V. CONCLUSION

NOW THEREFORE IT IS HEREBY ORDERED that the motion is granted and partial summary judgment on the defendants' liability on the plaintiffs' maritime negligence, nuisance, and trespass causes of action is entered. Left for proof at trial is the plaintiffs' ownership interest in the damaged reef and the extent and amount of those damages, and presumably, the plaintiffs' unseaworthiness cause of action, if the plaintiffs intend to go forward on that.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

NATIONAL GOVERNMENT OF THE FEDERATED STATES OF MICRONESIA, by and through its agency, the FSM Program Management Unit, Appellant, vs. PACIFIC INTERNATIONAL, INC., Appellee.	APPEAL CASE NO. P12-2021 (Civil Action No. 2014-046)

OPINION

Argued: June 14, 2022
Submitted: July 13, 2022
Decided: August 30, 2022

BEFORE:

Hon. Larry Wentworth, Associate Justice, FSM Supreme Court
Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court
Hon. Cyprian Manmaw, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, State Court of Yap, Colonia, Yap

APPEARANCES:

For the Appellant: Joses R. Gallen, Sr., Esq. (brief)
Attorney General
Leonito Bacalando, Jr., Esq. (brief & argued)
Jeffrey Tilfas, Esq. (brief & argued)
Jesse S. Mihkel, Esq. (brief)
Assistant Attorneys General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

For the Appellee: Thomas M. Tarpley, Jr., Esq.
Thomas McKee Tarpley Law Firm
137 Murray Blvd., Suite 202
Hagatna, Guam 96913

* * * *

HEADNOTES

Civil Procedure

A litigant is permitted to make arguments in the alternative. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 642 n.1 (App. 2022).

Appellate Review – Standard – Civil Cases – De Novo; Statutes – Construction

Appellate courts review de novo any matters of law, and matters of law include the interpretation and application of statutes. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 644 (App. 2022).

Appellate Review – Standard – Civil Cases – De Novo; Appellate Review – Standard – Civil Cases – Factual Findings; Equity – Waiver

An issue of waiver is a mixed question of law and fact for which appellate courts use a de novo review for the law and the clearly erroneous standard for the facts. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 644 (App. 2022).

Judgments; Settlement

A court judgment, or a litigation settlement, or an arbitration award does not obligate funds. The most that an award, a settlement, or a judgment can do is determine the amount of a party's liability, not obligate funds for payment. If needed or required, an obligation of funds will follow after the appropriation and allotment of funds. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 644 (App. 2022).

Contracts – Conditions

A promise "to make payment within 30 days following appropriation of funds by FSM Congress" is not an obligation of funds. There is no obligation to pay unless (and until) Congress has appropriated the funds. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 644 (App. 2022).

Arbitration

There is no impediment, constitutional or statutory, preventing parties who contractually agree to settle disputes through arbitration instead of litigation from doing so. Like any other lawful contract provision, an arbitration clause or agreement should generally be enforceable by a court. Such enforcement is not a delegation of the court's judicial power to an arbitrator, but merely the court enforcing the remedy that the contracting parties have chosen and agreed to. This is true even if the national government is one of the contracting parties. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 644 (App. 2022).

Civil Procedure – Stare Decisis; Judgments

A precedent must be binding in order to be "controlling law." A binding precedent is a precedent that a court must follow – an applicable holding of a higher court in the same jurisdiction; in other words, an appellate decision. Other jurisdictions' precedents are not "controlling law" in the FSM, although, on a proper occasion, they may be persuasive (or very persuasive) authority. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 645 (App. 2022).

