

63701-1

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NO. 63701-1 I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

OTAN INVESTMENTS, LLC and OTAN INVESTMENTS, LLC,

Appellants,

vs.

INTERASCO (GENEVA) S.A., INC.,

Respondent.

BRIEF OF RESPONDENT INTERASCO (GENEVA) S.A., INC.

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I. INTRODUCTION

It is axiomatic that a dispute is not subject to arbitration unless there is a valid agreement between the parties to arbitrate the dispute. The issue of arbitrability—whether the parties contracted to have a particular dispute arbitrated—is a matter for the courts, not arbitrators, to decide.

Appellants buried the most important fact in this appeal in a footnote on the first page of their opening brief: there are actually two separate entities called “Otan Investments, LLC.” The first Otan Investments, LLC, with UBI 602425940, was formed on September 2, 2004 and was canceled by its members on November 15, 2006 (“Otan I”). By operation of law, Otan I became a nonexistent entity the moment it was canceled. The second Otan Investments, LLC, with UBI 602859993, was formed nearly two years later, on August 27, 2008 (“Otan II”), *after* Respondent Interasco (Geneva) S.A., Inc. (“Interasco”) initiated arbitration proceedings against Otan I.¹ Otan’s entire appeal is premised on the misguided and unsubstantiated assumption that Otan I and Otan II are the same entity.

¹ Otan I and Otan II are collectively referred to as “Otan.”

Otan is wrong. Interasco never entered into a contract with Otan II, and never agreed to arbitrate any disputes with it. The trial court, in a preliminary ruling, properly agreed with Interasco that whether Otan II can pursue claims against Interasco in arbitration is a question of arbitrability for the court, and not of standing for the arbitrator. In so ruling, the trial court did not make any decision at all as to whether the matter was actually arbitrable. Instead, the trial court temporarily stayed the arbitration for 90 days to allow the parties time to conduct discovery and brief the issue of arbitrability for summary judgment or, if that failed, to prepare for trial.

Otan prematurely appealed the trial court's order, improperly casting the issue of arbitrability as one of "standing." Moreover, Otan's alternative argument—that the contract itself provides that arbitrability is for the arbitrator—was raised for the first time on appeal, and should be disregarded, as briefed more fully in Interasco's accompanying Motion to Strike. Regardless, even if this Court entertains Otan's alternative argument, Otan has cited no controlling law for its belated proposition. In fact, Washington courts have held that the parties' "clear and unmistakable intent" that an arbitrator is to decide his or her own

jurisdiction must be shown by an express delegation of arbitrability in the contract.

Because the trial court properly decided that Interasco had raised an issue of arbitrability, the Court should affirm the trial court's order granting a temporary stay of the arbitration to allow the parties time to conduct discovery and for the trial court to determine whether the matter is arbitrable.

II. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR²

A. Response

Interasco assigns no error to the trial court's ruling that Interasco raised an issue of arbitrability for the trial court to decide.

B. Issues Pertaining to Assignments of Error

Does the trial court properly stay arbitration proceedings temporarily, where the party demanding the arbitration is not a signatory to the contract, in order to allow the parties time to conduct discovery so that the trial court may rule on the arbitrability of the dispute?

² Otan did not set out any assignments of error or issues pertaining to assignments of error, as required by RAP 10.3(a)(4).

III. COUNTERSTATEMENT OF THE CASE

Otan has attempted to mislead the Court by presenting a statement of the case that is argumentative, incomplete, and misstates facts relevant to the appeal. While Interasco disputes Otan's characterization of the "facts" giving rise to the arbitration in the first place, the merits of the underlying dispute simply are not relevant to Otan's appeal. Otan's misrepresentations regarding the arbitration proceeding, however, require clarification.

A. Interasco Contracted With Otan I.

In June 2006, Interasco (then known by its previous name "Interwood SA, Inc.") and Otan I contracted for the purchase and sale of timber (the "Contract"). CP 72-79. The Contract contains an arbitration provision at Clause 11. Clause 11 reads:

All disputes that may arise between the Parties in connection with the present Contract, including interpretation and/or fulfillment of it, and impossible to be settled by means of negotiations, shall be finally settled by the International Court of Arbitration, United States of America or Switzerland no recourse to law courts being permitted. Arbitration procedure is to be in accordance with regulations of this Court applying the current International Laws. The award rendered by such arbitration court shall be final and binding for both Parties.

CP 75-76. The Contract also provides that a court may consider the Contract. Paragraph 5 in Clause 12, General Conditions, reads:

In the event any of the clauses or/and [sic] conditions of the present Contract is [sic] recognized invalid or/and [sic] of no juridicial [sic] power by governmental officials, *court or arbitration* of the Seller's or Buyer's country, such recognition does not influence the validity of any other clauses and conditions of the present Contract.

CP 76 (emphasis added).

B. Arbitration Proceedings

On or about August 22, 2008, Interasco exercised its right under the Contract by bringing a Request for Arbitration in the International Chamber of Commerce, International Court of Arbitration (“ICC”)³ against Otan I, alleging that Otan I failed to supply and deliver timber in accordance with the Contract. CP 124-28. The merits of the dispute are not relevant.

³ The International Court of Arbitration is not a “court” in the traditional sense of the word. The court does not itself settle disputes, but rather administers arbitration before independent arbitrators. ICC Rule 1(2), attached as Appendix B to Otan’s brief. The ICC is a private and for-profit organization.

