OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CORTEZ BYRD CHIPS, INCL, Petitioner v. BILL HARBERT CONSTRUCTION COMPANY, ETC.

CASE NO: 98-1960 c.1

PLACE: Washington, D.C.

DATE: Monday, January 10, 2000

PAGES: 1-49

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IN THE SUPREME COURT OF THE UNITED STATES

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CORTEZ BYRD CHIPS, INC., :

Petitioner :

v. : No. 98-1960

BILL HARBERT CONSTRUCTION :

COMPANY, ETC. :

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Washington, D.C.

Monday, January 10, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

DANIEL H. BROMBERG, ESQ., Washington, D.C.; on behalf of the Petitioner.

SUSAN S. WAGNER, ESQ., Birmingham, Alabama; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 98-1960, Cortez Byrd Chips, Inc. v. Bill Harbert Construction Company.

Mr. Bromberg.

ORAL ARGUMENT OF DANIEL H. BROMBERG

ON BEHALF OF THE PETITIONER

MR. BROMBERG: Mr. Chief Justice, and may it please the Court:

This case presents a question of statutory interpretation, specifically whether the special venue provisions of the Federal Arbitration Act are exclusive and therefore preclude application of the general venue statute to requests to confirm, correct, modify or correct or vacate arbitration agreements.

As the vast majority of courts and commentators to consider the question have concluded, the answer to the question is no. The FAA's special venue provisions are permissive in nature, and they supplement rather than supplant the general venue statute. This conclusion is supported by the permissive language of section 9 and the lack of any restrictive language in sections 9, 10, and 11. It is supported by the context in which that language is used, and also by the overall structure of the

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FAA. It is independently supported as well by the --

QUESTION: Mr. Bromberg, do you think that the word may in section 9, 10, and 11 must be interpreted the same way? Does section 9 mean exactly the same thing that 10 and 11 mean, in effect, in the use of the word may?

MR. BROMBERG: No, Your Honor. The reference in section 9 is connected to an application for a confirmation order. In sections 10 and 11 the word may is not clearly connected to such an application because there is no reference in 10 and 11 to an application.

What is important, though, is that section 9 is clearly a permissive provision.

QUESTION: Well, it may be permissive only because it's conditional. I mean, it reads, if no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district in which such award was made. Now, you really wanted them to say, then such application must be made? I mean, the writer could think that that would be a command to make an application. Surely you don't have to make an application, do you?

MR. BROMBERG: Your Honor, I think that is correct as far as it pertains --

QUESTION: So wouldn't that explain the may? It's a conditional may. If no court is specified, then

such application may be made.

MR. BROMBERG: Well, Your Honor, the word may usually connotes discretion, and you're suggesting that the discretion is to not bring an action.

QUESTION: Right.

MR. BROMBERG: That is a possible interpretation.

QUESTION: There you are. There goes your may argument.

MR. BROMBERG: Well, Your Honor, this court has interpreted may, of course, to indicate discretion.

QUESTION: But isn't there one case that doesn't do that? Isn't it -- it's the Radzanower case. The words were, may be had. This was in reference to venue for suits against national banks, and the court treated that as an exclusive venue provision even though the words were may be had.

MR. BROMBERG: Your Honor, that's correct, Radzanower did apply prior decisions of this Court, but the national bank provision I would suggest is very different from the provision that is before this Court, because it was clear that Congress had a purpose to protect a particular party by limiting venue to a particular district and it is, I think, important to note that the provision at issue there, which of course has

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since been superseded, dealt not only with venue in Federal courts, but also with venue in State courts as well. The --

QUESTION: There's a curiosity about the procedural history of this case, and I wonder if you could address it, and that is, as I understand it, the circuit, the Eleventh Circuit was relying on old Fifth Circuit precedent, which was since changed in the Fifth Circuit, is that right?

MR. BROMBERG: That's correct.

QUESTION: And so the panel was stuck, yet you didn't ask for an en banc so the new Eleventh could consider the question afresh in light of what the current Fifth Circuit has held.

MR. BROMBERG: Yes, Your Honor. The panel had held that the prior Fifth Circuit decision controlled, and we did decide to file a petition for certiorari rather than seeking a hearing en banc.

QUESTION: Even though most of the circuits go your way.

MR. BROMBERG: Yes, Your Honor. Five of the circuits have gone -- have interpreted these venue provisions to be permissive in clear holdings. Two have suggested that in dicta. There are three circuits that have adopted a restrictive interpretation.

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Justice Scalia, to get back to your question, we think that a permissive interpretation of the FAA's special venue provisions is not only supported by the language of these provisions, and although it may be possible to read them otherwise we do think that the most natural reading is a permission to use different venue statutes, but you also have to look at the context in which these provisions were enacted.

As we indicate on page 14 of our opening brief, where Congress has intended special venue statutes to be restrictive, it has frequently, though not always, used explicitly mandatory or restrictive language. Moreover, permissive interpretation is consistent with the structure of the Federal Arbitration Act. If a restrictive interpretation is adopted, the Federal Arbitration Act would not provide enforcement of arbitrations that are conducted abroad.

However, as this Court indicated in the Scherk case, the FAA as originally enacted was intended to apply to such arbitrations. As a consequence, a restrictive interpretation would create a gap in the venue created by the statute.

QUESTION: Can you tell me, is it always crystal clear which district the award has been made in? If the arbitrators meet in several different cities, and their

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offices are in different parts, is it always clear where the award was made?

MR. BROMBERG: Your Honor, I am aware that there is some litigation on that question. I must admit, though, that I'm not familiar with it.

QUESTION: If that is true, does that help or hurt you in your interpretation of the statute? On the one hand it means that there's perhaps multiple -- it seems to me it would help you.