Arbitration; Equity – Waiver

The FSM waived its objection to arbitrability when, first, Congress appropriated $500,000 (which the President signed into law) for the FSM to adequately present its defenses and counterclaims during the arbitration proceeding, indicating the national government's willingness, as a whole, to proceed with

arbitration, and second, and more importantly, when the FSM never raised an objection to arbitrability before the arbitrator(s), even though the arbitration rules provided for just such an opportunity. That was when the FSM should have raised and maintained its objection to arbitrability if the FSM had wanted to preserve an objection to arbitrability. Instead, the FSM chose not to (or neglected to) object to arbitrability and fully engaged in the arbitration process; pursued its own claims against the other party as well as defended against that party's claims; and presented extensive evidence and testimony on its own behalf. This was an implied waiver of a known right. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 645 (App. 2022).

Equity – Waiver

An implied waiver can be established by acts and conduct from which an intention to waive may be reasonably inferred, or where a person has pursued such a course of conduct as to evidence an intention to waive a right, by implication through a party's conduct inconsistent with an intent to assert a right. An implied waiver may also arise where neglect to insist upon a right results in prejudice to another party. Waiver may be inferred from conduct of such a nature as to mislead the opposite party into an honest belief that a waiver was intended or assented to. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 645-46 (App. 2022).

Arbitration; Equity – Waiver

A party, having received an unfavorable arbitration decision and having waived its objection to arbitrability, cannot then ask the court to vacate the arbitration award and proceed to trial. That would prejudice the other party. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 646 (App. 2022).

Arbitration

When the parties agreed to an arbitration and the type of arbitration they agreed to was an arbitration with upper and lower limits (a high-low arbitration), the agreed high-low limits cannot be separated from the arbitration. The high-low limits must be applied to the final arbitration award, and it was plain error for the trial court not to do so. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 646 (App. 2022).

Appellate Review – Decisions Reviewable

An appellate court may consider an issue raised for the first time on appeal in the case of plain error – error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. And the appellate court may consider an issue that was the basis of the appellant's response and opposition to the appellee's trial court motion to enter judgment although that issue was only cursorily raised by the appellant on appeal. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 646 n.4 (App. 2022).

Arbitration

If, in a high-low arbitration, the arbitration amount, not including contractual interest, is less than the upper limit, then contractual interest will be allowed, up until when the upper liability limit is reached. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 646 (App. 2022).

Appellate Review – Mandate; Judgments – Interest on

If a judgment is modified or reversed with a direction that a judgment for money be entered in the court appealed from, the mandate shall contain instructions with respect to allowance of interest. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 647 (App. 2022).

Sovereign Immunity

Since sovereign immunity implicates a court's subject matter jurisdiction, the defense of sovereign immunity can be raised at any time, either by a party or by the court. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 647 (App. 2022).

Judgments – Interest on; Statutes – Construction

When identically-worded, interest-on-judgment statutes are derived from the same identically-worded source, the Trust Territory Code statute, the statutes would logically be interpreted and applied against their respective sovereigns in the same manner. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 647 (App. 2022).

Judgments – Interest on; Sovereign Immunity

Since the FSM has not statutorily waived its right to sovereign immunity from statutory post-judgment interest, the general statute imposing post-judgment interest, 6 F.S.M.C. 1401, does not make the FSM liable for post-judgment interest. FSM v. Pacific Int'l, Inc., 23 FSM R. 638, 648 (App. 2022).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This appeal arises from the trial court's order that the parties submit to binding arbitration to resolve their contractual damages dispute and the trial court's judgment confirming the resulting arbitration award. We affirm the trial court's confirmation of the arbitration award, but modify the trial court judgment to limit the award amount to $6 million. Our reasons follow.

I. BACKGROUND

On February 20, 2009, the FSM contracted with Pacific International, Inc. ("PII"), a general contractor with its principal place of business in the Marshall Islands, to rebuild about 4.2 miles of road on Weno, in the State of Chuuk. The contract amount was $25,882,348.89, with completion required by March 14, 2012. This contract did not contain a clause requiring arbitration of disputes but did contain a provision that the parties could agree to "ADR" [Alternative Dispute Resolution] to resolve any disputes.

