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

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

TACOMA NARROWS CONSTRUCTORS, a Washington joint venture,
Plaintiff/Respondent
v.
NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation
Defendant/Respondent

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STATE OF WASHINGTON
SECURITY

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

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I. INTRODUCTION

The arbitration clause at issue in this appeal is exceedingly broad: it requires arbitration of “[a]ll disputes, controversies or differences which may arise out of or in relation to or in connection with the [NSKJV] Purchase Order, or for the breach thereof.” CP 1306. NSK¹ does not dispute – nor could it – that both the “audit claim” and the “change order claims” asserted in this matter arise out of or in connection with the NSKJV Purchase Order (or the alleged breach thereof). NSK nevertheless seeks to avoid arbitration of its claims as required by the parties’ agreement.

NSK’s principal argument is that it can properly “eschew” arbitration, Resp. Br. 24, based on the final paragraph of Clause 30, which is quoted at pages 9-10 of Samsung’s opening brief and again on page 16 below. But as Samsung explained, the “all disputes” language in the parties’ agreement also requires that any disputes regarding the arbitrability of Samsung’s claims be decided by arbitration. Thus, even if NSK’s argument regarding this issue has merit (which it does not), the Federal Arbitration Act (“FAA”) requires that the parties’ dispute be

¹ As used herein, “NSK” refers collectively to Respondents Nippon Steel-Kawada Bridge, Inc. and Nippon Steel/Kawada Joint Venture, “Samsung” refers to Appellant Samsung Heavy Industries Co., Ltd., and “TNC” refers to Tacoma Narrows Constructors.

resolved by the International Court of Arbitration (“ICA”) in Singapore. App. Br. 15-19. NSK attempts to distinguish some of the cases addressing this point, but it cannot – and does not – do so persuasively. As discussed in Section III.A below, those cases are controlling here. The trial court therefore erred in deciding the arbitrability issue rather than referring that issue to the ICA.

Next, NSK attempts to argue that the audit claim and the change order claims “touch or concern” NSK’s dispute with TNC and are therefore not subject to mandatory 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. Indeed, as discussed in Section II below, the trial court itself concluded that “reasonable minds” could conclude that the issues involved in the TNC-NSK dispute “are not the same” as the issues involved in the Samsung-NSK disputes. The court then failed to resolve such doubts in favor of arbitration as required by applicable case law.

Finally, NSK makes the preposterous assertion that Samsung is proposing “non-binding arbitration.” *E.g.*, Resp. Br. 10, 25-26, 28. Samsung has argued from the outset, *see* CP 1600 n.5 – and continues to argue – that the parties’ dispute should be referred to the ICA for *binding* arbitration in Singapore. Samsung also has argued that the outcome of the TNC-NSK dispute would be binding in any such arbitration, thus protecting NSK from inconsistent judgments (as the final paragraph of Clause 30 contemplates). CP 1279-80; App. Br. 21-22. That does not mean that the arbitration is non-binding, as NSK erroneously claims. To the contrary, arbitration will allow both NSK and Samsung to *conclusively* resolve their disputes without protracted litigation. Unfortunately, NSK misrepresents the record in this and several other respects – some of which will be addressed briefly in Section II below.

In short, the trial court here erred by (a) deciding the arbitrability issue rather than referring the dispute to arbitration, and (b) concluding that both NSK’s change order claims and its audit claim are not subject to mandatory (and binding) arbitration. For all these reasons, this Court should reverse the trial court’s arbitration rulings and refer both the change order claims and the audit claim to the ICA as the parties agreed and as required by law.