Unbeknownst to Interasco at that time, Otan I had actually been cancelled of its own accord on November 13, 2006, when it filed a Certificate of Cancellation/Withdrawal with the Washington Secretary of State due to the “termination of business.”⁴ CP 45-47, 69. Under Washington law, Otan I ceased to exist on that date. Governing law at the time provided that Interasco could bring claims against Otan I for three years after its dissolution. However, once Otan I was cancelled, it could no longer bring claims against Interasco or any other entity.⁵

Otan II was formed as a separate limited liability company on August 27, 2008, just five days after receiving Interasco’s Request for Arbitration. CP 193. Otan II is an entity separate and distinct from Otan I. There is no evidence that Otan II has any connection to Otan I other than a shared name.

⁴ Otan I’s cancellation is suspect, as the Contract was signed just four months prior. Interasco questions whether Otan I ever intended to fulfill its contractual duties.

⁵ See *Chadwick Farms Owners Ass’n v. FHC LLC*, 139 Wn. App. 300, 304, 160 P.3d 1061 (2007), *rev’d in part*, 166 Wn.2d 178, 207 P.3d 1251 (2009), where this Court held that although a canceled limited liability company could not sue, it could be sued for up to three years post-dissolution under RCW 25.15.303.

On October 29, 2008, Otan II filed an “Answer”, along with “counterclaims” against Interasco, suggesting that Otan II was formed for the sole purpose of prosecuting claims against Interasco. CP 84-102.

On November 7, 2008, Interasco withdrew its claim in arbitration after learning of Otan I’s cancellation and determining that the burden of pursuing a claim against a canceled limited liability company was not cost effective. CP 69, 81-82.

C. Interasco Did Not Contract With Otan II.

Otan omits the corporate standing of Otan I and Otan II. Otan I is a cancelled limited liability company. CP 45-47. It is no longer a legally cognizable company.

Otan II, formed after Interasco demanded arbitration, never contracted with Interasco in any regard. Interasco and Otan II never agreed to arbitrate any dispute between them. CP 69.

When Interasco withdrew its claims, the ICC lost jurisdiction over the matter because only Otan II’s claims remained, and Interasco never contracted with Otan II. Nevertheless, Otan II continued to pursue its claims against Interasco in arbitration.

D. Procedural History

On May 14, 2009, facing impending arbitration deadlines, Interasco filed a lawsuit against Otan for injunctive relief and declaratory judgment on the narrow issue of arbitrability. CP 1-36.

On June 4, 2009, Interasco brought a Motion for Preliminary Injunction and Stay of Arbitration Proceedings. CP 111-19. Interasco argued that there was no evidence that Otan II was a successor in interest to Otan I, or that Otan I assigned its rights to Otan II. CP 117. Interasco further argued that it never contracted with Otan II, which was the entity prosecuting claims in arbitration against Interasco. CP 114-18. Interasco argued that whether Otan II can bring claims against Interasco in arbitration is a question of arbitrability for a court, not an arbitrator. CP 116-18. In other words, absent an agreement between Interasco and Otan II to arbitrate, the ICC has no jurisdiction over the claims asserted by Otan II. *Id.*

Otan opposed Interasco's Motion, arguing that Interasco presented an issue of standing for the arbitrator. CP 207-17. Otan II provided no evidence of any relationship between Otan I and Otan II, or Otan II and Interasco.

On June 16, 2009, the Superior Court of King County, Washington, the Honorable Jim Rogers presiding, denied the Motion as to the preliminary injunction, but granted it as to the stay of arbitration. CP 225-27. He agreed that the issue of whether Otan II may pursue claims against Interasco in arbitration is an issue of arbitrability, and rejected Otan's arguments that the issue is one of standing. *Id.*

The trial court's order is limited in both time and scope. The order granted a stay of only 90 days, 60 of which were for discovery on the issue of arbitrability, and 30 of which were for summary judgment proceedings on that narrow issue. CP 225-27. Indeed, Interasco's complaint seeks relief related only to arbitrability. CP 1-36.

Importantly, the trial court did not order that the arbitration be discontinued, or permanently enjoin Otan from proceeding with arbitration. The order is not final on the issue of arbitrability.

The trial court's June 16, 2009 order granting Interasco's Motion for Stay of Arbitration Proceedings is the subject of Otan's appeal.

IV. ARGUMENT

A. Summary of the Argument

The sole issue on appeal is whether the trial court properly ruled that Interasco's challenge to the ICC's jurisdiction over the dispute with

Otan II, a non-signatory, is an issue of arbitrability for the court and not of standing for the arbitrator. This inquiry necessarily requires a review of Washington's statutory scheme and case law governing limited liability companies, including *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). In that case, the Washington Supreme Court held that a Washington limited liability company, such as Otan I, ceases to exist once its certificate of formation is canceled, and has no right to sue or be sued. *Id.* at 182. By operation of law, Otan I no longer legally exists. Interasco never contracted with Otan II. Thus, whether the ICC has jurisdiction over Interasco and Otan II's dispute is a question of arbitrability—did *parties to a contract* agree to arbitrate a certain dispute?

This Court should not consider Otan's alternative argument, that an arbitrator should decide arbitrability, as it was not timely raised. If the Court does entertain Otan's belated argument, it should still affirm the trial court's decision that arbitrability in this case is for a court to decide. Otan's argument requires that the Court engage in contract interpretation and find that the parties clearly and unmistakably intended that an arbitrator would decide arbitrability. The cases Otan cites are not controlling, and Division II of the Court of Appeals has held that a nearly identical arbitration clause—with language stating that all disputes shall

take place in the ICC in accordance with the ICC rules—does not demonstrate clear and unmistakable intent that an arbitrator is to decide arbitrability. *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn. App. 203, 211-15, 156 P.3d 293 (2007). Otan fails to present evidence of a clear and unmistakable delegation of arbitrability to the arbitrator.

B. Standard of Review on Appeal

Questions of arbitrability are reviewed *de novo*. *Tacoma Narrows*, 138 Wn. App. at 214 (citations omitted); *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 404, 200 P.3d 254 (2009) (citation omitted).