During the Weno road project, difficulties arose that required numerous negotiated and agreed change orders which increased the contract cost and extended the required completion date to November 25, 2013. Later, more change orders were agreed to, and PII sought a further extensions to February or May, 2014, but the FSM did not agree to any. The FSM tried to improve PII's performance so as to meet the November 2013 completion date. On November 7, 2013, the FSM terminated the PII contract, asserting that PII had defaulted. The Weno road project was then over 85% complete.

On December 16, 2014, PII filed suit against the FSM, alleging that its requested contract time extensions were excusable and had been unreasonably denied, that the contract was wrongfully terminated, and that mediation efforts had failed. PII contended that, under the contract, it was owed a further $14,129,786.14 for work performed and costs incurred. On March 4, 2015, the trial court stayed the litigation pending mediation between the parties. With the help of an independent professional mediator, the parties agreed to a settlement, which was hand-written and read:

> June 3, 2015
>
> 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, Draining and Utilities Upgrade, Phase I under the following terms:
>
> 1. FSM agrees to make a payment of $2,000,000.00 to PII subject to 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 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 the 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.

5. If the arbitration award is $6,000,000.00 or under in favor of PII the FSM will pay PII the amount of the award, less 2,000,000.00.
6. If the arbitration award is over 6,000,000.00 the FSM will pay PII an additional maximum amount of 4,000,000.00.
7. The prior termination for default shall be and is converted to a termination for convenience. During the arbitration PII shall not mention that there is a termination for convenience.
8. Neither PII nor FSM shall mention any part of this agreement during the arbitration.
9. Any claims against the surety (CIC) are released.

The FSM President did not approve the settlement and Congress did not appropriate the $2 million. Nevertheless, based on this mediated settlement agreement, PII moved for partial summary judgment and to compel arbitration, which the trial court denied on October 12, 2015. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224-25 (Pon. 2015). Discovery ensued. The trial court denied PII's next summary judgment motion because there were genuine disputes about the material facts regarding the FSM's termination of PII's contract. Pacific Int'l, Inc. v. FSM, 21 FSM R. 283, 288-90 (Pon. 2017).

On October 20, 2017, PII moved that the matter be set for trial, but on December 28, 2017, PII instead moved to stay the litigation and to enforce the arbitration agreement. The FSM opposed both the stay and the arbitration. On June 13, 2018, the trial court ruled that, regardless of whether the other parts of an agreement were potentially void or voidable, arbitration clauses imbedded in contracts were separately enforceable, and granted the requested stay. Pacific Int'l, Inc. v. FSM, 21 FSM R. 662, 663-65 (Pon. 2018). The trial court further ordered the parties to pursue settlement negotiations, and, if settlement discussions reached an impasse, to submit the matter to binding arbitration and agree, by October 12, 2018, on a mutually acceptable arbitrator. *Id.* at 665-66.

Settlement discussions reached an impasse, and the parties agreed to arbitration by a panel of three arbitrators at the American Arbitration Association's International Centre for Dispute Resolution in Honolulu, Hawaii, and asked the trial court to approve or confirm their choice. It did so on January 9, 2019. Congress appropriated $500,000 to defray "PII Litigation/Arbitration" expenses. FSM Pub. L. No. 20-172, § 4, 20th Cong., 7th Spec. Sess. (2019) (amending FSM Pub. L. No. 20-131, § 8(8) to add § 8(8)(o)).

The arbitration was held in June and July 2019. Each side asserted claims against the other. Both sides presented extensive evidence and testimony, followed by further post-arbitration briefing. The arbitrators issued their final award on March 20, 2020. They awarded PII $8,515,466 plus $984,988 in interest (total $9,500,454), with the parties to bear the arbitration's administrative fees and expenses as incurred and the arbitrators' expenses and compensation equally.

