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Court of Appeals No. ~~35241-9-II~~ 34901-9

IN THE COURT OF APPEALS, DIVISION II,
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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUE PRESENTED	1
III.	STATEMENT OF THE CASE	2
	A. The Project And The Parties.....	2
	B. NSK's Change Order Claims.....	4
	C. NSK's Audit Claim.....	7
	D. The Trial Court's Arbitration Rulings	9
	E. Appellate Proceedings	12
IV.	SUMMARY OF ARGUMENT.....	13
V.	ARGUMENT	15
	A. Pursuant To The Parties' Agreement, The Convention, And The FAA, The Parties' Dispute Regarding The Arbitrability Of NSK's Claims Must Be Referred To The ICA.	15
	B. The Trial Court Erred In Not Referring NSK's Challenge To The Arbitrability Of The Audit Claim And The Change Order Claims To The ICA.	20
VI.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

China Minmetals Import & Export Co. v. Chi Mei Corp., 334
F.3d 274 (3d Cir. 2003)..... 19

Empresas Electricas Estatales, No. 05-civ-5004(RMB), 2005
WL 1705080 (S.D.N.Y. July 18, 2005) 20

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)..... 16

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003) 18

Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146
Wn.2d 29 (2002) 17

Kamaya Co., Ltd. v. American Property Consultants, Ltd., 91
Wn. App. 703 (1998) 16, 17, 22

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52
(1995)..... 17, 23

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473
U.S. 614 (1985)..... 17

Mount Adams Sch. Dist. v. Cook, 150 Wn.2d 716 (2003) 17

*Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum
Corp.*, 88 F.3d 129 (2d Cir. 1996) 17

*Oriental Republic of Uruguay v. Chem. Overseas Holdings,
Inc.*, Nos. 05-civ-6151(WHP), 05-civ-6154(WHP),
2006 WL 164967 (S.D.N.Y. Jan. 24, 2006) 19

Peninsula Sch. Dist. v. Pub. Sch. Employees of Peninsula, 130
Wn.2d 401 (1996) 17

<i>Riley v. Kingsley Underwriting Agencies, Ltd.</i> , 969 F.2d 953 (10th Cir. 1992).....	16
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974)	16
<i>Shaw Group Inc. v. Tripelfine International Corporation</i> , 322 F.3d 115 (2d Cir. 2003).....	19
<i>State v. Bisson</i> , 156 Wn.2d 507 (2006).....	23
<i>Tombs v. Northwest Airlines</i> , 83 Wn.2d 157 (1973).....	17
<i>W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco</i> , 47 Wn. App. 681 (1987)	18

Other Authorities

T. Oehmke, COMMERCIAL ARBITRATION, § 20:9 (2006)	19
U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, <i>reprinted at</i> 9 U.S.C. § 201	11, 15
9 U.S.C. § 201.....	11, 15
9 U.S.C. § 206.....	15

I. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to refer the parties' dispute regarding the arbitrability of the "audit claim" asserted by Respondents Nippon Steel-Kawada Bridge, Inc. and Nippon Steel/Kawada Joint Venture (collectively, "NSK") to the International Court of Arbitration ("ICA") in Singapore. RP 08/18/2006, at 21; CP 1938-39.

2. The trial court similarly erred in failing to refer the parties' dispute regarding the arbitrability of the "change order claims" asserted by NSK against Appellant Samsung Heavy Industries Co., Ltd. ("Samsung") to the ICA. RP 05/05/2006, at 23; CP 1604-05.

