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Court of Appeals No. 34901-9-II  
(and consolidated Court of Appeals No. 35241-9-II)

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IN THE COURT OF APPEALS, DIVISION II,  
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

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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,  
Defendant-Respondent  
and  
SAMSUNG HEAVY INDUSTRIES CO., LTD. a Korean corporation,  
Defendant-Appellant

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**BRIEF OF PLAINTIFFS-RESPONDENTS NIPPON STEEL-  
KAWADA BRIDGE, INC. AND NIPPON STEEL / KAWADA  
JOINT VENTURE IN RESPONSE TO BRIEF OF APPELLANT**

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## I. STATEMENT OF THE ISSUES

1. Where Washington and federal courts agree that courts, not arbitrators, must decide whether a contractual dispute is arbitrable, did the trial court correctly determine that it, not an arbitrator, must decide whether the pending disputes between defendant-appellant Samsung Heavy Industries Co., Ltd. ("SHI") and plaintiffs-respondents Nippon Steel / Kawada Joint Venture ("NSKJV") and Nippon Steel-Kawada Bridge, Inc. ("NSKB") (collectively, "Plaintiffs") are arbitrable?

2. Where (i) Washington and federal courts uniformly follow the principle that a party can be forced to arbitrate only those issues it specifically has agreed by contract to submit to arbitration; (ii) the contract between SHI and NSKJV specifically *exempts* from any obligation to arbitrate all disputes that NSKJV chooses to have resolved jointly with disputes arising under the contract between NSKB and defendant-respondent Tacoma Narrows Constructors ("TNC"); and (iii) NSKJV has chosen to join its and NSKB's claims against TNC and SHI in a single action in the Superior Court of Washington for Thurston County, did the trial court correctly decide that the pending disputes between Plaintiffs and SHI are not arbitrable?

3. Leaving aside the exception to arbitration invoked by Plaintiffs and the trial court, where (i) even the general provision in the contract between SHI and NSKJV providing for arbitration allows only final and binding arbitration; and (ii) SHI admits in its Opening Brief that any arbitration of Plaintiffs' pending claims against it would not be final or binding, but instead "the outcome of the TNC-NSK dispute" in Washington court "would be binding in any arbitration between NSK[JV] and [SHI]," did the trial court correctly decide that the pending claims against SHI are not arbitrable?

## II. STATEMENT OF THE CASE

These appeals arise from two consolidated actions asserting interrelated claims based on two contracts to furnish, *inter alia*, the steel bridge deck for the new Tacoma Narrows bridge in Gig Harbor, Washington. The two contracts in issue are (i) the August 2002 purchase order in which NSKB promised TNC to perform certain work relating to the new bridge, including fabrication and delivery of the steel bridge deck (the "NSKB-TNC Contract"); and (ii) the November 2002 subcontract in which SHI promised to fabricate and deliver to NSKB's sister entity,

NSKJV, the same steel bridge deck that was the subject of the NSKB-TNC Contract (the "SHI Contract").<sup>1</sup> (CP 1989-2073, 2075-319.)<sup>2</sup>

Almost immediately after the two contracts were signed, disputes erupted over TNC's unilateral redesign of the bridge deck. (CP 1954-58 ¶¶ 51-77.) For the next two years, work proceeded due to clauses in both contracts that obligate the parties to perform while disputes are pending resolution. (CP 2009, 2274.) In August 2005, however, SHI threatened (not for the first time) to stop work. (CP 1958 ¶ 77; 1960-61 ¶¶ 88-89.) See *infra* note 14. In September 2005, after SHI breached the SHI Contract by stopping all work on the bridge deck, (CP 2352 ¶ 44), NSKB and NSKJV sued SHI and TNC in the Superior Court of the State of Washington for Thurston County. (CP 8-371.) Plaintiffs sought, among other things, an order of specific performance sending SHI back to work, and damages from TNC for costs and damages caused by its redesign,

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<sup>1</sup> In September 2002, NSKB entered into a subcontract with its sister entity, NSKJV, to facilitate satisfying its obligation to fabricate and deliver the steel bridge deck under the NSKB-TNC Contract, and NSKJV, in turn, entered into the SHI Contract. (CP 1953 ¶ 43.)

<sup>2</sup> Although SHI's two appeals are consolidated under Appeal No. 34901-9-II, for ease of the Court's reference, all record citations in this Brief are to the reports of proceedings and clerk's papers designated in Appeal No. 35241-9-II, to which SHI has exclusively cited throughout its Opening Brief. (Brief of Appellant ("SHI Br.") at 12 n.2.)

which was the root cause of SHI's work stoppage.<sup>3</sup> (CP 27-35.) As discussed below, the disputes among the parties, like their contracts, are intertwined, and include:

(a) claims by NSKB and NSKJV against TNC for injury caused by TNC's insistence that the steel bridge deck conform to the redesigned plans unilaterally issued by TNC after NSKB and SHI signed their respective contracts (CP 1954-58 ¶¶ 51-73, 1975-80 ¶¶ 158-84);

(b) claims by NSKB and NSKJV against SHI as a result of SHI's ceasing fabrication of the redesigned steel bridge deck (CP 1960-61 ¶¶ 87-91, 1971 ¶¶ 137-38);

(c) claims by NSKB and NSKJV against TNC and SHI based on TNC's and SHI's entry into a contract of their own on September 29, 2005—the day before the trial court was to decide whether to grant Plaintiffs' motion that SHI be ordered to complete its work—in which TNC agreed to pay SHI an additional \$29.1 million to perform the same fabrication and delivery obligations SHI already owed NSKJV (CP 1961-64 ¶¶ 92-103, 1971-73 ¶¶ 139-46, 1980-82 ¶¶ 185-95); and

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<sup>3</sup> TNC had previously served, but not filed, a complaint against NSKB, claiming breach of the NSKB-TNC Contract based on allegations that SHI was behind schedule in building the steel bridge deck. (CP 2372-73, 3417-31, 3480 n.1, 3461-65, 2551.) Not until after NSKJV and NSKB started this action against TNC and SHI did TNC file its complaint. (CP 3417-31.) The two cases were consolidated by the trial court on February 10, 2006. (CP 768-69.)

(d) claims by NSKB and NSKJV against SHI based on SHI's refusal to afford NSKJV its contractual right to audit SHI's books and records, which TNC has been allowed to review, despite SHI's insistence that NSKJV pay SHI additional amounts which SHI claims it incurred as a result of TNC's redesign of the steel bridge deck and other changes made by TNC. (CP 1968-70 ¶¶ 127-32, 1973-74, ¶¶ 147-53.)

The first of SHI's consolidated appeals is taken from the trial court's May 8, 2006 Order denying SHI's motion to compel arbitration and stay trial court proceedings as to SHI. (CP 1604-05.) SHI's second appeal is purportedly taken from the trial court's August 18, 2006 Order granting Plaintiffs' motion for leave to amend and supplement their complaint, and rejecting SHI's argument that Plaintiffs' new claims must be arbitrated. (CP 1938-39, RP 08/18/2006, at 20:19 – 21:5.)

**A. The Parties**

NSKB is a California corporation created for the special purpose of contracting with TNC to work on the new Tacoma Narrows bridge. (CP 1949 ¶¶ 21-22, 1952-53 ¶¶ 40-42.) NSKJV is a joint venture originally formed between Nippon Steel Corporation and Kawada Industries, Inc.—two of the world's most experienced bridge builders and the ultimate parents of NSKB—which was created to help carry out NSKB's obligation under the NSKB-TNC Contract. (CP 1949 ¶ 22.)

SHI is engaged in the business of shipbuilding and construction. (CP 2362.) It was specifically selected by NSKB and TNC as subcontractor and agreed to perform the actual fabrication of the steel bridge deck for NSKJV. (CP 1989-2073, 2091.) TNC—a joint venture of Bechtel Infrastructure Corporation and Kiewit Pacific Co.—is the prime contractor responsible for the construction of the new Tacoma Narrows bridge pursuant to its contract with the Washington State Department of Transportation (“WSDOT”). (CP 750 ¶ 21, 770 ¶¶ 1-2, 771 ¶ 5, 1949 ¶ 23, 1951 ¶ 32.)

**B. The NSKB-TNC Contract**

The NSKB-TNC Contract provides, *inter alia*, for NSKB to furnish the steel deck for the new Tacoma Narrows bridge in conformity with the attached drawings, plans and specifications that define the scope of this work under the Contract. (CP 1952 ¶ 40, 2079-80, 2083-84, 2095-219.) The NSKB-TNC Contract names SHI as the subcontractor that is to fabricate the steel bridge deck. (CP 2091.) It is governed by Washington law and makes the Superior Court for Thurston County the exclusive venue for litigation. (CP 2236.)

