

FSM SUPREME COURT TRIAL DIVISION

PACIFIC INTERNATIONAL, INC.,)	CIVIL ACTION NO. 2014-046
)	
Plaintiff,)	
)	
vs.)	
)	
THE NATIONAL GOVERNMENT OF THE)	
FEDERATED STATES OF MICRONESIA, by and)	
through its agency, the FSM Program Management)	
Unit ("PMU"),)	
)	
Defendant.)	
_____)	

FINAL ORDER RE: PII' S MOTION FOR ENTRY OF JUDGMENT ON AAA/ICDR ARBITRATORS'
FINAL AWARD

Beauleen Carl-Worswick
Associate Justice

Hearing: April 8, 2021
Decided: July 2, 2021

APPEARANCES:

For the Plaintiff: Thomas M. Tarpley, Jr., Esq.
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HEADNOTES

Arbitration

The court has jurisdiction to enforce an arbitration clause. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 350 n.4 (Pon. 2021).

Arbitration

FSM case law also supports specific enforcement of arbitration agreements. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 351 (Pon. 2021).

Arbitration

The prevailing modern view of arbitration, even in the absence of a statute, is that arbitration is

generally favored by the courts, and every reasonable will be indulged to uphold arbitration proceedings. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 351 n.5 (Pon. 2021).

Arbitration; Contracts

The court has jurisdiction to sever and enforce a mandatory arbitration clause in a mediated settlement agreement. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 351 (Pon. 2021).

Arbitration

An objection to the court's authority to order arbitration is untimely when it is made nearly two years after entry of the court's order enforcing an arbitration agreement. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 352 (Pon. 2021).

Arbitration

When the parties have demonstrated a preference for concluding a matter through alternative dispute resolution, including mediation and arbitration, the court can act to effectuate this intent. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 352 (Pon. 2021).

Arbitration

Alternative dispute resolution is most consistent with Micronesian custom and practice, and FSM courts have ordered parties involving commercial litigation to assess and report on the possibility of alternative dispute resolution. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 352 n.7 (Pon. 2021).

Arbitration; Equity – Waiver

When, although a party had the opportunity to request a trial when a stay pending arbitration was requested, that party did not do so until after the completion of arbitration, that party did not exercise its right to timely request trial and has waived trial. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 353 (Pon. 2021).

Arbitration

Arbitrability is the question of whether an arbitration agreement creates a duty for the parties to arbitrate a particular grievance. Arbitrability is a jurisdictional issue and, unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 353 (Pon. 2021).

Arbitration; Contracts – Interpretation

When a contract contains an arbitration clause, there is a presumption of arbitrability, and an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 353 (Pon. 2021).

Arbitration; Equity – Waiver

A commercial entity that objects to the arbitrability of a dispute, but does not seek reasonable judicial remedies and instead participates in the arbitration, waives its argument that the dispute was not arbitrable. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 353-54 (Pon. 2021).

Arbitration; Equity – Waiver

A party should be bound by the arbitrators' decision when it fully participated in the arbitration process and when it failed to object to the arbitration tribunal's jurisdiction or to the validity of the mediated settlement agreement under that tribunal's rules, and that failure to object constitutes a waiver. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 355 (Pon. 2021).

Arbitration; Constitutional Law – Due Process

The FSM was provided due process in the arbitration proceedings when three arbitrators with commercial litigation experience determined this matter after ten days of hearings, including expert testimony; when the arbitrators' final award consisted of 72 pages of discussion, analysis and conclusions; and when the FSM has not questioned the validity of the arbitrators' conclusions, only the amount of damages to be entered by the court. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 355-56 (Pon. 2021).

Arbitration

International commercial disputes may best be resolved by private individuals, selected by the parties, who are knowledgeable in the trade and industry in which the commercial enterprises operate. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 356 n.14 (Pon. 2021).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. BACKGROUND

Plaintiff Pacific International, Inc. ("PIP") filed its Motion for Entry of Judgment on April 7, 2020, along with the Final Award of the arbitrators of the American Arbitration Association's International Centre for Dispute Resolution ("AAA/ICDR"). Defendant National Government of the Federated States of Micronesia ("FSM") filed Defendant's Response to Motion to Enter Judgment on Final Award and Motion to Reduce Liability ("Defendant's Response to Motion to Enter Judgment") on May 1, 2020.

