking at other opposing counsel's side, they've gone through a lot of process here that, you know, it's sometimes people say it's a little overbalanced toward an employer as opposed to an employee, or whatever. The employer could be there a long time, an employee has to go work somewhere else, so it looks as though you might, that might be troublesome in, in effecting one of these.

ATTORNEY ALAN L. BUSCH: Well, if the parties had that clause and still chose to have a nonlawyer arbitrator, I can see how that would be a problem, but they're still free to make contracts. They can still free, they're still free to say, "You know we thought about it and, and maybe we ought to just have a nonlawyer decide this and let's, let's not have this limitation on their powers. Let's just let this nonlawyer do whatever that specialist in that particular construction defect or whatever do what they want to do.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, counsel. That concludes the argument in that case, and the Court will take another brief recess.

[End of Audio Recording.]

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