On April 7, 2020, PII moved for the entry of a judgment based on the arbitrators' final award. It asked that a judgment be entered for the $9,500,454 plus 0.425% interest on $8,515,466 as post-award interest, plus, once the court entered judgment, 9% interest on the judgment amount pursuant to 6 F.S.M.C. 1401. On May 1, 2020, the FSM responded. The FSM contended that the arbitration award triggered the arbitration agreement's high-low provisions and asked the trial court to enter a judgment for PII for $6 million because high-low economic settlements or arbitration agreements had never been found void or voidable; or, in the alternative,[1] that the trial court should set the arbitration award aside and resume trial because, if parts of the mediated settlement agreement were void, then all of that agreement (including the arbitration clause) should be void. PII replied that the high-low agreement was unenforceable and had been abandoned and that the arbitration award was enforceable because the arbitration clause was enforceable by itself or because the FSM had waived or abandoned any objection to arbitration. The FSM countered that it had not waived its objection to arbitration, but had only been following the court's order to arbitrate, and that the court

[1] A litigant is permitted to make arguments in the alternative. FSM Dev. Bank v. Adams, 14 FSM R. 234, 246 (App. 2006).

could not enforce only paragraph 3 of the mediated settlement agreement and ignore or delete the rest of the arbitration terms (the high-low limits to liability).

The trial court, on July 2, 2021, apparently rejected the FSM's request to enforce the high-low provision, only just mentioning it in passing in a dismissive footnote. Pacific Int'l, Inc. v. FSM, 23 FSM R. 347, 350 n.4 (Pon. 2021). The trial court focused on the FSM's alternative request and ruled that the FSM had waived any objection to the court's authority to order arbitration, to the FSM's engaging in alternative dispute resolution, to the matter's arbitrability, and to the arbitrators' jurisdiction, and thus also to any right to a trial, *id.* at 352-56. It ordered judgment entered for PII for $8,515,466, plus $984,988 pre-award interest, plus post-award interest on $8,515,466 at the rate set in Section 1.28(g) of the Contract, and 9% interest on the total judgment amount as set forth in 6 F.S.M.C. 1401, with the parties to bear their own attorney's fees and costs. Pacific Int'l, Inc., 23 FSM R. at 356. Judgment was entered accordingly.

The FSM promptly moved for reconsideration, arguing that the trial court had erroneously applied various U.S. court decisions to find waiver; that the court's June 13, 2018 order compelling arbitration was an interlocutory order not subject to appeal and therefore the FSM's failure to appeal that order could not be a waiver; that the arbitration award was invalid and unenforceable as a matter of law; and, alternatively, that the trial court order had improperly changed the terms (did not enforce the agreement's high-low limits) of the proposed arbitration. The FSM asked the court to vacate the July 2, 2021 judgment; grant the FSM 60 days to review the June 3, 2015 mediated settlement agreement; and, if the FSM did not agree to the entire mediated settlement agreement, return the case to the court's trial calendar. PII opposed, arguing that the trial court had not committed a manifest error; that a party could not voluntarily submit a dispute to arbitration and then, if the decision is unfavorable, seek to litigate the matter in another proceeding; that res judicata applied to arbitration proceedings as well as litigation; and that enforcement of the $6 million cap on an arbitration award was precluded because PII had not been paid the $2 million floor.

Finding that the FSM had waived any objection to arbitrability, the trial court denied the FSM's motion and concluded that it would be a great waste of judicial resources to permit the FSM, after fully participating in the arbitration proceeding, to essentially have a second run of the case before the trial court. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 394 (Pon. 2021). The FSM timely appealed. *See* FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 454-56 (App. 2021).

II. ISSUES PRESENTED

The FSM contends that the trial court committed reversible error:

1) by holding that a mandatory arbitration clause in an otherwise unenforceable agreement was separately enforceable and ordering the parties to submit their dispute to arbitration while also holding unenforceable the rest of the mediated settlement agreement, including its economic benefits;

2) by applying or following United States case law about arbitration that was based on a United States statute that has no effect or validity or counterpart in the FSM;

3) by not ruling that the FSM Financial Management Act precluded the FSM from entering into an arbitration agreement without explicit prior appropriation of funds by Congress;

4) by ruling that the FSM had waived any objection to arbitrability;

5) by holding that settlement of this matter through more informal alternative dispute resolution would be most consistent with Micronesian custom and practice and likely to lead to a lasting solution to this long running dispute, even though there was no evidence or proof of that; and

6) because the order to compel arbitration was an unallowable delegation of the FSM Supreme

Court's judicial power and function, thus violating the FSM Constitution.

