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STATE OF WASHINGTON
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Supreme Court No. _____
Court of Appeals No. 34901-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TACOMA NARROWS CONSTRUCTORS, a Washington joint venture,
Plaintiff/Respondent

v.

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation,
Defendant/Respondent

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation,
and

NIPPON STEEL / KAWADA JOINT VENTURE, a Japanese joint
venture,

Plaintiffs/Respondents

v.

TACOMA NARROWS CONSTRUCTORS, a Washington joint venture,
and SAMSUNG HEAVY INDUSTRIES CO., LTD. a Korean corporation,
Defendants/Appellants

**ANSWER OF PLAINTIFFS/RESPONDENTS NIPPON STEEL-
KAWADA BRIDGE, INC. AND NIPPON STEEL / KAWADA
JOINT VENTURE IN OPPOSITION TO PETITION FOR
DISCRETIONARY REVIEW OF PETITIONER SAMSUNG
HEAVY INDUSTRIES CO., LTD.**

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RULE

RAP 13.4(b)4

I. IDENTITY OF ANSWERING PARTY

Plaintiffs-Respondents Nippon Steel-Kawada Bridge, Inc. (“NSKB”) and Nippon Steel / Kawada Joint Venture (“NSKJV”) (collectively “Plaintiffs”) respectfully submit this Answer opposing the Petition for Discretionary Review of Defendant-Appellant Samsung Heavy Industries Co., Ltd. (“SHI”)

II. THE COURT OF APPEALS DECISION

The published Court of Appeals decision that SHI asks this Court to review (the “Decision”) correctly applied both the Federal Arbitration Act and controlling case law in deciding the issue of arbitrability and determining that the parties never agreed to arbitrate the disputes that form the basis for Plaintiffs’ Amended Complaint against both SHI and Tacoma Narrows Constructors (“TNC”) in the Superior Court for Thurston County.¹ A2, A7.² The Court of Appeals rejected the very same arguments SHI makes to this Court because it read the entire Dispute Resolution clause of the Purchase Order between SHI and NSKJV (“Purchase Order”), as this Court’s decisions obligate it to do, and found that (i) the clause “does not clearly state that the parties agreed to submit the question of arbitrability to an arbitrator” and (ii) the parties agreed “to

¹ Plaintiffs’ lawsuit has been consolidated with TNC’s action against NSKB.

² The Decision forms the Appendix to SHI’s Petition, page citations to which appear herein as “A__”.

arbitrate *only* those disputes” that — unlike the pending claims — “are unconnected to” disputes between NSKJV and TNC. A11, A15 (emphasis added). The Court of Appeals relied upon, and correctly read, the entirety of the Dispute Resolution clause, including its final three paragraphs – and paragraph 4 in particular. SHI has advertently omitted all of these paragraphs from its Petition, and its grudging, limited discussion of paragraph 4 misstates the provision by omitting its crucial language.

The Court of Appeals applied the rule — repeatedly affirmed over decades by the U.S. Supreme Court, this Court, and the Court of Appeals — that the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201-208, contains a strong presumption that *courts* — *not arbitrators* — determine the threshold issue of whether parties’ contract disputes are arbitrable. That presumption stands unless the contract clearly and unmistakably shows that the parties intended for arbitrability to be decided by an arbitrator. A11. The Court of Appeals also correctly applied this Court’s decisions holding that, “[i]n interpreting an arbitration clause, the intention of the parties as expressed in the agreement control, but ‘those intentions are generously construed as to issues of arbitrability.’” A12 (*quoting In re W. A. Botting Plumbing & Heating Co.*, 47 Wn. App. 681, 684 (1987)).

Reading the Dispute Resolution clause as a whole, the Court of Appeals correctly held that (i) it had to determine the question of arbitrability; (ii) the parties had not agreed to arbitrate Plaintiffs’ claims against SHI; and (iii) Plaintiffs could require those claims to be resolved

jointly with their claims against TNC, in a single proceeding in Thurston County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

The Decision turns on the particular words of a particular contract, and presents no issues warranting review by this Court. SHI's statement of issues misstates the applicable law and the operative provisions of the contract at issue.

