

RECEIVED Supreme Court No. 80259-9
SUPREME COURT
STATE OF WASHINGTON Court of Appeals No. 34901-9-II

2008 MAY -1 A 10:16
BY RONALD FORBES
SUPREME COURT
OF THE STATE OF WASHINGTON

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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

**SUPPLEMENTAL BRIEF OF PETITIONER SAMSUNG
HEAVY INDUSTRIES CO., LTD.**

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**FILED AS ATTACHMENT
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I. INTRODUCTION

In this appeal, Appellant Samsung Heavy Industries Co., Ltd. (“Samsung”), a Korean corporation, seeks to enforce its contractual right to mandatory arbitration of its disputes with Respondent Nippon Steel/Kawada Joint Venture (“NSK”), a Japanese joint venture, with regard to steel fabrication work for the new Tacoma Narrows Bridge (the “Project”) that was performed and delivered in Korea using steel manufactured in Japan.¹ Although the parties agreed that such disputes would be resolved by the International Court of Arbitration (“ICA”) in Singapore pursuant to the arbitration rules of the International Chamber of Commerce (“ICC”), the Court of Appeals concluded that the parties’ dispute should be resolved through *litigation in Washington*, thereby eviscerating the parties’ arbitration agreement.

This Court subsequently granted review, following Samsung’s argument that the matter involves issues of substantial public interest related to international comity and commerce. As set forth in Samsung’s Petition For Review, two questions are presented:

¹ Nippon Steel-Kawada Bridge, Inc. (“NSKB”) also is a nominal respondent in this appeal. NSKB was the recipient of a purchase order issued by Tacoma Narrows Constructors, the general contractor on the Tacoma Narrows Bridge project. For simplicity, this brief refers to both respondents as “NSK” unless otherwise indicated.

1. Whether the Court of Appeals' ruling regarding the arbitrability of NSK's audit claim² 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; and
2. Whether the Court of Appeals' ruling regarding the arbitrability of NSK's change order claims³ 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.

As set forth below, the Court of Appeals erred by deciding the arbitrability issue rather than referring the dispute to arbitration and by concluding that both NSK's change order claims and its audit claim are not subject to mandatory (and binding) arbitration. This Court should reverse.

II. SUMMARY OF ARGUMENT

The parties' agreement – referred to herein as the “Purchase Order” – includes a provision requiring resolution of disputes by arbitration in Singapore – close to where Samsung and NSK are headquartered – rather than through protracted litigation in Washington. Specifically, section 1, clause 30 of the Purchase Order (“Clause 30”)

² As used herein, “audit claim” refers to NSK's attempt to compel Samsung to make its records available to be audited by NSK's litigation consultants. The Superior Court granted NSK's motion to file a second amended complaint adding that claim on August 18, 2006. CP 1938-39. The claim is set forth at CP 1611-710 and is described in greater detail at pages 7-9 of Samsung's Brief Of Appellant.

³ As used herein, “change order claims” refers to NSK's attempt to challenge certain change orders that Samsung submitted during the project. The claims are set forth at CP 399-402 and are described in greater detail at pages 4-6 of Samsung's Brief Of Appellant.

requires final and binding arbitration of “[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’ before the ICA in accordance with the ICC’s rules. CP 1306. NSK has never disputed – nor could it – that both its audit claim and its change order claims arise out of or in connection with the Purchase Order. NSK nevertheless seeks to avoid arbitration of its claims as required by the parties’ agreement.

NSK’s principal argument is that it can avoid arbitration based on the final paragraph of Clause 30, which is quoted on page 10 below. But as Samsung explained, the parties’ agreement requires that any disputes regarding the arbitrability of Samsung’s claims also be decided by arbitration. As discussed in Section III.A.1 below, the parties did that (a) by requiring arbitration of “all disputes,” and (b) by stating that arbitration shall proceed under the arbitration rules of the ICC. Thus, even if NSK’s argument regarding this issue had merit, the parties’ dispute regarding arbitrability should be resolved by the ICA in Singapore. As discussed in Section III.A.2 below, the final paragraph of Clause 30 does not change this result.