III. STANDARD OF REVIEW

We review de novo any matters of law. Occidental Life Ins. Co. v. Johnny, 20 FSM R. 420, 426 (App. 2016). Matters of law include the interpretation and application of statutes, Iriarte v. Individual Assurance Co., 18 FSM R. 340, 351 (App. 2012), and questions of contract interpretation, Sam v. FSM Dev. Bank, 20 FSM R. 409, 418 (App. 2016). An issue of waiver is a mixed question of law and fact for which we use a de novo review for the law and the clearly erroneous standard for the facts. Alik v. Heirs of Alik, 21 FSM R. 606, 616 (App. 2018).

IV. ANALYSIS

A. *Whether the Financial Management Act Barred the Arbitration Agreement*

The FSM contends that the Financial Management Act bars any agreement such as the mediated settlement agreement (and thus the arbitration it provided for) because that Act prohibits the unauthorized obligation of government funds "pursuant to any appropriation, apportionment, reapportionment, or allotment" in excess of available funds, or in advance of the funds availability, or for purposes other than for which the allotment was made. 55 F.S.M.C. 221.

We cannot agree. This litigation, or any settlement of this litigation, or any arbitration of the parties' claims involved in this litigation is not and cannot be an obligation of "any appropriation, apportionment, reapportionment, or allotment" of government funds. A court judgment, or a litigation settlement, or an arbitration award does not obligate funds. The most that an award, a settlement, or a judgment can do is determine the amount of a party's liability (in this case, the FSM's), not obligate funds for payment.

If needed or required, an obligation of funds will follow after the appropriation and allotment of funds. A promise "to make payment within 30 days following appropriation of funds by FSM Congress" is not an obligation of funds. There is no obligation to pay unless (and until) Congress has appropriated the funds.

B. *Whether Arbitration Is an Unconstitutional Delegation of FSM Judicial Power*

The FSM contends that arbitration is an unconstitutional delegation of (or a usurpation of) the FSM Supreme Court's judicial power and function. In essence, the FSM asserts that arbitration agreements are all unenforceable and that instead the court must adjudicate all commercial disputes, or at least all commercial disputes involving the national government. For this last point, the FSM relies upon Section 6(a) of Article XI of the Constitution, which grants the FSM Supreme Court original and exclusive jurisdiction over cases where the national government is a party, except when an interest in land is at issue.

We cannot agree. We see no impediment, constitutional or statutory, preventing parties who contractually agree to settle disputes through arbitration instead of litigation from doing so. Like any other lawful contract provision, an arbitration clause or agreement should generally be enforceable by a court. Such enforcement is not a delegation of the court's judicial power to an arbitrator, but merely the court enforcing the remedy that the contracting parties have chosen and agreed to. This is true even if the national government is one of the contracting parties.

C. *Whether "Controlling Law" Mandates Enforcement of an Arbitration Clause*

The FSM contends that the trial court (relying on either a United States statute or precedents in case law from various U.S. jurisdictions) erred when it held that "controlling law" compelled the court to enforce the mediated settlement agreement's arbitration clause. PII contends that "controlling law" requires court enforcement of the arbitration clause in the mediated settlement agreement. PII relies on and cites various

U.S. precedents to that effect as controlling law.

We cannot agree with PII. A precedent must be binding in order to be "controlling law." Setik v. Mendiola, 21 FSM R. 537, 560 (App. 2018). A binding precedent is a precedent that a court must follow – an applicable holding of a higher court in the same jurisdiction; in other words, an appellate decision. *Id.* at 561. There are no appellate decisions in the FSM concerning arbitration or the enforceability of arbitration agreements, either as a clause in an enforceable contract or as a separate, possibly enforceable clause in an otherwise unenforceable contract. This is the first. Other jurisdictions' precedents are not "controlling law" in the FSM, although, on a proper occasion, they may be persuasive (or very persuasive) authority.