C. Controlling Law

Because this matter involves an international agreement, the arbitrability of this matter is governed by Chapter 2 of the Federal Arbitration Act (“FAA”). 9 U.S.C. § 202. Chapter 2 of the FAA requires both state and federal United States courts to enforce the international Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. § 201 *et seq.*; *Tacoma Narrows*, 138 Wn. App. at 213.

Because both the Washington Arbitration Act (“WAA”) and the FAA agree that a court, not an arbitrator, must determine whether a

contract exists between the parties, and because state law principles guide contract interpretation under both the WAA and FAA, the FAA's role in Otan's instant appeal is of limited significance. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S. Ct. 909 (1964); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 940, 115 S. Ct. 1920 (1995); RCW 7.04A.060(2).

D. This Matter Involves a Non-Signatory, Otan II, Seeking to Compel Arbitration with a Signatory, Interasco.

Otan's appeal arises from both a misunderstanding of the components of arbitrability and a fundamentally unsound initial premise, which is evidenced in the first sentence of their opening brief: “[w]here *parties to a contract* have agreed to arbitrate ‘[a]ll disputes that may arise *between the Parties* in connection with the present Contract . . .’ any disputes concerning one *party’s* standing to assert counterclaims” App. Br. p. 1 (emphases added). Otan has put the proverbial cart before the horse and assumed, incorrectly, that the parties here have contracted with one another. By ignoring the basic premise that an arbitration clause is only effective as to the parties who agreed to it, Otan has improperly defined “arbitrability” as the “subject matter of the dispute.”

However, as case law concerning both the FAA and WAA has made clear, arbitrability involves not only whether the subject matter of the dispute is one that the parties agreed to arbitrate, but also whether the parties even contracted in the first place. *See, e.g., John Wiley*, 376 U.S. 543.

1. Otan I Ceased Existing on November 13, 2006.

Otan assumes that Otan I and Otan II are the same legal entity, but this assumption lacks any supporting evidence. Otan’s characterization of Otan I’s cancellation as a “gap in [] corporate existence” is not only inaccurate, but also directly contradicts Washington law.

A limited liability company is a creature of statute, not of common law. *Chadwick Farms*, 166 Wn.2d at 195 n.6. It is a “statutory business structure that is like a corporation in that members of the company are generally not personally liable for the debts or obligations of the company and like a partnership in that it can be classified as a partnership for tax purposes and therefore avoid ‘double taxation.’” *Id.* at 186-87 (citation omitted).

A limited liability company is formed when a certificate of formation is filed with the Secretary of State. RCW 25.15.070(1). It is a “separate legal entity, *the existence of which as a separate legal entity*

shall continue until cancellation of the limited liability company's certificate of formation." RCW 25.15.070(2)(c) (emphasis added).

A limited liability company can be canceled in several ways, including (1) by an event stated in the limited liability company agreement, (2) by its members' consent, (3) through judicial dissolution, and (4) through administrative dissolution by the Secretary of State. *Chadwick Farms*, 166 Wn.2d at 187. Where a limited liability company files a Certificate of Cancellation, the company ceases to exist on the effective date specified therein. *Id.* at 188; RCW 25.15.080. "[T]he *separate legal existence* of a limited liability company ends upon cancellation of the certificate of formation." *Chadwick Farms*, 166 Wn.2d at 199 (emphasis added).

Here, Otan I was cancelled, via its members' consent, when it filed a Certificate of Cancellation with the Washington Secretary of State on November 13, 2006. Otan I ceased to exist on November 13, 2006.

The cancellation of Otan I is significant; once the company was cancelled, it no longer existed as a separate legal entity. The Washington Supreme Court clarified earlier this year "that a canceled limited liability company lacks capacity to sue," and thus, "a limited liability company's

ability to sue ends upon *cancellation*.” *Chadwick Farms*, 166 Wn.2d at 199 (emphasis added).

Importantly, Otan I was canceled, not just dissolved—a distinction with a difference emphasized in *Chadwick Farms*. 166 Wn.2d at 194. Dissolution does not terminate the existence of a limited liability company; cancellation does. *Id.* at 188 (citations omitted). RCW 25.15.070(2) and 303, when read in the context of other statutory provisions, provide that actions against a limited liability company must be brought within three years of *dissolution*, but actions against a limited liability company *completely abate upon cancellation*. *Chadwick Farms*, 166 Wn.2d at 197. In other words, claims against a limited liability company may be made within three years of dissolution “up to the time” the limited liability company is canceled. *Id.* at 202-03.

Otan may argue that it had a right to “reinstate” Otan I after Otan I was canceled. Washington’s limited liability statutory scheme does not allow a canceled limited liability company to reinstate itself. *Compare* RCW 25.15.290(3) (allowing an administratively dissolved limited liability company to seek reinstatement and carry on its business as though

the limited liability company was never dissolved).⁶ The court in *Chadwick Farms* finally decided the legal rights of a canceled LLC: “there is no preservation of claims after cancellation.” 166 Wn.2d at 196 n.7. *See also Maple Court Seattle Condominium Ass’n v. Roosevelt, LLC*, 139 Wn. App. 257, 262, 160 P.3d 1068 (2007) (a cancelled limited liability company is no longer a legal entity, and as such, cannot maintain a cause of action).

Thus, by operation of law, Otan I has no right to assert claims against Interasco, and Interasco has no right to assert claims against Otan I. Otan I is a nonexistent company that cannot sue or be sued.