MR. BROMBERG: I think it does, because I think what respondent has argued is that their interpretation better fits with the policies underlying the act, because it would eliminate any questions about the proper venue, and would therefore be more consistent with the speedy and efficient resolution of disputes.

QUESTION: In this case, it was not the parties but was the American Arbitration Association that specified a place for the arbitration, is that so?

MR. BROMBERG: That's correct. The petitioner objected to the location that was chosen by the American Arbitration Association and in fact they filed this action in the district in which they would have preferred to have the arbitration conducted.

QUESTION: The parties did stipulate for the application of Mississippi law, and yet, although they

might have, they didn't provide for a forum for the enforcement of the award.

MR. BROMBERG: That's correct, Your Honor, and I think that brings up one point, that -- one difficulty with the restrictive interpretation that respondents have suggested. Under respondents' interpretation the parties can only agree to a venue if that pertains to an application to vacate and it is in an arbitration agreement, because that is the only type of forum selection clause that is specifically referred to in the FAA, so they would construe, for example, sections 10 and 11, which do not contain any specific language concerning forum selection clauses, to exclude such clauses.

We would suggest that a permissive interpretation would better fit with the purposes underlying the act, for two reasons. First of all, it would allow parties to agree to litigate in the most convenient venue.

Now, there would be a difference between applications to vacate and other applications. Applications to vacate would be judged under section 9, which provides an absolute mandate that forum selection clauses be enforced. Other forum selection clauses would be enforced under the general rule that governs forum selection clauses that this Court announced in the Bremen

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case.

QUESTION: Excuse me, applications to vacate would -- no. You must have misspoke.

MR. BROMBERG: I may have misspoke, Your Honor.

QUESTION: Applications to confirm would be under 9.

MR. BROMBERG: Applications to confirm would be under 9.

QUESTION: Applications to confirm would be under 9.

MR. BROMBERG: And applications to correct, modify, or vacate --

QUESTION: Right.

MR. BROMBERG: -- would be judged under the general rule which governs forum selection clauses.

Furthermore, under a permissive interpretation the parties would be able after an arbitration to look around and determine what is the most convenient venue. Under respondents' restrictive interpretation, because section 9 refers only to forum selection clauses in arbitration agreements, the parties would not be able to do so.

This would conflict with the purposes underlying the Federal Arbitration Act in two ways. First, it would prevent the parties from choosing the most convenient

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venue. Second, it would prevent the enforcement of an agreement of the parties, and this Court has indicated that one of the primary purposes of the Federal Arbitration Act is to vindicate the parties --

QUESTION: Aren't the parties going to often be disputing which is the venue that they want, one wants one and one wants the other?

MR. BROMBERG: They may, Your Honor, and in that situation I would suggest that a permissive interpretation would also be the more reasonable and sensible one, because it would allow for transfers under 1404(a) when a venue that is selected is inconvenient.

QUESTION: But what about the race to the courthouse problem? If you have multiple venues, then you could have what happened here, one files in Mississippi, the other files in Alabama, where if you say the only place you can go, barring your agreement on some other place, is the place where the arbitration occurs, and you don't have the race to the courthouse problem.

MR. BROMBERG: Well, Your Honor, I think that a restrictive interpretation would solve some but not all of that problem, because jurisdiction to enforce the FAA is concurrent with the State courts, and I don't think that sections 9, 10, and 11, which refer only to the United States district courts, would apply to State courts. As a

consequence, a party that is interested in evading a restrictive interpretation of section 10, for example, would simply file their action in State court rather than in Federal court.

QUESTION: Is there an argument to be made as with respect to convenience that if there really is a mutually convenient venue the parties will have selected it and, if they have selected it, the scheme of the statute is that, having selected it once, that should be the venue for all times whenever any issue on the merits is being litigated, whether it litigated before the arbitrator, or litigated later on on a motion to vacate or to modify. Is that -- would that be a sound argument?

MR. BROMBERG: Your Honor, I think there are many situations in which that argument would not apply. Parties will agree to arbitrate in distant locations that they would find it inconvenient to litigate. It is far easier to arbitrate --

QUESTION: Because, what, they want the arbitrator who lives there, is that --

MR. BROMBERG: They may want the arbitrator who lives there, they may be trying to accommodate the convenience of witnesses, neither of which may be involved in a post arbitration proceeding. They may also be more willing to accommodate the convenience of each other.

QUESTION: Well, they may not trust the courts of that jurisdiction, although they're willing to trust an arbitrator who's selected by the parties.

MR. BROMBERG: That is quite possible as well, Your Honor. I would also add that a party who decides, for example, to conduct an arbitration at the hotel airport in Dallas or in Chicago may be unwilling to litigate in those districts because they don't want to retain local counsel in those districts, so there are many reasons why a venue that is convenient for arbitration may prove to be inconvenient for future litigation.

I would also add that it is possible that parties may want to consolidate a post arbitration proceeding with another pending litigation between the parties, or they may wish to file a single action which will enforce an arbitration and also allow them to levy against property of the other party, or seek execution in the residence of the other party.

QUESTION: Now, it would not be the consequence of your interpretation, would it, that if the parties agree in their arbitration agreement as to where litigation concerning the arbitration award will be conducted, that will govern?

MR. BROMBERG: It would not be?

QUESTION: It would not be. Would it be?

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MR. BROMBERG: No, that would be, with I think two caveats, Your Honor. One would be, an arbitration forum selection clause would only be absolutely enforceable with respect to an application to confirm.

QUESTION: Well, that's -- of course. That was mainly what I had in mind. Section 10 --

MR. BROMBERG: Right.