II. CORRECTIONS TO NSK'S STATEMENT OF THE CASE

NSK's Statement of the Case, which relies primarily upon allegations in NSK's amended complaint that were expressly denied by Samsung, is inaccurate in several material respects and misstates the origin and nature of the disputes between Samsung and NSKJV and between TNC and NSKB:

1. Contrary to NSK's assertion, Samsung did not breach the NSKJV Purchase Order. That agreement required Samsung to complete fabrication of the steel bridge deck sections and to load and sea-fasten the sections on ships according to a schedule set by NSKJV. CP 1997. Section 1, clause 28 of the NSKJV Purchase Order, which NSK alleges Samsung breached, Resp. Br. 8, provides that the existence of a dispute between NSK and Samsung did not entitle Samsung to delay or suspend the *performance of its obligations under the Purchase Order*.² But the suspension of work for several weeks in September 2005 to focus the parties on a resolution of the change order dispute did not affect Samsung's ability to meet NSKJV's delivery schedule or otherwise affect

² Section 1, clause 28 provides in pertinent part: "Subject to the provisions of Clause 30, the existence of a dispute or proceeding to resolve a dispute between [NSKJV] and [Samsung], shall not in any manner excuse continued and timely performance by [Samsung] of its obligations under the Purchase Order or entitle [Samsung] to suspend or delay performance." CP 1305.

Samsung's performance. CP 2965 (transcript 11:14-21). Indeed, the TNC-Samsung Settlement, in which TNC confirmed the changes in Samsung's scope of work, facilitated the early completion of Samsung's work such that Samsung qualified for a \$3 million incentive bonus from TNC, *see* CP 1245, and the deck sections had to be stored until NSKJV could arrange for ships on which Samsung could load the deck sections. CP 2417 & n.2.

2. NSK's discussion of Samsung's performance is also misleading because NSK's brief omits any mention of the provision in section 1, clause 6 of the Purchase Order ("Clause 6") for a default payment arrangement for change order disputes such that Samsung can continue to perform while the disputes are being resolved. Clause 6 states that if the parties cannot agree on pricing for Samsung's change orders but NSKJV nevertheless directs Samsung to perform the changed work, Samsung will be reimbursed on an ongoing basis under a time and materials calculation. CP 1293.³ It was NSK's failure to comply with

³ Section 1, clause 6 provides in pertinent part: "If the parties can not reach agreement [on change order pricing] using the above methods and [NSKJV] directs [Samsung] in writing to perform the changed work or as a temporary payment mechanism during negotiation to reach agreement on the increase or decrease in the Price resulting from a Change Order where [NSKJV] determines that immediate performance is necessary, Samsung shall promptly proceed with the changed work, and the payment or Price reduction, as applicable, shall be determined on the basis of reasonable cost reimbursable
(footnote continued...)"

Clause 6 – by abdicating its responsibility to act on Samsung’s change order requests⁴ or to direct Samsung in writing to perform the changed work – that precipitated Samsung’s decision to slow and ultimately suspend work on the Project (but not Samsung’s timely performance under the NSKJV Purchase Order) and TNC’s decision to intervene and to provide, in the TNC-Samsung Settlement, the direction and assurance of compensation that NSK had declined to give.⁵

3. Contrary to NSK’s assertion, Resp. Br. 18-19, Samsung did not reject NSK’s “audit” request. The sole impediment to NSK’s consultants receiving the requested records was, and remains, NSK’s unwillingness to agree to maintain the confidentiality of the records or to suggest any reason why this would be a hardship for NSK or its consultants. CP 1765-67; Appellant’s Br. 8-9. TNC entered into a

(continued from previous page)

expenditures or savings for the Subcontract Work attributed to the Change Order.” CP 1293.

⁴ Pursuant to a January 13, 2005 letter between NSKJV and Samsung, CP 1173-74, Samsung received an advance of \$12 million from NSK (\$2 million of which was provided by TNC) and agreed to perform overtime and weekend work to meet the delivery schedule established by NSKJV. Contrary to NSK’s assertions, Resp. Br. 13, 17-18, the letter did not state or suggest that that the advance was intended or sufficient to compensate Samsung for the changes in its scope of work. Instead, the letter obligated NSK to resolve Samsung’s change order claims “as soon as possible.” CP 1174. Despite numerous requests from Samsung, NSK made no serious effort to resolve these claims.