On May 7, 2020, PII filed PII's Reply to Defendant's Response/"Counter-Motion" to Motion for Entry of Judgment ("PII's Reply to Defendant's Response to Motion for Entry of Judgment"). The FSM filed Defendant's Surreply to Plaintiffs Reply to Defendant's Motion to Reduce Liability on May 14, 2020.

II. FACTS

The issue presented is whether the court should enter the AAA/ICDR arbitrators' Final Award as an Order of the court. The Final Award contains the arbitrators' adjudication of all issues arising out of the parties' lawsuit over the underlying construction contract (No. IDP-L-0005, Weno Road, Drainage and Utilities Upgrade, Phase I).

The instant dispute arises from the court's order in this case to further mediation and arbitration following severance and enforcement of the arbitration clause contained in the parties' mediated settlement agreement, signed June 3, 2015.

The mediated settlement agreement¹ includes the following terms:

Pacific International Inc. (PII) and the Federated States of Micronesia (FSM) agree to settle and compromise all claims against each other in any way related to contract No. IDP-L-0005, Weno Road, Drainage and Utilities Upgrade, Phase I under the following terms:

¹ A copy of the original mediated settlement agreement is attached as Exhibit 1 to Defendant's Response to Motion To Enter Judgment.

1. FSM agrees to make a payment of \$2,000,000 to PII subject to the approval by the President of the FSM within 14 days (fourteen days) and appropriation of funds by the Congress of FSM.
2. FSM agrees to make payment to PII within 30 days following appropriation of funds by FSM Congress.
3. The claims of PII against FSM and the claims of FSM against PII will be resolved by binding arbitration.
4. At arbitration FSM may raise its default termination claim against PII. If the arbitration ruling upholds the termination for default FSM will owe no amount to PII and FSM will not recover any amount against PII. [In no event can FSM recoup the \$2,000,000 payment.²]
5. If the arbitration award amount is \$6,000,000.00 or under in favor of PII the FSM will pay PII the amount of the award, less \$2,000,000.
6. If the arbitration award amount is over \$6,000,000.00 FSM will pay PII an additional maximum amount of \$4,000,000.00.
7. The prior termination for default shall be converted and is converted to a termination for convenience.³ During the arbitration PII shall not mention there is a conversion to termination for convenience.
8. Neither PII nor FSM shall mention any part of this agreement during the arbitration.
9. Any claims by FSM against the surety (CIC) are released.

Oral argument was heard in this matter on April 8, 2021

The FSM objected to entry of the arbitrators' Final Award as an order of the court and argued that the court had no jurisdiction to sever the arbitration clause from the parties' mediated settlement agreement and order arbitration, as the court's decision in Pacific Int'l, Inc. v. FSM, 20 FSM R. 220 (Pon. 2015) found that the mediated settlement agreement and all its provisions were unenforceable. Therefore, according to the FSM, the AAA/ICDR arbitration award could not be entered by the court as a matter of law. In the alternative, the FSM argued that if the court had jurisdiction to enforce the arbitration clause, then it had jurisdiction to enforce all the stipulations in the mediated settlement agreement, including the high-low provisions, and if the high-low provisions were enforced, the arbitration award would be reduced to the liability limits set forth in the mediated settlement agreement.⁴ The FSM requested that the whole case be set on the court's trial calendar.

² This provision is noted in the margin of the mediated settlement agreement.

³ This clause is not numbered but appears to be part of paragraph 7.

⁴ Here, the question is whether the court has jurisdiction to enforce the arbitration clause. The court finds that it does. Resolution of this question is determinative of the entire matter, rendering the FSM's alternative argument regarding enforcement of the high-low provisions in the mediated settlement agreement moot. ("[H]igh-low agreements [are] intended to cap damages between the parties. They protect the claimant from no recovery or very low award and protect the defendant from a very high award." Def.'s Resp. To Mot. To Enter J. on AAA Award & Mot. to Reduce Liability at 3.)

Plaintiff PII argued that the AAA/ICDR arbitration award should be entered as an order of the court, as the FSM failed to raise timely objections to the jurisdiction of the court to order the case to arbitration before the AAA/ICDR and actively engaged in the arbitration process. PII contended that the FSM's objection to jurisdiction is an attempt to avoid entry of an unfavorable arbitration award in favor of PII.

The court finds that it had jurisdiction to order arbitration and that the FSM waived objection to and actively engaged in arbitration, and it is not entitled to a court trial.