QUESTION: -- even if you had an agreement, would allow an order to vacate to be brought in the district where the award was made, whether or not the parties agreed to another district, isn't that right?

MR. BROMBERG: I think that's correct, Your Honor, and I would suggest that there is a sound reason for that. One of the justifications for vacating an award is partiality or corruption of arbitrators, also fraud. That may involve the testimony of recalcitrant witnesses from the district. Parties, when they are making forum selection clauses and arbitration agreements can't foresee that the other party is going to resort to fraud. As a consequence, they should not be forced to litigate in a district where they cannot subpoena necessary parties.

QUESTION: Can a defendant waive proper venue?

MR. BROMBERG: Under a permissive interpretation, I think they can.

QUESTION: I mean, generally speaking. I mean,

I sue you in a place where venue statutes do not allow me to sue you, and you simply make no defense. You're willing to have it there.

MR. BROMBERG: Yes, Your Honor. I think that's the import of this Court's decision in the Nearbo case.

QUESTION: It's generally the case that venue -- venue is a highly waivable thing in the pecking order. Subject matter jurisdiction is not waivable. Personal jurisdiction is, but it's not easily waived. Venue is highly waivable. That's the way it works generally, isn't it?

MR. BROMBERG: Your Honor, I think that's correct, but it's not clear to me that that would be the case under the restrictive interpretation that respondents have suggested, for the reason that it's unclear under their interpretation why Congress would restrict applications to vacate to a single district. If Congress intended that such applications be decided in one district and one district alone, we would submit that it is not clear that consent to venue in a different district would be allowed.

QUESTION: But under your interpretation Congress also, you admit that 10 is exclusive, don't you?

MR. BROMBERG: That 10 is exclusive, Your Honor?

QUESTION: Yes. They make -- the -- no, I guess

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not. You would say that even a request to vacate may be brought under the general venue statute as well.

MR. BROMBERG: Yes, Your Honor.

QUESTION: Which is the suit that you brought, is a suit to vacate.

MR. BROMBERG: That's correct, Your Honor, and the reason that we reach that position, Your Honor, is that we think that sections 9, 10, and 11 have to be construed together. As every court of appeals that has considered the question has concluded, they must be interpreted in tandem so that they are either all restrictive or all permissive, and in our view, since section 9 is clearly permissive, sections 10 and 11 have to be construed as being permissive as well.

Now, this interpretation is also supported, as I said earlier, by the structure of the act, by the venue gap that would result, and also by the unexplained distinction that would be created by a narrow interpretation between sections 9, 10, and 11, and the Federal Arbitration Act's other special venue provision in section 204.

We also think that a permissive interpretation is independently supported by the presumption that special venue statutes are supplemented by the general venue statute. This presumption, which courts and commentators

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have found implicit in this Court's decision in Suarez, is based upon Congress' historical practice. Historically, Congress has used special avenue statutes in order to expand, not restrict, the venue available under the general venue statute.

Moreover, as I indicated before, where Congress has intended a special venue statute to be exclusive, it has normally used explicitly restrictive mandatory language. This suggests that, in the absence of such restrictive or mandatory language, the special venue statute should be interpreted to be supplemented by the general venue statute, and this presumption is supported by important pragmatic consideration.

There are hundreds of special venue statutes in the U.S. Code. If all of these venue statutes were interpreted restrictively, then the general rules that section 1391 attempts to create would be subject to a patchwork of arcane and perhaps unintended exceptions. As -- yes, Your Honor.

QUESTION: May I ask you, what happens to the authorities conferred upon the court by section 11 if the suit is not brought in the court specified by section 11? Section 11 gives the district courts powers that I am not sure district courts somewhere else would have, namely, where there was an evident material miscalculation of

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figures, or an evident material mistake, the court can modify or correct the award where the arbitrators have awarded upon a matter not submitted to them, or where the award is imperfect in matter of form, not affecting the merits.

MR. BROMBERG: Your Honor --

QUESTION: You think any United States court would have that authority anyway?

MR. BROMBERG: I think, Your Honor, that -- yes, Your Honor, I think they would as part of --

QUESTION: Then why did they say it?

MR. BROMBERG: -- of section 11.

QUESTION: Why did they say it, then?

MR. BROMBERG: I think section 11 has substantive provisions, and it also has venue provisions, and the substantive provisions, after this Court's decision in Southland, I would suggest, have to be read broadly to apply to any court that is --

QUESTION: Even a court under 1331? Wow. That's not what it says. It says the United States court in and for the district wherein the award was made may make such an order, and you're saying we should read that to say, moreover, any other U.S. court can make that --

MR. BROMBERG: I think, Your Honor, that this Court should read the reference to the United States court

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in and for the district wherein the award was made as an allusion back to the standards in section 9. There are other places in this statute which this Court said in transit is an ambiguously drafted statute, where certain words are used to refer to more complicated contexts.

QUESTION: Well, I'm sure it does refer back to section 9, but section 9 only applies to a certain court, a court in the district where the award was made.

MR. BROMBERG: Your Honor --

QUESTION: Now, you say section 9 is not exclusive, and you can certainly bring the suit in another court. That's fine. But section 9, even if you refer back to it, only refers to the court where the award was made.

I think it's one of the problems with your interpretation. I don't know what you do with the substantive provisions of section 11 if you sort of extend them to all other courts. It seems very strange to extend them to all other courts.

Now, maybe -- maybe they don't say anything. Maybe any court would have that authority anyway. I guess that's probably your best argument.

