IN THE SUPREME COURT OF TEXAS

NO. 08-0613

NAFTA TRADERS, INC., PETITIONER,

v.

MARGARET A. QUINN, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued October 8, 2009

CHIEF JUSTICE JEFFERSON, joined by JUSTICE WAINWRIGHT and JUSTICE LEHRMANN, concurring.

Increasingly, our civil disputes are submitted to the private sector rather than a judge or jury. The trend is neither intrinsically good nor bad, but there are consequences. When a case is tried in open court, rules of evidence inherited from Britain and modified by American courts dictate what facts a jury may properly consider. The proceeding is recorded, and dispositive rulings are subject to principles of error preservation. When the facts are established and the law applied, the State of Texas enforces the trial court's judgment. Journalists report the facts, editorial writers critique the judgment, citizens reflect on the state of our laws, and legislators file bills to alter future outcomes. When the parties appeal, the resulting precedent gives predictability to the activities and transactions in which people and corporations engage.

An arbitration is different.[1] It is said to be speedier, often less costly, and overseen by experts in the relevant subject matter. But it is conducted in private.[2] The rules of evidence do not apply. There may be no official transcript of the proceedings. The award is usually final, even when an identical judgment appealed to a state court would be reversed on procedural or substantive grounds. Courts are generally required to confirm an arbitral award because trial judges have little power to reverse it for factual insufficiency or, with certain exceptions, to prevent a miscarriage of justice.[3]

This case asks whether parties can agree to "try" a case privately, but then enlist state courts to review the decision for reversible errors of state or federal law. I agree with the Court that the agreement is enforceable under the TAA, *Hall Street* notwithstanding. ___ S.W.3d at ___. I write only to observe that our system is failing if parties are compelled to arbitrate because they believe our courts do not adequately serve their needs. If litigation is leaving because lawsuits are too expensive, the bench and the bar must rethink the crippling burdens oppressive discovery imposes. If courts have yet to embrace modern case-management practices, the Legislature should ensure that the justice system has resources to improve technology and to hire qualified personnel—two sure ways to improve efficiency.

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[1] *See Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1011 (10th Cir. 1994) ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system.").

[2] *See* Gu Weixia, Note & Comment, *Confidentiality Revisited: Blessing or Curse in International Arbitration?*, 15 AM. REV. INT'L ARB. 607, 622 (2004) ("How disputes are actually decided concerns not only the parties to the arbitration, but may also have substantial effects on the world at large, including shareholders, administrative regulators, consumers, and the like. Decisions affecting them should be subject to public scrutiny." (footnote omitted)).

[3] *See* 9 U.S.C. § 9 ("[A]ny party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]."); TEX. CIV. PRAC. & REM. CODE § 171.087 ("Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091 [of the TAA], the court, on application of a party, shall confirm the award.").

And it is unlikely, given a choice, that parties to an arbitration would choose, as their arbitrator, a person whose only qualification is the possession of a law license, and who need not have significant experience as an advocate or as a judge.[4] They seek instead a pool of qualified professionals rather than individuals who are swept in and out of office based not on considerations of merit, but on the vagaries of partisan election. *See* TEX. CONST. art. V (outlining the requirements for judicial election). The solution to that quandary is beyond the scope of this case, but the parties' contractual agreement for reviewing the arbitrator's decision demonstrates that people know how to avoid this perceived deficiency. They will, increasingly, select their own specialized tribunal and seek to retain a contractual right to meaningful appellate review in our state courts. As the Court does, I would affirm that right. Nevertheless, we must, in the future, address those aspects of our justice system that compel litigants to circumvent the courts and opt for private adjudication.

Wallace B. Jefferson
Chief Justice

Opinion Delivered: May 13, 2011

[4] *See* TEX. CONST. art. V, § 7 ("Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election . . . .").