III. ANALYSIS

Court Jurisdiction

The court's jurisdiction to sever and enforce the mandatory arbitration clause in the parties' June 3, 2015 mediated settlement agreement is a matter of first impression. The court's June 13, 2018 Order re Stay of Litigation and Enforcement of Arbitration Agreement, Pacific Int'l, Inc. v. FSM, 21 FSM R. 662 (Pon. 2018), is grounded in U.S. law that provides for enforcement of arbitration clauses embedded in contracts, regardless of whether there exist other potentially void or voidable portions of the agreement. ITT Educ. Servs. Inc. v. Arce 533 F.3d 342, 344-45 (5th Cir. 2008); 9 U.S.C.A. § 2 (1947).

Additional U.S. case law supports the court's jurisdiction to sever and enforce the mandatory arbitration clause in the parties' mediated settlement agreement. In Lefoldt for Natchez Regional Medical Center Liquidation Trust v. Horne, L.L.P., the court determined that even if another provision of the parties' contract, or the contract as a whole, is invalid, unenforceable, voidable, or void, that does not prevent a court from enforcing a specific agreement to arbitrate because, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract:

The Supreme Court has explained that "[t]here are two types of validity challenges under [9 U.S.C.A. § 2]." "One type challenges specifically the validity of the agreement to arbitrate." "The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." The Supreme Court has held that even if "another provision of the contract, or . . . the contract as a whole," is invalid, unenforceable, voidable, or void, that "does not prevent a court from enforcing a specific agreement to arbitrate" because, "[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."

Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Trust v. Horne, L.L.P., 853 F.3d 804, 814-15 (5th Cir. 2017) (quoting Rent-A-Center W. Inc. v. Jackson 561 U.S. 63, 70-71, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403, 411-12 (2010)).

FSM case law also supports specific enforcement of arbitration agreements. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 657 (Pon. 2013) ("The FSM Supreme Court generally encourages parties to voluntarily agree to resolve their disputes through alternative means such as arbitration and will 'specifically enforce the parties' contract to arbitrate.' E.M. Chen & Assoc. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 409 (Pon. 2001)").⁵

Based on the above, the court finds that it had jurisdiction to sever and enforce the arbitration clause in the mediated settlement agreement as a matter of law. Pacific Int'l, Inc. v. FSM, 21 FSM R. 662, 663-64 (Pon. 2018).

⁵ "The prevailing modern view of arbitration, even in the absence of a statute, is that arbitration is generally favored by the courts, and every reasonable will be indulged to uphold arbitration proceedings." E.M. Chen, 10 FSM R. at 408.

Waivers by the FSM

Waiver of Objection to Court Jurisdiction

At oral argument on April 8, 2021, the FSM argued that there is a distinction between the facts in the FSM cases relied on by the court (Luen Thai and Chen), in determining its jurisdiction to order this matter to arbitration, and the facts in the instant matter. Specifically, in Luen Thai and Chen, the arbitration clause enforced by the court was embedded in an existing, valid contract, whereas, the arbitration clause in the instant matter was included in an unenforceable, conditional contract.

While the FSM's argument regarding the applicability of Luen Thai and Chen to this matter does distinguish the cases, it is untimely nearly two years after entry of the court's Order Enforcing Arbitration Agreement.⁶

Waiver of Objection to Alternative Dispute Resolution

The parties have demonstrated a preference for concluding this matter through alternative dispute resolution, including mediation and arbitration, and the court has acted to effectuate this intent.⁷

On March 4, 2015, at the request of the parties, the court issued an order staying the litigation in this matter so the parties could voluntarily participate in mediation. Order to Stay Litigation Pending Mediation at 1.

The mediated settlement agreement between the parties clearly anticipates arbitration. Paragraph 3 states unequivocally that, "The claims of PII against FSM and the claims of FSM against PII will be resolved by *binding arbitration*." (emphasis added.)

In addition, the court finds that the parties' primary intent in entering into the mediated settlement agreement was to address the issue of damages, under the assumption that the FSM would be found liable for breach of contract at arbitration. Paragraph 7 of the mediated settlement agreement states that, "The prior termination for default shall be converted and is converted to a termination for convenience." This admission of liability by the FSM leaves only PII's damages claim for arbitration.

Paragraphs 5 and 6 of the settlement agreement deal exclusively with limiting the FSM's liability for damages at arbitration.

A clear-cut motive for the FSM to enter into the mediated settlement agreement was to cap damages

⁶ The FSM failed to challenge the court's June 13, 2018 Order Re Stay of Litigation and Enforcement of Arbitration Agreement under FSM Rules of Civil Procedure 59 or 60(b). At bottom, the court finds, pursuant to FSM Civil Rule 61, no error or defect that is ground for vacating its June 13, 2018 Order as inconsistent with substantial justice or the substantial rights of the parties.

