

Supreme Court No. 80259-9
Court of Appeals No. 34901-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

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

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation,
and
NIPPON STEEL / KAWADA JOINT VENTURE, a Japanese joint
venture,
Plaintiffs/Respondents

v.

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

**SUPPLEMENTAL BRIEF OF PLAINTIFFS/RESPONDENTS
NIPPON STEEL-KAWADA BRIDGE, INC. AND NIPPON STEEL /
KAWADA JOINT VENTURE**

Margaret K. Pfeiffer, admitted *pro hac vice*
Bruce W. Hickey, admitted *pro hac vice*
Erin R. Chlopak, admitted *pro hac vice*
SULLIVAN & CROMWELL LLP
1701 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 956-7500
Fax: (202) 293-6330

Michael Himes, WSBA # 19423
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Fax: (206) 359-9000

Attorneys for Plaintiffs/Respondents Nippon Steel-Kawada Bridge, Inc.,
and Nippon Steel / Kawada Joint Venture

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I. SUMMARY OF ARGUMENT

Contrary to the assertion of Petitioner Samsung Heavy Industries Co., Ltd. (“Samsung”) there *is no* “[w]ell-settled” authority—of this Court, any Court of Appeals in Washington, or any “controlling authority”—for the proposition on which Samsung bases its appeal. (Petition for Discretionary Review (“Petition” or “Pet.”) at 1.) Not only are they not “controlling authority,” the federal cases Samsung relies on *do not hold* that arbitrability of a dispute is to be decided by an arbitrator “if an arbitration provision (i) applies broadly to ‘all disputes,’ *or* (ii) incorporates arbitration rules that provide that questions regarding arbitrability are to be resolved by the arbitrator.” (*Id.*) Instead, in all of those cases, there was *both* a clause requiring arbitration of all disputes, without exception, *and* that clause invoked arbitration rules giving the arbitrator the power to determine arbitrability. None of Samsung’s cases involves a dispute resolution clause like the one here, whose plain language specifically excludes some disputes—including this one—from a general undertaking to arbitrate.

Indeed, if the cases held what Samsung claims, they would be irreconcilable with the presumption that judges, not arbitrators, decide arbitrability. As it is, both scholars and jurists have questioned whether these cases are correct in view of that presumption, which is written into the Federal Arbitration Act (the “FAA”) and has been reaffirmed by the United States Supreme Court on more than one occasion, most notably in the unanimous opinion in *First Options of Chicago, Inc. v. Kaplan*, 514

U.S. 938 (1995). There the Court confirmed that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” *First Options*, 514 U.S. at 944 (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986)). Unlike the cases Samsung cites, the *First Options* decision *is* controlling authority, which requires this Court to give effect to the presumption that courts decide arbitrability.

Furthermore, the cases Samsung relies on do not even apply here, because the contract between Samsung and Respondent Nippon Steel / Kawada Joint Venture (“NSK Joint Venture”) manifestly does not mandate arbitration of all disputes between the parties. In order to claim otherwise, Samsung simply ignores three-quarters of the contract’s Dispute Resolution Clause, which—inconveniently for Samsung’s labored argument—excepts from arbitration the current dispute among NSK Joint Venture, Samsung, Nippon Steel-Kawada Bridge, Inc. (“Nippon-Kawada”) and Tacoma Narrows Constructors (“TNC”).

Both the trial court and the Court of Appeals correctly recognized that this action comes within the specific, controlling exception (provided by Paragraph 4 of the Dispute Resolution Clause) to Paragraph 1’s more general provision providing for Samsung and NSK Joint Venture to arbitrate their disputes. Giving the Dispute Resolution Clause a “plain reading,” the Court of Appeals correctly interpreted it as specifically authorizing NSK Joint Venture to “require”—at its discretion—that disputes with Samsung be “dealt with jointly” with NSK Joint Venture’s

disputes involving TNC or Nippon-Kawada under the “TNC Contract.”