**C. The SHI Contract**

**1. SHI's Contractual Obligations**

The SHI Contract is also governed by Washington law. (CP 2009.) Signed by NSKJV and SHI two months after the NSKB-TNC Contract, it obligates SHI to fabricate the mile-long steel bridge deck, in segments, at its facilities in Korea, and load them onto vessels for shipment to Gig Harbor, Washington. (CP 1954 ¶ 47, 1993, 1997-98, 2020-28.) Fabrication is required to be in accordance with the basic design specifications and requirements attached to the SHI Contract, which are the very same as the ones attached to the NSKB-TNC Contract. (CP 1953-54 ¶¶ 45-47, 2036-52, 2095-219.) SHI agreed to perform all of its obligations under the SHI Contract for the price of \$24,581,579. (CP 1993.)

As specified in the SHI Contract, SHI's fabrication of the deck segments was undertaken to satisfy NSKB's obligation to supply the steel bridge deck to TNC pursuant to the NSKB-TNC Contract. (*Id.*) The SHI Contract defines the "TNC Contract" as "the contract executed on 30<sup>th</sup> August 2002 by and between TNC and Nippon Steel-Kawada Bridge Inc. for performance of the certain portion of the Project *including* the *Subcontract Work*," where "Subcontract Work" is defined as "all work,

materials and services required of [SHI] under the [SHI Contract].” (*Id.* (emphasis added).)

Clause 33 of Section 1 of the SHI Contract obligates SHI to “maintain books and accounts with respect to the Subcontract Work hereunder in accordance with generally accepted accounting principles and practices consistently applied.” (CP 2012.) Clause 33 also requires SHI to allow NSKJV, TNC and WSDOT to audit its books and records relating to the Subcontract Work. (*Id.*) The sole condition on this audit is that it must be conducted “[d]uring normal business hours.” (*Id.*)

Reflecting the fact that SHI’s subcontract work is only one piece—albeit a crucial one—of the overall “Project,”<sup>4</sup> the SHI Contract specifically and clearly forbids SHI to stop or suspend work in the event of a contract dispute. (CP 1968 ¶¶ 124-25, 2009.) Instead, where there is “a dispute or proceeding to resolve a dispute between” SHI and NSKJV, both parties must continue to perform. (CP 2009.) “[C]ontinued and timely performance by [NSKJV] of its obligations under the Purchase Order” is not excused, nor is SHI entitled to “suspend or delay performance.” (*Id.* (emphasis added).) This provision tracks the

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<sup>4</sup> “Project” means “the new bridge and roads to be constructed under the Design Build Agreement generally referred to as the Tacoma Narrows Bridge Project.” (CP 1993.)

analogous provision in the NSK-B-TNC Contract, which likewise prohibits any disputes under that agreement from affecting NSK-B's timely performance. (CP 2274.)

**2. Clause 30—The SHI Contract's Dispute Resolution Clause**

Clause 30 of Section 1 of the SHI Contract is the dispute resolution clause. (CP 2010.) It details the parties' obligations in the event that disputes arise not only under the SHI Contract, but also under the NSK-B-TNC contract or other agreements related to, or among the other parties involved with, the Tacoma Narrows Bridge Project, including TNC's contract with WSDOT.<sup>5</sup> (*Id.*)

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<sup>5</sup> Clause 30 provides in full:

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.

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, NSK-B and/or the Purchaser relating to the Vendor's performance of the Subcontract Work under the Purchase Order or involving claims,

(cont.)

Clause 30 has four paragraphs. Paragraph 1 is the only paragraph devoted to arbitration. It provides generally that “[a]ll disputes” regarding the SHI Contract “*shall be amicably settled,*” but, where there is no agreement “within a reasonable time, such disputes . . . *shall be finally referred to and settled by arbitration.*” (*Id.* (emphasis added).) In any arbitration under paragraph 1, “[t]he award rendered by the arbitrators *shall be final and binding upon both parties.*” (*Id.* (emphasis added).) 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. (*Id.*)

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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 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.

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.)

The rest of Clause 30 consists of *three* paragraphs that apply to the dispute resolution process; they apply “[n]otwithstanding” the first paragraph’s general provision for binding arbitration. (*Id.*) Each of these paragraphs specifies an exception to the first, general paragraph. (*Id.*)

Paragraph 4 is of special relevance to this appeal. That paragraph provides special procedures for resolving disputes under the SHI Contract where (i) there is also a dispute “in connection with” the NSKB-TNC Contract; (ii) “[NSKJV] *is of the opinion that such dispute touches or concerns*” SHI’s work under the SHI Contract; and (iii) NSKJV gives SHI written notice requiring that the SHI-NSKJV dispute “shall be dealt with jointly with the dispute under the” NSKB-TNC Contract.<sup>6</sup> (CP 2010

(emphasis added).) Again reflecting the interrelatedness of the NSKB-TNC Contract and the SHI Contract, paragraph 4 provides that “[SHI] shall be *bound in like manners [sic]* as [NSKJV] by the *award or decision made in connection with such joint dispute.*” (*Id.* (emphasis added).)<sup>7</sup> As SHI acknowledges, “the outcome of the TNC-NSK dispute *would be*

<sup>6</sup> The NSKB-TNC Contract provides that “[a]ll litigation between the parties . . . shall be filed, heard and decided in the Superior Court of Washington for Thurston County, which shall have exclusive jurisdiction and venue.” (CP 2278.) Thus, unless TNC and NSKB agree to another forum, any joint resolution of claims among SHI, NSKJV, NSKB and TNC must take place in Thurston County Superior Court.

<sup>7</sup> In paragraph 3 of Clause 30, SHI also agreed to be bound by the judgment in any litigation “arising between or among WSDOT, TNC, NSKB and/or [“NSKJV”] relating to SHI’s performance or actions under the SHI Contract. (CP 2010.)

*binding in any arbitration between NSK[JV] and [SHI].”* (SHI Br. at 22 (emphasis added).)

**D. The Underlying Contractual Disputes Among TNC, NSKB, NSKJV and SHI**

**1. The Disputes Concerning TNC’s Redesign of the Steel Bridge Deck**

About a year after the NSKB-TNC Contract and the SHI Contract were signed, it became clear that TNC was insisting that the steel bridge deck be built to its new design. (CP 1958 ¶¶ 75, 3488.) SHI and NSKB had promptly protested that the redesign was a radical change and would be much more expensive and time-consuming to produce than the design that formed the basis of the NSKB-TNC Contract and, subsequently, of the SHI Contract. (CP 1956 ¶¶ 58-62, 1958 ¶¶ 74-75.) Nevertheless, both Plaintiffs and SHI honored the provisions of their contracts that require them to continue to work pending resolution of disputes, and sought joint resolution of the redesign dispute with TNC.<sup>8</sup> (CP 1957 ¶ 68, 1958 ¶¶ 74-77, 1968 ¶¶ 124-25, 2009, 2274.) A mediation involving SHI, TNC, NSKJV and NSKB failed to resolve the dispute in December 2004. (CP 2351 ¶¶ 31-32, 3479, 3490-91, 3363-65, 2547.)

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<sup>8</sup> These efforts involved extensive correspondence and numerous meetings among the parties. (CP 2542-58, 3487 n.4.)

## 2. SHI's First Threats to Stop Work and the 2005 Letter Agreement

Almost immediately after the mediation, SHI informed NSKJV that it would stop certain fabrication work unless NSKJV paid SHI a substantial advance on its unresolved claims over the scope of the fabrication work. (CP 1958 ¶ 77.) In order to forestall SHI's repudiation of the SHI Contract and ensure that SHI's work on the steel bridge deck would not be interrupted, NSKJV acceded to SHI's threats. (CP 1958-59 ¶ 78.) In a January 13, 2005 Letter Agreement<sup>9</sup> (the "Letter Agreement"), NSKJV agreed to advance SHI an *additional* \$12 million—a nearly 50% increase on top of the agreed contract price of just over \$24 million<sup>10</sup>—in return for SHI's promise to work nights and weekends to complete fabrication of the bridge deck according to TNC's redesign, and to deliver the deck segments in three shipments due no later than the end of March, May and June of 2006, respectively.<sup>11</sup> (CP 1958-59 ¶ 78, 1986-87.)

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<sup>9</sup> The Letter Agreement is misdated "January 13, 2004." (CP 1986.)