D. *Whether Objection to Arbitrability Waived*

The FSM contends that the mediated settlement agreement is an unenforceable contract and that the arbitration clause within it is not separately enforceable. That being so, the FSM further contends that it had never waived its objection to being required to go to arbitration.

We conclude that the FSM did waive its objection to arbitrability. We base this conclusion on two grounds.[2] First, Congress appropriated $500,000 (which the President signed into law) so that the FSM could adequately present its defenses and counterclaims during the arbitration proceeding. FSM Pub. L. No. 20-172, § 4, 20th Cong., 7th Spec. Sess. (2019) (amending FSM Pub. L. No. 20-131, § 8(8), to add § 8(8)(o)). This indicates the national government's willingness, as a whole, to proceed with arbitration.

Second, and more importantly, the FSM never raised an objection to arbitrability before the arbitrator(s), even though the arbitration rules provided for just such an opportunity. If the FSM had wanted to preserve an objection to arbitrability, that was when the FSM should have raised and maintained its objection to arbitrability.[3] One of two things would have happened next. The arbitrator(s) would have either upheld the FSM's objection and the arbitration proceeding would have ended, leaving the matter to be resolved by the FSM trial court; or the arbitrator(s) would have found arbitrability and the arbitration would have gone forward. But, in that second instance, the FSM's objection to arbitrability would have been preserved for future litigation.

The FSM chose not to (or neglected to) object to arbitrability and instead fully engaged in the arbitration process. It pursued its own claims against PII as well as defending against PII's claims, and it presented extensive evidence and testimony on its own behalf. This was an implied waiver of a known right.

> An implied waiver can be established by acts and conduct from which an intention to waive may be reasonably inferred, or where a person has pursued such a course of conduct as to evidence an intention to waive a right, by implication through a party's conduct inconsistent with an intent to assert a right. An implied waiver may also arise where neglect to insist upon a right results in prejudice to another party . . . . Waiver may also be inferred from conduct of such a nature as to mislead the opposite party into an honest belief that a

[2] We do not need to take any position on or discuss the other grounds that the trial court relied on to find waiver. Nor do we need to consider whether arbitration is consistent with Micronesian custom and practice.

[3] The FSM cannot claim that the mediated settlement agreement's provision prohibiting PII and the FSM from mentioning any part of that agreement during the arbitration, Settlement Agreement para. 8 (June 3, 2015), prevented it from effectively objecting to arbitrability when the FSM's supposed position was that that agreement was unenforceable in its entirety and PII's position was that, except for the part about the parties' claims being resolved through arbitration, all other parts of the settlement agreement were void. Furthermore, arbitrability is a preliminary matter that a party may raise in the arbitration forum before any arbitration on the merits. Also, the arbitrators were already aware of the settlement agreement's existence (but maybe not its terms) because they said so in paragraph 2 of their Final Award.

waiver was intended or assented to.

28 AM. JUR. 2D *Estoppel and Waiver* § 209, at 612 (rev. ed. 2000) (footnotes omitted). The FSM's intent to waive objection may be reasonably inferred by its acts and its course of conduct, which were also such as to mislead PII into an honest belief that the FSM no longer objected to arbitrability. Furthermore, PII would be prejudiced by the FSM's neglect to object to arbitrability in the arbitration forum if it had to then present its whole case and all its evidence all over again, this time before the trial court.

Since we conclude that the FSM waived its objection to arbitrability, we do not address whether arbitration clauses in otherwise unenforceable contracts are separately enforceable. We further conclude that the FSM, having received an unfavorable arbitration decision and having waived its objection to arbitrability, cannot now ask the court to vacate the arbitration award and proceed to trial.