In so holding, the Court of Appeals respected and correctly applied the law set forth in both Washington court decisions with which Samsung, wrongly, claims the Decision conflicts—*Kamaya Co. v. American Property Consultants, Ltd.*, 91 Wn. App. 703 (1998) and *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293 (2004). Both of these cases state unambiguously that properly applying the FAA and the underlying federal policies it reflects demands first and foremost that courts respect parties’ agreements as to how they will resolve their disputes; like any other contract, agreements to arbitrate must be interpreted in strict accordance with their terms, as properly construed according to the basic canons of contract interpretation.

By contrast, Samsung’s argument that this dispute is to be arbitrated is dependent on alternatively ignoring and misstating the Dispute Resolution Clause. Samsung admits that the purpose of Paragraph 4 is to protect NSK Joint Venture from inconsistent judgments where disputes involving both TNC and Samsung must be decided—the situation here—by giving NSK Joint Venture the right to require that its disputes with Samsung be “dealt with jointly” with its disputes with TNC. Samsung asserts, however, that “dealt with jointly” means that NSK Joint Venture must litigate with TNC in the courts of Washington, with Samsung’s involvement, and then go to an arbitration in Singapore—in which the outcome of the Washington litigation is admittedly binding on the arbitrators. (Pet. at 16-17.) Such an interpretation is plainly wrong; it

not only violates every applicable canon of contract construction, it would result in a tremendous waste of time and resources by the parties.

As Samsung admits, the merits of the disputes among TNC, Nippon-Kawada, Samsung and NSK Joint Venture *will be litigated* in the Washington courts. Samsung admits that a Singapore arbitration would serve only to change the title of the judgment of these courts into an arbitration “award.” Such a procedure is not even covered by the arbitration provided for by Paragraph 1, which provides only for an arbitration that “finally” settles disputes between Samsung and NSK Joint Venture; more fundamentally, it is nonsensical to attribute to the parties an intent to engage in such a redundant and meaningless exercise. Thus Samsung offers no equally “reasonable interpretation[]” to permit reading the parties’ contract as allowing for arbitration of the pending disputes. *Kamaya*, 91 Wn. App. at 716.

II. ARGUMENT

A. **The Court of Appeals Correctly Determined that the Question of Arbitrability Is for the Court.**

Disregarding this Court’s recognition of “[t]he general rule that courts must decide the question of whether the parties agreed to arbitrate” a dispute, *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 724 (2003), Samsung argues that neither the trial court nor the Court of Appeals should have even considered the question of arbitrability of the parties’ disputes (Pet. at 8-13). This is simply wrong. “[T]he question of

arbitrability . . . is *undeniably* an issue for judicial determination.” *AT&T*, 475 U.S. at 649 (emphasis added). The Dispute Resolution Clause does not state “who decides arbitrability”; as the U.S. Supreme Court held in *First Options*, “silence or ambiguity on the ‘who should decide arbitrability’ point” is *insufficient* to overcome the presumption that this question is reserved for the courts. 514 U.S. at 945; *see also Kamaya*, 91 Wn. App. at 714 (“[T]he question of [arbitrability] is a judicial one unless the parties clearly provide otherwise.”) (citation omitted).

Samsung bases its claim that this Court should ignore the specific provision of Paragraph 4 (Pet. at 11-12 n.5) on the assertion that “controlling federal law” treats an arbitration clause that provides *either* for “all disputes” to be arbitrated *or* for any arbitration to be governed by the arbitration rules of the International Chamber of Commerce (“ICC”) as “clearly and unmistakably” showing the parties’ intent to arbitrate the question of arbitrability (Pet. at 10-12)—despite the presumption that this question is “for a court to decide,” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Samsung misstates the rule of the federal cases it cites, which all involved contracts that *both* provided for arbitration of *all* claims, without exception, *and* invoked specific arbitration rules. Samsung also ignores the well-settled precedent of this Court and the Court of Appeals, including *Kamaya* and *Zuver*, in both of which the *court* determined the issue of arbitrability. *See Kamaya*, 91 Wn. App. at 712 (“[T]he first task of *a court* asked to compel arbitration . . . is to determine whether the parties agreed to arbitrate that dispute.”) (internal quotation

marks and citations omitted) (emphasis added); *Zuver*, 153 Wn.2d at 300 (noting that the Washington superior court ruled claims were arbitrable).