⁵ NSK’s claim that Samsung accepted funds from TNC knowing they were from a draw against NSKB’s letter of credit, Resp. Br. 18, was expressly denied by Samsung. CP 1191 ¶ 133.

confidentiality undertaking with Samsung and has received these same materials.

4. The trial court's comment that reasonable minds could differ as to whether arbitration should be compelled was not, as NSK suggests, Resp. Br. 45 n.28, confined to whether the disputes between Samsung and NSK "touch or concern" NSK's claims against TNC. While the trial court did state that one could reasonably conclude that the disputes were not connected, RP 05/05/2006, at 22, the trial court also stated:

Counsel, I have done my best to understand the issue before me today, and while some might feel that it's straightforward, and as advocates I've heard attorneys argue for their clients as to how straightforward it should be one way or the other, *it's pretty clear that reasonable minds can differ but I find this to be much more complex than simply making a decision yes or no.*

Id. at 21 (emphasis added).⁶ Unfortunately, as will be discussed more fully below, the trial court erroneously resolved these doubts in favor of litigation rather than arbitration – a ruling that is directly contrary to controlling legal principles.

⁶ Nor is it accurate to state, as NSK asserts, Resp. Br. 19-20, that the trial court's January 20, 2006 ruling denying Samsung's motion to dismiss for lack of personal jurisdiction was a "rejection" of Samsung's position that Clause 30 requires NSK to arbitrate its claims against Samsung. *See* CP 1600-01. In fact, at the conclusion of the court's ruling on jurisdiction, Samsung's counsel advised the court that a motion to compel arbitration would be filed. CP 1922-23 (transcript 69:23-20:23); CP 1600.

III. ARGUMENT

A. The Trial Court Erred in Deciding the Arbitrability Question.

Samsung argued in the trial court,⁷ CP 1279, 1596-97; RP 05/05/2006, at 4-5, 18, and in its opening brief, citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), and *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003), that under the FAA the trial court should have required NSK to present its challenge to the arbitrability of its claims to the ICA in Singapore for resolution. App. Br. 18-19. The broad language of Clause 30 referring to the ICA “[a]ll disputes, controversies or differences which may arise out of or in relation to or in connection with the [NSKJV] Purchase Order” reflects an intention that the ICA decide objections to the scope of its jurisdiction. 539 U.S. at 451-52; 322 F.3d at 121-22.

NSK responds that both *Green Tree* and *Shaw Group* require that a court, rather than the ICA, decide questions of arbitrability, Resp. Br. 31-34, but NSK’s argument is based upon a fundamental misreading of these decisions. In *Green Tree*, the U.S. Supreme Court vacated a decision of the Supreme Court of South Carolina affirming a decision to certify a class

⁷ Thus, NSK is wrong in asserting, Resp. Br. 34, that Samsung “admitted the trial court’s power to interpret Clause 30 by affirmatively asking *the court* to interpret Clause 30” in Samsung’s motions to compel arbitration.

action for arbitration. The Court held that because the contract in question provided that “all” disputes between the parties would be submitted to arbitration,⁸ under the FAA the South Carolina courts had erred in deciding the class certification question:

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

539 U.S. at 451-52 (first emphasis in original; second emphasis added; citations omitted). The Court also reiterated: “And if there is doubt about that matter – about ‘the scope of arbitrable issues’ – we should resolve that doubt ‘in favor of arbitration.’” *Id.* at 452.

The *Green Tree* Court noted a “narrow exception” to this rule “in certain limited circumstances,” *i.e.*, where the question is whether the

⁸ NSK attempts, Resp. Br. 31-32 n.22, to distinguish *Green Tree* on the ground that the arbitration clause in that case contained a jury waiver and Clause 30 does not. But the presence, or absence, of a jury waiver was not relied or even remarked upon in either the Court’s opinion or in the dissent.

parties have a valid arbitration agreement *at all*⁹ or whether an arbitration clause covers a particular *class* of controversies (*e.g.*, labor-management layoffs), courts may assume, in the absence of clear and unmistakable evidence to the contrary, that the parties intended a court and not an arbitrator to make the decision. 539 U.S. at 452. But beyond this narrow exception, where the provision at issue contains broad language concerning the scope of questions committed to arbitration “matter[s] of contract interpretation should be for the arbitrator, not the courts, to decide.” 539 U.S. at 453.