<sup>10</sup> Of this \$12 million advance, \$2 million came from TNC, which by this time had begun to make clear to NSKB its concerns that SHI was failing to make the necessary progress on fabrication to meet TNC's anticipated schedule for delivery of the bridge deck segments in Gig Harbor. (CP 774 ¶ 35, 1960 ¶ 85.)

<sup>11</sup> Contrary to SHI's assertion that "performance problems of NSK" have delayed the schedule, the Letter Agreement dates were pushed back by TNC. (RP 05/05/06, at 26:12-18.)

### 3. The TNC Complaint Regarding Deck Fabrication Progress and NSKJV's Clause 30 Notice to SHI

Despite taking \$12 million and promising to deliver the redesigned bridge deck on schedule, SHI quickly demanded that NSKJV pay it still more money to continue to perform under the SHI Contract and the Letter Agreement. (CP 1960 ¶ 87, 2456-57 ¶¶ 2-6, 2458-62.) Meanwhile, TNC intensified its complaints that SHI was allegedly falling behind schedule. (CP 774-75 ¶¶ 35-42, 2551.) Shortly after Plaintiffs' and SHI's suggestion of a second, "technical" mediation to resolve the disputes was rebuffed by TNC (CP 3491, 3363-65), TNC served NSKB with a complaint in Thurston County Superior Court claiming that SHI was "falling further and further behind" schedule, and that its delays were "immediately threatening to irreversibly delay the scheduled completion of this vital public works project." (CP 3480 n.1, 3417-18 ¶ 3.)

Although counsel for SHI soon thereafter both confirmed the inter-related nature of the parties' disputes and expressed sympathy that NSKB was caught in the middle of the redesign dispute<sup>12</sup> (CP 3363-65), SHI announced that it would "commence an arbitration proceeding on or

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<sup>12</sup> SHI's counsel indicated that "SHI is sympathetic to NSKB's position. TNC has specified significant changes in the design for the Bridge, which have driven up the costs of the Purchase Order. NSKB has been unsuccessful in persuading TNC to address those changes and, therefore, has been reluctant to commit to SHI's change order requests." (CP 3363-65.)

before July 15, 2005, to resolve SHI's change order requests and other claims against NSKB under the Purchase Order," unless NSKB could offer "another means [to] reach a *final* resolution of SHI's claims." (*Id.* (emphasis added).)

NSKJV timely responded by giving written notice to SHI that it was invoking both paragraph 4 of Clause 30 of the SHI Contract—requiring SHI's claims to be dealt with jointly with the TNC dispute, rather than by a separate arbitration—and paragraph 3 of Clause 30—requiring SHI to provide its full assistance in connection with the TNC lawsuit.<sup>13</sup> (CP 3367-68.) SHI expressed its intention to commence arbitration nonetheless, but, after NSKJV reminded it that the dispute was not arbitrable under Clause 30, SHI did, and has since done, nothing to initiate arbitration proceedings against NSKJV. (CP 3370-71.)

In the following weeks, Plaintiffs, faced with the prospect of litigation with TNC and SHI's increasingly menacing threats of a work

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<sup>13</sup> NSKJV's notice to SHI stated that:

"[p]ursuant to Clause 30 of the Purchase Order, NSKB hereby gives notice in writing that, since a dispute has arisen in connection with the TNC Contract, and NSKB is of the opinion that this dispute touches or concerns the Subcontract Work, SHI's change order requests and other claims against NSKB must be dealt with jointly with the TNC contract dispute, and not by separate arbitration." (CP 3367-68.)

slowdown, participated in talks among counsel and executives of all the parties to try to resolve their disputes. (CP 1960 ¶ 88.) At a meeting in mid-August, from which TNC withdrew at the last minute, SHI spurned Plaintiffs' offer of another advance payment on SHI's claims (in addition to the \$12 million advanced under the Letter Agreement) and immediately thereafter announced its intention to stop work. (CP 1960-61 ¶¶ 88-89.) By September 5, 2005, SHI had completely ceased all fabrication of the steel bridge deck.<sup>14</sup> (CP 1960-61 ¶ 89, 2338 ¶ 89, 2352 ¶ 44.)

Plaintiffs helped to set up a meeting of the parties' counsel aimed at getting SHI back to work. (CP 1961 ¶ 90.) When TNC and SHI refused to agree to any arrangement that would preserve Plaintiffs' existing contract rights to be free of inconsistent judgments in the resolution of disputes involving Plaintiffs, TNC and SHI (CP 2010), Plaintiffs were forced to withdraw from further discussions. (CP 3435-36.) They then sought judicial intervention to enforce their contract rights in the only forum that has the power to "jointly" deal with the parties' disputes: the Superior Court for Thurston County. (CP 8-371.)

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<sup>14</sup> (CP 2433-54; 2457 ¶¶ 7-8; 2464; 2480-81 ¶¶ 3, 5; 2486; 2488-89 ¶¶ 2-8; 2470-71 ¶¶ 21-22; 2475; 2491 ¶¶ 2-3; 2493-95.)

**E. SHI and TNC Moot the Judicial Relief Sought By Plaintiffs.**

On September 19, 2005, Plaintiffs sued TNC and SHI, and asked for a temporary restraining order, injunctive relief and an order of specific performance requiring SHI to perform its obligations under the Letter Agreement and the SHI Contract.<sup>15</sup> (CP 8-371, 2436-54.) At a hearing two days later, the trial court denied Plaintiffs' request for a temporary restraining order, citing the need for more information and time to decide SHI's claim that it was not subject to the court's jurisdiction. (CP 3618-19 (transcript pages 32:16-33:7).) The court then set a hearing nine days later to determine whether a preliminary injunction should issue against SHI and ordering SHI to respond to discovery related to jurisdiction. (*Id.*)

The afternoon before the scheduled hearing, SHI and TNC entered into a separate, new agreement (the "SHI-TNC Contract"), giving SHI an *additional* \$29.1 million—over and above the \$24 million original contract price and the \$12 million advanced to SHI in connection with the Letter Agreement—to perform exactly the same work, on exactly the same

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<sup>15</sup> Plaintiffs have since amended their complaint twice to include later-arising claims against TNC and SHI. (CP 372-746, 1940-2319.) The trial court's grant of leave to file Plaintiffs' Second Amended Complaint is the subject of SHI's second appeal. (CP 1938-39, 2320-27.)

schedule, that SHI was already required to perform under its binding contracts with NSKJV. (CP 1237-63; *see also* CP 1962 ¶ 94.)

To make matters worse, TNC paid the first installment under its new contract with SHI with NSKB's money, which it drew under the letter of credit NSKB provided to TNC under the NSKB-TNC Contract. (CP 1243, CP 1964 ¶ 102.) In order to get these funds, TNC represented to the issuing bank that NSKB had breached its contract with TNC, which was untrue. (CP 1964 ¶ 102-03.) Knowing the source of the funds, SHI accepted them. (CP 1972 ¶ 142.) Plaintiffs immediately notified TNC and SHI that their new contract was a repudiation of the SHI Contract and the NSKB-TNC Contract, as well as an act of tortious interference by TNC with the SHI Contract. (CP 392-95 ¶¶ 89-100, 400-02 ¶¶ 128-37, 408-09 ¶¶ 169-75.) SHI resumed its fabrication work pursuant to its new contract with TNC. (CP 1243.)

#### **F. The Audit Dispute**

On March 30, 2006, with SHI's fabrication work in Korea nearing completion, NSKJV notified SHI that it would exercise its audit rights to obtain actual cost information regarding SHI's claims for payment and the costs of TNC's redesign. (CP 1827-28.) Notwithstanding the unvarnished nature of SHI's audit obligations—as well as its Clause 30 obligation to “fully assist” NSKJV in any litigation with TNC—SHI repeatedly said

“No” to an audit. (CP 1804-12, 1823-1901.) Its “rationale” changed from one day to the next, despite SHI’s acknowledgment, from the beginning, of NSKJV’s right to conduct an audit. (CP 1804-12, 1823-1901, 1968-69 ¶ 128; RP 05/05/2006, at 46:2 (“There is an audit right of NSK.”).)

After spending more than three months trying to persuade SHI—by compromise after compromise—to meet its contract obligations, Plaintiffs reluctantly concluded that further negotiation was a waste of time (CP 1804-12, 1823-1901), and moved for leave to amend and supplement their complaint to include a claim for breach of contract based on SHI’s refusal to provide the audit. (CP 1611-1730.) In granting Plaintiffs’ motion, the trial court rejected SHI’s argument that the audit claims must be arbitrated. (CP 1938-39; RP 08/18/2006, at 20-21.)