IV. STATEMENT OF THE CASE

SHI's statement of the case in its Petition is argumentative, incomplete, and misstates the facts relevant to the issues on review. SHI omits the salient provisions of the Dispute Resolution and audit clauses of the Purchase Order, and neglects to mention SHI's breaches of contract that imperiled the on-time completion of the new Tacoma Narrows Bridge and provoked this litigation. Plaintiffs respectfully refer the Court to the Facts set forth in the Decision — which were drawn from the briefing of the parties below, A2-6 — for a complete and accurate discussion of the facts relevant to the issues raised by the Petition.

V. ARGUMENT

A. **The Court of Appeals's Decision Does Not Conflict With Any Decision of this Court or the Court of Appeals, But Correctly Applies the Federal Arbitration Act and Controlling Precedent in Washington and U.S. Supreme Court.**

Although SHI contends that the Court of Appeals departed from Washington law when it concluded that "a court, not an arbitrator, is the

appropriate entity to determine the question of whether the parties agreed to submit a specific claim to arbitration,” A11, SHI cites only two Washington cases: this Court’s decision in *Zuver v. Airtouch Communications, Inc.*, 153 Wn. 2d 293 (2004)³ and the Court of Appeals’s decision in *Kamaya Co. v. American Property Consultants, Ltd.*, 91 Wn. App. 703 (1998). Pet. at 8-9, 12-13. Furthermore, SHI cites these two cases solely for the unexceptionable proposition that “both state and federal courts of the United States” must enforce Chapter 2 of the FAA, which ratified and implemented the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”), (*id.* at 9, 12), implying that the Court of Appeals ignored the FAA. That Court, however, not only expressly cited and acknowledged the applicability of the FAA, it correctly applied the FAA, and controlling case law thereunder, in interpreting the Dispute Resolution clause of the Purchase Order. A9-11. Having failed to cite *any* Washington authority that was not considered and followed by the Court of Appeals, the Petition does not satisfy RAP 13.4(b)’s requirement of a conflict between the Decision and Washington law, and must be denied.

³ In its extensive briefing in the trial court and the Court of Appeals, SHI never cited *Zuver*.

1. **The Court of Appeals Correctly Followed the Controlling Washington and Federal Rule that Courts, Must Decide the Threshold Issue of Arbitrability Unless the Parties *Clearly and Unmistakably* Agree to Have an Arbitrator Assume the Court's Power to Decide a Particular Dispute.**

SHI's Petition simply ignores the law, long settled by both Washington courts and the U.S. Supreme Court, "that the question of arbitrability . . . is undeniably an issue for *judicial* determination." *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986) (emphasis added). This Court has likewise held that "it is the *court's* duty to determine whether parties have agreed to arbitrate a particular dispute." *Mt. Adams Sch. Dist. v. Cook*, 150 Wn. 2d 716, 723 (2003) (quoting *Peninsula Sch. Dist. No. 402 v. Pub. Sch. Employees of Peninula*, 130 Wn. 2d 401, 413-14 (1996)) (emphasis added). If a contract is either silent or ambiguous as to *who* determines whether a dispute is to be arbitrated, courts *presume* that the *court* will decide, and one seeking arbitration must prove, by clear evidence, that the parties intended an arbitrator to resolve the issue. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Kamaya*, 91 Wn. App. at 714 ("[T]he question of whether parties have agreed to arbitrate a dispute is a *judicial one* unless the parties clearly provide otherwise.") (emphasis added; quotation omitted). As Justice Breyer noted in *Green Tree*, the presumption generally favoring arbitration to resolve disputes — on which the Petition is premised — simply does not apply where the question is "whether the parties wanted a

judge or an arbitrator to decide *whether they agreed to arbitrate a matter.*”
Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003)

As the U.S. Supreme Court explained in *AT&T*, “whether or not [a party is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.” 475 U.S. at 649 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964)). Because the duty to arbitrate is of contractual origin, “a compulsory submission to arbitration cannot precede *judicial* determination that [a contract] does in fact create such a duty.” *Id.*

Of significance in evaluating SHI’s Petition is the fact that the U.S. Supreme Court disagrees with SHI’s contention that the “substantial public interest” in encouraging parties to choose arbitration is best promoted by having arbitrators decide arbitrability. Pet. at 12-13. The U.S. Supreme Court has decided that these policies are best protected by the presumption that *judges*, not arbitrators, decide arbitrability, noting that “the willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced . . . if a[n] . . . arbitrator had the power to determine his own jurisdiction.” *AT&T*, 475 U.S. at 651 (citations and quotations omitted). This presumption favoring judicial resolution of arbitrability can be overcome only if the party trying to overcome it demonstrates that “the parties ‘clearly and unmistakably provided otherwise’” in their contract, *Mt. Adams School Dist.*, 150 Wn. 2d at 724 (quoting *AT & T*, 475 U.S. at 649), as even SHI is forced to admit. Pet. at 9.