⁷ Alternative dispute resolution is most consistent with Micronesian custom and practice. E.M. Chen, 10 FSM R. at 408-09. FSM courts have ordered parties in other cases involving commercial litigation to assess and report on the possibility of Alternative Dispute Resolution. In FSM v. GMP Hawaii, Inc., the court entered a Pre-Trial Order that the parties shall confer and discuss settlement possibilities and shall file and serve "a report on the likelihood of settlement and on the efforts made toward settlement, mediation, or arbitration (but omitting specific details of any offers or counteroffers)." FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 594 (Pon. 2011) (breach of contract claim alleging improper subcontracting, failure to conduct soil testing, and use of improper survey for Weno road project); Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 12 (Pon. 2013) (breach of marine salvage contract).

at \$6,000,000 and avoid a much larger damages award at arbitration.⁸ This intent is borne out by the FSM's arguments opposing entry of the arbitration award and seeking to enforce the damages limitation clauses in paragraphs 5 and 6 of the mediated settlement agreement.⁹

The FSM's ongoing interest in arbitration is evident in defense counsel 's February 6, 2018 email to PII that stated, "the FSM is still considering the issue of arbitration; as such, the FSM may be inclined to change its position and agree to PII's request for a stay in this litigation so the parties can submit their claims to arbitration." PII's Reply to Def. 's Resp. to Mot. for Entry of J. Ex. 4.

Waiver of Trial

The FSM did not exercise its right to timely request trial. The FSM had an opportunity to do so in its Opposition to Plaintiffs Motion for Stay of Litigation to Enforce Arbitration Agreement; Memorandum of Points and Authorities in Support Thereof, filed February 5, 2018, and it failed to act.

The FSM did not request trial in this matter until May 1, 2020, after the completion of arbitration. Def.'s Resp. to Mot. to Enter J. at 5.

Waiver of Objection to Arbitrability

Arbitrability is the question of whether an arbitration agreement creates a duty for the parties to arbitrate a particular grievance. AT&T Techs., Inc. v. Communication Workers of Am., 475 U.S. 643, 649, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 656 (1986). Arbitrability is a jurisdictional issue and, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.*¹⁰

Finally, where the contract contains an arbitration clause, there is a presumption of arbitrability: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 650, 106 S. Ct. At 1419, 89 L. Ed. 2d at 656 (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co. 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1352-53, 4 L. Ed. 2d 1409, 1417-18 (1960). See also Gateway. Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 377-78, 94 S. Ct. 629, 636-37, 38 L. Ed. 2d 583, 592 (1974)).

At oral argument on April 8, 2021, the FSM conceded that it did not file a Motion to Reconsider the Court's June 13, 2018 Order re Stay of Litigation and Enforcement of Arbitration Agreement. The FSM offered no excuse for this omission. The court finds that the FSM should not now be permitted to reassert arguments presented in its February 5, 2018 Opposition to Plaintiffs Motion for Stay of Litigation to Enforce Arbitration Agreement, which it failed to raise via a timely-filed Motion to Reconsider.

In addition, the court finds that the FSM has waived any objection to arbitrability pursuant to U.S. case law. This issue has not been addressed by FSM courts but has been adjudicated in other jurisdictions, including by the Colorado Court of Appeals, which held that a commercial entity that objects to the arbitrability of a dispute, but does not seek reasonable judicial remedies and instead participates in the

⁸ The prayer of the Complaint requests over \$14,000,000 in damages. Compl. at 10.

⁹ Def.'s Resp. to Mot. for Entry of J. at 5; Def. 's Surreply to Pl.'s Reply to Def.'s Mot. to Reduce Liability at 5.

¹⁰ The arbitrator determines the merits of the dispute, not the court. AT&T Techs., Inc., 470 U.S. at 649-50, 106 S. Ct. at 1419, 89 L. Ed. 2d at 656.

arbitration, waives its argument on appeal that the dispute was not arbitrable. Harper Hofer & Assocs., LLC v. Northwest Direct Marketing, Inc., 412 P.3d 659, 666 (Colo. Ct. App. 2014).¹¹

The Harper Hofer Court reviewed the case law extensively, beginning with precedent from New Jersey:

[t]he principle of waiver is invoked to assure that a party may not get two bites of the apple: if he chooses to submit to the authority and jurisdiction of an arbitrator, he may not disavow that forum upon the return of an unfavorable award. That important policy would be subverted if a party could enter a nominal objection to the arbitrator's jurisdiction, submit himself fully to the arbitration and still retain the option to demand a new hearing if he does not like the outcome of the arbitration.