2. Interasco and Otan II Never Agreed to Arbitrate.

Otan II was formed on August 27, 2008, after Interasco initiated arbitration proceedings against Otan I and nearly two years after Otan I

⁶ Otan may rely on H.B. Bill 1592 § 3 (2009) (enacted), which went into effect on July 26, 2009. Such reliance would be misplaced. The new law provides for the reinstatement of voluntarily *dissolved* limited liability companies and would not apply here for two reasons: first, Otan I was not merely dissolved, but actually canceled; and second, the reinstatement under the new law must be made within 120 days after dissolution, and Otan II was created nearly two years after Otan I was canceled.

was cancelled. CP 193. Otan II is a separate and distinct legal entity from Otan I.

The record is completely devoid of any evidence that Otan II is entitled to any of the legal rights—or liabilities—of Otan I under any legally cognizable theory. There is no evidence of a merger or a sale. The Contract explicitly prohibited assignment without written consent, and, regardless, there is no such evidence of assignment. The Contract does not contain any language binding any of the parties' predecessors or successors to its terms.⁷

Likewise, the record is completely devoid of any basis for Otan II to assert that it has any relationship with Interasco, as it did not even exist until *after* Interasco instituted arbitration proceedings.

Thus, Otan's entire appeal is based on the flimsy premise that by sharing the same name as Otan I, a nonexistent legal entity since November 2006, Otan II is entitled to its contractual rights. The law does not support Otan's position. A name, in and of itself, is meaningless.

⁷ Considering that Otan II was not formed until nearly two years after Otan I ceased to exist, it is virtually impossible for Otan I to have merged with, sold to, or assigned its rights to Otan II. Indeed, Otan II presented no evidence of a successor or assignee relationship with Otan I in response to Interasco's Motion raising those issues.

E. **The Trial Court Properly Decided, In Its Preliminary Ruling, That Interasco Raised Questions of Arbitrability For the Court, and Not of Standing For the Arbitrator.**

Interasco's objection to the ICC's jurisdiction over Otan II's claims raises an issue of arbitrability. Importantly, to enforce or enjoin arbitration, a *court*, and not an assigned arbitrator, must first determine whether there is a valid agreement between the parties to arbitrate.

Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula, 130 Wn.2d 401, 413, 924 P.2d 13 (1996). Arbitrability encompasses not only disagreements over whether a dispute falls within the type the parties have agreed to submit to arbitration, but also disagreements over whether the parties contracted with one another in the first place.

1. **Whether a Signatory is Bound to Arbitrate With a Non-Signatory Presents an Issue of Arbitrability.**

In *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547, 84 S. Ct. 909 (1964), the United States Supreme Court considered the issue of who should decide whether an arbitration provision of a collective bargaining agreement survived a signatory's merger with another company, which had not signed the agreement. In that case, the signatory, Interscience, had merged with John Wiley & Sons, a non-signatory, for genuine business reasons. *Id.* at 545. Interscience thus ceased to do business as a separate legal entity. *Id.* The Court reasoned that past cases left "no doubt" that

the issue of whether John Wiley was bound by Interscience's contract to arbitrate was to be resolved by the courts, and not by arbitrators:

Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

John Wiley, 376 U.S. at 547 (citations omitted). The Court noted that *courts* should decide whether a party is bound by an arbitration agreement because the duty to arbitrate is of contractual origin, and a party cannot be compelled to arbitrate if the arbitration clause does not bind it at all. *Id.* See also *AT&T Technologies v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415 (1986) (quoting *John Wiley* for the proposition that a submission to arbitration cannot precede judicial determination that an agreement creates a duty to arbitrate).

Notably, the *John Wiley* Court decided the issue that presents here: who should decide the effect of an arbitration clause when a party to the contract changes corporate structure? In *John Wiley*, a signatory merged with a non-signatory. Here, a signatory, Otan I, was cancelled and ceased to exist long before the non-signatory, Otan II, was created. As Otan II was not even in existence at the time Interasco contracted with Otan I, Interasco could not have contracted with Otan II and could not have

agreed to arbitrate with Otan II. It is the court's, and not an arbitrator's, decision to determine whether Interasco is bound to arbitrate when it never signed an agreement with Otan II to do so.

Otan incorrectly argues that the court's role in determining arbitrability is limited to determining whether the subject of the dispute is governed by a contract. App. Br. p. 11-12. Otan completely ignores the additional duty of the court to determine whether the parties in the arbitration were also the parties to the contract. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies*, 475 U.S. at 648 (citations omitted). *See also* RCW 7.04A.060(2) (under the WAA, the existence of an agreement to arbitrate is an issue for the court to decide).

Courts uniformly hold that where a party is challenging the existence of a contract with another party, the issue is one of arbitrability. *See, e.g., Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (holding that issue was a matter of arbitrability for the court where party argued signatory to contract did not have authority to bind it, and thus no contract between the parties existed); *Am. Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828-29 (2d

Cir. 1968) (holding that issue was a matter of arbitrability for the court where signatory to contract challenged contract assignee's right to compel arbitration).

I.S. Joseph Co., Inc. v. Michigan Sugar Co., 803 F.2d 396 (8th Cir. 1986) is directly on point. I.S. Joseph, a signatory to the contract, transferred part of its business to a new entity, Josco Crown, and the transaction included the purported assignment of the rights and duties under the subject contract. *Id.* at 398. Josco attempted to compel arbitration, arguing that the meaning and effect of the assignment of the contract was for the arbitrator. *Id.* at 398-99. The other signatory to the contract, Michigan Sugar, argued that Josco was a stranger to the agreement. *Id.* at 399.