1. Paragraph 1's Reference to ICC Rules Does Not Allow an Arbitrator to Decide Arbitrability.

Samsung erroneously claims that “controlling” case law treats an agreement to have arbitration proceedings conducted in accordance with the ICC rules as constituting the necessary clear and unmistakable expression of the parties’ intent to have arbitrability decided by an arbitrator, not a court. (Pet. at 10-12 (citing *Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115 (2d Cir. 2003); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989); *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299 (D. Haw. 1991)).)

Samsung is doubly wrong. First, it is wrong to call the cases it cites “controlling” authority in this Court, as the rule and reasoning they apply has not been endorsed by the U.S. Supreme Court. The Washington courts have repeatedly confirmed that they “are not . . . bound to follow a holding of a lower federal court,” even with respect to construing a federal statute. *S.S. v. Alexander*, 177 P.3d 724, 733 (Wash. Ct. App. 2008).

Second, Samsung is wrong to say that these cases hold that invoking ICC rules (or other rules similarly) permitting arbitrators to determine arbitrability is, by itself, sufficient to convert the question of arbitrability from a judicial one into a task for an arbitrator. (Pet. at 9-12.) Not one of these cases involved *just* the invocation of ICC or similar rules;

in every one, the parties expressly agreed to have “*all disputes*” between them, without any exception, resolved by arbitration in accordance with those specified rules. The *correct* statement of these cases is summarized by the court in *Daiei*: “[W]hen parties contract to have *all disputes* resolved *according to the Rules of the ICC*, which the parties here have done, they agree to let the arbitrator decide questions of arbitrability.” 755 F. Supp. at 303 (emphasis added) (citing *Apollo Computer*, 886 F.2d at 473).

Once the cases are properly described, it becomes obvious that they do not apply here. None of these cases involved an arbitration clause that specified exceptions to arbitration, as does the Dispute Resolution Clause. See *Shaw Group*, 322 F.3d at 120, 124-25; *China Minmetals*, 334 F.3d at 277; *Apollo Computer*, 886 F.2d at 473-74; *Daiei*, 755 F. Supp. at 301. And, *a fortiori*, none involved claims which came with an exception to arbitration, as this case does.

The four-paragraph Dispute Resolution Clause at issue here does *not* provide for all disputes to be arbitrated; it specifically excludes certain disputes from arbitration, “[n]otwithstanding” Paragraph 1’s provision for final settlement by arbitration of other disputes. In sharp contrast, the arbitration clause at issue in *Shaw Group*, for example, consists of just *two sentences*, containing no exceptions to, or limitations on, the requirement to arbitrate “[a]ll disputes.” *Shaw Group*, 322 F.3d at 120.¹ The

¹ The arbitration provision in *Shaw Group*, 322 F.3d at 120, provided:

arbitration clauses in *China Minmetals*, *Apollo Computer*, and *Daiei* likewise admitted of no exceptions to arbitration.

In contrast, in the one case in this line in which the parties *excluded* certain claims from arbitration, the Delaware Supreme Court expressly held that where parties expressly exclude certain claims from arbitration, “something *other than the incorporation of the [arbitrators’] rules* would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator.” *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 81 (Del. 2006) (emphasis added). *James & Jackson’s* insistence on both an all-encompassing arbitration clause *and* incorporation of arbitration rules is especially noteworthy because it was in *James & Jackson* that the Delaware Supreme Court first adopted the “view” of a “majority” of the U.S. circuit courts “that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator.” *Id.* at 80. In adopting this view, however, the court held that it “does not, however, mandate that arbitrators decide arbitrability in *all* cases where an arbitration clause incorporates the AAA rules.” *Id.* Instead, the view applies *only* “in those cases where the

15. All disputes between you [Triplefine] and us [Stone & Webster] concerning or arising out of this Agreement shall be referred to arbitration to the International Chamber of Commerce, New York, New York, in accordance with the rules and procedures of International Arbitration. This Agreement and the rights and obligations of the parties shall be construed in accordance with and governed by the laws of New York.

arbitration clause generally provides for arbitration of *all disputes and also* incorporates a set of arbitration rules that empower arbitrators to decide arbitrability.” *Id.* (emphasis added).