MR. BROMBERG: Your Honor, I'm not suggesting that this is a perfectly clearly drafted statute, but I would suggest that the scenario that you are posing would

cause certain problems. The first and foremost would be, it would require piecemeal litigation in certain cases. Where there is a forum selection agreement that is enforceable under section 9 --

QUESTION: It's not my scenario that would do that. It's yours. You're the one that would allow suit in various courts. If suit could only be brought in this Court, you'd have those powers.

MR. BROMBERG: Your Honor, actually I would suggest that the --

QUESTION: It always could be brought in the place where your parties agreed on.

MR. BROMBERG: I'm sorry, Your Honor.

QUESTION: It always could be brought where the parties agreed to have it brought, which might be different from this provision.

MR. BROMBERG: Under our interpretation that would be correct.

QUESTION: Well, that's true.

MR. BROMBERG: And Your Honor, I would suggest that the problem that -- Justice Scalia, the problem that you're identifying is a problem with the restrictive interpretation that respondents have suggested, because under their interpretation, where there is a forum selection clause that is --

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QUESTION: Right. Right.

MR. BROMBERG: -- enforceable under section 9, you may have to bring motions to vacate or motions to modify in one district and motions to confirm in another.

QUESTION: I guess we can decide that issue in a later case, and be treated to this whole thing again, right?

MR. BROMBERG: Your Honor, I'd also like to address one argument that respondent has made, and that's that their interpretation, by posing a rigid and restrictive rule, would serve the purposes of the Federal Arbitration Act.

As I have already suggested, I think that the value or the benefit of that rule is significantly undermined by the fact that there is concurrent jurisdiction in the State courts for Federal arbitration proceedings.

I would also suggest, however, that there are costs to a rigid and inflexible rule. It would require piecemeal litigation in certain cases. It would also prevent agreements on the most convenient forum from being enforced. It would force litigation in certain cases to be conducted in inconvenient fora, because no transfers under 1404(a) would be possible.

QUESTION: You talk about concurrent

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jurisdiction in State courts, Mr. Bromberg. Does the Federal Arbitration Act in -- by terms give the State courts jurisdiction?

MR. BROMBERG: Well, Your Honor, I think that is an issue that this Court has debated long and hard in Southland and its progeny. I think that Southland does find that the Federal Arbitration Act applies at least in certain provisions to State courts.

QUESTION: Yes, certainly substantive provisions in Southland were held to apply, but what about provisions to vacate awards and that sort of thing?

MR. BROMBERG: Well, Your Honor, certainly actions to vacate, some actions to vacate must be brought in State court, because, as this Court recognized in Moses H. Cone, the Federal Arbitration Act does not provide for independent Federal subject matter jurisdiction. As a consequence, a case that was between two parties resident from the same State, or that otherwise did not satisfy diversity jurisdiction, could not be brought in Federal court.

QUESTION: Even though it was subject to the Federal Arbitration Act?

MR. BROMBERG: That's correct, Your Honor. As a consequence, some actions at least to vacate, modify, or correct arbitration awards will have to be brought in

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State court.

Now, there is another problem with respondent's interpretation as well. According to their interpretation, in 1925, when Congress passed the Federal Arbitration Act it intended to exclude application of the general venue statute. At that time, however, the general venue statute basically provided only for venue in the residence of the defendant, and respondent has failed to suggest any reason why Congress would have wanted to prevent applications to confirm or to vacate or modify to be brought in the residence of the defendant.

Finally, Your Honors, I would suggest that their interpretation would complicate the arbitration process itself, because it would make parties less likely to reach compromises and accommodations in the arbitration process when they are determining where the location of the arbitration should be. That question, as it stands now, is often quite contentious.

If that were given the added significance of determining where future litigation would be conducted, parties would be less likely to reach compromises, and I think that's particularly true for parties such as petitioner, who is from a rural area in Mississippi. He may be willing to agree to accommodate the convenience of arbitrators to conduct an arbitration in another State, at

a major airport that has a hub, but he would be unwilling, or at least less willing to conduct an arbitration there if he knew that any subsequent litigation would be conducted there.

In sum, Your Honors, I think that a permissive interpretation is supported by the language of the FAA, by the context in which that language is used, and by the structure. It is also supported by the presumption that special venue statutes are supplemented by the general venue statute, and by the policies of the Federal Arbitration Act and the more reasonable and sensible nature of the rule that it would create.

If there are no more questions, I would like to reserve any remaining time for rebuttal.

QUESTION: Very well, Mr. Bromberg.

Ms. Wagner, we'll hear from you.

ORAL ARGUMENT OF SUSAN S. WAGNER

ON BEHALF OF THE RESPONDENTS

MS. WAGNER: Mr. Chief Justice, and may it please the Court:

Certainly the sole issue in this case is the interpretation of the venue provisions under sections 10 and 11 of the FAA, but those sections cannot be read in isolation to determine the question of whether this venue is exclusive or not exclusive. The best way to tell what

Congress or what the drafters of the FAA had in mind when it put this statute together is to compare sections 9, 10, and 11 with other provisions of the FAA and to see how they compare and contrast, and also to compare sections 9 with the different language of sections 10 and 11.

Looking at sections 9, 10, and 11 alone and particularly 10 and 11 alone --

QUESTION: Now, where will we find these? Is it in the appendix to the petition for certiorari, or --

MS. WAGNER: I'd like to direct your attention particularly to section 4 of the FAA. We have cited the 1925 version of that section in -- on page 12 of our red brief.

QUESTION: Page what?

MS. WAGNER: And then the -- I'm sorry, the modern version is on page 12 of the red brief.

QUESTION: You say -- is it set out in haec verba there?

MS. WAGNER: I'm sorry?

QUESTION: Are the words to section 4 set out at page 12?