II. ISSUE PRESENTED

The purchase order agreement at issue in this appeal requires, among other things, that the parties resolve through arbitration "[a]ll 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." CP 1306. Although both the "audit claim" and the "change order claims" asserted in this matter arise out of or in connection with the purchase order (or the alleged breach thereof), the trial court refused to refer the parties' dispute regarding the arbitrability of those claims to the ICA and allowed NSK's claims to proceed in litigation. RP 05/05/2006, at 23; RP

08/18/2006, at 21; CP 1604-05, 1938-39. The following issues pertain to the assignments of error in Section I above and bear directly on the proper scope and effect of the parties' agreement to arbitrate:

1. Whether the trial court's oral ruling and written order regarding the arbitrability of NSK's audit claim should be reversed because (a) the parties' dispute regarding the arbitrability of the audit claim must be resolved by the ICA, and (b) the arbitration provision at issue here encompasses that claim. AE 1.

2. Whether the trial court's oral ruling and written order regarding the arbitrability of the change order claims should be reversed because (a) the parties' dispute regarding the arbitrability of the change order claims must be resolved by the ICA, and (b) the arbitration provision at issue here encompasses those claims as well. AE 2.

III. STATEMENT OF THE CASE

A. The Project And The Parties

This appeal concerns disputes arising out of the construction of the new Tacoma Narrows Bridge (the "Project"), an \$849 million public works project for a second highway span between Tacoma and the Kitsap Peninsula. CP 2399. The Washington State Department of Transportation ("WSDOT") engaged Tacoma Narrows Constructors ("TNC"), a joint

venture of Bechtel Infrastructure Corporation and Kiewit Pacific Company, to be the general contractor on the Project. CP 1941-42.

In August 2002, TNC issued a purchase order (the "TNC Purchase Order") to Nippon Steel-Kawada Bridge, Inc. ("NSKB"), a corporation owned by subsidiaries of Nippon Steel Corporation and Kawada Bridge, Inc., to furnish and to deliver the steel bridge deck and suspension cables for the Project. CP 2348, ¶ 6. NSKB then subcontracted the supply and delivery of the steel bridge deck to Nippon Steel/Kawada Joint Venture ("NSKJV"), a Japanese joint venture of Nippon Steel and Kawada Bridge. CP 1316, ¶ C. The price for the TNC Purchase Order was approximately \$63 million. CP 2076.

In November 2002, NSKJV issued a purchase order (the "NSKJV Purchase Order") to Samsung, a corporation registered in the Republic of Korea and a member of the Samsung Group. CP 2348, ¶ 8. Samsung's scope of work under the purchase order was to (a) fabricate the bridge deck in Korea from steel supplied by NSK according to plans specified in the purchase order, and (b) load the deck in sections onto vessels arranged by NSKJV for transport to the Project site in Gig Harbor, Washington. CP 1954, ¶ 47. The price for the NSKJV Purchase Order was approximately \$24.6 million. CP 2348, ¶ 9.

B. NSK's Change Order Claims

After execution of the NSKJV Purchase Order, Samsung learned from NSK that the design for the Project had been changed very substantially by TNC. CP 2349, ¶ 18. As NSK itself would later allege, (a) TNC's design changes were inconsistent with the drawings, plans, and specifications used in the NSKJV Purchase Order for the design of the bridge deck (CP 375, ¶ 8), (b) the changes were "radical in nature, and beyond the reasonable contemplation of an experienced steel bridge fabricator" (CP 385, ¶ 49), and (c) TNC's changes made "fabrication of the steel deck much more costly and time-consuming, with fabrication taking up to 14 months longer than had been anticipated" (CP 387, ¶ 58).

The bridge redesign altered and considerably increased Samsung's scope of work under the NSKJV Purchase Order and resulted in substantial additional cost, including overtime and weekend work, for Samsung to complete fabrication of the bridge deck within the schedule of the NSKJV Purchase Order. CP 1320, ¶ A. In October 2003, Samsung submitted a number of proposed change order requests pursuant to the terms of the NSKJV Purchase Order. CP 1221-27, 2350, ¶ 23. NSK informed Samsung that it would submit those change order requests (along with several of its own) to TNC. CP 2350, ¶ 25. In the meantime,

however, NSK directed Samsung to proceed with the changed scope of work and accelerated work schedules. *Id.*; ¶ 26. Samsung was not aware of the limitations on change orders contained in the TNC Purchase Order. CP 2363-64, ¶ 6.