Highgate Dev. Corp. v. Kirsh, 224 N.J. Super. 328, 540 A.2d 861, 863 (App. Div. 1988); accord Wein v. Morris 194 N.J. 364, 944 A.2d 642, 652 (2008); see also Bayscene Resident Negotiators v. Bayscene Mobilehome Park, 15 Cal. App. 4th 119, 18 Cal. Rptr.2d 626, 632 (1993) ("[A] party who questions the validity of the arbitration agreement may not proceed with arbitration and preserve the issue for later consideration by the court after being unsuccessful in the arbitration."); Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 569 S.E.2d 349, 355 (2002) ("[A] party that by its conduct consents to arbitration of a dispute waives any subsequent judicial challenge to its arbitrability."), vacated on other grounds by Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).

Harper Hofer & Assocs., LLC, 412 P.3d at 664-65.

We acknowledge that there are jurisdictions which hold that a party's participation in arbitration proceedings will not result in waiver of its right to raise the issue of arbitrability if it has made a timely objection to arbitrability before a hearing on the merits. See Eleanor L. Grossman, Annotation, *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability Under State Law*, 56 A.L.R.5th 757, § 4 (1998) (collecting cases); see, e.g., Olsen v. United States 546 F. Supp. 2d 1122, 1129 (E.D. Wash. 2008) ("[W]hen a party 'forcefully objected to arbitrability at the outset of the dispute, never withdrew that objection, and did not proceed to arbitration on the merits of the contract claim,' waiver does not occur." (quoting Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280 (9th Cir. 2006)); Mass. Highway Dep't v. Perini Corp., 83 Mass. App. Ct. 96, 981 N.E.2d 721 (2013) (party did not waive its objection to arbitrability by participating in arbitration by consistently raising objection to the binding nature of arbitration); SCA Servs., Inc. v. Gen. Mill Supply co., 129 Mich. App. 224, 341 N.W.2d 480, 482 (1983) (same).

Harper Hofer & Assocs., LLC, 412 P.3d at 665.

However, a major distinction between many of those cases and the situation at hand is that the party objecting to arbitration sought court review of the arbitrability question prior to proceeding to arbitration. See, e.g., Ruffin Woody & Assocs., Inc. v. Person Cnty., 92 N.C. App. 129, 374 S.E.2d 165, 167 (1988) (objection to arbitrability of dispute was preserved in part because "plaintiff followed the correct procedure by applying for a court order to stay the arbitration proceeding[s]"); SCA Servs. Inc. 341 N.W.2d at 481 (appellant "vigorously disputed the authority of the arbitrator to determine the waiver question, both in the courts and during

¹¹ FSM Courts may look for guidance from U.S. common law decisions if there are no statutes or decisions of constitutional courts within the FSM. Ihara v. Vitt, 18 FSM R. 516, 526 (Pon. 2013).

the arbitration proceedings"); but see Grant v. Rotolante 147 So. 3d 128, 132 (Fla. Dist. Ct. App.2014) (although party "had other options to challenge the panel's authority," his objection to the arbitration panel prior to participation in the arbitration was enough to preserve his objection to the panel's jurisdiction); Aetna Bridge co. v. Dep't of Transp., 795 A.2d 517, 522 (R.I. 2002) 'It is well settled in this jurisdiction that if a party objects to substantive arbitrability at the arbitration hearing and then proceeds to arbitration, the party has preserved the [substantive arbitrability] issue for later determination by a reviewing court.' " (quoting State v. Local No. 2883, Am. Fed. of State, Cnty. & Mun. Emps., 463 A.2d 186, 189 (R.I. 1983))).

Harper Hofer & Assocs., LLC, 412 P.3d at 665.