Having accepted the above rule, the Delaware Supreme Court held that the rule did not apply to the arbitration clause before it, which, just like the Dispute Resolution Clause here, “begins by requiring arbitration of any controversy arising out of or relating to” the parties’ contract, “[b]ut” later “expressly authorize[es] [certain actions] in the courts.” *Id.* at 81. “Thus,” the court concluded, “despite the broad language at the outset, not all disputes must be referred to arbitration.” *Id.* Because “this arbitration clause does not generally refer all controversies to arbitration,” reference to the AAA rules was not sufficient “to establish that the parties intended to submit arbitrability questions to an arbitrator.” *Id.* There being no such evidence—as there is none here—the court ruled that “the trial court properly” decided arbitrability. *Id.* Thus, even if Samsung’s cases were controlling, the result would be the same as that reached in *James & Jackson*: arbitrability is for the court.

To get around this difficulty, Samsung tries to paint the Dispute Resolution Clause as an “all disputes” arbitration clause, using two devices: first, it quotes only Paragraph 1 in the Petition and *calls* it an “all disputes” arbitration clause (Pet. at 11); second, it asserts in a footnote that Paragraph 4 “only addresses the question of whether the parties’ dispute is arbitrable and is not relevant to the threshold issue of whether arbitrability is to be decided by the court or the arbitrator.” (*Id.* at 11-12 n.5.) Again, Samsung is doubly wrong. First, in determining the parties’ intent this

Court must apply Washington contract law, which requires that the Dispute Resolution Clause be read in its entirety, “giv[ing] effect to all of its provisions” so as not to “render[] some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101 (1980); *see also First Options*, 514 U.S. at 944 (courts “should apply ordinary state-law principles” of contract “[w]hen deciding whether the parties agreed to arbitrate a certain matter (*including arbitrability*)”) (emphasis added). Second, as *James & Jackson* illustrates, the existence of exceptions to a general provision for arbitration of certain disputes takes this case out of the cases that Samsung urges upon this Court.²

2. Paragraph 1’s Reference to “All Disputes” Does Not Delegate Arbitrability to Arbitrators.

Also dependent on the Court’s ignoring the Dispute Resolution Clause’s extensive and specifically drafted exceptions to allowing

² Although this Court need not consider Samsung’s request to adopt this clearly inapplicable “incorporation by reference” rule, it should be noted that this rule has raised troubling concerns among scholars and jurists, many of whom have rejected it as clearly contrary to *First Options*. *See Diesselhorst v. Munsey Bldg., L.L.P.*, Civ. No. AMD 04-3302, 2005 U.S. Dist. LEXIS 1947, at *12-13 (D. Md. Feb. 9, 2005); *Martek Biosciences Corp. v. Zuccaro*, Civ. No. AMD 04-3349, 2004 U.S. Dist. LEXIS 25868, at *8-*9 (D. Md. Dec. 23, 2004); *Willie Gary LLC v. James & Jackson LLC*, C.A. No. 1781, 2006 Del. Ch. LEXIS 3, at *22-*29 (Del. Ch. Jan. 10, 2006); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 868-69 (2003). This “incorporation by reference” rule has the perverse effect of requiring those parties who agree to arbitrate any dispute in accordance with certain arbitral rules (a practical requirement of any arbitration provision) to “explicitly indicate that disputes about arbitrability are reserved to the judiciary,” *Willie Gary*, 2006 Del. Ch. LEXIS 3, at *26, despite the *presumption* favoring judicial decision of this issue. The rule thus “reverse[s] the command of *First Options*, which required a clear and unmistakable expression of the intent to *divest the judiciary* of the power to decide arbitrability” in the plain terms of the parties’ agreement. *Id.* (emphasis added).