Despite its promise to do so, NSK did not properly pursue additional compensation from TNC on behalf of Samsung. CP 1316-17. Indeed, Samsung later learned that NSK did not formally submit the Samsung change orders to TNC until December 2005. CP 2376, 2389. When TNC eventually convened a series of meetings to discuss Samsung's concerns, NSK participated briefly and then withdrew. CP 2351-53.

TNC and Samsung thereafter met without NSK. CP 2352-53. As a result of those meetings, on September 29, 2005, TNC and Samsung entered into an agreement – the “TNC-Samsung Settlement” – pursuant to which TNC approved Samsung's proposed change order requests and agreed to pay SHI an additional \$29.1 million for completion and loading of the bridge deck sections on an expedited schedule in June 2006. CP 1236-63, 2353, ¶ 46. It is Samsung's understanding that TNC thereafter made a draw of approximately \$12.9 million against an NSK

letter of credit guaranteeing its performance under the TNC Purchase Order.¹ CP 1964, ¶¶ 102-03.

Rather than work cooperatively with TNC and Samsung, NSK filed this lawsuit. CP 8-371. The amended pleading that NSK filed on October 25, 2005, includes the following claims regarding Samsung's change order requests:

- Count One seeks a declaratory judgment concerning NSK's and Samsung's rights and obligations under the NSKJV Purchase Order,
- Counts Two and Three seek damages for alleged breaches by Samsung of the NSKJV Purchase Order, including recovery of the \$12 million advanced by NSK in January 2005 and any amounts received under the TNC-Samsung Settlement, and
- Count Four seeks indemnification under the NSKJV Purchase Order for any damages suffered by NSK.

CP 399-402. As can be seen, all of these claims – referred to herein as NSK's "change order claims" – arise out of or relate to the NSKJV Purchase Order or the alleged breach thereof.

¹ Samsung completed fabrication of the deck sections in June 2006. CP 2417. However, loading of the deck sections on vessels for transport to Gig Harbor was delayed by various performance problems of NSK. CP 2417 n.2. On or about November 3, 2006, loading of the final deck sections will be completed. At that point, other than potential warranty-related issues, Samsung's work on the Project will be complete.

C. NSK's Audit Claim

The NSKJV Purchase Order provided in section 1, clause 33 ("Clause 33") that Samsung's books and records relating to the Project would be available for review by NSK:

Maintenance of Books and Records. ... During normal business hours, Vendor [Samsung] shall afford Purchaser [NSKJV] ... access to [Samsung's] records, books, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, and other data relating to the Subcontract Work and the Purchase Order....

Audit. Although no audits may be conducted more than three (3) years from the end of the calendar year in which the last Acceptance Date for the New Transportation Facilities under the [WSDOT-TNC] Design Build Agreement occurs, [Samsung] shall retain records relevant to the Subcontract Work for a period of seven (7) years after Project Substantial Completion under the Design Build Agreement should [NSKJV] ... require records for [its] use.

Additional Requested Information. Until final completion under the Design Build Agreement or earlier termination of this Purchase Order, [Samsung] shall provide documents, reports and information in connection with this Purchase Order in addition to that specifically required in this Purchase Order that may reasonably be requested by [NSKJV] from time to time, provided such additional information involves no material additional cost to [Samsung].

CP 1308. On March 30, 2006 – while NSK's performance claims were pending against Samsung – NSK cited this provision and advised Samsung of its desire to conduct an audit of Samsung's cost records regarding the Project. CP 1827-28.

Samsung suggested that any audit be deferred until the final shipment of bridge decks was completed so that all costs would be known and the audit could be comprehensive. CP 1749-50. Samsung also asked who from NSK would be conducting the audit. *Id.* NSK declined Samsung's suggestion to defer the requested audit, asserted that Clause 33 did not limit the number of audits NSK could undertake, and disclosed that the "audit" would be conducted by NSK's outside litigation consultants. CP 1752-53.