The rule is that any doubts are to be resolved in favor of the *court* — not an arbitrator — deciding arbitrability. As the Court held in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995):

“[G]iven the principle that a party can be forced to arbitrate only those issues it *specifically has agreed* to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” (Emphasis added).

Thus the Court of Appeals correctly applied controlling law and policy in the form of “[t]he general rule [] that whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties.” A10.

2. The Court of Appeals Followed Controlling Washington and Federal Law and Correctly Determined that the Dispute Resolution Clause Does Not Clearly and Unmistakably Provide for an Arbitrator to Decide the Arbitrability of the Pending Disputes.

In determining that SHI failed to show that the parties “clearly manifested [the] intention” to have an arbitrator decide the arbitrability of the pending disputes, A10 (citations and quotations omitted), the Court of Appeals again reasoned in accordance with the controlling decisions of the U.S. Supreme Court, which repeatedly confirm that the “first principle . . .

is that arbitration is a matter of contract.” *AT&T*, 475 U.S. at 648 (citations and quotations omitted); *see also First Options*, 514 U.S. at 943; *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Therefore, courts must apply “ordinary state-law principles” of contract interpretation to determine whether the plain text of the provision in question reveals an objective intent by the parties “to submit the arbitrability issue to arbitration.” *First Options*, 514 U.S. at 944.

This is a crucial principle, because, as this Court has observed, parties often choose to articulate specific exceptions to the arbitration provisions in their contracts. *See Mt. Adams Sch. Dist.*, 150 Wn. 2d at 724; *Peninsula Sch. Dist.*, 130 Wn. 2d at 414; *see also Volt*, 489 U.S. at 478-79 (noting that parties “may limit by contract the issues which they will arbitrate”). The Court of Appeals strictly complied with the above-cited decisions, quoting *in full* the parties’ *four-paragraph* “dispute resolution clause,” and giving it “a plain reading,” A8-9. *See Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667 (1994).

In contrast to the Court of Appeals’s meticulous application of the law requiring contracts to be given their “plain meaning”, SHI’s argument disregards three of the four paragraphs of the Dispute Resolution clause — the fourth in particular — and treats the first clause as if it stood alone. As the complete text plainly shows, each of these three paragraphs specifically apply “[n]otwithstanding” the first paragraph’s general provision for permitting arbitration.

30. DISPUTE RESOLUTION

[Paragraph 1] All disputes, controversies, or differences which may arise out of or in relation to or in connection with the Purchase Order, or for the breach thereof, shall be amicably settled between the Purchaser and the Vendor. In case no agreement is reached within a reasonable time, such disputes, controversies or differences shall be finally referred to and settled by arbitration. The arbitration shall take place in the court of International Chamber of Commerce in Singapore in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The Arbitration shall be made by three (3) arbitrators. The award rendered by the arbitrators shall be final and binding upon both parties.

[Paragraph 2] Notwithstanding the foregoing, all questions, disputes or differences between the Purchaser and the Vendor arising as a result of disputes between or among WSDOT, TNC, NSKB and/or the Purchaser relating to the Vendor's performance of the Subcontract Work under the Purchase Order or involving claims by WSDOT, TNC and/or NSKB against the Purchaser resulting from the Subcontract Work shall be governed in accordance with the laws of the State of Washington, the United States of America.

[Paragraph 3] The Vendor shall, upon the Purchaser's written request, fully assist the Purchaser in the proceedings of the arbitration or litigation arising between or among WSDOT, TNC, NSKB and/or the Purchaser relating to the Vendor's performance of the Subcontract Work or

otherwise related to the Vendor's actions under the Purchaser Order. In such case, the Vendor shall be bound by the award of such arbitration or the judgment of such litigation, as the case may be.