NSK improperly attempts to transform this “narrow exception” – and the *Green Tree* dissent’s view that all questions pertaining to the interpretation of an arbitration clause should be decided by a court, 539 U.S. at 456 – into the holding of the case. Thus, NSK argues that *Green Tree* “confirm[s] that courts, not arbitrators, must determine whether the parties have agreed to arbitrate a particular issue.” Resp. Br. 31.

⁹ See, *e.g.*, *First Options of Chicago, Inc v. Kaplan*, 514 U.S. 945 (1995) (parties with respect to whom arbitration was sought to be compelled denied that they were parties to the contract containing the arbitration agreement); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003) (court independently reviews claim that arbitration agreement was a forgery). That the factual differences between *Green Tree* and *First Options* led to different outcomes is underscored by the fact that Justice Breyer authored the Court’s opinion in both cases.

But the narrow exception referenced in *Green Tree* does not apply here. No question has been raised as to the validity of Clause 30 and, while they disagree on how Clause 30 should be interpreted, both NSK and Samsung agree that it is a valid and enforceable part of the NSKJV Purchase Order. Similarly, no question has been raised as to whether the disputes between NSK and Samsung are within the class of disputes covered by Clause 30. Each of the claims asserted by NSK “arise out of or in relation to or in connection with the [NSKJV] Purchase Order” as Clause 30 provides. The issue on appeal is whether the last paragraph of Clause 30 should be interpreted to allow NSK to avoid its obligation to arbitrate, and that issue, under *Green Tree*, is “for the arbitrator, not the courts, to decide.” 539 U.S. at 453.

Much the same can be said with regard to *Shaw Group*, where the Second Circuit vacated a decision that a claim for costs in an arbitration proceeding should be decided by a court rather than an arbitrator because the arbitration provision in an international commercial agreement did not expressly provide that the arbitrator would consider such claims. 322 F.3d at 119. The Second Circuit noted that under the FAA any doubts regarding the “scope of arbitrable issues” should be resolved in favor of arbitration, but that the decision whether a particular issue was arbitrable

should only be referred to an arbitrator where there is “clear and unmistakable evidence” from the parties’ agreement of an intent to allow the arbitrator to determine such issues. 322 F.3d at 121 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)) .

The court then held that the arbitration provision, which committed to arbitration “all disputes” concerning or arising out of an international commercial agreement, provided the requisite evidence of intent, particularly where the provision referred the disputes to be decided by the ICA in accordance with the rules of the International Chamber of Commerce:

In sum, because the parties’ arbitration agreement is broadly worded to require the submission of ‘all disputes’ concerning the Representation Agreement to arbitration, and because it provides for arbitration to be conducted under the rules of the ICC, which assign the arbitrator initial responsibility to determine issues of arbitrability, we conclude that the agreement clearly and unmistakably evidences the parties’ intent to arbitrate questions of arbitrability.

322 F.3d at 124-25. That is precisely the situation here: Clause 30 provides that all disputes concerning the NSKJV Purchase Order will be resolved by arbitration before the ICA under the arbitration rules of the International Chamber of Commerce.