Ultimately, the parties agreed that the review by NSK's litigation consultants would proceed in Korea, beginning on July 10, 2006. CP 1759-63. However, a dispute arose regarding Samsung's request that NSK's consultants execute a confidentiality undertaking. CP 1765-70. Samsung's business is primarily the result of competitive bidding, and Samsung's cost data are sensitive non-public information. CP 1749, 1759. Because the trial court had ruled that discovery in the case would be deferred until December 2006, no protective order had been entered in the case. CP 1732-33, 1769. Therefore, Samsung had proposed the confidentiality undertaking. CP 1759.

Unlike TNC – which executed a confidentiality undertaking and is reviewing Samsung's cost records regarding the Project – NSK objected to

the form of agreement that Samsung had proposed. CP 1765-67. NSK then proceeded to file a motion for leave to amend its complaint to add a claim seeking to compel Samsung to make its records available to be audited. CP 1611-710. Like NSK's change order claims, the audit claim arises out of or relates to the NSKJV Purchase Order (specifically section 1, clause 33 of the agreement) or the alleged breach thereof. CP 1945-46, ¶¶ 15-16.

On August 18, 2006, the trial court granted NSK's motion to file a second amended complaint (including the audit claim). CP 1938-39.

D. The Trial Court's Arbitration Rulings

The NSKJV Purchase Order includes a provision requiring resolution of disputes via arbitration in Singapore – close to where Samsung and NSKJV are headquartered – rather than via protracted litigation in Washington. Specifically, section 1, clause 30 of the NSKJV Purchase Order (“Clause 30”) states:

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 [NSKJV] and the Vendor [Samsung]. 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 the 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 before

three (3) arbitrators. The award rendered by the arbitrators shall be final and binding upon both parties.

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.

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 Purchase 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.

If any dispute arises in connection with the TNC Contract [the TNC Purchase Order] 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 [sic] as the Purchaser by the award or decision made in connection with such joint dispute.

CP 1306 (emphasis added). As the highlighted text shows, the arbitration provision applies broadly to “[a]ll 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” – language that clearly encompasses both the change order claims and the audit claim.

When the disputes with NSK could not be settled, Samsung asked that NSK agree to submit the disputes to arbitration. CP 2352, ¶¶ 39-41. When NSK refused, and thereafter filed suit against Samsung in Washington, Samsung moved to compel NSK, pursuant to Clause 30, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted at* 9 U.S.C. § 201 (the “Convention”); and the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (the “FAA”), to arbitrate its claims against Samsung before a panel of the ICA in Singapore. CP 1269-82. Samsung asserted this argument twice: (1) on March 15, 2006, in response to NSK’s change order claims (*id.*); and (2) on July 19, 2006, in response to NSK’s motion to file its audit claim. CP 1731-38.

The trial court rejected Samsung’s arguments in both instances. Although the trial court stated with regard to NSK’s change order claims that “reasonable minds could differ” (RP 05/05/2006, at 21), it concluded that there were “connections” between the dispute involving NSK and Samsung and the dispute involving NSK and TNC² and, therefore, the

² In its original and its amended pleadings, NSK also asserted a variety of claims against TNC, seeking (a) to rescind the TNC Purchase Order, and (b) to recover damages from TNC based on its alleged breach of the TNC Purchase Order, interference with the NSKJV Purchase Order, and draw against NSK’s letter of credit. *E.g.*, CP 1974-82.

final paragraph of Clause 30 (quoted on page 10 above) required that the change order claims be resolved in litigation jointly with NSK's claims against TNC. *Id.* at 22.