arbitration (as well as the language of Paragraph 1 itself) is Samsung's argument that an arbitration agreement "employ[ing] the 'any and all' language . . ." (Pet. at 10 (omission in original)) alone manifests the parties' intent to arbitrate arbitrability. These specific provisions—Paragraph 4 in particular—control. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55 (2005). Samsung seeks support by *misquoting* dicta from the Second Circuit's decision in *John Hancock Life Insurance Co. v. Wilson*, 254 F.3d 48, 55 (2d Cir. 2001), (Pet. at 10), replacing with an artful ellipsis, the *Wilson* court's reference to "Bybyk," *i.e.*, the Second Circuit's decision in *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996). In *Bybyk*, the court construed an arbitration agreement that truly covered "any and all controversies" between the parties concerning, *inter alia*, "any account, transaction, *dispute* or" even "any other agreement" between the parties—past, present, or future, *with no exceptions*, providing that the parties waived their right to seek any remedies in court, and citing, if not incorporating, the arbitration rules of the NASD. *Id.* at 1196, 1199-1200 (emphasis added).

The Court of Appeals correctly rejected Samsung's argument, concluding that "general 'all disputes' arbitration phrases are not an express delegation of the issue of arbitrability to the arbitrator," (A11 (quoting *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1100 (8th Cir. 1999))), and such a delegation is required by *controlling* decisions of the U.S. Supreme Court. *See supra* pp. 4-5. The Court of Appeals thus recognized, and federal courts have confirmed, that the mere use of boilerplate phrases such as "any controversy" and "all

differences” are “too general to amount to an express delegation of the issue of arbitrability” “required by [*First Options v.*] *Kaplan.*” *Lebanon Chem.*, 179 F.3d at 1100; *Spahr v. Secco*, 330 F.3d 1266, 1270-71 (10th Cir. 2003) (“broad provisions to arbitrate all disputes arising out of or relating to the overall contract” insufficient to preclude trial court from determining arbitrability); *McLaughlin Gormley King Co. v. Terminix Int’l Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (a broadly worded arbitration clause does not require the arbitrator to decide arbitrability).

Even assuming the “rule” urged by Samsung—but rejected by the very courts it invokes—were not manifestly inconsistent with *controlling* precedent favoring judicial determination of arbitrability, and cautioning that neither silence nor ambiguity can overcome that presumption, *First Options*, 514 U.S. at 944-45, that rule simply does not apply here, where the parties have clearly *not* agreed to arbitrate “all disputes.”

B. The Court of Appeals Correctly Held that Paragraph 4 Prevents Arbitration of the Pending Disputes.

The Court of Appeals correctly determined that Paragraph 4 of the Dispute Resolution Clause “clearly expresses the parties’ intent to resolve ‘jointly’ any pending disputes in connection with” the “TNC Contract” “that, in the opinion of NSK Joint Venture, ‘touches or concerns [Samsung’s] Subcontract Work’”—which includes this lawsuit. (A13.) Correctly eschewing Samsung’s plea to ignore everything but Paragraph 1, the Court of Appeals followed controlling Washington contract law, and gave all four paragraphs of the Dispute Resolution Clause “a plain reading,” properly concluding that Paragraph 4 constituted a specific,

express exception to the general “amicable settle[ment]” and “final” arbitration provisions of Paragraph 1. (A8, 11.)

Although Samsung accuses the Court of Appeals of “fail[ing] to properly resolve any doubts in favor of arbitration” (Pet. at 16), Samsung is, again, wrong. The FAA does not arbitrarily “favor” arbitration, but simply proscribes *disfavoring* arbitration. As the *Kamaya* court recognized, the FAA was enacted “to abolish the longstanding judicial hostility to arbitration agreements that had . . . been adopted by American courts” and to put them “upon the same footing as other contracts.” 91 Wn. App. at 709 (quotation omitted). Samsung’s endorsement of *Kamaya* must include this principle, under which the parties’ intention, as manifested in the language of the contract, controls. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (“[The court’s duty is] to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”). Only where there is genuine ambiguity may that ambiguity be resolved in favor of arbitration, *First Options*, 514 U.S. at 944-45; that is the extent to which “the law’s permissive policies in respect of arbitration” apply. *Id.* The Court of Appeals, not Samsung, respects that the FAA’s underlying policy, which “does not . . . prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement.” *Volt*, 489 U.S. at 478-79. Contrary to Samsung’s position, the U.S. Supreme Court has repeatedly emphasized that “parties are generally free to structure their arbitration agreements as they see fit,” including the