[Paragraph 4] If any dispute arises in connection with the TNC Contract and the Purchaser is of the opinion that such dispute touches or concerns the Subcontract Work, then the Purchaser may by notice in writing to the Vendor require that any such dispute under this Purchase Order shall be dealt with jointly with the dispute under the TNC Contract. The Vendor shall be bound in like manners as the Purchaser by the award or decision made in connection with such joint dispute.

(CP 2010 (bold in original).)

It is entirely on Paragraph 1 that SHI relies; indeed, SHI essentially ignores the rest of the Dispute Resolution clause, Pet. at 3-4. Paragraph 1 is a general clause providing that “[a]ll disputes” regarding the SHI Contract are to be settled, but, where there is no settlement “within a reasonable time, such disputes . . . *shall be finally* referred to and *settled by* arbitration.” (CP 2010) (emphasis added). Paragraph 1 also provides that, in cases where binding arbitration is the appropriate dispute resolution mechanism, the rules of the International Chamber of Commerce (“ICC Rules”) will apply⁴. (*Id.*)

⁴ Paragraph 1 provides only for an arbitration in which the arbitrator's award is binding on both parties; there is *no* provision for a non-binding arbitration. (CP 2010) (“The award rendered by the arbitrators *shall be final and binding upon both parties.*”) (emphasis added).) SHI concedes, however, that, if this Court adopts SHI's so-called

Paragraph 4, in contrast, is a *specific* clause, in which the parties agreed to procedures for resolving disputes arising from the Purchase Order where (i) there is any dispute “in connection with” the contract between NSKB and TNC; and (ii) “[NSKJV] *is of the opinion* that such dispute *touches or concerns*” the Purchase Order work. (CP 2010). Where these conditions obtain, the dispute resolution clause gives NSKJV the right to “*require* that any such dispute under this Purchase Order shall be *dealt with jointly* with the dispute under the TNC Contract.” (*Id.* (emphasis added)). As is clear from the face of Plaintiff’s Amended Complaint, and as the Court of Appeals found through a thorough examination of the record, the pending claims meet both conditions. Indeed, it is undisputed that NSKJV has formed the opinion that its pending disputes with SHI “touch or concern” the disputes between NSKB and TNC. A13-17.

It is hornbook law that specific clauses prevail over general ones like paragraph 1. *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 354-55 (2006). By *excepting* the pending disputes from paragraph 1’s provisions allowing binding arbitration, the parties did not manifest the requisite “clear and unmistakable” intent to have an arbitrator decide whether the pending disputes are arbitrable. A11. To the contrary; it is plain that the

“plausible interpretation” of paragraph 4, “the outcome of the TNC-NSK dispute would be binding in any arbitration between NSK and Samsung,” Pet. at 16, SHI thus admits that the arbitration it is seeking is a *non-binding* one. Since no such arbitration is encompassed by paragraph 1, SHI admits that paragraph 1 does not apply.

parties did *not* agree for an arbitrator to determine arbitrability of disputes like the pending ones, which involve claims among Plaintiffs, TNC and SHI that are subject to “joint[]” resolution.

The Court of Appeals correctly recognized that paragraph 4 of the Dispute Resolution clause operates as a specific exception to paragraph 1’s general provision allowing arbitration of disputes between NSKJV and SHI. A13. Paragraph 4 specifically empowers NSKJV to *require* that SHI resolve disputes between them “jointly” with disputes arising under NSKB’s contract with TNC. In addition, paragraph 3 specifies that disputes involving TNC and NSKB may be litigated. Thus, the specific exceptions to paragraph 1 of the Dispute Resolution clause plainly allow NSKJV to resolve joint disputes by litigation. And, under this Court’s *Mt. Adams School District* and *Peninsula School District* decisions, such disputes are therefore, unquestionably, beyond the scope of the Dispute Resolution clause’s paragraph allowing for arbitration. 150 Wn. 2d at 724; 130 Wn. 2d at 414.