NSK also claims that the audit claim and the change order claims “touch or concern” NSK’s dispute with Tacoma Narrows Constructors (“TNC”), the general contractor on the Project, and are therefore not

subject to arbitration. As discussed in Section III.B below, this argument misinterprets the final paragraph of Clause 30, which requires only that the outcome of the TNC-NSK dispute be binding in any arbitration between NSK and Samsung. The argument also is factually flawed, as neither the audit claim nor the change order claims “touch or concern” the TNC-NSK dispute. The Court of Appeals reached an erroneous result because – among other things – it failed to resolve any doubts regarding this issue in favor of arbitration as required by applicable case law.

Before addressing these issues, a preliminary point bears emphasis. NSK has repeatedly asserted, most recently in its response to Samsung’s Petition For Review (at 10-11 n.4), that Samsung is proposing “non-binding arbitration.” This argument is both perplexing and wrong. Samsung has argued from the outset, and the parties’ agreement expressly states, that the parties’ dispute “shall be *finally* referred to and *settled* by arbitration” before the ICA in Singapore. CP 1306 (emphasis added). Samsung also has argued – again, as Clause 30 expressly states – that Samsung will be “bound” in the ICA arbitration by any determinations made in litigation between TNC and NSK that bear on NSK’s claims against Samsung. *Id.* Thus, Samsung’s interpretation of Clause 30, if accepted by this Court, will allow NSK and Samsung to *conclusively* resolve their disputes – just as the parties agreed and as required by law.

III. ARGUMENT

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

1. The Parties Evidenced A Clear And Unambiguous Intent To Refer Questions Regarding Arbitrability To The Arbitrator (a) By Requiring Arbitration Of "All Disputes," And (b) By Stating That Arbitration Shall Proceed Under The Arbitration Rules Of The ICC.

There is no dispute – as the Court of Appeals recognized – that the arbitrability of NSK's claims is governed by both 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 "U.N. Convention") and the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (the "FAA"). *See Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn. App. 203, 213, 156 P.3d 293 (2007). Nor is there any dispute – as the Court of Appeals also recognized – that "whether and what the parties have agreed to arbitrate is an issue for courts *unless otherwise stipulated by the parties.*" *Id.* (emphasis added).⁴

The question, then, is whether the parties "otherwise stipulated" that arbitrability questions would be decided by the ICA. As Samsung

⁴ *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e] evidence that they did so.'") (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Amer.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-19, 89 L. Ed. 2d 648 (1986)).

explained, under well-settled law, the parties clearly did so. Specifically, under the FAA, parties may evidence a clear and unmistakable intent to submit the question of arbitrability to an arbitrator “by entering into a[n] [arbitration] agreement that (1) employs the ‘any and all’ language . . . or (2) expressly incorporates the provisions of [a tribunal that requires questions of arbitrability to be decided in arbitration].” *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 55 (2d Cir. 2001) (emphasis added). As the disjunctive “or” confirms, an arbitration provision need only satisfy one such requirement. If it does, then questions regarding arbitrability are for the arbitrator to decide.

The decision in *Shaw Group Inc. v. Triplefine International Corp.*, 322 F.3d 115 (2d Cir. 2003), applying the FAA, is instructive on this point. The parties there, as here, agreed that “All disputes . . . concerning or arising out of this Agreement shall be referred to arbitration to the [ICC] . . . in accordance with the rules and procedures of [the ICC].” *Id.* at 120. Because the parties agreed to arbitrate “all disputes” and because the arbitration clause “provides for arbitration to be conducted under the rules of the ICC, which assign the arbitrator initial responsibility to determine issues of arbitrability,” the court concluded that “the agreement clearly

and unmistakably evidenced the parties' intent to arbitrate questions of arbitrability." *Id.* at 124-25.⁵

Similarly, in *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 470 (1st Cir. 1989), a decision also applying the FAA, the parties agreed – as NSK and Samsung did here – that all disputes arising out of or in conjunction with their agreement would be settled in accordance with the rules of arbitration of the ICC. Noting that parties may “agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits of the dispute,” the court ruled that the parties clearly and unmistakably agreed to delegate decisions concerning the arbitrability of disputes to the arbitrator “[b]y contracting to have all disputes resolved according to the Rules of the ICC.” *Id.* at 473. Other courts have similarly held.⁶

⁵ Article 6, section 2, of the ICC rules (“ICC Rule 6.2”) “specifically provides for the ICA, the arbitral body of the ICC, to address questions of arbitrability, either *sua sponte* before an answer is filed or at the request of either party.” *Shaw Group*, 322 F.2d at 122 (quoting ICC Rule 6.2 in its entirety).