MS. WAGNER: In page 11 of the -- I'm sorry, page 11 of our brief cites the language of the original 1925 version, I believe, and what that says is that a party who seeks to compel arbitration, in other words, a

pre-arbitration type of proceeding, such a party may petition any court of the United States, which save for the arbitration agreement -- I'm paraphrasing -- would have jurisdiction under the judicial code, which is now title 28, of the subject matter of the suit arising out of the controversy between the parties.

The modern version of section 4 is basically to the same effect. It substitutes courts of the United States with district courts, but essentially it is to the same effect.

That section, in sharp contrast with sections 9, 10, and 11, provides broad venue, or it does one of two things. It either provides extremely broad venue concurrent with subject matter jurisdiction, as the petitioner argues, or it expressly incorporates the venue provisions of section 1391 of title 28.

Now, if, as we say, it expressly incorporates venue, then by doing that in section 4 and rejecting that language in favor of much more restrictive language in sections 9, 10, and 11, it is clear that Congress did not intend to incorporate those general --

QUESTION: Why would Congress want to have done such a thing? I mean, a normal case, A sues B, they're both residents of the middle west, different States, they're in Federal court in Iowa, you know, and the judge

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there says, go to arbitration. I'll suspend this suit. Go arbitrate. You promised to arbitrate.

And now you're saying, when they finish their arbitration, which happens to be at the association's headquarters in New York, they cannot come back to where they started their original suit in the middle of the argument and get this either enforced. Worse than that, if they happen to agree in their agreement, by the way, we're always going to be able to sue each other in Iowa, always, even though they agreed to that, on your interpretation, too bad, although you could go to Iowa to have the thing confirmed, you have to stay in New York to have it vacated, modified, et cetera.

I mean, I do not know why any human being would want such a thing, and so I cannot think of what Congress could have had in mind by buying your interpretation, but I can easily think what they would have had in mind the other way.

MS. WAGNER: Justice Breyer, you asked certainly a compound question, and I'll try to answer it in turn.

First, why would they want to do that? We're talking about venue of an action that challenges an arbitration award, much like you would have an appellate review, and you may have a case where the parties are litigating in Alabama, and for circumstances that have

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changed, perhaps they really don't think Alabama is the best forum, but there it is. They can't go appeal in California because they think that's a more convenient forum for their appeal.

So why would Congress want to provide for that review process to be in the same forum? It is analogous to an appeal, and that gives the district court some power over the arbitration and over the proceedings because they're in the same location. In fact, Justice --

QUESTION: If it were analogous to an appeal, then why did Congress provide in section 9 that it could be any place the parties pick?

MS. WAGNER: Because section 9, Your Honor, is not really analogous to appeal. Section 9 is not a review process. It's simply a process of certifying and reducing to judgment --

QUESTION: But in a section 9 proceeding, wouldn't a motion to vacate modify the compulsory counterclaim? It would have to be brought.

MS. WAGNER: Yes, it would, and in that instance certainly you would end up with, if you were in two different -- if the parties agreed to a forum for confirmation that was different from the location of the arbitration award you would have the proceeding then going forward in another location, and that would occur in that

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instance, so it would still --

QUESTION: I must say, I'm troubled by your analogy to appellate review. In a normal litigation, of course an appellate court in Alabama can only review trial courts in Alabama, but that doesn't at all apply to, you might pick an arbitrator in Hawaii just to -- you want him out there, but that doesn't mean you want to litigate in Hawaii.

MS. WAGNER: That's right, and of course --

QUESTION: Or that any -- it would only be Hawaii courts that would have any particular ability to review the matter, either, so I don't find your analogy very persuasive.

MS. WAGNER: My question, Justice Stevens, was -- or my answer was directed to the question, why would they want to do this, and I think that provides us an answer, and again, it's just guesswork as to why --

QUESTION: Would they have wanted this situation where the parties say, we absolutely agree, absolutely agree that when it comes time to confirm this award it will be here, at our home in Hawaii, and they write it right in, we love Hawaii.

(Laughter.)

QUESTION: And now it turns out, because the arbitration takes place in New York -- they're willing to

go there once in their lives, all right.

(Laughter.)

QUESTION: That when it comes time to confirm the award, right back to Hawaii. But should anybody have a complaint about it, want to modify a comma, vacate it, or whatever, they have to stay in New York.

Now, I mean, why would somebody really want to do that, to take one example?

MS. WAGNER: The answer to that question relates to the fact, Justice Breyer, that this is a venue provision. It is not a subject matter provision.

And as you have pointed out, Mr. Chief Justice, venue is waivable. Venue is always waivable, and there's nothing about this particular statutory scheme that would keep venue from being waivable, so we have a situation where, if everybody agrees that Alabama or Mississippi or Hawaii is a better forum, and they continue to agree to that after the arbitration is over, then a court could be empowered through that --

QUESTION: Does that -- I don't know how that works. Does that normally happen where, say I'm a rather alert judge, which may be contrary to fact, but I'm sitting there with a case in front of me, and I happen to know I'm in Alaska, and I also happen to know there's no venue in Alaska, and suppose I were to say to one of the

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parties, I'm surprised here you happen to be in Alaska, because the statute here says there's no venue. Now, does that normally happen, and they say, oh, don't worry about it.

MS. WAGNER: They certainly can do that.

QUESTION: Does that -- is that normal?

MS. WAGNER: I don't know --

QUESTION: I mean --

MS. WAGNER: I don't know that it's normal, Justice Breyer, for the parties ever to agree on what is the best venue, which is part of the problem here, is that the idea that the parties after the arbitration is over are going to get together and say, hey, let's agree, I mean, if they do that --

QUESTION: But the forum selection clause would come before that. It would come in the agreement to arbitrate, wouldn't it, just as there was here a choice of law clause but not a choice of forum clause. It wouldn't occur after the arbitration. You would expect it to be in the agreement itself.