Reading the Dispute Resolution clause in full, it is clear that the federal court decisions that SHI asks this Court to follow instead of the Washington and U.S. Supreme Court authority followed by the Court of Appeals are completely inapposite. Pet. at 10-11. *See Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 121, 124-25 (2d Cir. 2003); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 277 (3d Cir. 2003); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473-74 (1st Cir. 1989); *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299, 301 (D.

Hawaii 1991). The arbitration agreements in those cases gave no indication that the parties intended any mechanism *other* than arbitration to resolve all disputes for, in each of the cases SHI relies upon, the contracts made arbitration the sole means of deciding every dispute. Unlike the Purchase Order, those contracts contained no exceptions, or otherwise allowed for any dispute to be resolved by any other means, but broadly mandated arbitration to resolve all disputes. Thus, the courts concluded that the all-encompassing provisions for arbitration, together with their adoption of ICC rules giving the arbitrator power to determine arbitrability, manifested with sufficient clarity the parties' intent to have the arbitrator decide arbitrability. Assuming those decisions comport with U.S. Supreme Court case law affirming the strong presumption that *judges* decide arbitrability, *see, e.g., First Options*, 514 U.S. at 944-45, they nevertheless provide no authority for referring arbitrability to an arbitrator in this case, given the material differences between the arbitration clauses in those cases and the Dispute Resolution clause here.

Where, as here, the “contract[] [] begin[s] with *broad sweeping language which is later qualified or narrowed*, the rule of construction is that the specific provisions in the agreement control.” *Goldberg v. Bear Stearns & Co.*, 912 F.2d 1418, 1421 (11th Cir. 1990) (emphasis added). *See also Adler*, 153 Wn. 2d at 354-55. Thus, SHI is incorrect in asserting that paragraph 1's general reference to “all disputes” and its choice of ICC Rules to govern disputes that are *actually* “referred to . . . arbitration” under that paragraph can be read as a clear and

unmistakable agreement that an arbitrator — instead of a court — should decide whether the pending disputes are arbitrable. These disputes, as the Court of Appeals correctly found, fall within the exception of paragraph 4.

SHI having failed to overcome the presumption that judges decide arbitrability, the Court of Appeals properly declined to follow SHI's cited cases, which turned on the text of arbitration clauses that differ materially from the Dispute Resolution clause.

B. The Court of Appeals's Decision Is Consistent with Washington Law and U.S. Supreme Court Precedent Requiring Courts to Interpret Dispute Resolution Provisions in Accordance with Basic Canons of Contract Interpretation To Determine and Enforce the Parties' Intent.

SHI also incorrectly asserts that the Decision conflicts with the *Zuver* and *Kamaya* opinions, because, in SHI's view, the Decision allegedly fails to “indulge every presumption in favor or [*sic*] arbitration” or resolve “any doubts concerning the scope of arbitrable issues . . . in favor of arbitration.” Pet. at 18. Once again SHI is wrong. There *is* no conflict between the Decision and Washington law, and SHI's assertion to the contrary ignores the Decision's express application of the very interpretive principles that SHI accuses the Court of Appeals of overlooking. Thus the Court recognized that:

In interpreting an arbitration clause, the intentions of the parties as expressed in the agreement control, but those intentions are generously construed as to issues of arbitrability. To rule that a particular dispute is not arbitrable under an arbitration agreement the court must be able to say with

positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

A12-13 (citations and quotations omitted).

It is SHI, not the Court of Appeals, that is mistaken about the applicable law. The general policy favoring arbitration⁵ is one that places arbitration agreements “upon the same footing as other contracts,” *Volt*, 489 U.S. at 474 (citation omitted), not one that allows courts to twist the words of the parties’ agreements to force them to arbitrate.⁶ *Goldberg*, 912 F.2d at 1419-20. “Arbitration under the [FAA] is a matter of consent, not coercion” *Volt*, 489 U.S. at 479. Consistent with U.S. Supreme

⁵ Only final and binding arbitration is favored. *United Steelworkers Local 1165 v. Lukens Steel Co.*, 969 F.2d 1468, 1474 (3rd Cir. 1992). Since, as shown *supra* n.4, SHI’s proffered reading of the Dispute Resolution clause would result in non-binding arbitration, the arbitration sought by SHI is not favored by the policy SHI espouses.