freedom to “limit by contract the issues which they will arbitrate.” *Id.*; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). It is, moreover, a basic canon of contract law that such specific limitations—like those found in Paragraph 4—control over a general provision. *Mut. Life Ins. Co. v. Hill*, 193 U.S. 551, 558 (1904) (“[W]here there are two [contract] clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms”); *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1421 (11th Cir. 1990) (“[I]t is not at all uncommon for contracts to begin with broad sweeping language which is later qualified or narrowed.”); *Adler*, 153 Wn.2d at 354-55 (“It is a well-known principle of contract interpretation that ‘specific terms and exact terms are given greater weight than general language.’”) (citation omitted).

Seeking to avoid the Court of Appeals’s correct reading of Paragraph 4 as excepting the contract dispute from arbitration, Samsung asks this Court to interpret the phrase “dealt with jointly” in Paragraph 4 to mean “dealt with separately”—the opposite of the contract language. Samsung’s position is made even more untenable by its admission that the purpose of Paragraph 4 is to prevent NSK Joint Venture from being subject to conflicting judgments—as would occur with respect to the pending claims if a court found, *inter alia*, that TNC’s redesign of the Tacoma Narrows bridge deck was not so radical as to require TNC to pay Nippon-Kawada more money to build the redesigned decks, but an

arbitrator found that TNC's same redesign *did* require NSK Joint Venture to pay Samsung more to build it. Samsung nevertheless asserts that "[n]othing 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," or "that in certain circumstances [the parties'] disputes would be resolved through litigation in Washington." (Pet. at 16-17.) This contention ignores the plain—and controlling—meaning of "dealt with jointly."³ Moreover, Paragraph 4 explicitly refers to the "TNC Contract," which, Samsung admits "expressly states that disputes may be resolved through litigation in the Thurston County Superior Court." (Pet. at 16 n.8.) Thus any joint resolution must be in court.

Samsung's attempt to invoke "ambiguity" in order to escape Paragraph 4 is equally tortured and erroneous. First, it misstates the law, claiming that arbitration is required unless the Dispute Resolution Clause "is not susceptible of *any* interpretation that requires arbitration." (Pet. at 16.) As the *Kamaya* court recognized, only "reasonable interpretations" can be considered in construing an arbitration provision to determine whether it is so ambiguous that, of two equally plausible readings, the one resulting in arbitration must be chosen. *Kamaya*, 91 Wn. App. at 716-17. Second, it again twists the plain meaning of Paragraph 4's requirement

³ Samsung's claim also disregards the fact that both Paragraphs 3 and 4 of the Dispute Resolution Clause expressly refer to the possibility that Samsung will have to participate in a multi-party litigation to resolve certain types of disputes. Paragraph 3 provides for the possibility of "litigation arising between or among" TNC and Nippon-Kawada, as well as Samsung's obligation to assist in any such litigation. (A8.)

that Samsung-NSK Joint Venture disputes be “dealt with jointly” with disputes concerning the “TNC Contract.” Thus, Samsung claims the “most plausible” “alternative” reading of Paragraph 4 is that the result of “any dispute resolution process between TNC and NSK” would “be binding in a subsequent arbitration between NSK [Joint Venture] and Samsung.” (Pet. at 16-17.) In other words, Samsung argues that the most plausible reading of the parties’ agreement that their disputes be “dealt with jointly” with the TNC Contract disputes is that they be “dealt with *separately*”—in two proceedings, in two different forums, at two different times, on two different continents.