#### **G. The Trial Court’s Arbitration Rulings**

The trial court first rejected SHI’s arbitration argument on January 20, 2006. Among its reasons for denying SHI’s motion to dismiss for lack of jurisdiction, the court concluded that Clause 30 of the SHI Contract provides for any dispute “that involves not just SHI and NSKB but Tacoma Narrows and that’s clearly developed” to be resolved by litigation in the trial court. (CP 1921 (transcript page 64:11-19).) On

February 10, 2006, the trial court entered an Order denying SHI's motion to dismiss.<sup>16</sup>

SHI did not challenge the trial court's rejection of its arbitration argument, but effectively ignored the ruling by making the same arbitration argument approximately two months later, when it moved to compel arbitration and stay the proceedings. (CP 1269-82.) On May 5, 2006, the trial court again rejected SHI's arguments:

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<sup>16</sup> Contrary to the representation in SHI's Opening Brief, the trial court's January 20 ruling was not limited to a finding that SHI's execution of the SHI-TNC Contract subjected it to long-arm jurisdiction. (SHI Br. at 13-14 n.4.) Instead, the court identified *three* bases of jurisdiction: (1) SHI's minimum contacts with Washington including, but not limited to, the SHI-TNC Contract, (CP 1921 (transcript pages 63:24 – 64:9)); (2) the language of paragraph 4 of Clause 30 of the SHI Contract, which, the trial court found, "establish[ed] jurisdiction in a Washington court under the facts as they now exist," (*id.* (transcript page 64:17-19)); and (3) a "fallback position" based on the court's imposition of sanctions against SHI for violating the court's order that SHI provide jurisdictional discovery relevant to its contention that it was not subject to the court's jurisdiction, (CP 1921-22 (transcript pages 65:14-20, 66:1-2)). As a sanction for SHI's "violation of what th[e] Court previously ordered as far as discovery" (CP 1921 (transcript page 65:2-3)), the trial court "construe[d] all the facts against SHI" and therefore "assum[ed] that there are facts out there that would have made the case *even stronger* for th[e] Court having jurisdiction had there been full disclosure or full discovery." (CP 1921-22 (transcript pages 65:14-20, 66:1-2) (emphasis added).)

The footnote SHI devotes to the trial court's denial of its motion to dismiss is also inaccurate because it fails to mention that SHI was forced to withdraw both of its subsequently filed motions for reconsideration of the court's jurisdiction and sanctions decisions, and to admit that upon "review of documents requested by [Plaintiffs]"—but *never provided to them* as a consequence of SHI's violation of the trial court's order—SHI "discovered" that it "had delivered cranes to the Navy's facilities on Puget Sound, in 2002 and 2005." (CP 3784-86.) SHI had told Plaintiffs and the trial court that the latter lacked personal jurisdiction because SHI had *no* contracts with any Washington businesses or resident and only "purely incidental" contacts with the State. (CP 2363, 2840-41, 3009-10.) SHI's tardy admission confirmed that the trial court was correct in imposing sanctions; there were indeed "facts out there" that established personal jurisdiction. (CP 1921-22 (transcript pages 65:14-20, 66:1-20).)

I believe that in this particular case that this Court is in a position to decide whether or not there was a clear agreement that the issues between NSK and SHI be resolved internationally, and I do not find that there was such a clear agreement in this contract.

*I believe that paragraph, the final paragraph [of Clause 30] does, in fact, apply, and in this particular case is an exception to that [arbitration] requirement.*

And so I'm going to deny the motion by SHI that there be a stay and that arbitration must be or must take place.

(RP 05/05/2006, at 23:2-13 (emphasis added).) SHI appealed the trial court's May 8, 2006 Order denying its motion.

SHI raised the same arguments for the third time in July 2006, in response to Plaintiffs' motion for leave to amend and supplement their Amended Complaint to add new claims concerning SHI's breach of the SHI Contract's audit provisions. (CP 1731, 1735-36.) The trial court rejected SHI's argument again, granting Plaintiffs' motion on August 18, 2006. (CP 1938-39.)

#### **H. Proceedings Before This Court**

SHI filed timely notices of appeal from the trial court's May 8, 2006 and August 18, 2006 orders. (CP 1606-10, 2320-28.) On

October 6, 2006, this Court consolidated SHI's appeals under Cause of Action No. 34901-9-II and set them for accelerated review.<sup>17</sup>

### III. SUMMARY OF ARGUMENT

SHI's opening brief completely disregards the law governing interpretation of a contract's dispute resolution clause. The United States Supreme Court's many decisions, of which *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) is the most recent, leave no room for disagreement. The threshold question whether a dispute is arbitrable—that is, whether an arbitration clause “applies to a certain type of controversy”—is a matter that “courts assume . . . the parties intended courts, not arbitrators, to decide (in the absence of ‘clea[r] and unmistakabl[e]’ evidence to the contrary).” *Id.* at 452. In the face of the *Green Tree* Court's overwhelming agreement on this point,<sup>18</sup> SHI

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<sup>17</sup> On September 12, 2006, the Court of Appeals Commissioner granted SHI's motion in the Court of Appeals for a stay of the underlying trial court proceedings pending resolution of SHI's appeal of the Order denying its motion to compel arbitration. (See Ruling Granting Stay, Appeal No. 34901-9-II, at 2 (Wash. Ct. App. Div. II, Sept. 12, 2006).) Although the Commissioner's ruling stated that under RAP 7.2(a), the trial court lost the authority to act in this case upon SHI's filing of its notice of appeal (*id.* at 4), and that the trial court therefore had no authority to grant Plaintiffs leave to amend their complaint, (*id.* at 6), SHI's appeal of the August 18 ruling is based solely on the argument that Plaintiffs' claims must be arbitrated.

<sup>18</sup> Although there were four opinions in *Green Tree*, seven of the Justices agreed that the issue in the case before this Court—whether an arbitration clause applies to the underlying dispute between the parties—is for courts, not arbitrators, to decide. *Green Tree*, 539 U.S. at 452 (opinion of Breyer, Scalia, Souter, Ginsburg, JJ.); *id.* at 456

(cont.)

incorrectly accuses the trial court of “not properly respect[ing] or apply[ing]” the law under the controlling Federal Arbitration Act (“FAA”)<sup>19</sup> because the court decided the question of arbitrability itself. (SHI Br. at 19.) In fact, the trial court did exactly what the Supreme Court has said it must do. Washington law agrees with the rule of *Green Tree* that the *court* is the proper tribunal to decide whether Clause 30 provides for arbitration of the disputes between Plaintiffs and SHI. *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 712 (1998).

Contrary to SHI’s assertion, the trial court both respected and applied the law under the FAA, and did so correctly. The law under the FAA, like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”), which the FAA incorporates, permits arbitration only when the parties have, in their contract, agreed to arbitrate the particular “type of controversy” in question. *Green Tree*, 539 U.S. at 453. The bedrock principle under the FAA is “that a party can be forced to arbitrate *only* those issues it specifically has agreed to submit to

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(Rehnquist, O’Connor, and Kennedy, JJ., dissenting). Justice Thomas, believing that the FAA does not apply in state courts, did not reach the issue. *Id.* at 460 (Thomas, J., dissenting).

<sup>19</sup> Washington courts have held that “whether a particular dispute is within the class of those disputes governed by the arbitration . . . clause is a matter of federal law.” *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 712 (1998); *see also id.* at 710 (noting that “the FAA applies in both state and federal courts”).

arbitration . . . .” *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)) (emphasis added); *Green Tree*, 539 U.S. at 457 (Rehnquist, O’Connor, Kennedy, JJ., dissenting). Moreover, under the FAA, “parties are generally free to structure their arbitration agreements as they see fit.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

In this case, there *is* no agreement to arbitrate the claims set out in the Second Amended Complaint. “Notwithstanding” the general agreement to have final and binding arbitration of unspecified disputes, paragraph 4 of Clause 30 specifically gives NSKJV the right to eschew arbitration and join SHI in its dispute with TNC in court, whenever NSKJV “is of the opinion” that a dispute under the NSKB-TNC Contract “touches or concerns” SHI’s obligations under the SHI Contract. (CP 2010.) NSKB has exercised its right in this case, and, as the trial court recognized, once NSKJV made its choice, the trial court was the only proper forum to decide the dispute. (*Id.*; CP 1921 (transcript page 64:11-19); RP 05/05/2006, at 23:7-13; RP 08/18/2006, at 20:21 – 21:5.) *Cf. infra* Section IV.D.