⁶ SHI faults the Court of Appeals for not rewriting the Dispute Resolution clause to compel arbitration, insisting that “the most plausible interpretation” of paragraph 4 is that the parties’ agreement that NSKJV can require disputes to be resolved “jointly” really means that the disputes must be resolved *separately*—*i.e.*, in two separate actions: one a Washington litigation in which TNC and Plaintiffs, but not SHI, will participate; the other a Singapore arbitration in which Plaintiffs and SHI, but not TNC, will participate. Pet. at 17. The Court of Appeals, consistent with fundamental rules of contract interpretation repeatedly affirmed by this Court, correctly rejected SHI’s construction. A12; *see also Wagner v. Wagner*, 95 Wn. 2d 94, 101 (1980) (courts must “give[] effect to all of [a contract’s] provisions,” taking care not to “render[] some of the language meaningless or ineffective”); *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667 (1994) (noting that courts “must read [a contract] as the average person would read it,” avoiding “a strained or forced construction leading to absurd results.”) (quotations and citations omitted); *accord Eurick v. Pernco Ins. Co.*, 108 Wn. 2d 338, 341 (1987); *Forest Mktg. Enters. v. State*, 125 Wn. App. 126, 132 (2005).

Court precedent, the decisions in both *Zuver* and *Kamaya* make plain what SHI asks this Court to ignore: “generally applicable” principles of contract law govern. Thus “the duty to submit a matter to arbitration arises from the contract itself,” not some “policy”, as SHI urges. 91 Wn. App. at 713-14; 153 Wn. 2d at 302.

The Decision expressly followed these rules, setting forth, at the outset of its analysis, the four “guiding principles” Washington courts follow “when determining whether the two parties agreed to submit a particular dispute to arbitration.” The “first principle,” as the Court of Appeals acknowledged, is that “arbitration is a matter of contract,” so that “a party *cannot* be required to submit to arbitration any dispute which he has not agreed so to submit.” *AT&T*, 475 U.S. at 648 (citations and quotations omitted) (emphasis added); *see also, e.g., Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 760-61 (D.C. Cir. 1988).

This is so because the FAA policy “favoring” enforcement of arbitration provisions “simply requires courts to enforce privately negotiated agreements to arbitrate, *like other contracts, in accordance with their terms.*” *Volt*, 489 U.S. at 478. (emphasis added). As *Zuver* makes clear, this “policy” is really one that does not permit arbitration agreements to be treated *differently* from other contracts. 153 Wn. 2d at 302; *accord, Volt*, 489 U.S. at 478. (“The [FAA] was designed to overrule the judiciary’s longstanding refusal to enforce agreements to

arbitrate and to place such agreements upon the same footing as other contracts.”) (emphasis added; citations and quotations omitted).⁷

Finally, the fundamental genesis of the policy of favoring arbitration is the desire to avoid “the formalities, the delay, the expense and vexation of ordinary litigation,” to “avoid the courts” in resolving disputes, thereby enhancing efficiency and reducing the costs and burdens associated with litigation. *Barnett v. Hicks*, 119 Wn. 2d 151, 160 (1992). SHI’s position, if accepted, would subvert these goals, for it asks the Court to interpret the Dispute Resolution clause so that there would be *two* proceedings — the Superior Court litigation between TNC and Plaintiffs, followed by a Singapore arbitration between SHI and Plaintiffs, with “the outcome of the TNC-NSK dispute [to] *be binding in any arbitration between NSK and [SHI]*.” Pet. at 16 (emphasis added). Leaving aside the fact that this is only the latest of eight or so “plausible interpretations” SHI has urged on the courts, such an interpretation multiplies, not avoids, litigation, in clear violation of the aims of both the policy favoring arbitration and the express terms of the Purchase Order. It also

⁷ The “positive assurance” standard quoted by the Decision, — which SHI inexplicably claims the Decision ignores, Pet. at 15 — is an affirmation, not an erosion, of this bedrock principle. *See, e.g., Berkery v. Cross Country Bank*, 256 F. Supp. 2d 359, 365-66 (E.D. Pa. 2003) (“Positive assurance is not . . . absolute certainty. Even as it applies the presumption of arbitrability, . . . a district court must still determine, and honor, what appears to be most consistent with the intent of the parties, on the theory that arbitration clauses are creatures of contract, and, [a]s a matter of contract, no party can be forced to arbitrate unless that party has entered into an agreement to do so.”) (citations and quotations omitted).

contravenes the rule that the “courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.” *Goldberg*, 912 F.2d at 1419-20.