The trial court repeated this ruling regarding NSK's audit claim, stating that "I've already ruled that I did not believe the arbitration clause was appropriate in this case, and I've already denied arbitration and said we were going to move forward on this case." RP 08/18/2006, at 20. Accordingly, as it had done with regard to the change order claims, the trial court refused to refer the parties' dispute regarding the arbitrability of NSK's audit claim to the ICA. *Id.* at 21; CP 1938-39.

E. Appellate Proceedings

Samsung filed a timely notice of appeal regarding the trial court's first arbitrability ruling (dated May 8, 2006) on May 26, 2006. CP 1606-10. It filed another notice of appeal regarding the trial court's second arbitrability ruling (dated August 18, 2006) on August 25, 2006. CP 2320-27. This Court, in turn, docketed both appeals, issued an order staying all further trial court proceedings pending appeal, and issued a letter ruling consolidating the two appeals under Cause No. 35241-9-I.³

³ Likewise, all record citations herein are to the report of proceedings and clerk's papers designated in the above-referenced cause number.

IV. SUMMARY OF ARGUMENT

The arbitration provision at issue here, Clause 30, applies to “[a]ll 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.”

The claims at issue here – both NSK’s audit claim and the change order claims – are disputes, controversies or differences that arose out of or in relation to or in connection with the NSKJV Purchase Order or the alleged breach thereof. As such, Clause 30 encompasses both types of claims.

Indeed, neither NSK nor the trial court has asserted otherwise.

Instead, the trial court concluded – as NSK argued – that there were “connections” between the dispute involving NSK and Samsung and the dispute involving NSK and TNC and, therefore, the final paragraph of Clause 30 (quoted on page 10 above) required that the change order claims be resolved in *litigation* jointly with NSK’s claims against TNC. Thus, rather than an arbitration in Singapore (close to where Samsung and NSKJV are headquartered), the trial court required that Samsung be a party to litigation in Washington.⁴ In so ruling, the trial court erred in at least the following respects:

⁴ In a separate ruling, the trial court on January 20, 2006, denied Samsung’s motion to dismiss NSK’s amended complaint for lack of personal jurisdiction and insufficiency of service of process. CP 1921. Although the disputes at issue
(footnote continued...)

- The trial court erroneously decided whether the parties' disputes must be arbitrated even though, under governing federal case law, NSK's challenge to the arbitrability of the audit claim and the change order claims must be resolved by the ICA.
- The trial court misinterpreted and misapplied the final paragraph of Clause 30. Nothing in Clause 30 states that Samsung can be required to resolve its disputes with NSK via litigation in Washington rather than via arbitration in Singapore.
- Even if NSK's interpretation of Clause 30 were accepted, NSK's claims do not "touch or concern" the TNC-NSK disputes. Thus, contrary to the trial court's ruling, the final paragraph of Clause 30 is not applicable.
- The trial court also erred by failing to properly apply the FAA (as well as analogous state law) and resolve any doubts in favor of arbitration. Indeed, the trial court erroneously resolved its doubts *against* arbitration.

For each and all of these reasons – and as discussed below – this Court should reverse the trial court's rulings so that NSK's challenge to the arbitrability of its audit claim and the change order claims can be decided by the ICA in Singapore as the parties intended.

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here are between Samsung and NSK, the trial court held that Samsung was subject to long-arm jurisdiction in Washington because it contracted with a resident of Washington by entering into the TNC-Samsung Settlement with TNC (a resident of Washington). *Id.*

V. ARGUMENT

A. Pursuant To The Parties' Agreement, The Convention, And The FAA, The Parties' Dispute Regarding The Arbitrability Of NSK's Claims Must Be Referred To The ICA.

The parties' dispute regarding the arbitrability of NSK's claims is governed by both the Convention and the FAA, each of which require that NSK's claims be referred to arbitration. Article II of the Convention provides in pertinent part:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The FAA incorporates the Convention into U.S. law and directs that the Convention be applied in actions pending in state as well as federal courts.