E. *Whether Arbitration Award Has Limits*

The FSM further contends that the trial court deprived it of its economic benefit of the mediated settlement agreement, that is, that its liability would be limited to $6 million. *See* Appellant's Br. at 25-26. PII contends that because the FSM President never approved the mediated settlement agreement and because it was not paid the $2 million, the lower ($2 million) and upper ($6 million) limits on an arbitration award ceased to exist.

We cannot agree. We hold that the upper and lower limits were a part and parcel of the mediated settlement agreement's arbitration clause. When the parties agreed to arbitration, that is the type of arbitration they agreed to – a high-low arbitration – an arbitration with upper and lower limits. When the FSM impliedly waived its objection to arbitration, the type of arbitration to which it waived its objection was a high-low arbitration. The agreed high-low limits cannot be separated from the arbitration. The high-low limits must be applied to the final arbitration award.

Thus, it was plain error[4] for the trial court to not grant the FSM's first request to enter judgment for PII for $6 million. We do not doubt that, if, at anytime before the arbitration proceeding started, the FSM had tendered $6 million to PII, PII could not then have insisted that it still had claims left to arbitrate. And undoubtedly, the trial court could not have still compelled the parties to proceed to or to continue with the arbitration if the FSM had tendered $6 million to PII.

We further conclude that this $6 million cap includes the contractual pre-judgment interest. PII had a contractual right to interest on successful contract claims. But that contractual interest was part of PII's claims and part of the arbitration award subject to the high-low arbitration limits. The arbitrators awarded PII damages (including pre-award interest) in excess of the arbitration's $6 million upper limit. If the arbitration amount, not including contractual interest, had been less than $6 million, then contractual interest would have been allowed, up until the $6 million total liability limit was reached. No contractual interest can be awarded to increase that would increase the $6 million limit.

F. *Post-Judgment Interest*

Since PII specifically asked the trial court to award 9% post-judgment interest against the FSM and the trial court specifically included that provision in the judgment, we asked the parties to submit

[4] An issue raised for the first time on appeal is waived, except in the case of plain error – error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *E.g.*, George v. Nena, 12 FSM R. 310, 319 (App. 2004). In this case, the $6 million limit was not raised for the first time on appeal, but was the basis of the FSM's May 1, 2020 response and opposition to PII's motion to enter a judgment in conformity with the arbitration award. Thus, although the issue was only cursorily raised by the FSM on appeal, Appellant's Br. at 25-26, it is one we may consider.

supplemental briefs on this issue. This was a proper line of inquiry because "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the court appealed from, the mandate shall contain instructions with respect to allowance of interest," FSM App. R. 37, and we wanted to be fully prepared to give the proper instructions. These briefs were all filed by July 13, 2022,[5] at which time we considered this appeal submitted to us for our decision.

We conclude that the FSM is not liable for any post-judgment interest. We agree with the trial court's reasoning in Eot Municipality v. Elimo, 20 FSM R. 7 (Chk. 2015), which considered whether the State of Chuuk was subject to post-judgment statutory interest. That court held that:

> Since "[s]overeign immunity implicates a court's subject matter jurisdiction . . . the defense of sovereign immunity can be raised at any time, either by a party or by the court." Sumitomo Constr. Co. v. Guam, 2001 Guam 23 ¶ 22 (Guam 2001). "[T]he law is well established that counsel for the State or one of its agencies may not . . . by failure to plead the defense, waive the defense of governmental immunity in the absence of express statutory authorization." Samuels v. Tschechtelin, 763 A.2d 209, 240 (Md. Ct. Spec. App. 2000). Even when there is no provision in the state's constitution or its statutes "expressing the immunity of the state from liability for interest payments not assented to[, s]uch immunity is an attribute of sovereignty and is implied by law for the benefit of the state . . . ." Treadway v. Terrell, 158 So. 512, 517 (Fla. 1935).