Equally flawed is SHI’s argument that the pending disputes must be arbitrated because there is some overriding policy that favors arbitration in the abstract. (SHI Br. at 17 n.7.) To the contrary, the

indisputable rule is that the court must determine whether the parties have *agreed* to arbitrate by reading the words of their contract. As SHI concedes, it is the FAA provisions that “reflect a ‘liberal policy favoring arbitration agreements’” (SHI Br. at 16), but “[a]rbitration under the [FAA] is a matter of *consent, not coercion.*” *Volt*, 489 U.S. at 479 (emphasis added).

Clause 30 contains no consent by the parties to arbitrate the pending claims, which arise out of the extra work necessitated by TNC’s redesign of the bridge deck; SHI’s failures to continue to fabricate the redesigned deck as required by the SHI Contract and the Letter Agreement<sup>20</sup> and SHI’s breach of its audit obligations. (CP 2010, CP 1944-46 ¶¶ 11-16, 1958-61 ¶¶ 74-91, 1964-74 ¶¶ 104-53, 2329-58.)

First, paragraph 1 of Clause 30 generally permits only “final and binding” arbitration. (CP 2010 (“The award rendered by the arbitrators shall be *final and binding* upon both parties.”) (emphasis added).) As SHI concedes, under paragraph 4 of Clause 30, it is the “outcome of the TNC-NSK dispute” that “would be binding in any arbitration between NSK and

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<sup>20</sup> Likewise, SHI’s admission that TNC has requested, and SHI has permitted, a review of SHI’s Project cost records—the same records requested by NSKJV in its audit demands—underscores the fact that Plaintiffs’ claims against SHI concerning its breach of its audit obligations do in fact “touch or concern” the disputes with TNC. Indeed, the claims are thoroughly intertwined. (SHI Br. at 8.)

[SHI].” (SHI Br. at 22.) Because *the trial court* in the NSKB-TNC dispute would render the only binding decision, the arbitration proposed by SHI is admittedly neither final nor binding. It is thus not within the agreement, or even the contemplation, of the parties regarding arbitration, set out in paragraph 1 of Clause 30. Since paragraph 1 of Clause 30, by its terms and SHI’s admission, does not apply to the pending disputes, there is no basis for arbitration.

Second, even if an arbitration of the pending claims would be final and binding, which SHI concedes it would not be, paragraph 4 is specific. It unambiguously excepts from paragraph 1 disputes like the present one, where NSKJV has invoked its right to require a joint resolution of its disputes with TNC and SHI in Thurston County Superior Court. Contrary to SHI’s assertion, paragraph 4 of Clause 30 does not impose an objective test of whether Plaintiffs’ disputes with TNC “touch or concern” the SHI Contract. That determination is solely for NSKJV’s “opinion.” (*Compare* SHI Br. at 23-24, *with* CP 2010.) Nevertheless, in this case it is objectively obvious that the claims are interrelated.

To accept SHI’s argument, the Court would have to disregard the fundamental legal rules governing the construction of dispute-resolution clauses. These require the Court: (1) to determine NSKJV’s and SHI’s intent, as expressed in the SHI Contract, regarding which disputes are to

be arbitrated and which are to be litigated; (2) to give effect to *all* of the paragraphs of Clause 30, taking care to interpret the Clause as a whole, in a manner that does not render any provision meaningless or ineffective; and (3) to give greater weight to the specific language of the last three paragraphs, which expressly limit the circumstances in which arbitration may proceed, than to the general provision of paragraph 1.

Indeed, to find for SHI, the Court would have to stop reading Clause 30 after its first paragraph and ignore the other three-quarters of the provision. This is just what SHI improperly asks this Court to do, by confining its discussion of Clause 30 to paragraph 1 and relying on cases interpreting arbitration clauses that contain a single, all-encompassing reference of “all claims” to arbitration, without any exceptions like the last three paragraphs of Clause 30. The trial court correctly rejected this argument.

In an attempt to avoid the clear import of paragraph 4, SHI contends that Clause 30 should be read to provide for non-final, non-binding arbitration. Conceding as it must that the parties intended to protect NSKJV against “inconsistent outcomes if disputes arose between TNC and NSK that concerned [SHI’s] work on the Project,” SHI concludes that “[i]n that event, the outcome of the TNC-NSK dispute *would be binding in any arbitration* between NSK[JV] and [SHI].” (SHI

Br. at 21-22 (emphasis added).<sup>21</sup> Leaving aside the fact that such an interpretation has no foundation in the canons of contract interpretation set out above, it would lead to the absurd, and thus incorrect, result that the parties and arbitrators would spend their time and money to reach a decision that will have no effect; the court's decision in the NSKB-TNC case, not the arbitrators' decision, admittedly would be determinative. (*Id.*) Furthermore, a non-binding arbitration is not even within the generalized policy that favors *binding* arbitration as a tie-breaker in interpreting ambiguous contractual provisions. And finally, paragraph 1 of Clause 30 does not provide for non-final, non-binding arbitration.

There is simply no way that Clause 30 can be read to compel arbitration of the pending disputes. Both black letter law and policy considerations require affirmance.

#### IV. ARGUMENT

##### A. **The Trial Court Correctly Decided That It, Not an Arbitrator, Must Decide Whether the Pending Claims Are Arbitrable.**

Contrary to SHI's argument, the trial court's finding that it was "in a position to decide whether or not there was a clear agreement that the

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<sup>21</sup> This is precisely the situation presented by TNC's Amended Complaint against NSKB and Plaintiffs' Second Amended and Supplemented Complaint against TNC and SHI. (CP 770-94, 1940-2319.)

issues between NSK and SHI be resolved” by arbitration, and its conclusion that it did “not find that there was such a clear agreement in this contract,” both respect and follow the law governing the determination of whether certain disputes are arbitrable. (SHI Br. at 19; RP 05/05/06, at 23:2-7.) As the Washington Supreme Court has recognized, “the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.” *Kamaya*, 91 Wn. App. at 712 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

The law, as settled by the Supreme Courts of both Washington and the United States, is entirely contrary to SHI. “[T]he question of whether parties have agreed to arbitrate a dispute is a *judicial one* unless the parties clearly provide otherwise.” *Kamaya*, 91 Wn. App. at 714 (emphasis added) (quotation omitted); see *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“[T]he *question of arbitrability* is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.”) (citations omitted) (emphasis in original). “[A] disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court.” *Howsam*, 537 U.S. at 84 (citing *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 651-52 (1986)) (emphasis added).

As the United States Supreme Court has recognized, there is an excellent reason for this rule:

[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.

*First Options*, 514 U.S. at 945 (citation omitted) (emphasis added); *Green Tree*, 539 U.S. at 456 (Rehnquist, O’Connor, Kennedy, JJ., dissenting).

See also *AT&T*, 475 U.S. at 651 (“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 . . . .’”) (citation omitted).

Even a broad sort of arbitration provision, such as one which—unlike Clause 30—provides for arbitration of “all differences” arising under the contract and contains no exceptions, has been held to be “too general to amount to an express delegation of the issue of arbitrability [to the arbitrator].” *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1100 (8th Cir. 1999).

SHI cites *no* authority that supports its assertion that the issue of arbitrability of the pending disputes can be decided by an arbitrator, not the trial court. Instead, all of the cases SHI has relied on confirm that courts, not arbitrators, must determine whether the parties have agreed to arbitrate a particular issue. For example, in *Green Tree*, the plurality identified a class of questions which “courts *assume* that the parties intended courts, not arbitrators, to decide” absent “‘clea[r] and unmistakabl[e]’ evidence to the contrary” in the contract. 539 U.S. at 452 (citing *AT&T*, 475 U.S. at 649) (emphasis added) (discussed at SHI Br. at 18). These questions “include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or *whether a concededly binding arbitration clause applies to a certain type of controversy.*” *Id.* (emphasis added); see also *Howsam*, 537 U.S. at 83.

In *Shaw Group Inc. v. Triplefine Int’l Corp.*, the Second Circuit similarly observed that “when the doubt concerns *who* should decide arbitrability[,] [t]he law . . . favor[s] judicial rather than arbitral resolution.” 322 F.3d 115, 120 (2d Cir. 2003) (emphasis added) (discussed at SHI Br. at 18-19).<sup>22</sup> “An exception to the requirement—that

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<sup>22</sup> Unlike this case, both *Green Tree* and *Shaw Group* involved broad arbitration provisions with *no* exclusions. See *Green Tree*, 539 U.S. at 448; (cont.)

any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration—applies when the doubt concerns *who should decide* arbitrability, and the law then reverses the presumption to *favor judicial rather than arbitral resolution.*” 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 20:9, at 20-25 (3d ed. 2006) (emphasis added). The rule “is that the question of arbitrability . . . is *undeniably* an issue for judicial determination.” *AT&T*, 475 U.S. at 649 (emphasis added).