⁶ See, e.g., *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (addressing AAA rules, holding “when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator”); *Global Gold Mining, LLC v. Robinson*, 533 F. Supp. 2d 442, 444 (S.D.N.Y. 2008) (“by agreeing to [ICC] rules the parties have demonstrated an intent to arbitrate arbitrability pursuant to the ICC Rules, including Article 6, Section 2”) (citing *Shaw Group*, 322 F.3d at 122) (quotation marks omitted); *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991) (“[W]hen parties contract to have all disputes resolved according to the Rules of the ICC . . . they agree to let the arbitrator decide questions of arbitrability.”). 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).

In this case, the parties adopted ICC rules *and* agreed to arbitrate “all disputes.” They did so in the first paragraph of Clause 30, which 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 [NSK] 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 by three (3) arbitrators. The award rendered by the arbitrators shall be final and binding upon both parties.

CP 1306 (emphasis added). Thus, under *Shaw Group, Apollo Computer*, and other such cases, the parties clearly and unmistakably agreed that questions of arbitrability are to be decided by the ICA and not by courts.

The Court of Appeals did not discuss or cite *Shaw Group, Apollo Computer*, or any of the similar cases cited by Samsung, and it did not discuss or cite ICC Rule 6.2, which states that the ICA shall address questions of arbitrability either at the request of one of the parties or *sua sponte*. Instead, the Court of Appeals cited *Lebanon Chemical Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095 (8th Cir. 1999), and concluded that “Samsung’s argument that the general ‘all disputes’ arbitration clause covers questions of arbitrability fails.” *Tacoma Narrows*

Constructors, 138 Wn. App. at 215. In so holding, the Court not only ignored Samsung's argument and controlling case law but also relied on a decision that is factually inapposite.

The contracts at issue in *Lebanon* stated only that they were "subject to the trade rules of the American Seed Trade Association," which provided that all differences "arising from" a contract subject to the association's rules would be arbitrated. 179 F.3d at 1100. Unlike the ICC rules, the seed association's rules did not expressly provide that the arbitrator would decide questions of arbitrability. In the absence of such a provision, the *Lebanon* court concluded that the issue whether a dispute was arbitrable should only be decided by an arbitrator in cases where the parties agreed to arbitrate all disputes "arising out of *or relating to*" their contract. *Id.* at 1101 (emphasis added).

The decision in *Lebanon* does not control the result in this case both because of the applicability of the ICC rules and because Clause 30 – unlike the contracts in *Lebanon* – specifically states that "All disputes ... which may arise out of *or in relation to* or in connection with the Purchase Order" are to be arbitrated. CP 1306 (emphasis added). The Court of Appeals' misplaced reliance on *Lebanon* caused it to erroneously conclude that a trial court in Washington can properly determine whether NSK's claims against Samsung are arbitrable. This Court should reverse

that ruling and remand the matter so that the ICA can decide the parties' dispute regarding arbitrability as Clause 30 requires.

2. The Final Paragraph Of Clause 30 Does Not Eviscerate The Parties' Agreement To Refer Questions Regarding Arbitrability To The Arbitrator.

As noted, NSK's principal response to Samsung's arguments regarding arbitrability is that the final paragraph of Clause 30 of the Purchase Order somehow allows NSK to avoid arbitration. The final paragraph of Clause 30 states:

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 [sic] as the Purchaser by the award or decision made in connection with such joint dispute.

CP 1306. Section III.B below establishes that this provision does not preclude arbitration of NSK's claims. Nor, as set forth immediately below, does the provision preclude arbitration of disputes regarding the arbitrability of NSK's claims.

First, the plain language of the final paragraph of Clause 30 does not limit the "all disputes" language or the reference to the ICC rules in the first paragraph of Clause 30. It therefore does nothing to undermine the central point of the arbitration provision: that "*All* disputes, controversies or differences which may *arise out of or in relation to or in*

connection with the Purchase Order” shall be resolved through arbitration. CP 1306 (emphasis added). The foregoing language is sufficient, even under the *Lebanon* decision, to require that disputes regarding arbitrability be resolved through arbitration. And as the disjunctive “or” in *John Hancock* confirms (see discussion on page 6 above), the express incorporation of ICC rules is similarly sufficient – by itself – to require arbitration of disputes regarding arbitrability.⁷