NSK suggests that *Shaw Group* stands for the proposition “when doubt concerns *who* should decide arbitrability, the law favors judicial rather than arbitral resolution.” Resp. Br. 31. As NSK’s own argument makes clear, this rule applies only where there is doubt as to that particular issue. The *Shaw Group* court thus went on to decide – in language omitted by NSK – that when an arbitration provision includes “all disputes” language like that in Clause 30, this constitutes the requisite clear and unmistakable evidence of the parties’ clear intent to arbitrate issues of arbitrability. 322 F.3d at 121.¹⁰

¹⁰ NSK similarly references a passage in a leading treatise noting the presumption favoring judicial, rather than arbitral, resolution of arbitrability questions, but fails to include the treatise’s further statement:

The FAA empowers the arbitrator to determine the scope of the arbitration clause as well as the substantive merits of the claim, which is the result when the parties’ broad arbitration clause contemplates the arbitrator deciding arbitrability. For instance, a clause providing for arbitration of all matters ‘arising from’ an agreement overwhelmingly suggests that a given dispute is arbitrable. In another case, an arbitration clause provided that ‘[a]ll disputes [between the parties] concerning or arising out of this Agreement shall be referred to arbitration’; the court interpreted the ‘arising out of’ language very broadly, holding it required referring even the issue of arbitrability to the arbitrator.

One arbitration agreement manifested the parties’ clear and unmistakable intent to submit questions of arbitrability to arbitration. There, the contract plainly submitted ‘all disputes concerning or arising out of’ the agreement to arbitration.... The parties’ contract referred all disputes to the International Court of Arbitration (ICA) for a decision under ‘the International Chamber of Commerce in accordance with the rules and Procedures of International Arbitration’; those ICC rules specifically provide for the arbitral body of the ICC to resolve

(footnote continued...)

The teaching of the decisions in *Green Tree*, in *Shaw Group*, and in other decisions¹¹ is that in international commercial agreements governed by the Convention and the FAA, where the parties have agreed to submit “all” their disputes to an arbitrator,¹² any challenge to the arbitrability of an issue – as opposed to the validity of the arbitration provision itself or whether a particular class of controversies is covered by the provision – is for the arbitrator and not for the courts to decide,

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arbitrability issues, either sua sponte before an answer is filed or at the specific request of any party.

In other situations, parties who contracted for arbitration under ICC rules were thereby agreeing to submit questions of arbitrability to the arbitrator.” (footnotes omitted, brackets in original).

T. OEHMKE, COMMERCIAL ARBITRATION, § 20:9 (2006). This treatise, like the authorities discussed in the text above, recognizes that disputes as to arbitrability must be decided by an arbitrator where, as here, the parties agreed to arbitrate “all” disputes.

¹¹ E.g., *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 55 (2d Cir. 2001) (“parties may overcome the *First Options* presumption [that courts should decide questions of arbitrability] by entering into [an] ... 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]”); *Oriental Republic of Uruguay v. Chemical Overseas Holdings, Inc.*, No. 05 Civ. 6151, 2006 WL 164967, at *5-6 (S.D.N.Y. Jan. 24, 2006) (same).

¹² In *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095 (8th Cir. 1999), a case decided before *Green Tree* and cited at Resp. Br. 30, the court found that because the arbitration provision did not extend to all issues “relating to” the parties’ agreement, the presumption favoring judicial determination of arbitrability questions had not been overcome. 179 F.3d at 1101. In contrast, here Clause 30 encompasses “all disputes, controversies or differences which may arise out of or *in relation to* or in connection with” the NSKJV Purchase Order.” CP 1306 (emphasis added).

particularly where, as here, the arbitrator's rules provide that it may resolve challenges to the arbitrability of a dispute.¹³

Here, neither party has questioned the validity or applicability of Clause 30, and neither party has asserted that NSK's claims against Samsung and the arbitrability of such claims are not "disputes, controversies or differences which ... arise out of or in relation to or in connection with" the NSKJV Purchase Order. CP 1306. The issue is whether to interpret the last paragraph of Clause 30 to permit NSK to avoid arbitration of its claims against Samsung, an issue that, in light of the "all disputes" language and reference to the ICC's rules in Clause 30, the trial court should have referred to the ICA to decide.