9 U.S.C. § 201.⁵

As Division I noted in *Kamaya Co., Ltd. v. American Property Consultants, Ltd.*, 91 Wn. App. 703 (1998), “[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of

⁵ The FAA states that if, as in Clause 30, the agreement to arbitrate provides that the arbitration proceed at a location outside the United States, a U.S. court may so direct. 9 U.S.C. § 206.

commercial arbitration agreements in international contracts. . . .” *Id.* at 710 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)). The *Kamaya* court recognized that the FAA “mandates that both state and federal courts of the United States enforce the convention.” *Id.* This, in turn, “imposes a mandatory duty on the courts of a Contracting State to recognize and enforce an agreement to arbitrate unless the agreement is ‘null and void, inoperative, or incapable of being performed.’” *Id.* (quoting *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992) (quoting 9 U.S.C. § 201 note)).

Addressing the FAA, the U.S. Supreme Court has repeatedly held that the FAA’s provisions reflect a “liberal federal policy favoring arbitration agreements.” *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This policy “applies with special force” in international commercial transactions:

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985). Other federal courts have echoed this view.⁶

Division I has similarly ruled that the intentions of the parties with respect to arbitration of an international commercial dispute are to be “generously construed” and that such disputes are arbitrable “unless it can be said ‘with positive assurance’ that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Kamaya Co.*, 91 Wn. App. at 714 (quoting *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739 (1993)). Numerous other Washington courts have applied a similar test in the context of domestic transactions.⁷

⁶ See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996) (“ambiguities as to the scope of an arbitration clause must be resolved in favor of arbitration”).

⁷ See, e.g., *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 723 (2003) (“An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.”) (quoting *Peninsula Sch. Dist. v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 413-14 (1996). These cases reflect and implement Washington’s strong public policy in favor of resolving disputes through arbitration. See, e.g., *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 51 (2002) (“Washington public policy favors arbitration.”); *Tombs v. Northwest Airlines*, 83 Wn.2d 157, 161 (1973) (“the law favors and encourages settlement of controversies by arbitration”). Thus, “[i]n determining whether the parties have agreed to arbitrate a dispute the balance is weighted in favor of arbitration.” *W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn. App. 681, 683-84 (1987) (describing an “inexorable presumption in favor of arbitration”).

Because the FAA applies here, and because Clause 30 unambiguously refers “all disputes” to arbitration, any question regarding the arbitrability of a given dispute must also be referred to arbitration. The U.S. Supreme Court’s decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion), is instructive on this issue. The Court recognized that questions regarding how an “all disputes” arbitration provision should be enforced are for the arbitration panel to decide:

The parties agreed to submit to the arbitrator “[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.” And the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute “relating to this contract” and the resulting “relationships.” Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.

Id. at 451-52 (emphasis in original). This legal principle is controlling here – and requires that NSK’s challenge to the arbitrability of its claims be referred to the ICA – because the substantive disputes between NSK and Samsung, as well as their disagreement over whether their disputes should be arbitrated, are “disputes, controversies or differences” that all arose out of the NSKJV Purchase Order.

In *Shaw Group Inc. v. Tripelfine International Corporation*, 322 F.3d 115 (2d Cir. 2003), the court similarly ruled that the parties’

agreement to refer “all disputes” to arbitration required that questions of arbitrability be decided by arbitration. *Id.* at 121. *Shaw Group* is especially instructive because the court there also found that the parties’ agreement to arbitrate questions of arbitrability was further evidenced by the fact — also present here (*see* page 9 above) — that the arbitration was to be conducted pursuant to rules of arbitration of the International Chamber of Commerce (“ICC”), which provide in Rule 6.2 for the ICA to address questions of arbitrability, either at the request of one of the parties or *sua sponte*. *Shaw Group*, 322 F.3d at 122. A leading treatise similarly states that “parties who contracted for arbitration under ICC rules were thereby agreeing to submit questions of arbitrability to the arbitrator.” T. Oehmke, COMMERCIAL ARBITRATION, § 20:9 (2006). Numerous courts have confirmed this legal principle.⁸

As discussed below, the trial court did not properly respect or apply this body of law, and its arbitrability rulings should therefore be reversed.