Eot Municipality, 20 FSM R. at 10-11. The FSM statute under which PII seeks post-judgment interest reads: "Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered." 6 F.S.M.C. 1401. This statute derives from the identically-worded Trust Territory statute: "Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered." 8 TTC 1. The Eot Municipality court noted that the Commonwealth of the Northern Marianas also has an identically-worded statute, 7 N. Mar. I. Code § 4101, derived from the same source as the FSM Code, the Trust Territory Code, and that "[l]ogically, the statutes would be interpreted and applied against their respective sovereigns in the same manner." Eot Municipality, 20 FSM R. at 11. We agree.

The Commonwealth of the Northern Marianas Supreme Court ruled that the Commonwealth was not liable for the 9% interest included in a trial court judgment because the Commonwealth did not become liable for payment of interest by reason of a general statute imposing liability for interest such as 7 N. Mar. I. Code § 4101. Marine Revitalization Corp. v. Department of Land & Natural Resources, 2010 MP 18 ¶ 46 (N. Mar. I. 2010). It concluded that since the general statute for judgment interest could not apply and since the breached lease that was the subject of the lawsuit did not make the government contractually liable for post-judgment interest, the Commonwealth owed no interest on the judgment. *Id.* We agree with this reasoning.

The Eot Municipality court further noted that:

> The Guam situation is similar. The Guam Supreme Court held that since "sovereign immunity can only be waived by duly enacted legislation," that "'[i]n the absence of express [legislative] consent to the award of interest *separate from a general waiver of immunity to suit*,'" the government "'is immune from an interest award.'" Sumitomo Constr. Co. v. Guam, 2001 Guam 23 ¶¶ 9-10 (Guam 2001) (quoting Library of Congress v. Shaw, 478 U.S. 310, 314, 106 S. Ct. 2957, 2961, 92 L. Ed. 2d 250, 257 (1986) (emphasis added by the Guam Supreme Court). The Sumitomo Construction court found that Guam had statutorily waived

[5] PII's July 13, 2022 brief asked the court to take judicial notice of an attached World Bank report about the difficulty of enforcing contracts in the FSM. On August 5, 2022, the FSM moved to strike that attachment and asked that PII's counsel be admonished under Civil Procedure Rule 11 for casting aspersions on the FSM in its judicial notice request. We grant the motion to strike the attachment since it is not relevant to this appeal, and we decline to impose any Rule 11 sanctions for PII's counsel's seemingly intemperate language.

its sovereign immunity in contract procurement cases for pre-judgment interest, Sumitomo Constr. Co., 2001 Guam 23 ¶¶ 11-21, 23, but that there was no statutory waiver of sovereign immunity for post-judgment interest and Guam courts lacked the authority to find an implied waiver, *id.* ¶¶ 22-26. The court concluded that "the trial court erred as a matter of law in awarding post-judgment interest," because "in the absence of an express statutory waiver of immunity against post-judgment interest, the government is not liable for such interest." *Id.* ¶ 27.

Eot Municipality, 20 FSM R. at 11-12.

We therefore conclude that since the FSM has not statutorily waived its right to sovereign immunity from statutory post-judgment interest, the general statute imposing post-judgment interest, 6 F.S.M.C. 1401, does not make the FSM liable for post-judgment interest. The FSM owes, and will owe, no interest on the judgment.

V. CONCLUSION

Accordingly, we affirm the trial court's confirmation of the arbitration award in Pacific International, Inc.'s favor, but limit the amount awarded to $6 million with no post-judgment interest thereon. The trial court shall enter an amended judgment to that effect. The parties will bear their own costs on this appeal.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. JAY ANCHETA, Defendant.	)	CRIMINAL CASE NO. 2020-2500

ORDER MEMORIALIZING VERDICT RENDERED IN OPEN COURT

Dennis L. Belcourt
Associate Justice

Trial: August 30, 2022
Decided: September 5, 2022
Entered: September 14, 2022

APPEARANCES:

For the Plaintiff: Quintina Letawerpiy, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941