¹³ Clause 30 expressly provides that the arbitration shall be "in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce." CP 1306. Article 6, section 2 of the ICC Rules "specifically provides for the ICA, the arbitral body of the ICC, to address questions of arbitrability." *Shaw Group*, 322 F.3d at 122. To the same effect is *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 209-11 (2d Cir. 2005) (relying on American Arbitration Association rules).

B. The Trial Court Erred in Interpreting Clause 30 Not to Require NSK to Arbitrate Its Claims Against Samsung.

1. "Dealt With Jointly" Is at Most Ambiguous and Should Not Be Interpreted to Mean "Litigated Jointly in Thurston County Superior Court."

The first, third, and fourth paragraphs of Clause 30 provide:

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

* * *

The Vendor shall, upon the Purchaser's written request, fully assist the Purchaser in the proceedings of the arbitration or litigation arising between or among WSDOT, TNC, NSKB and/or the Purchaser relating to the Vendor's performance of the Subcontract Work or otherwise related to the Vendor's actions under the Purchase Order. In such case, the Vendor shall be bound by the award of such arbitration or the judgment of such litigation, as the case may be.

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

CP 1306. Samsung argued in the trial court and in its opening brief that the most appropriate interpretation of Clause 30 – which was drafted by NSK (CP 1279; App. Br. 22 n.9) – 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 NSK and TNC that concerned Samsung’s work on the Project. In that event, the outcome of the NSK-TNC dispute would be binding in any subsequent arbitration¹⁴ between NSK and Samsung. CP 1279-80, 1598-99; App. Br. 21-22.

NSK contends that the fourth paragraph of Clause 30 (“Paragraph 4”) should be interpreted to create for NSK an absolute and completely discretionary right to “require a joint resolution of its disputes with TNC and [Samsung] in Thurston County Superior Court.” Resp. Br. 26.¹⁵ Any

¹⁴ NSK argues repeatedly in its brief that this reading of Clause 30 would result in arbitration that would somehow be “non-binding” or “non-final.” Resp. Br. 10, 25-26, 28, 36, 44, 47. Samsung has no idea where this notion originated, certainly not with Samsung. Nothing in Samsung’s reading of Clause 30 would require or suggest that the arbitration of NSK’s claims against Samsung would be anything other than final and binding on the parties.

¹⁵ Contrary to NSK’s assertion, it does not – and cannot – have unfettered discretion to determine whether the audit claim and the change order claims “touch or concern” NSK’s dispute with TNC. Indeed, 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 (1979). To avoid striking down contracts on this basis, Washington courts have held that “[t]he covenant of good faith applies when a contract gives one party discretionary authority to determine a contract term.” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738 (footnote continued...)

other interpretation of Clause 30, according to NSK, would require a court (or the ICA) to “ignore” the last paragraph of the provision. Resp. Br. 27. NSK’s primary argument is that the only possible interpretation of Paragraph 4 is that the parties intended NSK to have the option of compelling Samsung to resolve a dispute with NSK via litigation in Thurston County Superior Court:

Paragraph 4 specifically provides NSKJV the power to require [Samsung] to resolve NSKJV-[Samsung] disputes jointly with disputes arising under the [TNC Purchase Order]. 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.

Resp. Br. 33. NSK argues that various rules of contract construction, such as “when provisions in a contract conflict, the later, specific provisions control,” Resp. Br. 33, 40, 43, and “courts must give effect to all

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(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 (2003).

Despite this body of law, NSK’s counsel candidly admitted to the trial court that NSK’s claims against TNC had been asserted in an effort to satisfy the last 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 as well, NSK’s reliance on the final paragraph of Clause 30 is seriously misplaced.

provisions of a contract,” Resp. Br. 41-42, 48, support its reading of Paragraph 4.

NSK’s argument is wrong because, among other things, the first paragraph of Clause 30 is much more explicit and specific than Paragraph 4, and Samsung’s reading of Clause 30 clearly encompasses Paragraph 4 by recognizing that NSK can require that the parties’ arbitration be deferred until similar claims between NSK and TNC are resolved. Indeed, NSK’s interpretation of Paragraph 4 essentially voids the parties’ agreement in the first paragraph of Clause 30 to arbitrate their disputes. Thus, it is NSK’s interpretation, not Samsung’s, that would require the Court to improperly ignore the parties’ agreement.