The Eighth Circuit agreed that the issue was one of arbitrability. Josco's position assumed the existence of an agreement with Michigan Sugar in the first instance. *Id.* at 400. The court emphasized that an arbitrator's power to resolve disputes arises out of a contract—"[h]e has no independent source of jurisdiction apart from the consent of the parties. If there is in fact a dispute as to whether the agreement to arbitrate exists, then that issue must first be determined by the court as a prerequisite to the

arbitrator's taking jurisdiction.” *I.S. Joseph*, 803 F.2d at 399 (citing *John Wiley*, 376 U.S. at 547).

2. Otan Confuses Gateway Disputes of Arbitrability With Procedural Defenses.

By ignoring the basic premise that parties must agree to arbitrate, Otan improperly defines arbitrability and incorrectly argues that whether a party is bound to arbitrate is an issue of standing. The United States Supreme Court distinguished gateway disputes of arbitrability and procedural questions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588 (2002). A “gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide.” *Id.* at 84 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-46, 115 S. Ct. 1920 (1995); *John Wiley*, 376 U.S. at 546-47). Similarly, whether a concedingly binding contract applies to a “particular type of controversy” is also for the court. *Id.* (citing *AT&T Technologies*, 475 U.S. at 651-52; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241-43, 82 S. Ct. 1318 (1962)). Thus, a court must decide *both* that a valid agreement to arbitrate exists between the parties, and that the specific dispute falls within the substantive scope of that agreement. *AT&T Technologies*, 475 U.S. at

648-49 (noting that prior United States Supreme Court decisions make it clear that parties must agree in advance to submit an issue to arbitration).

As opposed to questions of arbitrability, procedural questions that “grow out of the dispute and bear on its final disposition” are for the arbitrator. *Howsam*, 537 U.S. at 84 (citing *John Wiley*, 376 U.S. at 557). Thus, procedural questions about waiver, delay, time limits, notices, laches, estoppel, and other procedural questions are generally for the arbitrator, as these questions go directly to the merits of the claim. *Id.* at 84-85 (citations omitted). *See also John Wiley*, 376 U.S. at 557 (emphasis added) (“*Once it is determined*, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”).

Here, Interasco argues that it never entered into a contract with Otan II, so it is not bound to arbitrate any disputes with it.⁸ Interasco has

⁸ The fact that Interasco initiated arbitration proceedings against Otan I is of no effect in this appeal. Interasco did agree to arbitrate with Otan I. Interasco dismissed its claims against Otan I after learning that Otan I ceased to exist.

not raised any procedural defense that goes to the merit of Otan II's claim. The issue raised by Interasco is not one of standing, i.e., whether Otan II has a right to assert a claim against Interasco. Standing affects the merits of the claim; arbitrability does not. Arbitrability and standing are separate concepts. First comes arbitrability—did the parties agree to arbitrate? If so, then there may be an issue of standing—does the party have a right to pursue a claim? If the parties did not agree to arbitrate, the claim is not necessarily extinguished. Rather, it simply cannot be arbitrated.

Otan's reliance on *Environmental Barrier Co., LLC v. Slurry Systems, Inc.*, 540 F.3d 598 (7th Cir. 2008) is misplaced, as that case involved a distinguishable procedural background and a different legal theory—waiver—not present here. In *Environmental Barrier*, the party (EBC) who *purchased* the assets of the contracting party (Geo-Con) asserted claims in arbitration against the other contracting party (SSI). *Id.* at 600. In letters to the arbitrator, SSI argued that EBC had no “standing” to pursue a claim against SSI, *while at the same time* arguing that EBC assumed the contract from Geo-Con. *Id.* at 603. In its answering statement and position paper, SSI argued that EBC assumed Geo-Con's contract and had failed to fill Geo-Con's remaining contractual obligations. *Id.* At the two-day arbitration, the only issues addressed were

the merits of the case—neither arbitrability nor standing were mentioned. *Environmental Barrier*, 540 F.3d at 604.

The arbitrator found in favor of EBC, and EBC filed an action to confirm its award. For the first time, SSI argued that there was no agreement to arbitrate. *Id.* at 606.

The *Environmental Barrier* court clearly distinguished “standing” from “arbitrability,” both of which were issues before it. Standing, an issue for the arbitrator, “addresses the entitlement of the party to raise a given point before the arbitrator.” *Id.* at 605. For example, did the party seeking arbitration have standing to assert claims when it had allegedly breached other contract provisions? *Id.* An issue of arbitrability, on the other hand, is for judicial determination, and considers “whether an agreement to arbitrate existed between the parties.” *Id.* at 606. A challenge to the existence of an agreement to arbitrate between a signatory and a non-signatory is an issue of arbitrability properly before a court. *Id.* at 607.

The Seventh Circuit concluded that SSI had waived the right to judicial determination of arbitrability by waiting to challenge the existence of an agreement to arbitrate between SSI and the non-signatory EBC. *Id.* at 607. The issue would have been properly before the court had EBC not

waited until *after* the arbitration award to raise the issue. *Environmental Barrier*, 540 F.3d at 606 (citing *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)) (if “a party clearly and explicitly reserves the right to object to arbitrability, his participation in arbitration does not preclude him from challenging the arbitrator’s authority in court.”).

Unlike that case, there is no evidence here that the non-signatory (Otan II) is a successor company to the signatory (Otan I). Moreover, Interasco timely and properly raised the issue of the arbitrability of any claims between it and Otan II before any substantive arbitration briefings or hearings, and long before any arbitration award.

None of the cases discussing procedural defenses that Otan cites involve the claim that no valid contract between the parties exists. *See Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 860 F.2d 1420 (7th Cir. 1988) (disagreement over whether dispute was ripe); *United Steelworkers of Am. v. Smoke-Craft, Inc.*, 652 F.2d 1356 (9th Cir. 1981) (employer failed to raise issue of signatory union’s standing, i.e. its representation of the aggrieved employees, until after arbitration award); *Heights at Issaquah Ridge*, 148 Wn. App. 400 (failure to raise claim within the 21-day time limit in the arbitration agreement); *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281,

135 P.3d 558 (2006) (failure to raise claim within the 30-day time limit in the collective bargaining agreement). The procedural issues in those cases did not involve challenges to the existence of an arbitration agreement between the parties, but rather went to the merits of the claim.