Second, NSK’s argument ignores Washington law requiring courts to read contracts as a whole and “give[] effect to all of [a contract’s] provisions.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). NSK’s interpretation effectively reads the first paragraph of Clause 30 out of the parties’ agreement. According to NSK, all it need do is decide – in its sole discretion (a point discussed in footnote 11 below) – that a dispute with Samsung touches or concerns one or more of its disputes with TNC and the first paragraph of Clause 30 is rendered superfluous and can be ignored. In contrast, Samsung’s interpretation gives meaning to both paragraphs: if NSK believes one of its disputes

⁷ In order to manufacture an argument that the final paragraph of Clause 30 somehow modifies the first, NSK has at times suggested that the fourth paragraph is to be applied “notwithstanding” the first paragraph’s requirement that all disputes between NSK and Samsung be resolved by arbitration. Tellingly, the word “notwithstanding” appears *only* at the beginning of the second paragraph of Clause 30. *Tacoma Narrows Constructors*, 138 Wn. App. at 212 (quoting CP 1306). The parties did not include similar language at the beginning of the fourth paragraph. *Id.* Nor, as set forth in the text above, is there any reason that they would have done so.

with Samsung should be considered jointly with a TNC-NSK dispute and Samsung disagrees, the issue is resolved by the ICA.

Finally, NSK's argument is also contrary to controlling federal decisions applying the FAA, including *Shaw Group* and *Apollo Computer*, which hold that if parties agree to arbitrate "all disputes" or adopt the arbitration rules of the ICC, the initial question of whether a dispute is arbitrable is a question to be resolved by an arbitrator. Thus, even if NSK's interpretation of Clause 30 were plausible (which it is not), the ICA is the proper party to decide which party's interpretation is correct. For this reason too, the Court of Appeals erred by failing to refer the parties' dispute to arbitration.

B. Even If The Parties' Agreement Allows A Court To Decide Issues Regarding Arbitrability, The Agreement Requires That The Audit Claim And The Change Order Claims Be Arbitrated.

If the Court agrees that disputes regarding arbitrability must be referred to arbitration, then it need not (and indeed it should not) decide whether the audit claim and the change order claims at issue here must be arbitrated. Instead, that question should be referred to the ICA as required by the FAA and applicable case law. But if the Court does address whether the audit claim and the change order claims must be arbitrated,

the result is the same: the parties' dispute should be arbitrated before the ICA in Singapore, not resolved by litigation before a court in Washington.

To begin with, NSK does not appear to dispute the fact that the first paragraph of Clause 30 requires arbitration of NSK's audit claim and change order claims against Samsung. Those claims are "disputes, controversies, or differences" that arise out of the Purchase Order and are therefore arbitrable, and there is nothing in the language of any of the paragraphs of Clause 30 that would have put Samsung, a Korean corporation, on notice that it could be required to litigate claims by NSK in Washington. The Court of Appeals did not take issue with that assertion. Rather, at NSK's urging, the Court of Appeals focused on the final paragraph of Clause 30. According to NSK, this paragraph (quoted on page 10 above) should be construed to require Samsung to join in litigation between TNC and NSK, *wherever it might be pending*, rather than to require NSK to arbitrate its claims against Samsung before the ICA in Singapore. The Court of Appeals erroneously accepted that argument. *Tacoma Narrows Constructors*, 138 Wn. App. at 216.

In order to refute NSK's argument, Samsung need not establish that its interpretation of the final paragraph of Clause 30 is the only reasonable interpretation of that paragraph. That is because, as this Court noted in *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103

P.2d 753 (2004), “[c]ourts must indulge every presumption in favor of arbitration.” *Id.* at 301 (quotation marks omitted). Thus, “[a]n 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.” *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 723, 81 P.3d 111 (2003) (quotation marks omitted; emphasis in original). This is particularly true in the present case because “[t]he federal policy favoring arbitration is even stronger in the context of international transactions.” *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 714, 959 P.2d 1140 (1998) (quoting *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1063 (2d Cir. 1993)).

Federal courts have also explained that “[t]he reasons for th[e] strong pro-arbitration policy [underlying the FAA] are to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation” *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 906 (11th Cir. 2006) (internal quotation marks omitted). Washington courts have acknowledged these same benefits of arbitration.⁸ Addressing the

⁸ See, e.g., *Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (finding “strong public policy in this state favoring arbitration of disputes” and holding “[a]mong other things, arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation”);
(footnote continued...)

importance of international comity, the court in *Kamaya* added: “We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” 91 Wn. App. at 713 n.2 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444 (1985)).