Not only is there no clear and unmistakable provision in the SHI Contract requiring arbitrability to be decided by an arbitrator, *nothing* in that contract permits such a conclusion. Unlike the arbitration provisions

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*Shaw Group*, 322 F.3d at 120. The agreements in both cases made no provision for any procedure other than arbitration to resolve all disputes arising under those agreements. See *Green Tree*, 539 U.S. at 448; *Shaw Group*, 322 F.3d at 120-21. In *Green Tree*, the arbitration clause was “sweeping” in scope, and went so far as to specify in all capital letters that “THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY U.S. (AS PROVIDED HEREIN).” 539 U.S. at 448, 453.

Indeed, SHI’s reliance on *Green Tree* is entirely misplaced. As quoted above, the United States Supreme Court in that case affirmed the rule that the *court* must determine the issue now before this Court, that is, whether an “arbitration clause applies to a certain type of controversy.” *Id.* at 452. However, a *different* issue was presented by the plaintiffs in *Green Tree*: “whether the contracts [in issue] forb[ade] class arbitration . . . .” *Id.* As the plurality observed, that issue “concern[ed] neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties.” *Id.* See *id.* (“[T]he question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to.”) (emphasis in original; internal citation omitted). As noted above, both the plurality and the dissent agreed that the *court* is to determine the question of arbitrability. *Id.* at 452 (opinion of Breyer, Scalia, Souter, Ginsburg, JJ.); *id.* at 456 (Rehnquist, O’Connor, and Kennedy, JJ., dissenting).

in all of the cases that SHI cites, Clause 30 does not limit dispute resolution to arbitration. Instead, after opening with a general, first paragraph providing for final and binding arbitration and prescribing that *arbitrated matters* follow the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Clause 30 goes on—

”[n]otwithstanding” paragraph 1—to expressly limit that paragraph.

Paragraph 4 specifically provides NSKJV the power to require SHI to resolve NSKJV-SHI disputes jointly with disputes arising under the NSKB-TNC Contract. In addition, paragraph 3 specifies that disputes involving TNC and NSKB may be litigated. Thus, these specific exceptions to paragraph 1 plainly allow such joint disputes to be resolved by litigation.

It is well settled that where, as here, such “broad,” “general, summary, or preliminary” language is “later qualified or narrowed” by “definitive, particularized contract language,” the “rule of construction” is that the later, “specific provisions in the agreement control.” *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1421 (11th Cir. 1990); *John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669-70 n.8 (2d Cir. 1983); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55 (2005). Thus, the authorities string-cited by SHI in a footnote (SHI Br. at 19 n.8) do not support the notion that the reference to the ICC Rules in

paragraph 1 of Clause 30 empowers an arbitrator, rather than the trial court, to decide the threshold issue of arbitrability here.<sup>23</sup> The trial court was accordingly correct in not finding “such a clear agreement [“that the issues between NSK and SHI be resolved internationally”] in this contract.” (RP 05/05/06, at 23:2-7.) See *Howsam*, 537 U.S. at 83; *Kamaya*, 91 Wn. App. at 714.

Finally, SHI has itself admitted the trial court’s power to interpret Clause 30 by affirmatively asking *the court* to interpret Clause 30, in both its December 2005 Motion to Dismiss and its August 2006 Counterclaim (CP 2347-58, 2829-44), as well as by electing not to contest the trial court’s ruling that Clause 30 grants the trial court jurisdiction over SHI. See *supra* p. 20 & n.16. See *Howsam*, 537 U.S. at 83.

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<sup>23</sup> Two of these cases specifically hold that “under both the [Convention] and the FAA a court must decide whether an agreement to arbitrate exists before it may order arbitration.” *China Minmetals Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 282 (3d Cir. 2003) (citations omitted) (emphasis added); accord *Oriental Republic of Uruguay v. Chem. Overseas Holdings, Inc.*, No. 05-civ-6151 (WHP), 2006 WL 164967, at \*4-5 (S.D.N.Y. Jan. 24, 2006). The treatise cited also supports Plaintiffs. T. OEHMKE, *supra* § 20:9, at 20-25 (where there is a question regarding arbitrability, the law “favor[s] judicial rather than arbitral resolution”). The final case SHI cites, *Empresa Generadora de Electricidad Itabo, S.A. v. Corporacion Dominicana de Empresas Electricas Estatales*, No. 05-civ-5004, 2005 WL 1705080, at \*6 (S.D.N.Y. July 18, 2005), mentions no provision expressly limiting the disputes subject to arbitration in the parties’ agreement, as Clause 30 does in the SHI Contract.

**B. The Pending Claims Against SHI Are Not Arbitrable Because There Is No Agreement to Arbitrate Those Claims.**

**1. A Party Cannot Be Required to Arbitrate a Dispute Unless It Agrees by Contract to Do So.**

Congress, courts and commentators all agree that a contractual duty to submit a dispute to arbitration can exist *only* where the parties *agree* to arbitrate that dispute. Indeed, it is hornbook law that “[a]rbitration is a creature of contract,” and that “[a] party who has not agreed to arbitrate a dispute cannot be forced to do so.” OEHMKE, *supra* § 5:1, at 5-2. Likewise, the Supreme Court of the United States has repeatedly confirmed that the “first principle” is that “arbitration is a matter of contract.” *AT&T*, 475 U.S. at 648 (citation omitted); *First Options*, 514 U.S. at 943; *Volt*, 489 U.S. at 478. Thus, “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>24</sup> *AT&T*, 475 U.S. at 648 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

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<sup>24</sup> The “positive assurance” standard cited by SHI (SHI Br. at 17, 22), is an affirmation, not 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 omitted; alteration in original).

Consistent with this basic principle, the FAA allows arbitration only of disputes that the parties have actually agreed to arbitrate. See *Goldberg*, 912 F.2d at 1420 (“The Federal Arbitration Act (FAA) ‘simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.’”) (quoting *Volt*, 489 U.S. at 478); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 756-57 (9th Cir. 1988).

SHI erroneously suggests that there is general policy favoring arbitration that suffices to require arbitration in this case. (SHI Br. at 16, 17 n.7.) First, only *final and binding* arbitration is favored and, as SHI has admitted, any arbitration of the pending disputes would not be final or binding. (*Id.* at 21-22.) As explained by the United States Court of Appeals for the Third Circuit, to the extent there is a policy in favor of resolving ambiguities in contractual dispute-resolution provisions in favor of arbitration, “[i]t is not arbitration per se that federal policy favors, but rather *final* adjustment of differences by a means selected by the parties.” *United Steelworkers of Am., AFL-CIO-CLC, Local Union No. 1165 v. Lukens Steel Co.*, 969 F.2d 1468, 1474 (3d Cir. 1992) (citations omitted) (emphasis added); see also *Bakers Union Factory, No. 326 v. ITT Cont’l Baking Co.*, 749 F.2d 350, 353 (6th Cir. 1984) (same). That policy, like the FAA, seeks only to place arbitration agreements “upon the same

footing as other contracts.” *Volt*, 489 U.S. at 474 (citation omitted). It cannot be used to violate the rule that “[a]rbitration under the [FAA] is a matter of consent, not coercion.” *Id.* at 479.

“[T]he duty to submit a matter to arbitration [must] arise[] from the contract itself.” *Kamaya*, 91 Wn. App. at 713-14; *Powell v. Sphere Drake Ins. PLC*, 97 Wn. App. 890, 898 (1999). See also *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 760-61 (D.C. Cir. 1988) (“[M]indful as we are of the federal policy in favor of arbitration, it is our task nonetheless to determine what appears to be most consistent with the intent of the parties.”). As the Eleventh Circuit admonished in *Goldberg*: “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.” 912 F.2d at 1419-20.