Arthur Andersen LLP v. Carlisle, ____ U.S. ____, 129 S. Ct. 1896 (2009), cited by Otan, is not on point, as it addressed a non-signatory's right to appeal a district court's denial of the non-signatory's request to stay the court action pending arbitration. Regardless, the opinion is consistent with Interasco's position that where a signatory ceases to exist, it does not necessarily follow that a subsequent company assumes its rights and liabilities. See *John Wiley*, 376 U.S. at 551 (noting that where there is a change in corporate structure, the "lack of any substantial continuity of identity in the business enterprise" may remove a duty to arbitrate).

The *Arthur Andersen* Court noted that traditional principles of state law *may* allow a contract to be enforced by or against non-parties through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel." 129 S. Ct. at 1902 (citation omitted). The Court refused to decide the issue because it had not been briefed by the parties, and remanded to the *courts* for consideration. *Id.* at 1903. The Court did not hold, or even imply, that

the question of whether the non-signatory could compel arbitration was a question of standing.

Here, Otan has not identified a legal theory or provided any evidence showing that Otan II, a company that did not exist until two years after Otan I ceased to exist, has any right to enforce the contract between Interasco and Otan I.

The trial court properly agreed with Interasco that whether Otan II could assert a claim against Interasco in arbitration was a question of arbitrability for the court and not of standing for the arbitrator. This Court should affirm the trial court's temporary stay of the arbitration for 90 days to allow development of a factual record and briefing on the issue of arbitrability. Otan's premature appeal should be dismissed.

F. Courts Decide Issues of Arbitrability Unless the Parties Clearly and Unmistakably Agreed that the Arbitrator Would Decide Arbitrability.

1. Otan's Argument That the Arbitrator Should Decide Arbitrability Was Raised for the First Time on Appeal and Should Be Disregarded.

Otan argues, for the first time on appeal, that Interasco and Otan I agreed that an arbitrator should decide arbitrability. The Court should not consider Otan's claim of error, raised for the first time on appeal, pursuant to RAP 2.5(a) and the accompanying Motion to Strike.

2. Interasco and Otan I Did Not Clearly and Unmistakably Agree that the Arbitrator Is To Decide Arbitrability.

Even if this Court considers Otan's alternative argument that arbitrability in this instance is for the arbitrator, Otan has failed to show that Interasco and Otan I clearly and unmistakably agreed that the arbitrator would decide arbitrability.

Whether or not parties have obligated themselves to arbitrate certain issues, including the issue of arbitrability itself, is a question of contract interpretation to be determined by "ordinary state-law principles that govern the formation of contracts."⁹ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920 (1995) (citations omitted).

Importantly, the general presumption favoring arbitrability does not apply to the question of who should decide arbitrability:

[T]he law treats silence or ambiguity about the question of "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"-for in respect to this latter question the law reverses the presumption.

⁹ This is true regardless of whether a contract is governed by state law or the FAA. *First Options*, 514 U.S. at 940.

First Options, 514 U.S. at 944-45 (citation omitted) (emphasis in *First Options*). This is because a party often does not focus upon the question or significance of having arbitrators decide the scope of their own jurisdiction. *Id.* at 945. The willingness of parties to enter into arbitration agreements would be “drastically reduced” if an arbitrator had the power to determine his or her own jurisdiction. *AT&T Technologies*, 475 U.S. at 651 (citation omitted).

Federal and state courts therefore require “clear and unmistakable” evidence that the parties agreed to arbitrate arbitrability. *First Options*, 514 U.S. at 944 (citations omitted); *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 724, 81 P.3d 111 (2003). Washington courts, in interpreting arbitration provisions under state law contract principles, require “an express delegation of the issue of arbitrability to the arbitrator.”¹⁰ *Tacoma*

¹⁰ Even with an arguably express delegation of arbitrability in the contract, Washington courts do not necessarily find the requisite clear and unmistakable intent. In *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 451-52, 45 P.3d 594 (2002), Division III held that an arbitration clause that read “[a]rbitration shall extend to and the arbitrator shall have the power to decide all matters and issue of fact and/or law, including, but not limited to, *the existence of the validity of the Agreement as contract*” and “any contests to the validity or enforceability of this Arbitration Provision” was insufficient to show clear and unmistakable intent. *Id.* at 451-52 (emphasis added). The court reasoned that in addition to the contract language above, the agreement also referenced the WAA, which

Narrows, 138 Wn. App. at 214-15. In *Mount Adams Sch. Dist.*, 150 Wn.2d at 724-25, the agreement provided that “the merits of a grievance *and the substantive and procedural arbitrability* issues arising in connection with that grievance may be consolidated for hearing before an arbitrator.” (Emphasis added). Likewise, in *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 314 n.4, 202 P.3d 1024 (2009), the subject clause read: “[t]he arbitrator shall decide *all substantive and procedural arbitrability* issues.” (Emphasis added). In both cases, the courts found clear and unmistakable evidence that the parties agreed to have arbitrability decided by the arbitrator, as “arbitrability” was expressly delegated to the arbitrator in the contract at issue.