C. The Court of Appeals Properly Interpreted the Dispute Resolution Clause As a Whole, Consistent with *Zuver* and *Kamaya*, and Correctly Found that Paragraph 4 Is an Express Exception that Applies “Notwithstanding” Paragraph 1.

The Court of Appeals also correctly held that “a plain reading” of paragraph 4 of the Dispute Resolution clause “clearly expresses the parties’ intent to resolve ‘jointly’ any pending disputes in connection with” the TNC Contract “that, in the opinion of NSK Joint Venture, ‘touches or concerns [Samsung’s] Subcontract Work.’”. A11, A13, Contrary to SHI’s argument, Pet. at 15-16, the U.S. Supreme Court has made clear that recognizing and enforcing such express exceptions to arbitration is completely consistent with the courts’ duties under the FAA.

“[T]he FAA does not . . . prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement;” rather, “parties are generally free to structure their arbitration agreements as they see fit” and “may limit by contract the issues which they will arbitrate.” *Volt*, 489 U.S. at 478-79; accord *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985). Thus, courts consistently hold — as did the Court of Appeals in the Decision — that broad, general arbitration clauses in an agreement can be, and are, limited by the parties. Any such limitations must be respected, and demands for arbitration inconsistent with such limitations must be denied.

See, e.g., Goldberg, 912 F.2d at 1419-20; *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 757-58 (9th Cir. 1989).

SHI's alternative argument — that paragraph 4 “is not applicable here because NSK's claims do not ‘touch or concern’ the TNC-NSK disputes” Pet. at 17 n.9 — once again ignores the plain language of the Dispute Resolution clause. The Court of Appeals correctly read paragraph 4 as clearly stating that what matters is NSKJV's “*opinion*” that its disputes with SHI “touch or concern” NSKB's disputes with TNC; if NSKJV holds that opinion — and it does — SHI is required to engage in joint resolution of claims. SHI's argument ignores this part of paragraph 4, offending the canon that it is plainly improper to interpret a contract provision in a manner that “renders some of the language meaningless or ineffective,” *Wagner v. Wagner*, 95 Wn. 2d 94, 101 (1980). Thus the Court of Appeals properly rejected SHI's “reading” of paragraph 4. A17. In addition, the Court of Appeals went on to examine and compare carefully Plaintiffs' claims against SHI and TNC, and, again correctly, found that they in fact “reveal a high degree of connection among them,” and are “related.” A15, A17.

D. The Decision Raises No Issue of Substantial Public Interest Not Already Addressed by the Same Washington and U.S. Supreme Court Decision with which it is Consistent

SHI's claim that the Decision can be reviewed because it raises an issue of substantial public interest rests on the false premise that the decision conflicts with basic policies underlying both the FAA and the

Convention—namely, fostering international comity and commerce by respecting and enforcing parties' agreements to arbitrate. Pet. at 12-13, 18-20. However, as explained above, far from conflicting with these policies, the Decision furthers them, by applying contract law principles and interpreting the dispute resolution clause here *according to its terms*, as the U.S. Supreme Court has instructed courts to do: *See, e.g., Volt*, 489 U.S. at 478 (“[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”).

As also noted above, it is *SHI's arguments* that offend the policy favoring arbitration, *see Volt*, 489 U.S. at 478, for, as the U.S. Supreme Court has noted, parties will be discouraged from agreeing to arbitrate any claims, unless they can trust the courts to honor limitations they impose on the scope of such arbitrations. *AT&T*, 475 U.S. at 651.

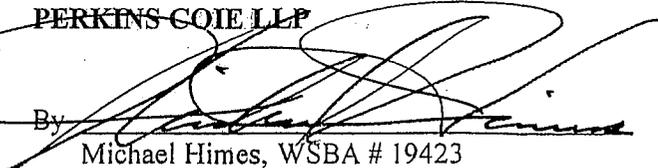
VI. CONCLUSION

For the foregoing reasons, SHI's Petition for Discretionary Review should be denied.

Dated: June 8, 2007.

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