The issue before this Court, therefore, is whether it may be said with positive assurance that Clause 30 (including the final paragraph of that provision) is not susceptible of an interpretation that would require arbitration. Addressing that issue, Samsung respectfully submits that a plausible and reasonable interpretation of the first and final paragraphs 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. In that event, if NSK gives notice to Samsung as required by the final paragraph of Clause 30, the outcome of the TNC-NSK dispute would be binding in any arbitration

(continued from previous page)

Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 765-66, 934 P.2d 731 (1997) (“There is a strong public policy in Washington state favoring arbitration of disputes. The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system.”) (citation omitted).

between NSK and Samsung and the dispute between NSK and Samsung would still be arbitrated as agreed.

NSK's contrary interpretation of Clause 30 – adopted by the Court of Appeals – is wrong for numerous reasons, not the least of which is that if the parties had intended that in certain circumstances their disputes would be resolved through litigation in Washington or that Samsung would be a party to any dispute resolution process involving TNC and NSK, they could have stated this clearly and unambiguously. Indeed, the TNC Contract, which pre-dated the Purchase Order with Samsung and to which respondent NSKB is a party, expressly states that disputes may be resolved through litigation in the Thurston County Superior Court. CP 329-30. Thus, if NSK, the drafter of Clause 30, had desired that outcome, it knew how to draft Clause 30 to accomplish it.

Rather than utilize such language, the final paragraph of Clause 30 states only that if a dispute arises in connection with the TNC Contract that concerns Samsung's work on the Project, then NSK may require that such a dispute be “dealt with jointly” with the dispute under the TNC Contract and Samsung would be bound by the result in the same manner as NSK. Nothing in the phrase “dealt with jointly” states, or would have alerted Samsung to the possibility that it could be required to litigate any claims asserted by NSK in the Washington courts. Nor does anything in

the phrase “dealt with jointly” preclude Samsung’s understanding that the intent of this paragraph was for any such outcome to be binding in a subsequent arbitration between NSK and Samsung. That, alone, is enough to require referring the arbitrability issue to the ICA for resolution.⁹

But even if NSK’s interpretation of Clause 30 were accepted, the final paragraph of Clause 30 is not applicable here because NSK’s claims do not “touch or concern” the TNC-NSK disputes. 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 on Clause 33 of the Purchase

⁹ The discussion in the text above also refutes NSK’s argument that Samsung’s interpretation of the final paragraph of Clause 30 is inconsistent with various rules of contract interpretation, such as (a) “when provisions in a contract conflict, the later, specific provisions control,” and (b) “courts must give effect to all provisions of a contract.” Samsung’s interpretation of the phrase “dealt with jointly” does not conflict with its interpretation of the first paragraph of Clause 30 or require that the final paragraph of Clause 30 be ignored. Rather, as noted above, the final paragraph allows NSK to protect itself against inconsistent outcomes by notifying Samsung that the outcome of the TNC-NSK dispute would be binding in any arbitration between NSK and Samsung. Because the dispute between NSK and Samsung would still be arbitrated as agreed, there is no conflict between the final paragraph of Clause 30, on the one hand, and the first paragraph, on the other. Equally important, NSK’s contrary interpretation does not make practical sense. There is no reason to force Samsung to litigate any of its disputes with NSK in a proceeding in Washington between NSK and TNC because TNC and Samsung already have resolved their differences, because the Purchase Order was negotiated and performed in Korea, and because both NSK and Samsung are foreign entities. Finally, although Clause 30 requires NSK to participate in both a lawsuit with TNC and an arbitration with Samsung, that result is mandated by the plain language of Clause 30 (which NSK drafted to protect itself against the risk of inconsistent outcomes) and does not in any way diminish or vitiate the policies favoring enforcement of NSK’s contractual obligation to arbitrate its disputes with Samsung.

Order, which governs NSK's ability to review Samsung's records. CP 1945-46. Like the audit claim itself, Clause 33 does not touch or concern TNC or NSK's disputes with TNC.¹⁰

Much the same is true with regard to NSK's 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 Contract, to recover any draws TNC made against NSK's letter of credit, and to recover damages for TNC's alleged interference with the 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 simply is not applicable.