⁸ *See, e.g., China Minmetals Import & Export Co. v. Chi Mei Corp.* 334 F.3d 274, 287 n.14 (3d Cir. 2003); *Oriental Republic of Uruguay v. Chem. Overseas Holdings, Inc.*, Nos. 05-civ-6151(WHP), 05-civ-6154(WHP), 2006 WL 164967, at *6 (S.D.N.Y. Jan. 24, 2006); *Empresa Generadora de Electricidad Itabo, S.A. v. Corporacion Dominicana de Empresas Electricas Estatales*, No. 05-civ-5004(RMB), 2005 WL 1705080, at *6 (S.D.N.Y. July 18, 2005).

B. The Trial Court Erred In Not Referring NSK's Challenge To The Arbitrability Of The Audit Claim And The Change Order Claims To The ICA.

There can be no serious question that NSK's claims against Samsung are encompassed by the broad language of Clause 30. NSK's claims are "disputes, controversies, or differences" that arise out of the NSKJV Purchase Order and are therefore within the scope of Clause 30. However, at NSK's urging the trial court focused on the final paragraph of Clause 30, which allows a dispute between NSK and Samsung to be "dealt with jointly" with a dispute between NSK and TNC if the dispute with TNC "touches or concerns the Subcontract Work" involving Samsung:

If any dispute arises in connection with the TNC Contract [the TNC Purchase Order] and the Purchaser [NSKJV] is of the opinion that such dispute touches or concerns the Subcontract Work, then the Purchaser [NSKJV] may by notice in writing to the Vendor [Samsung] 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 [sic] as the Purchaser by the award or decision made in connection with such joint dispute.

CP 1306. NSK contended in the trial court that this paragraph should be construed to require Samsung to join in litigation between TNC and NSK, wherever it might be pending, rather than arbitrate before the ICA in Singapore. RP 05/05/2006, at 15; CP 1572-90, 1777-78. As discussed in Section III.D above, the trial court accepted that argument and concluded

that the final paragraph of Clause 30 required that NSK's claims against Samsung be resolved in litigation jointly with NSK's claims against TNC.

The trial court's analysis is fatally flawed in several respects. First, the trial court erroneously characterized the principal legal issue presented by Samsung with regard to arbitrability. The trial court stated: "The issue before me today is whether or not I'm going to find that Paragraph 11 of [Clause] 30 entitled 'Dispute Resolution' requires arbitration and, thus, should grant a stay of these matters allowing such international arbitration to take place or find otherwise and deny that motion." RP 05/05/2006, at 21-22. As discussed in Section V.A above, the principal issue before the trial court was whether the parties' dispute regarding arbitrability should itself be referred to arbitration. The trial court erred by ignoring that issue, as well as ignoring controlling case law requiring that questions regarding arbitrability be referred to the ICA.

Second, the trial court misinterpreted and misapplied the final paragraph of Clause 30. Samsung submits, and argued in the trial court, that the most plausible interpretation of Clause 30 is that NSK and Samsung intended to arbitrate their disputes if they could not be settled, but that NSK could protect itself against inconsistent outcomes if disputes arose between TNC and NSK that concerned Samsung's work on the

Project. CP 1279. In that event, the outcome of the TNC-NSK dispute would be binding in any arbitration between NSK and Samsung. Nothing in Clause 30 states that Samsung can be required to resolve its disputes with NSK via litigation in Washington or, indeed, anywhere.

Under the FAA, the question is whether this Court can say “with positive assurance” that Clause 30 cannot be read as Samsung proposes. *Kamaya Co.*, 91 Wn. App. at 714. Additionally, any doubts regarding the parties’ agreement to arbitrate must be resolved in favor of arbitration. *Kamaya Co.*, 91 Wn. App. at 714 (“any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25).⁹ Consistent with these legal principles, it is difficult to see how arbitration would not be compelled. But there is nothing in the record to suggest that the trial court ever applied the FAA test in interpreting Clause 30.