Federal courts have also required an express delegation of arbitrability to the arbitrator. See *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330-31 (4th Cir. 1999) (noting that “if contracting parties wish to let an arbitrator determine the scope of his own jurisdiction, they must indicate that intent in a clear and specific manner” such as “all disputes

(continued . . .)
provides that arbitrability is for the court. *Id.* at 455-56. Under state law and *First Options*, the court concluded that the parties did not “clearly” agree to forego judicial review of arbitrability. *Id.* at 456.

concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration’ or words to that clear effect”); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (holding that there was no “clear and unmistakable evidence’ within the four corners of the Manufacturing Agreement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator”); *McLaughlin Gormley King Co. v. Terminix Int’l Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (holding that “neither the arbitration clause nor any other provision” in the contract “clearly and unmistakably evidenced the parties’ intent to give the arbitrator power to determine arbitrability” as the “arbitration clause made no mention of a ‘controversy’ over arbitrability”).

Here, the Contract provides no express delegation of the issue of arbitrability to the arbitrator. Instead, Otan incorrectly argues that the parties implicitly agreed that an arbitrator would decide arbitrability. But as Otan recognizes, general “all dispute” arbitration clauses do not cover questions of arbitrability. *Tacoma Narrows*, 138 Wn. App. at 214-15. Furthermore, the Contract’s language of “no recourse to law courts being permitted” is in the same sentence and in reference to the arbitrability of “all disputes” and is not a “clear and unmistakable delegation” of

arbitrability to the arbitrator. In fact, the Contract explicitly states that the Contract may be scrutinized by “governmental officials, *court or arbitration* of the Seller’s or Buyer’s country”. CP 76 (emphasis added).

Moreover, the Contract’s vague inclusion of language that the arbitration would be “in accordance with regulations of this Court applying the current International Laws” does not show a clear and unmistakable intent to arbitrate. Otan cites no controlling case law suggesting that it does. In fact, in *Tacoma Narrows*, Division II faced a similar arbitration provision that read:

All disputes controversies, or differences which may arise out of or in relation to or in connection with the [NSK Joint Venture-Samsung] Purchase Order, or for the breach thereof, shall be amicably settled between the Purchaser [NSK Joint Venture] 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 International Chamber of Commerce in Singapore in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. . . .

138 Wn. App. at 211-12. The *Tacoma Narrows* court correctly concluded that a plain reading of the dispute resolution clause did “not clearly state that the parties agreed to submit the question of arbitrability to an arbitrator.” *Id.* at 214.

Otan's reliance on *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205 (2d Cir. 2005) is misplaced. The parties in that case incorporated the American Arbitration Association ("AAA") Rules in the arbitration clause. The AAA Rules allow an arbitrator to decide his or her own jurisdiction. The Second Circuit held that the incorporation of the AAA Rules in the contract was sufficient evidence of clear and unmistakable intent that the parties intended for an arbitrator to decide arbitrability.

Washington courts are not bound to follow federal appellate courts, even with respect to constructing federal statutes. *S.S. v. Alexander*, 143 Wn. App. 72, 92-93, 177 P.3d 724 (2008) (citations omitted). *Contec* is not persuasive, as it contradicts United States Supreme Court precedent, conflicts with state law contract principles requiring that a contract expressly delegate arbitrability to the arbitrator, and is factually distinguishable because the non-signatory there could show a relationship to the signatories of the contract.

Contec's holding ignores *First Options'* requirement of "clear and unmistakable" evidence that arbitrability is to be decided by the arbitrator, as it *assumes* that parties know in advance of the meaning and effect of the procedural rules of an arbitral tribunal. In that regard, *Contec* improperly reversed the presumption favoring judicial decision of arbitrability as

described in *AT&T Technologies* and *First Options*. If the Court were to agree with Otan and *Contec*, it would have to find that the parties to the contract knew of the meaning and effect of ICC Rule of Arbitration, Article 6(2).¹¹ Otan has not shown any evidence demonstrating that understanding.

Contec is also unharmonious with Washington case law and state law contract principles requiring that arbitrability be expressly delegated to the arbitrator in the contract. Washington's rule is the sounder approach, as there is less room for mistaking the parties' intent where arbitrability is expressly delegated in the contract that the parties signed.

In fact, other courts have disagreed with the *Contec* court's reasoning. In *Telenor Mobile Communications AS v. Storm LLC*, 524 F.Supp.2d 332, 336, 350-51 (S.D. NY 2007), the court did not find that the parties clearly and unmistakably agreed that the arbitrator would decide

¹¹ Rule 6(2) itself is ambiguous, and can be interpreted to allow the ICC and a court to have concurrent jurisdiction over arbitrability. While the Rule appears to empower an arbitral tribunal to determine its own jurisdiction, it also reads that "[i]n such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement." It is unclear from the Rule whether "[i]n such a case" refers to when a party objects to jurisdiction, when an arbitral tribunal finds a matter is not arbitrable, or both.

arbitrability where the agreement read that “[a]ny and all disputes or controversies” were to be resolved “in accordance with the United Nations Commission on International Trade Law” Arbitration Rules (which allow an arbitral tribunal to decide its own jurisdiction). Likewise, the court in *Diesselhorst v. Munsey Building L.L.P.*, 2005 WL 327532, 4 (D. Md. 2005) declined to submit the issue of arbitrability to the arbitrator where the contract referenced the AAA Rules because the arbitration clause did not “explicitly provide that the arbitrator shall have the authority to decide which issues are arbitrable.” By simply agreeing “that any matters sent to arbitration would be governed by the AAA Rules, [the parties] did not clearly and unmistakably demonstrate an intent to have an arbitrator determine the question of arbitrability.” *Id.* See also *Martek Biosciences Corp. v. Zuccaro*, 2004 WL 2980741, 3 (D. Md. 2004) (rejecting incorporation by reference approach where arbitration agreement referred to Judicial Arbitration and Mediation Services (“JAMS”) rules, which grant the arbitrator jurisdiction to determine whether a particular dispute is arbitrable, because the “specification in the arbitration clause that the rules of JAMS apply to matters submitted to arbitration” meant that the “JAMS rules apply [but] only to subject matter properly submitted to and before an arbitrator”).