Waiver of Objection to AAA/ICDR Jurisdiction

The court finds that the FSM should be bound by the arbitrators' decision, as it fully participated in the arbitration process. (The FSM demanded that three arbitrators rather than one decide the dispute, driving up costs.) PII's Reply to Def.'s Resp. to Mot. for Entry of J. Ex. 5. Also, in 2019, FSM President Peter M. Christian signed FSM Public Law No. 20-172, which appropriated \$500,000 to fund the arbitration costs. *Id.* Ex. 7 at 2.¹²

The court further finds that the FSM should be held to the decision of the arbitrators because it failed to object to the jurisdiction of the tribunal under AAA/ICDR rules. (Under Article 19, para. 1 of the rules, the tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s). An objection to jurisdiction must be submitted to the AAA/ICDR prior to the filing of an Answer, pursuant to Article 19, para. 3 of the rules.)¹³

In addition, the court determines that the FSM is subject to Article 28 of the ICDR rules, which provides for a waiver of objection to non-compliance with the arbitration rules or the arbitration agreement as follows: "A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object."

Here, the FSM failed to object to the tribunal regarding the existence or validity of the mediated settlement agreement (The tribunal has the power to determine the existence or validity of the contract of which an arbitration claim forms a part.) (Article 19, para. 2 of the AAA/ICDR Rules). In addition, the FSM proceeded with the arbitration despite mandatory language in the AAA/ICDR Rules that directly contradicts its position that the arbitration clause in the mediated settlement agreement is not severable from the remainder of the agreement: "[A]n arbitration clause shall be treated as an agreement independent of the other terms of the contract." *Id.*

The FSM's objections to jurisdiction should have been raised long ago. Permitting such a challenge now runs afoul of the doctrine of waiver and should not be allowed, as set forth in the AAA/ICDR rules and in the cases noted, *supra*.

Due Process

The court finds that the FSM was provided due process in the arbitration proceedings. Three

¹² The total compensation and expenses of the arbitrators totaled \$493,548.45. Final Award at 71.

¹³ At oral argument on April 8, 2021, the FSM stated that it did not argue the issue of the AAA/ICDR's jurisdiction to decide the case because in its view the AAA/ICDR did not have the authority to decide the case in the first place.

arbitrators with commercial litigation experience determined this matter after ten (10) days of hearings, including expert testimony.¹⁴ The arbitrators' Final Award consists of seventy-two (72) pages of discussion, analysis and conclusions. The FSM has not questioned the validity of the arbitrators' conclusions, only the amount of damages to be entered by the court.¹⁵ The court finds no independent basis to decline entry of the Final Award as an Order and Judgment of the court.

IV. CONCLUSION

The FSM has not vigorously and consistently objected to the court's jurisdiction to order this matter to arbitration, or to the jurisdiction of the AAA/ICDR to adjudicate and enter a decision. The FSM should not now be permitted to benefit from any failure on its part to raise procedural issues that would not seem to substantively impact the outcome of the case. Under these circumstances, the court finds that the FSM has been accorded due process of law, and judicial economy militates in favor of entry of the arbitration award as an Order and Judgment of the court and the denial of trial de novo.

THEREFORE IT IS HEREBY ORDERED that the Final Award of the arbitrators of the American Arbitration Association's International Centre for Dispute Resolution shall be entered as an Order of the Court.

IT IS FURTHER ORDERED that the Clerk of Court shall enter Judgment in favor of the plaintiff Pacific International, Inc., and that the defendant National Government of The Federated States of Micronesia shall pay the monetary awards and interest on those awards as set forth in pages 70-71 of the Final Award of the arbitrators of the American Arbitration Association's International Centre for Dispute Resolution, as follows:

The FSM National Government shall pay PII a total judgment as follows:

1. An award amount of \$8,515,466.00.
2. Interest of \$984,988.00, on that portion of the award for costs prior to contract termination (accruing from the date of submission to FSM of PII's certified claim through the date of the award).
3. Interest on the award of accrued at the rate provided in Section 1.28(g) of the Contract, from the date of the award until the date this Court enters Judgment on its Order.
4. The total judgment shall accrue statutory interest at 9% per year, as set forth in 6 F.S.M.C. 1401.
5. The administrative fees and expenses of the ICDR of \$59,088.50 shall be borne as incurred by the parties, and the compensation and expenses of the arbitrators of \$493,548.45 shall be borne equally by the parties. Each party shall bear its own attorneys' fees and costs/expenses.

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¹⁴ "[I]nternational commercial disputes may best be resolved by private individuals, selected by the parties, who are knowledgeable in the trade and industry in which the commercial enterprises operate." E.M. Chen & Assoc. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 409 (Pon. 2001).

¹⁵ It is unclear what "meritorious defense" to the complaint the FSM might raise at trial that has not already been adjudicated by the arbitrators. FSM Dev. Bank v. Talley, 22 FSM R. 587, 593 (Kos. 2020).