⁹ The arbitration clause also should be construed against NSK because it drafted the clause. See *Mastrobuono*, 514 U.S. at 62-63 (“a court should construe ambiguous language against the interest of the party that drafted it”); *State v. Bisson*, 156 Wn.2d 507, 521 (2006) (“contract language subject to interpretation is construed most strongly against the party who drafted it”) (quoting *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827 (1966)).

Third, even if NSK's interpretation of Clause 30 were accepted, the final final paragraph of Clause 30 is not applicable here because NSK's claims do not "touch or concern" the TNC-NSK disputes. RP 05/05/2006, at 21-23. This is seen most clearly with respect to NSK's audit claim, which has no corollary either in the issues between TNC and NSK, where to Samsung's knowledge no audit claims have been asserted, or in any issues between TNC and Samsung. NSK's audit claim is based entirely on Clause 33 of the NSKJV Purchase Order, which governs NSK's ability to review Samsung's records. CP 1945-46. Like the ensuing dispute regarding NSK's alleged audit rights, Clause 33 does not touch or concern TNC or NSK's disputes with TNC. The trial court erred in concluding otherwise.¹⁰

Much the same is true with regard to the change order claims. NSK's amended complaint does *not* seek recovery on the proposed change orders that NSK submitted to TNC (which included Samsung's change order claims that are the subject of the NSK-Samsung dispute). Instead, NSK seeks in its amended complaint to rescind the TNC Purchase Order,

¹⁰ See RP 05/05/2006, at 22 ("I find that there indeed are connections"); RP 08/18/2006, at 20 ("I've already ruled that I did not believe the arbitration clause was appropriate in this case, and I've already denied arbitration and said we were going to move forward on this case.").

to recover any draws TNC made against NSK's letter of credit, and to recover damages for TNC's alleged interference with the NSKJV Purchase Order (by settling with Samsung so that the Project could proceed). CP 1979-82. Because the outcome of NSK's claims against TNC do not concern, and would not affect, the outcome of NSK's change order claims, the final paragraph of Clause 30 is not applicable. In this respect as well, the trial court erred.

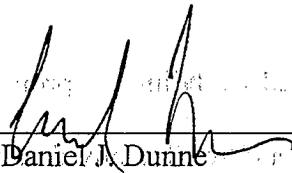
Finally, the trial court also erred by failing to properly apply the FAA (as well as analogous state law) and resolve any doubts in favor of arbitration. The trial court expressly acknowledged such doubts, noting for example that "[Samsung] is arguing to me that the issues involved are not the same, and *I realize that reasonable minds could say that*, however, in my mind I find that there indeed are connections." RP 05/05/2006, at 22 (emphasis added). Earlier in its ruling, the trial court similarly noted that "reasonable minds could differ" with regard to this issue. *Id.* at 21. Under both federal and state law (as set forth in Section V.A above), the trial court was required to resolve those doubts in favor of arbitration. Despite that body of law, the trial court did exactly the opposite and resolved its doubts *against* arbitration. In this respect as well, the trial court' arbitrability rulings are erroneous and should therefore be reversed.

VI. CONCLUSION

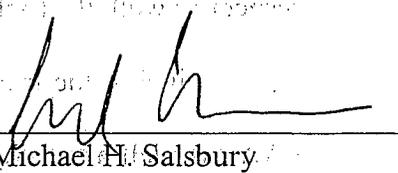
For the foregoing reasons, the Court here should reverse the trial court's arbitration rulings and refer both NSK's change order claims and its audit claim to the ICA as required by law.

RESPECTFULLY SUBMITTED this 31st day of October, 2006.

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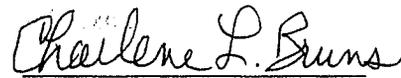
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