MS. WAGNER: The agreement can provide a forum selection clause, but the parties could alternatively agree after the arbitration is over as to an appropriate forum, and again, precisely as Justice Breyer has pointed out, the court can say, well, do I have venue, and the

parties can say, well, judge, we'd rather be here.

QUESTION: Well, Ms. Wagner, your answer -- I think, if I understand your answer, it assumes an answer to Justice Scalia's question about the significance in section 11 of apparently empowering that, the court particularly mentioned in section 11, with the authority to modify an award, and I take it your answer assumes that any court with jurisdiction would have the authority to do that if the parties otherwise waive the venue, any -- otherwise waive the restrictive venue provision, is that right?

MS. WAGNER: I would agree that if venue is properly conferred by waiver, or in the case of section 9 by a forum selection clause, that the court would have the power, then, to do whatever later comes up in that case. Once a case is filed in an appropriate venue, in an appropriate forum, that court could carry forward with the rest of the case. Whether it's a section 10 or 11 proceeding, or a section 9 proceeding, that court could keep that case.

So although section 11, as Justice Scalia points out, seems to envision proceedings by the same court, or in the same geographical location as the arbitration, that wouldn't necessarily always be the case because of these principles of waiver and because of the principle of

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retention of jurisdiction once the court has the case.

Similarly --

QUESTION: What's the source of the power of a Federal court to modify awards if it isn't section 11?

MS. WAGNER: The -- section 11 empowers a court to modify an award, but the provision as to which court may modify the award is one of venue, so it's really a compound provision in the sense that it grants power to the district court but specifies a venue for exercise of that power.

QUESTION: So in this respect you're in agreement with your colleague. He reads the statute the same way.

MS. WAGNER: I --

QUESTION: On venue you disagree, but insofar as the substantive authority of the court, you both agree that the statute is, shall we say, severable?

MS. WAGNER: That -- I do agree with that, Your Honor, yes.

I'd like to, though, just make one point, particularly about section 4, that I was discussing previously, and that is that we have said that section 4 expressly, expressly incorporates the venue provisions of 28 U.S.C. 1391, and the point I'd like to make, since it was addressed in the reply brief and we have not had the

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opportunity to respond, is that -- is the question of whether section 4 is really referring to venue or whether it's referring to subject matter jurisdiction.

And I would just point out that Congress oftentimes, and certainly in the early part of this century, has used the word venue when it really means -- has used the word jurisdiction when it really means venue, or has used the word venue -- has used the word jurisdiction broadly to include concepts of venue as well as subject matter and personal jurisdiction, so by its reference in section 4 to venue being concurrent with jurisdiction under title 28, we say that that means that venue under section 4 incorporates the venue provisions of title 28 as well as subject matter jurisdiction.

QUESTION: May I just ask this question about section 4? That covers every -- that applies to a suit to compel arbitration.

MS. WAGNER: That's correct.

QUESTION: Now, obviously, you couldn't authorize venue for such a suit in the place where arbitration had taken place.

MS. WAGNER: That's correct.

QUESTION: So that you could read this broadly and then say you have the additional situation, if an arbitration is out in Hawaii or some place it is also

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permissible there, and it would all fit together, it seems to me.

In other words, this is sort of the background rule of venue any place within this group. Then you say, but now when there is an arbitration and an action enforced, that couldn't have been covered in 4. You need an additional venue provision to cover that contingency.

MS. WAGNER: Justice Stevens, certainly Congress could have done that, but they didn't choose to do that. The language of section 9, 10, and 11 --

QUESTION: Well, that's the issue.

MS. WAGNER: Well, the language --

QUESTION: It doesn't seem to me that section 4 adds any enlightenment on the issue. The question is, how do you read the other section? Do you read it with the background principle that venue of course is available in all these places, but in addition you can have venue where you couldn't have had it for a suit to compel arbitration.

MS. WAGNER: We say that section 4 has to be compared and contrasted, that the language of section 4 has to be read alongside with 9, 10, and 11 to see that they provide different venue. Section 4 says, venue is, you simply refer to the general venue statutes under title 28. Section 9 says, for these proceedings you have just this single specified court, 10 and 11 to the same effect.

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There's nothing in 9, 10, or 11 that suggests that venue applies under any other section of the act.

QUESTION: But you've already said it isn't a single court, because you could choose to have the award confirmed by agreement, and then the modification would be a compulsory counterclaim.

MS. WAGNER: That's correct.

QUESTION: And so it would be in a place other than the place where arbitration was held.

But one question that I don't think your presentation responds to is, the default venue, the place where a person could always be sued even before the expansion of 1391 is where defendant's home base is, where defendant resides. Now, why in the world would Congress want to cut out that most convenient place for a defendant to be sued and say, no, you can't sue a defendant at the place that would be most convenient for defendant?

MS. WAGNER: Let me draw another analogy, Your Honor, with respect to that question, and that is a simple case of two corporations having a dispute arbitrate their dispute in Alabama. Let's say they're both incorporated here -- here. I'm from Alabama. But they're both incorporated in Alabama. They both have their principle place of business in Alabama. Their dispute arises in Alabama. Their arbitration takes place, either by

agreement or by decision of the arbitrators takes place in Birmingham, Alabama.