In addition to violating the plain meaning of Paragraph 4, Samsung’s proposed reading renders it surplusage, because Paragraph 3 *already* binds Samsung to the result of any separate litigation between Nippon-Kawada and TNC. *See Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 541-42 (2004) (rejecting interpretation of contract provision “that would render the former clause surplusage”). What Paragraph 4 most crucially adds to Paragraph 3 is the option for NSK Joint Venture to require resolution of all four parties’ disputes in a single forum; since “the TNC Contract” stipulates that all disputes must be resolved in a Washington court, that plainly includes joint resolution in such court.

Furthermore, Samsung’s reading of Paragraph 4 would result in the parties’ having agreed to an expensive, but entirely nugatory, exercise—an “arbitration” in which the dispute is not resolved by the arbitrators, but by the Washington courts who will be deciding the outcome of the TNC

Contract litigation, which is admittedly “binding” on Samsung. (Pet. at 16.) Not only is inferring that the parties intended such an outcome not reasonable, the resulting “arbitration” would not even be one permitted by Paragraph 1, because it would not produce final settlement by arbitration, or be “final” or “binding” as Paragraph 1 requires.⁴ Instead, final settlement would be by a *court* decision, with the arbitrators having nothing to arbitrate.⁵ All they could do is enter an award conforming to the Court’s judgment. Again, neither Washington law nor the FAA condones such a reading.⁶ *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667 (1994) (contract to be read “as the average person would read it

⁴ Indeed, what Samsung proposes would not even qualify as “arbitration,” which is a “method of dispute resolution involving one or more neutral third parties who are us[ually] agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY 112 (8th ed. 2004).

⁵ A similar argument was rejected by the Court in *Martek Biosciences Corp. v. Zuccaro*, Civ. No. AMD 04-3349, 2004 U.S. Dist. LEXIS 25868, at *11 (D. Md. Dec. 23, 2004), where one party offered an interpretation of the contract under which the merits would be decided by an arbitration “after which the court would still have to address whether” relief could be granted. The court found this interpretation could not support arbitration not only because it was inconsistent with the “objective reading” of the agreement, “but would also result in a waste of resources for the parties.” *Id.*

⁶ Samsung further asks this Court to violate the rules of contract interpretation and make an objective determination as to whether the disputes under the Samsung-NSK Joint Venture contract “touch or concern” those disputes under the “TNC Contract” (Pet. at 17 n.9), disregarding entirely the fact that the parties agreed it was only NSK Joint Venture’s “*opinion*” regarding the connection among the disputes that is of any legal significance under the Dispute Resolution Clause. The Court of Appeals correctly applied the agreement as written; it also thoroughly analyzed the pending claims and determined—again correctly—that *in fact* they touch or concern the TNC Contract. It is hard to imagine how it could be otherwise, since the Samsung / NSK Joint Venture contract is a subcontract to the TNC Contract and TNC drew on Nippon-Kawada’s letter of credit to pay Samsung under the separate TNC-Samsung contract that “settled their differences.” (Pet. at 18.)

. . . giv[ing] a practical and reasonable . . . interpretation, and not a strained or forced construction leading to absurd results.”) (quotation marks and citation omitted); *Goldberg*, 912 F.2d at 1419-20 (“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.”).

Finally, Samsung’s “reading” of Paragraph 4 is not reasonable because it would not fulfill the basic policy underlying the FAA, which promotes only final and binding arbitration, as a means of conserving judicial resources.⁷ *United Steelworkers of Am. v. Lukens Steel Co.*, 969 F.2d 1468, 1474 (3d Cir. 1992). Samsung has thus failed to show any ambiguity in the Dispute Resolution Clause which could lead to arbitration.