Moreover, NSK ignores the rule – under both the FAA and Washington case law – that the parties’ intentions “are generously construed as to issues of arbitrability,” with a dispute being arbitrable “unless it can be said ‘with positive assurance’ that arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Kamaya Co., Ltd. v. American Prop. Consultants, Ltd.*, 91 Wn. App. 703, 714 (1998), quoting *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739 (1993). Moreover, “[t]he federal policy favoring arbitration is even stronger in the context of international transactions.” *Id.*, quoting *Deloitte*

Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993). Read in context, NSK's interpretation of Clause 30, including Paragraph 4, is plainly incorrect.

The NSKJV Purchase Order is between a Japanese joint venture (NSKJV) and a Korean corporation (Samsung) and concerns fabrication work to be performed and delivered in Korea using steel manufactured in Japan. The contract clearly and expressly provides in Clause 30 that disputes will be resolved via arbitration in Singapore. If the parties had intended that in certain circumstances their disputes would be resolved through litigation in Washington, they could have stated this clearly and unambiguously in Paragraph 4, for example by stating "If disputes develop between TNC and NSKB that concern Samsung's work on the Project, NSKJV can require that any disputes between Samsung and NSKJV be resolved through litigation in the Superior Court of Washington for Thurston County, rather than through arbitration."¹⁶ Nothing in paragraph 4 (or the remainder of the Purchase Order) alerts

¹⁶ Samsung notes in this regard that the TNC Purchase Order, which pre-dated the NSKJV Purchase Order and to which 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, see App. Br. 22 n.9, had desired that outcome, it knew how to draft Clause 30 to accomplish it. Samsung was not aware of this provision in the TNC Purchase Order when it negotiated the NSKJV Purchase Order. CP 2363-64, ¶ 6.

Samsung to this possibility or supports NSK's strained attempt to avoid arbitration.

Instead, Paragraph 4 states only that if a dispute arises in connection with the TNC Purchase Order that concerns Samsung's work on the Project, then NSKJV may require that a dispute between it and Samsung concerning Samsung's work on the Project¹⁷ "shall be dealt with jointly with the dispute under the TNC Contract" and Samsung would be bound by the result in the same manner as NSKJV. While Paragraph 4 states that Samsung would be bound by the outcome of such a proceeding, nothing in the phrase "dealt with jointly" states or suggests that Samsung necessarily would be a party to any dispute resolution process between TNC and NSK. Nothing in the phrase "dealt with jointly" precludes Samsung's understanding that the intent of Paragraph 4 was for any such outcome to be binding in a subsequent arbitration between NSKJV and Samsung.

¹⁷ The most reasonable interpretation of Paragraph 4 is that it was intended, as the trial court apparently concluded, to protect NSK from inconsistent outcomes regarding its disputes with TNC and with Samsung and, therefore, for Paragraph 4 to be applicable, those disputes would have to be related. While the trial court concluded that there were "connections" between NSK's claims against TNC and against Samsung (while recognizing that reasonable minds also could find the claims were not connected), the claims are sufficiently different and distinct that TNC could prevail or lose at trial on its claims against TNC and still lose its claims against Samsung at arbitration. See Section III.B.2 below.