The Court of Appeals nevertheless concluded that the NSK-TNC disputes "touch" or "concern" the NSK-Samsung disputes because the claims "revolved around the same facts" and are "factually related."

¹⁰ As noted above, NSK's audit claim is set forth at CP 1611-710 and is described in greater detail at pages 7-9 of Samsung's Brief Of Appellant. NSK's change order claims, also addressed in the text above, are set forth at CP 399-402 and are described in greater detail at pages 4-6 of Samsung's Brief Of Appellant. Both claims are also described in the Court of Appeals' opinion. *Tacoma Narrows Constructors*, 138 Wn. App. at 208-11.

Tacoma Narrows Constructors, 138 Wn. App. at 220-21. That is not what the parties' agreement requires. The final paragraph of Clause 30 addresses situations where "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." CP 1306. As this language makes clear, the *disputes* themselves must overlap, not merely the facts that give rise to the disputes. Here, the parties' disputes do *not* overlap. Rather, NSK's claims against TNC are distinct from NSK's claims against Samsung.¹¹

Finally, the Court of Appeals' analysis also ignores the strong presumption in favor of arbitration. Under the FAA and Washington

¹¹ Relying on the "of the opinion" language in the final paragraph of Clause 30, NSK previously asserted that it has unfettered discretion to determine whether the audit claim and the change order claims "touch or concern" its dispute with TNC. The Court of Appeals implicitly rejected that argument and analyzed independently (albeit erroneously) whether the final paragraph of Clause 30 is applicable here. *Tacoma Narrows Constructors*, 138 Wn. App. at 217-23. Consistent with that approach, Washington courts have expressly questioned the validity of a contract that "leave[s] the promisor's performance entirely within his discretion and control." *Felice v. Clausen*, 22 Wn. App. 608, 611, 590 P.2d 1283 (1979). To avoid striking down contracts on this basis, Washington courts have held that "[t]he covenant of good faith applies when the contract gives one party discretionary authority to determine a contract term." *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997). This rule of law applies equally to a party's discretion to determine quantity, price, and time (three examples given in *Goodyear*) or whether a given dispute touches or concerns another (as in this case). That discretion must be exercised with "good reason" (*id.*) or, stated another way, with "honesty in fact and the observance of reasonable commercial standards of fair dealing." *U.S. Bank Nat'l Assoc. v. Whitney*, 119 Wn. App. 339, 346, 81 P.3d 135 (2003). Despite this body of law, NSK's counsel candidly admitted in the trial court that NSK's claims against TNC had been asserted in an effort to satisfy the final paragraph of Clause 30 that there be disputes between TNC and NSK "because otherwise they'll [Samsung] claim they're not subject to the court's jurisdiction." CP 3178-79 (transcript 16:1-18:16). As this concession reveals, NSK's assertion that its claims against Samsung touch or concern its claims against TNC are disingenuous at best. For this reason too, NSK's reliance on the final paragraph of Clause 30 is misplaced.

precedent, “[c]ourts must indulge every presumption in favor of arbitration.” *Zuver*, 153 Wn.2d at 301 (quotation marks omitted). Accordingly, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Kamaya*, 91 Wn. App. at 714 (internal quotation marks omitted); *Mitsubishi Motors*, 473 U.S. at 629, 105 S. Ct. at 3355. The Court of Appeals recognized these legal principles (*Tacoma Narrows Constructors*, 138 Wn. App. at 216), but then failed to properly apply them to the facts at hand. To the contrary, the Court of Appeals adopted a watered-down test – “factually related” – to allow NSK to avoid arbitration. In this respect as well, the Court of Appeals erred.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals’ rulings regarding arbitrability and remand the matter with instructions to grant Samsung’s Motion To Compel Arbitration pursuant to the parties’ agreement and as required by law.

RESPECTFULLY SUBMITTED this 1st day of May, 2008.

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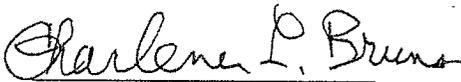
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Signed at Seattle, Washington this 1st day of May, 2008.


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DECLARATION OF SERVICE

I, Charlene L. Bruns, an employee with the law firm of HELLER EHRMAN LLP, hereby certify under penalty of perjury under the laws of the State of Washington that on May 1, 2008, I caused to be served upon counsel of record at the addresses and in the manner described below the foregoing Supplemental Brief of Petitioner Samsung Heavy Industries Co., Ltd. and this Declaration of Service.

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