Even if this Court agrees with the “incorporation by reference” theory in *Contec*, the trial court, not the arbitrator, must still determine whether the parties agreed to arbitrate because *Contec* is factually distinguishable. In that case, Contec L.P. was a signatory to the contract with Remote Solution. *Contec*, 398 F.3d at 207. Contec L.P. was converted to Contec LLC and then merged with Contec Corporation, leaving Contec Corporation as the only surviving business entity. *Id.* The court noted:

As an initial matter, we recognize that just because a signatory has agreed to arbitrate issues of arbitrability with another party *does not mean that it must arbitrate with any non-signatory*. In order to decide whether arbitration of arbitrability is appropriate, *a court must first determine* whether the parties have a sufficient relationship to each other and to the rights created under the agreement.

Id. at 209 (citing *First Options*, 514 U.S. at 944-45) (emphases added).

The *Contec* court ultimately concluded that there was a relationship between each corporate form of Contec and Remote Solution, and that the changes in Contec’s corporate form had not affected its business relationship with Remote Solution. *Id.* See also *Celanese Corp. v. BOC Group PLC*, 2006 WL 3513633, 3 (N.D. Tex. 2006) (declining to refer arbitrability to arbitrator when AAA Rules were referenced in contract—

the court found clear and unmistakable intent between the parties to the contract to arbitrate, but there was no clear and unmistakable intent between the non-signatory and signatory to do the same).

Otan fails this test, a test that is undisputedly for a *court*. The only evidence before the Court is that Otan I and Otan II share the same name. Otan II has no business relationship with Otan I, i.e., Otan II did not merge with or buy Otan I. Otan II also has no business relationship with Interasco; it was formed *after* Interasco initiated arbitration proceedings against Otan I. Otan II cannot show any relationship to Otan I *or* to Interasco sufficient to allow a court to compel arbitration.

Otan's arguments that the parties clearly and unmistakably agreed that the arbitrator decides arbitrability fall flat. "Unilateral or subjective beliefs about the meaning of what is written do not constitute evidence of the parties' intentions." *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 48, 17 P.3d 1266 (2001) (citation omitted). As the Contract is silent on the issue of arbitrability, and as Otan II has not shown any evidence of a relationship to the signatories to the contract, Otan's position leaves the door wide open for mistake. Otan has failed to overcome the presumption that judges, not arbitrators, decide arbitrability, and the trial court's order

temporarily staying the arbitration should be affirmed so that the trial court may properly decide the issue of arbitrability.

G. The Trial Court's Resolution of Arbitrability Prior To Arbitration Furthers Judicial Efficiency.

Both the FAA and the WAA provide for the judicial review of an arbitration award. 9 U.S.C. § 207; RCW 7.04A.220 – 250. When a party challenges the existence of a contract in the arbitration proceedings, a court reviewing an arbitration award “must make an *independent determination* of the agreement’s validity and therefore of the arbitrability of the dispute.” *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 285 (3d Cir. 2003) (emphasis added).

If this matter proceeds to arbitration without a court’s determination as to arbitrability first, this matter could conceivably return to court on the *exact issue* presented now—whether Otan II and Interasco ever agreed to arbitrate. In a later action, the court will have to make its own independent determination of arbitrability. The parties may go through the expense of arbitration only to have a court later determine that they never agreed to arbitrate with one another. The trial court’s resolution of arbitrability now furthers judicial efficiency.

V. CONCLUSION

The trial court properly ruled that Interasco raised an issue of arbitrability for the court, and not of standing for the arbitrator, when Interasco objected to the ICC's jurisdiction on the grounds that it never agreed to arbitrate with Otan II. The trial court also properly stayed the arbitration, temporarily, in order to allow the parties time to conduct discovery and argue the issue of arbitrability.

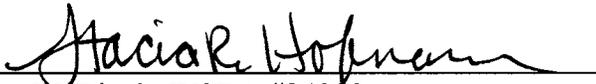
Otan prematurely filed an appeal before the trial court determined whether the dispute was arbitrable. Otan's argument that Interasco presented an issue of standing is incorrect. Otan's alternative argument that the parties agreed to arbitrate arbitrability, improperly raised for the first time in this Court, is equally unconvincing. The Contract does not explicitly designate arbitrability to the arbitrator, and Otan II has not provided any evidence of a relationship with Otan I or Interasco so as to allow it to compel arbitration.

This Court should affirm the trial court's order temporarily staying the arbitration and holding that Interasco presented an issue of arbitrability and not of standing. As the dates for discovery and summary judgment in the trial court's order have now passed, the Court should remand this matter to the trial court so that the trial court may set a new discovery and

summary judgment briefing schedule for the determination of arbitrability
consistent with the trial court's initial order.

Respectfully submitted this 25th day of September, 2009.

BETTS, PATTERSON & MINES, P.S.

By 
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Attorneys for Respondent Interasco (Geneva) S.A.,
Inc.

CERTIFICATE OF SERVICE

I, Shane Kangas, hereby certify that on the 25th day of September, 2009, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Maureen Mitchell	<input type="checkbox"/>	U.S. Mail, postage prepaid
Jessica Goldman	<input checked="" type="checkbox"/>	Hand Delivered via Messenger Service
Summit Law Group, PLLC	<input type="checkbox"/>	Overnight Courier
315 Fifth Ave S, Suite 1000	<input type="checkbox"/>	Facsimile
Seattle, WA 98104-2682		

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 25th day of September, 2009, at Seattle, Washington.


Shane L. Kangas

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