C. The Court of Appeals’s Decision Comports with both the *Zuver* and *Kamaya* Decisions.

The very premise of Samsung’s appeal—that the Court of Appeals’s Decision conflicts with decision of this Court in *Zuver* and Division I’s *Kamaya* decision—is both unproved and wrong. The

⁷ Indeed, Samsung has already turned to the courts in its dispute with NSK Joint Venture—albeit the courts of Korea. Eschewing arbitration, Samsung has sought and obtained an injunction preventing NSK Joint Venture from drawing on the letter of credit Samsung was required to obtain to ensure its performance of the Samsung-NSK Joint Venture contract. *Samsung Heavy Indus. Co. v. Korea Eximbank*, 2006-ka-hap-3097 (Seoul S. Dist. Ct., 51st Civ. Dept., Mar. 19, 2007). Claiming conduct by NSK was unauthorized by their contract, Samsung did not attempt to initiate an ICC arbitration in Singapore as it claims the Dispute Resolution Clause demands. Instead, it initiated litigation in Korea—a recourse inconsistent with its position here. *See Adler*, 153 Wn.2d at 351 (interpretation of contract must be consistent with party’s course of dealing under the contract).

Decision is fully consistent with both cases, as well as all other relevant Washington cases following the controlling U.S. Supreme Court precedents—precedents Samsung repeatedly asks this Court to disregard. Indeed, Samsung points to no specific holding of either case inconsistent with the Decision. Instead, Samsung makes two false assertions. First, Samsung asserts that “[t]he Court of Appeals’[s] opinion conflicts with . . . *Zuver* and . . . *Kamaya* because it fails to properly apply [the] controlling federal law” by “ignor[ing] *Shaw Group* and the other FAA cases,” (Pet. at 12), which, as shown *supra* pp. 6-12, are completely inapposite. Contrary to Samsung’s assertion, however, neither *Zuver* nor *Kamaya* cite or otherwise refer to those cases. Indeed, in both *Zuver* and *Kamaya*, the *court*—not an arbitrator—ruled on arbitrability.

Second, Samsung claims the Decision conflicts with *Zuver*’s and *Kamaya*’s respective acknowledgements that courts construing an arbitration provision must “indulge every presumption” and resolve “any doubts concerning the scope of arbitrable issues” “in favor of arbitration.” Far from disregarding this principles, the Court of Appeals expressly acknowledged that “arbitration of disputes is favored by the courts” (A11), “the intentions of the parties . . . are generously construed as to issues of arbitrability” (A12), and “[t]o rule that a particular dispute is not arbitrable . . . [t]he court must be able to say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute” (A12-13). The Court of Appeals strictly applied these and other controlling principles, and concluded “with positive assurance” that the

parties did not intend to arbitrate the disputes pending before the trial court. (*Id.*)

The Court of Appeals Decision is consistent with the conclusion that, just as “a parochial concept that all disputes must be resolved under our laws and in our courts” threatens foreign commerce, *Kamaya*, 91 Wn. App. at 713 n.2 (quoting *Mitsubishi*, 473 U.S. at 629), so too does a reflexive insistence on referring disputes to arbitration, notwithstanding the parties’ actual intentions as carefully set forth in their agreements. Nothing in either *Zuver* or *Kamaya* is to the contrary. As this Court recently explained, “Congress simply requires us to put arbitration clauses on the *same* footing as other contracts, not make them the special favorites of the law.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 858 (2007). The former is precisely what the Court of Appeals did.

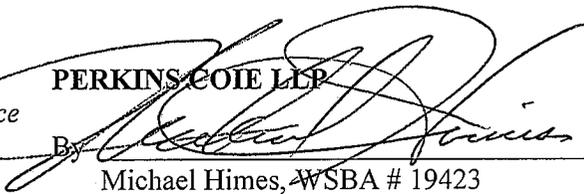
III. CONCLUSION

The Court should affirm the Court of Appeals’s Decision.

Dated: May 1, 2008.

Respectfully submitted,

SULLIVAN & CROMWELL LLP
Margaret K. Pfeiffer, admitted *pro hac vice*
Bruce W. Hickey, admitted *pro hac vice*
Erin R. Chlopak, admitted *pro hac vice*
1701 Pennsylvania Avenue, NW
Washington, DC 20006
Ph: (202) 956-7500
Fax: (202) 293-6330

PERKINS COIE LLP
By 
Michael Himes, WSBA # 19423

*Attorneys for Plaintiffs Nippon Steel-
Kawada Bridge, Inc., and Nippon Steel /
Kawada Joint Venture*