**2. Where, as Here, a Contract Exempts Certain Disputes from Arbitration, Those Disputes Cannot Be Arbitrated.**

The United States Supreme Court has also emphasized that “[n]othing [in the FAA] . . . prevents a party from excluding . . . claims from the scope of an agreement to arbitrate.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985); accord *Volt*, 489 U.S. at 478-79 (noting that “parties are generally free to structure their arbitration agreements as they see fit” and “may limit by contract the

issues which they will arbitrate”). Rather, the FAA, like the law of contracts generally, “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).<sup>25</sup>

Thus, courts consistently hold that a broad, general arbitration clause in an agreement can be limited by the parties, and any limitations must be respected. Demands for arbitration that are inconsistent with such limitations must be denied. See *Goldberg*, 912 F.2d at 1419-20; *Van Ness Townhouses*, 862 F.2d at 757-58; *Kadow v. A.G. Edwards & Sons, Inc.*, 721 F. Supp. 201, 203, 206 (W.D. Ark. 1989). The Eleventh Circuit’s opinion in *Goldberg v. Bear, Sterns & Co.* is instructive of this approach. *Goldberg* involved a standard agreement whose dispute resolution clause began with a broad statement that “[a]ny controversy arising out of or relating to your account . . . pursuant to this Agreement or the breach

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<sup>25</sup> Like the policy of resolving *doubts* concerning the scope of a purported arbitration clause *only* where the contract language is ambiguous, see *Volt*, 489 U.S. at 476, the practice of construing a contract against the drafter is invoked *only* where the language is ambiguous and susceptible of more than one interpretation. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995); *State v. Bisson*, 156 Wn.2d 507, 521-22 (2006) (both cited in SHI Br. at 22 n.9); see also *Forest Mktg. Enters., Inc. v. State Dep’t of Natural Res.*, 125 Wn. App. 126, 133 (2005) (“If . . . the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter.”). Thus, SHI is incorrect in asserting that Clause 30, the meaning of which is plain on its face, “should be construed against NSK because it drafted the clause.” (SHI Br. at 22 n.9.)

thereof shall be settled by arbitration.” 912 F.2d at 1419 (emphasis added). The last sentence of that clause, however, provided “[y]ou understand that this Agreement to arbitrate . . . specifically does not prohibit you from pursuing any claim or claims arising under the federal securities laws in any court of competent jurisdiction.” *Id.*

Like SHI, the defendants in *Goldberg* effectively asked the court to stop reading after the broad arbitration provision, arguing that to do otherwise “would render meaningless the first sentence of the agreement which states that ‘Any controversy arising out of . . . your account . . . shall be settled by arbitration.’” *Id.* at 1421 (emphasis and omissions in original). The *Goldberg* court, however, looked carefully at the contract language to determine what disputes the parties actually *agreed to* arbitrate, stressing that no presumption of arbitrability can displace the rules governing contract interpretation, including the rule that, “[w]hen general propositions in a contract are qualified by the specific provisions, . . . the specific provisions in the agreement control.” *Id.* As the court observed, “it is not at all uncommon for contracts to begin with broad sweeping language which is later qualified or narrowed.” *Id.*

The court acknowledged that the presumption in favor of arbitration creates “a strong temptation [by a reviewing court] to rewrite the contract to achieve that result.” *Id.* It made plain, however, that courts

must choose an interpretation which “accords with the agreement’s plain language and the intent of the parties at the time the contract was executed.” *Id.* Since the plain meaning of the last sentence was to limit the parties’ otherwise “seemingly absolute” agreement to arbitrate in the first sentence, the court rejected plaintiffs’ plea to read only the broad language and ignore the rest of the clause. *Id.* at 1420-21. In this case, the Court must similarly attend to the words of Clause 30, which clearly provide that the pending disputes do not have to be arbitrated.

**C. The Trial Court Properly Applied the Law of Contract Interpretation in Concluding That Clause 30 Does Not Compel Arbitration of the Pending Disputes.**

**1. Basic Canons of Contract Interpretation Govern.**

Courts must apply the same principles of contract interpretation to a dispute-resolution or arbitration clause as they employ to interpret the other provisions of a contract. *Goldberg*, 912 F.2d at 1419; *see also, 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.”) (emphasis added); *OEHMKE, supra* § 5:1, at 5-3. Aside from the rule that the parties’ intent, as set out in the words of the contract, controls, one of the most basic canons of contract interpretation is that courts must “give[] greater weight” to “specific terms and exact terms . . . than general language.” *Adler*, 153 Wn.2d at

354-55 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 203(c)

(1981)); see also *McGary v. Westlake Investors*, 99 Wn.2d 280, 286

(1983) (specific language contained in addendum to contract “must prevail over the general terms” appearing on contract’s first page).

SHI ignores this rule, which is essential, for “it is not at all uncommon for contracts to begin with broad sweeping language which is later qualified or narrowed.” *Goldberg*, 912 F.2d at 1421. In such circumstances, the later, “specific provisions in the agreement control.”

*Id.*; *John Hancock*, 717 F.2d at 669-70, n.8. “The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specifically directed to a particular matter controls in respect thereto over one which is general in its terms . . . .” *Mut. Life Ins. Co. v. Hill*, 193 U.S. 551, 558 (1904).

The second basic rule SHI ignores is that, in interpreting a contract, courts must “give[] effect to all of its provisions,” taking care not to “render[] some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101 (1980). In so doing, courts “must read [the contract] as the average person would read it . . . giv[ing] a practical and reasonable rather than a literal interpretation, and not a strained or forced

construction leading to absurd results.”<sup>26</sup> *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667 (1994) (internal quotations and citations omitted); *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341 (1987); *Forest Mktg. Enters.*, 125 Wn. App. at 132.

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<sup>26</sup> It is precisely this sort of “strained or forced construction leading to absurd results” that SHI advances in its most recent “interpretation” of Clause 30, which attempts to evade the clear language of paragraph 4 providing that disputes coming within paragraph 4 are exempt from the general arbitration provision of paragraph 1. Indeed, SHI has offered at least seven *other* “interpretations” of paragraph 4, also hoping to evade its plain meaning. (See, e.g., CP 2530 (“Nothing in Clause 30 states or implies that SHI consented by this language to join or be made a party to the NSKB-TNC dispute, only that SHI would be bound by the outcome of any issue resolved in that process that concerned SHI’s performance.”); CP 2613 (“[D]ealt with jointly’ . . . clearly refer[s] to voluntary conduct, such as participating in information exchanges, technical meetings and settlement negotiations . . . .”); *id.* (“[T]he most reasonable interpretation of [‘dealt with jointly’] is that if there are any overlapping claims . . . they will be resolved by negotiation, arbitration, or litigation between TNC and NSKB and SHI will be bound by the outcome.”); CP 2837-38 (“Clause 30 states or implies . . . only that SHI would be bound by the outcome of any issue resolved in any such proceeding that concerned SHI’s performance.”); CP 3382 (“[T]he proviso states simply that if a dispute between TNC and NSKB concerns SHI’s work, NSKJV can notify SHI that the dispute is being addressed in the proceedings between TNC and NSKB and that SHI will be bound by the outcome in any dispute between NSKJV and SHI.”); CP 1279-80 (“Clause 30 states that if there are disputes between NSKB and TNC, and between NSKJV and SHI, *that concern SHI’s work under the NSKJV Purchase Order*, NSKJV can require that the issues be considered together with SHI being bound by the result in any arbitration between NSKJV and SHI”) (emphasis in original); CP 1598 (“The last paragraph of Clause 30 allows NSKJV to defer the arbitration of a dispute between NSKJV and SHI if the *same* dispute involving SHI’s work arises between TNC and NSKB under the TNC Purchase Order. In that event, SHI would be bound by the outcome of the TNC-NSKB dispute in any subsequent arbitration with NSKJV”) (emphasis in original); CP 1599 (“Clause 30 can *only* be triggered if the disputes between TNC and NSKB and between NSKJV and SHI are the same.”) (emphasis in original); RP 05/05/06 at 5:17-20 (“[T]he parties intend[ed] . . . to defer arbitration of claims that overlapped claims between TNC and NSK so as to avoid NSK’s having to face inconsistent outcomes.”).)

Such shifting positions further undercut the validity of SHI’s “interpretation” of Clause 30.

**2. The Trial Court Correctly Concluded That the Pending Disputes Are Not Arbitrable.**

In fulfilling its judicial task of determining whether the SHI Contract imposed on NSKB and NSKJV a “duty to submit [their claims against SHI] to arbitration,” *Kamaya*, 91 Wn. App. at 713-14, the trial court correctly proceeded “to determine what appears to be most

consistent with the intent of the parties,” *Nat’l R.R. Passenger Corp.*, 850

Wn.2d at 760-61, by reading paragraph 1 of Clause 30 “in connection with the final paragraph” of that Clause. (RP 05/05/06, at 22:6-11, 23:4-10.)

The court thus correctly followed the rules of construction laid down by the Washington Supreme Court, reading Clause 30 in its entirety and taking care not to “render[] some of [its] language meaningless or ineffective.” *Wagner*, 95 Wn.2d at 101.