One of the parties is then dissatisfied with the award and chooses to challenge it under sections 10 and 11. That party then could file the proceeding in Alaska to challenge that Alabama arbitration proceeding if the defendant had a place of business there, or if the defendant did business there and satisfied the requirements of --

QUESTION: I wasn't asking about every place where the defendant does business. I was asking the defendant's residence. The one and only defendant's residence. That would be Alabama in your hypothetical.

I'm not asking you why Congress might have had a reason for wanting to cut out every place where the defendant is doing business, but why would it want to cut out the one place where the defendant resides, which on your theory it does?

MS. WAGNER: Of course, under modern venue statutes the -- a corporate defendant could have multiple residence, which is the hypothetical that I presented, but even under old law --

QUESTION: Well, I thought there's -- there's still a distinction between residing, which would be place of incorporation, principal place of business, and other

places where the defendant is doing business.

MS. WAGNER: Under the old law there might have been just one residence, because the residence definitions have come since that time, since the original FAA --

QUESTION: But doesn't 1391 -- do we have 1391 some place?

MS. WAGNER: Yes, Your Honor. The modern version of 1391 is in -- is on page 1 of the blue brief.

But getting back to your question, Justice Ginsburg, why would the -- why would Congress choose the default to be where the arbitration occurs when the defendant's -- when the defendant's residence may be elsewhere?

For the simple reason that there has been a determination of an appropriate forum as part of the arbitration proceedings either by the agreement or by the arbitrator that is presumptively convenient, and very simply, the FAA wanted to streamline -- the Congress wanted to streamline arbitration proceedings by providing that not every decision that an arbitrator makes should be subject to second-guessing.

QUESTION: But why do you say it is presumptively convenient, because that was sort of the point that an earlier question of mine was aiming at, and I thought I got a very good answer to it. It may be very

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inconvenient, but there may be a good arbitrator there, or it may be sufficiently convenient if we're talking about arbitration, but totally unacceptable if we're talking about a willingness to submit to the jurisdiction of the courts.

So I guess -- I guess I'm really asking you two questions. Why do you think it is presumptively convenient, and number 2, why is presumptive convenience the only consideration in trying to rationalize this?

MS. WAGNER: First, the arbitrator or the arbitration association is charged with the responsibility for selecting a convenient forum, and again, Congress, Your Honor, was trying to take those kinds of mundane considerations away from a position where they would be second-guessed by later court proceedings.

The arbitrator's discretion in many, many matters is not subject to being second-guessed and revisited in court proceedings. The review is very, very narrow.

QUESTION: Well, the place of the arbitration will not ne second-guessed, but that's not the question we've got.

MS. WAGNER: But the decision that the arbitration is the most convenient forum for the parties can carry forward with respect to later review, and

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second, to answer your question, certainly the defendant's residence may not be the best forum for review for a number of reasons. Since we're talking about proceedings under section 10 and 11, which is review and which is a challenge to the award, it provides that, for example, for fraud, or for some kind of misconduct on the part of the parties and the arbitrator, that that award could be set aside.

The convenience not only to the defendant, or to the party who is trying to uphold the award, but also to witnesses, to the arbitrator him or herself, all of those considerations of convenience of everyone involved come into play in making a decision as to where the arbitration should occur, and again, that can carry forward.

QUESTION: Ms. Wagner, why shouldn't we just apply -- you know, we have expressed a presumption in some of our cases that where you have a special venue provision we will presume it to be supplementary and not displacive unless it is made clear that the opposite is intended. I do not consider it at all clear here that the opposite is intended.

Why don't we just apply the presumption so that Congress will know in the future when you adopt a special venue provision we're assuming that that simply is cumulative. It is added to the normal venue provision.

Why isn't this an absolutely perfect case for applying that presumption?

MS. WAGNER: Justice Scalia, the presumption has not been stated in those general terms. The presumption that this Court applies is that if a specific venue statute is not intended to be exclusive, that it can be supplemented by later changes in general venue statutes.

QUESTION: Well, that's what we said. It's utterly meaningless. If it's not intended to be exclusive, it's not exclusive. That's a very significant piece of judicial --

MS. WAGNER: But that is what the cases say, and there is --

QUESTION: I think not. I think they express a presumption that when Congress enacts a venue provision it supplements extant venue provisions unless it is clear to the contrary.

MS. WAGNER: I have two responses to that, Justice Scalia.

QUESTION: And if we haven't said it, why shouldn't we say it?

MS. WAGNER: There is a countervailing presumption that specific controls over general, that if Congress specified venue or had a specific venue provision for a particular act, particularly one that's incorporated

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as part of an overall legislative scheme --

QUESTION: But Ms. Wagner, that's hard to apply here, because the particular could be any place under the choice of forum clause --

MS. WAGNER: That's correct.

QUESTION: -- which you concede, and then vacation comes in as a compulsory counterclaim, so it's the most general. It's anything. Anything.

MS. WAGNER: It is -- Your Honor, it is venue, certainly, and certainly, although this provides for exclusive forum, it is simply venue and can be waived, but the statute, by default, in the absence of such a post arbitration agreement with respect to 9 or 10, the default is whatever the arbitrator has decided or the parties have decided is the appropriate forum for the arbitration proceedings. And --

QUESTION: They say, if in doubt, and all the canons are pointing in different directions, and the language is somewhat ambiguous, I guess you could try to do what seems to make the most sense.

MS. WAGNER: Well --

QUESTION: And in your particular case you've said it does make sense to say that where Congress -- what Congress intended was, well, where the parties don't decide it, and you say we're going to arbitrate in Alaska,

do everything in Alaska. Now, that does make sense.

MS. WAGNER: And --

QUESTION: But they pointed out about six ways in which, once we go down that road, it's actually going to produce all kinds of inconvenience and mix-up and division of cases in all sorts of ways, which suggests their way makes quite a lot of sense, and I don't want you to leave without responding to the various points that they've made as to how this is all going to get mixed up if we take your route because of the cases being divided.