This last point is most important, because if Samsung and NSK's interpretation of Clause 30, and in particular Paragraph 4, both are plausible and reasonable – that is, if Clause 30 is ambiguous – the FAA requires that the ambiguity be resolved in favor of the interpretation that calls for arbitration of the parties' disputes. App. Br. 17 & n.7, 22. At a minimum, Samsung submits that the Court cannot conclude “with positive assurance,” as *Kamaya* requires, 91 Wn. App. at 714, that Samsung's interpretation is not supportable. Thus, even if the arbitrability issue were properly before the trial court (which it was not), the court erred in resolving any doubts against arbitration.¹⁸

¹⁸ It is equally clear that the cases cited by NSK regarding this issue, Resp. Br. 37-38, are not relevant here. Thus, where the express wording of an arbitration clause provides that it “specifically does not prohibit [a party] from pursuing any claim or claims arising under the federal securities laws in any court of competent jurisdiction,” *Goldberg v. Bear, Stearns & Co., Inc.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990) (*per curiam*), or provides that “Arbitration cannot be compelled with respect to disputes arising under the federal securities laws,” *Kadow v. A.G. Edwards & Sons, Inc.*, 721 F. Supp. 201, 203 (W.D. Ark. 1989), it is hardly surprising that such provisions would be held not to require arbitration of a federal securities claim. *Accord, Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 757 (9th Cir. 1989) (“This agreement to arbitrate does not apply to any controversy with a public customer for which a remedy may exist pursuant to an expressed or implied right of action under certain of the federal securities laws”). Those decisions are inapposite to the facts here because Clause 30 expressly states that all disputes between Samsung and NSK arising out of or relating to the NSKJV Purchase Order are to be arbitrated, and Paragraph 4 does not expressly exclude any dispute or class of disputes from this arbitration commitment.

2. **Even if NSK's Interpretation of Clause 30 Were Correct, NSK's Claims Against Samsung Do Not "Touch or Concern" NSK's Claims Against TNC.**

Finally, NSK erroneously asserts that its claims against TNC "touch or concern" its claims against Samsung because "all of the claims arise from one set of facts." Resp. Br. 46. But that is not what Paragraph 4 requires. Paragraph 4 concerns situations where the NSK-TNC *disputes* and NSK-Samsung *disputes* – not just their facts – overlap. As Samsung argued in its opening brief, the parties' disputes do *not* in fact overlap.

Indeed, NSK's claims against TNC are quite different and distinct from its claims against Samsung. NSK's complaint against TNC seeks primarily to *rescind* the TNC Purchase Order based on theories of fraudulent inducement (count 6), repudiation by TNC (count 7), breach of implied covenant of good faith and fair dealing (count 8), and no meeting of the minds (count 9), and to recover damages from TNC for the settlement with Samsung (count 10) and for the draw against NSK's letter of credit (count 11). CP 403-10. NSK asserts no audit claim of any nature against TNC.

In contrast, NSK's change order claims against Samsung proceed from theories based upon *enforcement* of the NSKJV Purchase Order, asserting breach of contract (count 2), money had and received (count 3),

and indemnification (count 4): CP 400-02. NSK's audit claim against Samsung, asserted in its proposed second amended and supplemented complaint, CP 1694-96, does not involve or even mention TNC in any way.

The trial court, while conceding that reasonable minds could agree with Samsung that there was no overlap in the NSK-TNC and NSK-Samsung disputes, concluded that there was a connection with respect to NSK's claim that TNC had improperly drawn against NSK's letter of credit and that Samsung had improperly received money from TNC. RP 05/05/2006, at 21-23. However, careful consideration of these claims shows that they are not connected. If NSK prevails on its claim that TNC's draw was improper, NSK's recovery will be from TNC, not from Samsung. If NSK loses on this claim against TNC, NSK will still assert that Samsung is not "entitled" to the settlement it received from TNC. *See* CP 401. While NSK's claims all arise from the Project, its claims against TNC and against Samsung are not co-dependent.

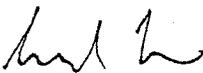
IV. CONCLUSION

For all the foregoing reasons, the Court should reverse the trial court's arbitration rulings and refer both NSK's change order claims and its audit claim to the ICA for binding arbitration as required by the parties' agreement and controlling case law.

RESPECTFULLY SUBMITTED this 5th day of January, 2007.

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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 January 5, 2007, I caused to be served upon counsel of record at the addresses and in the manner described below, the foregoing Appellant's Reply Brief and this Declaration of Service.

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