Likewise, the trial court’s conclusion that “the final paragraph does, in fact, apply, and in this particular case is an exception to [the first paragraph]” (RP 05/05/06, at 23:8-10), comports with the fundamental canon of contract interpretation, discussed above, that requires courts to “give[] greater weight” to “specific terms and exact terms” than general language.” *Adler*, 153 Wn.2d at 354-55 (citation omitted). The trial court thus correctly concluded that the general statement in paragraph 1 of Clause 30, providing for binding arbitration as a general matter, is

limited by the last paragraph of that Clause. Paragraph 4, which is more specific, expressly gives NSKJV the sole option to require that any dispute concerning SHI's work under the SHI Contract "shall be dealt with jointly with the dispute under the TNC Contract" if *NSKJV—not SHI— "is of the opinion that such dispute touches or concerns the Subcontract Work."* (CP 2010 (emphasis added).)<sup>27</sup>

That the trial court was correct is plain from reading Clause 30. As a threshold matter, the first paragraph states the parties' intent to arbitrate *only* disputes that can "be finally referred to and settled by arbitration," which SHI admits is not the case here. (*Compare* CP 2010, *with* SHI Br. at 21-22.) *See infra* Section IV.D. But, even if the first paragraph covered non-final, non-binding arbitration—which it does not—the facts of the current dispute come squarely within the last paragraph of Clause 30. Since it is also plain from the third paragraph of Clause 30, which specifically contemplates "litigation" of claims between TNC and NSKB, that such a joint resolution may take place in court, there is no question

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<sup>27</sup> The trial court had previously determined the meaning of Clause 30, ruling that the provision reflects the parties' understanding that "*this Court might get involved if there were an issue that involves not just SHI and NSKB but Tacoma Narrows*" and that such a situation has "*clearly developed.*" (CP 1921 (transcript page 64:11-19) (emphasis added).) The trial court had further correctly concluded that "*one [would] have anticipated that Clause 30 would establish jurisdiction in a Washington court under the facts as they now exist.*" (*Id.* (emphasis added).)

that the trial court was correct in refusing to compel arbitration of the pending claims:

**3. NSKJV Has Properly Invoked Paragraph 4 of Clause 30 in These Cases.**

SHI's assertion that the disputes with TNC do not touch or concern the SHI Contract is irrelevant, as well as wrong.<sup>28</sup> The plain language of Clause 30—which controls—makes dispositive NSKJV's "opinion" that a "dispute aris[ing] in connection with" the [NSKB-]TNC Contract "touches or concerns" the SHI Contract work. (CP 2010.) If NSKJV forms such an opinion, it "may by notice in writing to [SHI] *require* that any such dispute under this [SHI Contract] *shall be dealt with jointly* with the dispute under the [NSKB-]TNC Contract." (*Id.* (emphasis added).) SHI's opinion is not mentioned in Clause 30 and can play no role in the

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<sup>28</sup> Even a cursory review of the parties' pleadings shows the reasonableness of NSKJV's opinion that the claims concerning the NSKB-TNC Purchase Order "touch or concern" the claims relating to SHI's obligations under the SHI Contract, and vice versa, as the trial court has already found. The trial court's observation that "reasonable minds can differ" as to whether there were "connections" between the disputes involving TNC and those involving SHI does not change this fact. (RP 05/05/2006, at 21:19, 22:14-16; *see* SHI Br. at 11-12.) The trial court did *not* conclude that reasonable minds could differ as to the meaning of Clause 30; it simply indicated that there could be differences of opinion as to whether there were "connections" between disputes involving SHI and TNC. (RP 05/05/2006, at 22:14-16.) For purposes of determining whether disputes among TNC, SHI and Plaintiffs should be jointly resolved, all that matters is whether NSKJV is "of the opinion" that the two sets of disputes "touch or concern" one another. (CP 2010.) Nevertheless, the trial court's statement that reasonable minds could differ over the "connections," coupled with its conclusion that "there indeed are connections" (RP 05/05/2006, at 22:15-16), shows that NSKJV's opinion is objectively reasonable, even though no such requirement appears in Clause 30.

application of this provision. Because NSKJV has admittedly given SHI notice under paragraph 4, SHI's agreement to that paragraph gives it no choice but to have its pending disputes with NSKJV resolved jointly with the disputes pending between TNC and NSKB, in Thurston County Superior Court.

Furthermore, Plaintiffs' Second Amended Complaint shows that the disputes involving the NSKB-TNC Contract do indeed "touch or concern" the SHI Contract, for all of the claims arise from one set of facts: TNC's radical redesign of the steel bridge deck and the impact the design change had on SHI's fabrication of the deck under the SHI Contract. (CP 1941-83.) TNC's suit against NSKB likewise asserts claims regarding SHI's fabrication of the bridge deck. (CP 3669 ¶¶ 10-11.)

Plaintiffs' claims concerning SHI's breach of the SHI Contract's audit provisions similarly "touch or concern" the disputes with TNC, for the audit relates to the actual costs incurred in building the redesigned deck and thus to NSKJV's damages claims against TNC and to SHI's counterclaims against Plaintiffs. (Cf. CP 2351 ¶ 32 ("NSKB's claims to TNC . . . included SHI's proposed Change Orders.")) The fact that SHI has allowed TNC to perform the audit it has denied NSKJV confirms that the TNC dispute "touches or concerns" the SHI dispute. (SHI Br. at 8.)

**D. The Contract Does Not Permit, Much Less Compel, Arbitration of the Pending Claims Because, as SHI Admits, an Arbitration Decision Would Not Be Final and Binding.**

In addition to the reasons set forth above, there is another, separate and independent reason to affirm. There is no dispute here—nor can there be—that the *only* arbitration to which the parties have agreed is one that is final and binding, one which will *finally* settle their disputes. (CP 2010 (“The award rendered by the arbitrators shall be *final and binding* upon both parties.”) (emphasis added).) Yet SHI admits that, “if disputes arose between TNC and NSK that concerned [SHI’s] work on the Project[,]”—as the disputes have done—*the trial court’s decision* in “the TNC-NSK dispute would be *binding in any arbitration between NSK and [SHI].*” (SHI Br. at 21-22 (emphasis added).) In other words, the arbitration SHI asks this Court to compel would be neither final nor binding. Since a non-final, non-binding arbitration is not provided for even under paragraph 1 of Clause 30, there is no agreement to arbitrate the pending claims and arbitration cannot be compelled. (CP-2010.)

Furthermore, compelling a concededly non-binding arbitration in these circumstances would actually defeat the very purpose of arbitration. That purpose, as the Washington Supreme Court has recognized, “is to *avoid* the courts insofar as the resolution of the dispute is concerned.” *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131

(1967) (emphasis in original). *See also Barnett v. Hicks*, 119 Wn.2d 151, 160 (1992) (noting that “object” of arbitration is “[i]mmediate settlement of controversies” which “removes the necessity of waiting out a crowded court docket”).

Moreover, SHI’s assertion that NSKJV’s claims against SHI must be arbitrated—but that the court’s decision in the dispute between NSKB and TNC will be binding on the arbitrators—must be rejected as contrary to law, because it would yield the “absurd result[]” of a meaningless and ineffective arbitration proceeding, in which the arbitrators’ efforts would be wasted and their conclusions nullified by the orders of the trial court. *See, e.g., Allstate*, 72 Wn. App. at 667; *Eurick*, 108 Wn.2d at 341; *Forest Mktg. Enters.*, 125 Wn. App. at 132.

Finally, reading Clause 30 to compel arbitration would offend basic rules of contract interpretation, because it would nullify paragraph 4’s express provision for *joint* resolution, at NSKJV’s option, of the *joint* disputes. (CP 2010.) Thus, SHI’s argument violates the fundamental, well-settled principle of contract interpretation that a contract cannot be interpreted to render “meaningless or ineffective” any provision—here, NSKJV’s contractual right to have certain disputes “under [the SHI Contract] *dealt with jointly with the dispute under the TNC Contract.*” (*Id.* (emphasis added).) *See Wagner*, 95 Wn.2d at 101.

V. CONCLUSION

For the foregoing reasons, the trial court's May 8 and August 18,

2006 orders are correct and should be affirmed.

Dated: November 22, 2006.

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I, June Starr, an employee with the law firm of Perkins Coie LLP, hereby certify under penalty of perjury under the laws of the State of Washington that on November 22, 2006, I caused to be served upon counsel of record at the addresses and in the manner described below, the foregoing BRIEF OF PLAINTIFFS-RESPONDENTS NIPPON STEEL-KAWADA BRIDGE, INC. AND NIPPON STEEL / KAWADA JOINT VENTURE IN RESPONSE TO BRIEF OF APPELLANT.

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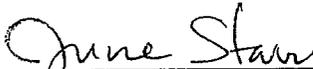
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June Starr