Remember, the other example was the example of an instance where somebody compels arbitration, they suspend the case, they go off somewhere to arbitrate, and obviously they'd like to go back to where they started.

MS. WAGNER: Which they can do, because --

QUESTION: If they agreed.

MS. WAGNER: Well, they can do, once that proceeding, Justice Breyer, is filed under section 3 -- under section 4 to compel arbitration, or under section 3 to stay a pending lawsuit. That court has the case, and if that court retains jurisdiction of the case, then that court can handle later proceedings, because these are, again, simply venue provisions.

But getting back to, I guess, an earlier question I'd like to complete the answer to, and that is,

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why can't we just assume that the general venue statutes -- why can't we just apply this liberally.

Well, first of all, venue is not something that you simply apply liberally out of some overriding policy consideration. You have to look at what is intended, and you have to apply it as it was written, and second, the section 10 and 11, particularly in contrast with section 4, simply cannot be read to leave that door wide open.

And I also would point out, as we have in our briefs, that looking at the history of this section, looking at the broad venue provision that Congress rejected out of the New York statute in favor of the very limited provisions, it's clear that they wanted to have this to be a limited venue provision.

I'd like -- I'd also raise one other practical consideration, and that is, a number of arbitrations in modern day are consolidated, where there may be multiple claims, multiple awards cases, you know, A versus B, C versus D, A versus D, you know, where the arbitrators are trying to make a number of decisions among a number of competing interests.

If venue is open, is wide open, what you're going to have is challenges and motions under section 9 --

QUESTION: Isn't that what 1404(a) is meant to accomplish, though, and district judges, recognizing that

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one action is better than five, or even two, will say, okay, this is a place of proper jurisdiction and venue, but we're going to transfer to that other so that all the arbitrations will go forward -- isn't that a typical use of 1404(a)?

MS. WAGNER: Certainly 1404(a) can be used, but the point is that FAA was intended to streamline, to simplify this procedure to avoid post arbitration arguments about procedural and matters of discretion.

QUESTION: But in -- it's in the cases that you put where arbitrations are often held in multiple cities, multiple venues, where the arbitrators themselves are from Chicago and New York and Los Angeles, it's not clear to me where the award is made.

MS. WAGNER: Courts that have addressed that issue, Justice Kennedy, have said that where the hearing takes place is venue for purposes under 9 --

QUESTION: But they have multiple hearings in multiple cities.

MS. WAGNER: Then presumably any of those cities would be an appropriate forum if the award is made in a number of different places, with different aspects heard in different places.

In light of the comparison between section 4 and section 9, 10, and 11, also the contrast between 9, 10,

and 11, there really is only one reading that can be had of this statute, that the intent of the Congress is clear, and that the default provision for venue, the provision that will apply in the cases where there is not already a pending case, or whether there's not post arbitration agreement, is going to be where the arbitration award took place, where the hearing took place.

Congress has determined that that is presumptively a proper forum, and that it simply should not be subject to later litigation as to whether there might be some, you know, arguably better forum for that proceeding.

Treating it like, as though it's an appeal process, it's a review process, where, for example, the arbitrator might be subject to discovery, witnesses might have to be called with respect to allegations of fraud and the like --

QUESTION: Your answer that if a motion to compel arbitration is brought in one court, that court could retain jurisdiction, cuts against your now answer that this is like an appellate proceeding.

MS. WAGNER: That's right, but again, presumptively like an appeal. Answering the question why this Congress would do it, it seems that that's the way they viewed it, that they viewed this as something which

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naturally ought to flow upstream through the same location, but certainly there are circumstances where that would not necessarily follow, and that would be cases where there is jurisdiction that has been lodged in a particular court, or where the parties simply waive venue objections.

But looking at the statute as a whole, and looking at a comparison of this statute with the broader language of the New York statute that served as its model, and that Congress rejected in favor of this very closely delineated provision for venue, it's very clear what Congress had in mind and, as this Court has held, has often held, venue is not something that this Court can simply apply in a way that seems convenient, or any court, but it is a matter of statute.

QUESTION: Thank you, Ms. Wagner.

Mr. Bromberg, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF DANIEL H. BROMBERG

ON BEHALF OF THE PETITIONER

MR. BROMBERG: Your Honor, unless the Court has questions, I have no further argument.

QUESTION: I have just one question, and that is, let's assume that you're right that Mississippi is a place of proper venue for this litigation, there is the general rule of the first to file is the one that goes --

to be filed goes forward, but that's not an iron-clad rule, so could it be that the Alabama district court would say, well, we're not going to defer to the first suit. There's nothing that obliges the Alabama court to give way, is there?

MR. BROMBERG: Well, Your Honor, we have not had the opportunity to brief that question, but I would add -- I would point out that there are what I think several difficulties with a response like that.

The first is, I think that it is unfair to require a party like the petitioner, who has objected to arbitration being conducted in a particular place, to force them, whether through a -- an absolute rule, as respondent is suggesting, or through a presumptive rule, to litigate post arbitration proceedings in that district.

The second thing that I would add is that some of the problems that I pointed out about a restrictive interpretation of sections 9, 10, and 11 would also be created by a presumptive rule.

In particular, it would burden the arbitration process itself. The prearbitration sparring, in some cases, over where an arbitration should be located would be complicated as much by a presumptive rule as it would be by an absolute restriction.

CHIEF JUSTICE REHNQUIST: Thank you,

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Mr. Bromberg. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 98-1960

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BY Ann Marie Fedrico

(REPORTER)