## ARBITRATION

When the defendant never accepted the plaintiff's offer to waive arbitration, no binding agreement to waive arbitration was ever entered into by the parties. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 407 (Pon. 2001).

The filing of a lawsuit constitutes a party's waiver of arbitration only if that party substantially invokes the litigation machinery and the other party is prejudiced as a result. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 407 (Pon. 2001).

Compelling arbitration will not subject either party to duplicative litigation of the issues in dispute when the plaintiff did not substantially invoke the litigation machinery and there was no prejudice to the defendant from the filing of the court case because the plaintiff's initial complaint was dismissed for failure to comply with the statute of limitations for contract actions, because the defendant never answered the complaint, but merely filed a motion to dismiss; and because the court never addressed any of the substantive issues. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 407-08 (Pon. 2001).

The prevailing modern view of arbitration is that, even in the absence of a statute, courts generally favor arbitration, and every reasonable presumption will be indulged to uphold arbitration proceedings. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 408 (Pon. 2001).

Agreements to arbitrate need not even be in any particular form, as long as the parties have agreed to do so by clear language, and it appears that the intent of the parties was to submit their dispute to arbitrators and be bound by the arbitrators' decision. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 408 (Pon. 2001).

An agreement to arbitrate future contractual disputes is specifically enforceable, even if one party attempts to revoke the agreement. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 408 (Pon. 2001).

Requiring parties to resolve their disputes outside of court does not replace the judiciary's role in resolving disputes; it complements judicial proceedings by allowing the parties to freely contract to resolve their disputes in other forums, with the confidence that the court will enforce such agreements. When a contract's clear language evidences the parties' intent to submit disputes to arbitration, the court will hold them to their agreement and specifically enforce the contract's arbitration provisions. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 408 (Pon. 2001).

Non-judicial settlement of disputes is entirely consistent with Micronesian customs and traditions, whether it be by arbitration or some other form of alternative dispute resolution. Beyond customary considerations, 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. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 408-09 (Pon. 2001).

The FSM Supreme Court adopts the modern view of common law of arbitration and specifically enforces the parties' contract to arbitrate. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 409 (Pon. 2001).

The touchstone for determining whether the right to arbitrate has been waived by litigation conduct is prejudice to the non-moving party. A non-exclusive list of factors relevant to the prejudice inquiry is: 1) timeliness of a motion to arbitrate; 2) the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claim; 3) the extent of the moving party's non-merits motion practice; 4) its assent to the trial court's pretrial orders; and 5) the extent to which both parties have engaged in discovery. Harden v. Inek, 18 FSM R. 551, 552 (Pon. 2013).

While delay alone is not sufficient to establish prejudice, a delay of more than two years far exceeds the delay involved when courts have found no waiver of the right to compel arbitration, and also of great significance is that the parties had previously expected the matter to be resolved at trial but the judge previously assigned to the case recused herself only one day before trial was to start, all of which, combined with the parties' compliance with pretrial orders, demonstrates conclusively that the parties had consented to a judicial determination of the dispute. Harden v. Inek, 18 FSM R. 551, 552-53 (Pon. 2013).

A plaintiff would suffer prejudice if compelled to engage in duplicative litigation efforts in an arbitral forum because when a party fails to demand arbitration during pretrial proceedings, and, in the meantime, engages in pretrial activity inconsistent with an intent to arbitrate, the party later opposing arbitration may more easily show that its position has been prejudiced, since it can readily be inferred that the party claiming waiver has already invested considerable time and expense in litigating the case in court and would be required to duplicate its efforts, at least to some degree, if the case were to proceed in the arbitral forum. Prejudice of this sort is not mitigated by the absence of substantive prejudice to the party's legal position. Harden v. Inek, 18 FSM R. 551, 553 (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. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 657 (Pon. 2013).

There are no FSM statutes governing arbitration, therefore only common law arbitration exists here. Nevertheless, when a contract clearly shows the parties' intent to submit disputes to arbitration, the court will allow and encourage the parties to freely contract to resolve their disputes in other forums, with the confidence that the court will enforce such agreements. The court will hold the parties to their agreement and specifically enforce the arbitration provisions in the contract. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 657-58 (Pon. 2013).

In the absence of a statute requiring it, the specific enforcement of the arbitration clause does not mandate that litigation be dismissed before the arbitration can proceed. Generally, judicial proceedings will instead be stayed pending the arbitration. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 658 (Pon. 2013).

In the absence of a statute requiring dismissal and in the interests of judicial economy and of lessening the parties' financial burden, the best way to specifically enforce the arbitration clause's intent is not to dismiss the case in the hope that a foreign arbitration will proceed smoothly and not require further judicial enforcement. The best way to specifically enforce the arbitration clause is to stay the judicial proceedings and maintain the status quo while the parties go through arbitration. A preliminary injunction will therefore remain in effect and the

case will remain open while the arbitration proceeds. Once an arbitration decision is rendered, the court can then enforce that decision as a judgment or final order of this court and take such further steps as may be necessary and appropriate to conclude this litigation. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 658 (Pon. 2013).

A stay of judicial proceedings while the parties arbitrate is meant solely as an aid to the mandatory and binding arbitration, leaving the parties confident that the result will be quickly and easily enforceable here if needed, with the rest of the case proceeding or being dismissed as need be. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 658 (Pon. 2013).

An agreement to arbitrate future contractual disputes is specifically enforceable, even if one party attempts to revoke the agreement. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 653, 658 (Pon. 2013).

Even in the absence of a statute, courts generally favor arbitration and every reasonable presumption will be held to uphold arbitration proceedings. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224 (Pon. 2015).

When the applicable regulations require that any public contracts awarded under those regulations are subject to mandatory alternative dispute methods; when the movants have filed a complaint and thereby "invoked the litigation machinery"; when the parties availed themselves of an alternative dispute method by virtue of a mediation session but the settlement agreement thus reached was unenforceable because it did not receive the required Presidential approval; and when the government is not disposed to resume alternative dispute resolution, the plaintiff's motion to compel arbitration will be denied. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224-25 (Pon. 2015).

Arbitration clauses imbedded in contracts are separately enforceable, regardless of whether there are other potentially void or voidable portions in the agreement. Thus, a mandatory arbitration clause in an unenforceable mediated agreement is separately enforceable from the remainder of the agreement, and further arbitration is legally required. Pacific Int'l, Inc. v. FSM, 21 FSM R. 662, 663 (Pon. 2018).

Mandatory arbitration clauses in contracts are specifically enforceable. Pacific Int'l, Inc. v. FSM, 21 FSM R. 662, 664 n.1 (Pon. 2018).

Since settlement through a more informal alternative dispute resolution than arbitration would be most consistent with Micronesian custom and practice and likely to lead to a lasting solution, the court will order that the parties attempt that before resorting to the mandatory arbitration. Pacific Int'l, Inc. v. FSM, 21 FSM R. 662, 664 (Pon. 2018).

When neither side has expressed any interest in proceeding to arbitration and both sides reject the idea, any right to arbitration, that either party had, has been waived. Basu v. Amor, 22 FSM R. 557, 562-63 (Pon. 2020).