IN THE SUPREME COURT OF GUAM

ASIA PACIFIC HOTEL GUAM, INC.,
Plaintiff-Appellant,

v.

DONGBU INSURANCE COMPANY, LTD.,
Defendant-Appellee.

GUAM ADVANCE ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

ASIA PACIFIC HOTEL GUAM, INC.,
Defendant-Appellant.

Supreme Court Case No. CVA10-021
Superior Court Case No. CV0194-06 & CV0303-06 (consolidated)

OPINION

Cite as: 2011 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted May 23, 2011
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

TORRES, J.:

[1] Asia Pacific Hotel Guam, Inc. ("Asia Pacific") appeals a trial court judgment rendered in favor of Dongbu Insurance Company, Ltd. ("Dongbu"), which found that the entire amount awarded to Dongbu in arbitration was justified[1]. For the reasons set forth below, we reverse the judgment of the trial court and remand the case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Asia Pacific is the owner of hotel property in Tumon commonly known as the Fiesta Resort. In 2004, Asia Pacific entered into a contract with Harmon Corporation ("Harmon") for the renovation of the hotel. Dongbu was engaged to issue a Performance and Payment Bond, naming Harmon as contractor and Asia Pacific as obligee. Harmon defaulted on its construction contract with Asia Pacific prior to the completion of the project. Following demand by Asia Pacific, Dongbu commenced work on the completion of the construction left unfinished by Harmon, pursuant to the Performance Bond. Disputes arose between Dongbu and Asia Pacific concerning multiple alleged deficiencies in Dongbu's work, culminating in the filing of this action by Asia Pacific in the trial court. Dongbu filed an answer, along with three counterclaims.

[1] Asia Pacific notes in their Plaintiff-Appellant's Opening Brief on Appeal ("Appellant's Br.") that the other named party in this case, Guam Advance Enterprises, Inc. ("Guam Advance") is a major sub-contractor of Dongbu, which did not participate in the post-arbitration litigation at the center of this case, and has not participated in this appeal. At one point, Guam Advance filed a mechanic's lien claim against Asia Pacific (CV0303-06); that claim was later assigned to Dongbu. Guam Advance did participate in the arbitration proceeding underlying this case, but did not participate in the subsequent arbitration enforcement litigation in the trial court. The mechanic's lien case was later consolidated with a separate civil claim between Asia Pacific and Dongbu, CV0194-06. *See* ER at 182 (Dec. and Order, Oct. 22, 2008).

[3] The parties voluntarily agreed to arbitrate a portion of their dispute. The parties also agreed, prior to arbitration, that if Dongbu prevailed on its *quantum meruit* counterclaim, then the amount of Dongbu's subrogation rights would be determined by the Superior Court of Guam. The arbitrators returned a partial award in the late summer of 2007, and a final award later that year. The Final Award disclaimed that the arbitrators had not resolved several issues which they felt were outside what was submitted for their consideration. Asia Pacific moved to have the Final Award vacated. Dongbu responded by filing a motion to confirm the arbitration award and for summary judgment on the issues which were left unresolved by the arbitrators. The trial court entered its Decision and Order granting the motion to confirm and denying the motion to vacate.

[4] After further arguments, the trial court entered a second Decision and Order granting a Motion for Final Judgment previously filed by Dongbu. Final Judgment was delivered by the trial court the same day. This appeal followed.

II. JURISDICTION

[5] This court has jurisdiction over appeals from final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-9 (2011)); 7 GCA §§ 3107 and 3108(a)(2005).

III. STANDARD OF REVIEW

[6] Legal rulings of a trial court confirming an arbitration award are reviewed *de novo*, while factual findings are reviewed under the clearly erroneous standard. *See Gov't of Guam v. Pacificare Health Ins. Co. of Micronesia, Inc.*, 2004 Guam 17 ¶ 16. However, this standard of review does not permit appellate courts to disregard the general policies applicable to trial court review of arbitration awards, which trend toward favoring arbitration for public policy reasons. *See Melwani v. Arnold,* 2010 Guam 7 ¶ 11 (quoting *Pacificare*, 2004 Guam 17 ¶ 16). A factual

finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that an error has been made. *Id.* (citing *Macris v. Swavely*, 2008 Guam 18 ¶ 9). The issue of whether a prejudgment interest award was liquidated is reviewed *de novo*. *See Tanaguchi-Ruth & Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 81.

IV. ANALYSIS

[7] Asia Pacific asserts numerous points of error on appeal including: (1) statutory grounds for vacation of the arbitration award, (2) non-statutory grounds for vacation of the arbitration award, (3) that the trial court erred in calculating the amount of money owed to Dongbu under the terms of the award, and (4) that the trial court erred in awarding pre-judgment interest to Dongbu. Appellant's Br. (Feb. 15, 2011). The parties also debate over what source of law governed the arbitration and the arbitration confirmation and/or vacation process in this case. We will address this underlying issue first.

A. Governing Law

[8] Asia Pacific argues that the arbitration (and our review of the trial court's decisions confirming the award) is governed by the Federal Arbitration Act ("FAA"), while Dongbu argues that the Guam International Arbitration Chapter ("GIAC") (7 GCA § 42101 *et seq.*) applies except to the extent pre-empted by the FAA. *See* Appellant's Br. at 10; Appellee's Br. at 12-13 Apr. 4, 2011). Prior to entering arbitration, the parties entered into the following understanding:

> IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys of record that the applicable law in connection with this arbitration shall be as follows:
>
> 1. The substantive law of Guam will be applied.

> 2. The procedural rules of Dispute Prevention and Resolution Inc. will govern all procedural issues to the extent such rules are not inconsistent with Guam law.
>
> 3. Any confirmation proceeding in connection with an Award will be held in the Courts of Guam and will be subject to Guam law.

ER at 62 (Agreement re: Applicable Law, May 23, 2007). This Agreement regarding "the applicable law in connection with this arbitration" and the law to apply in the subsequent arbitration enforcement litigation requires further examination. *Id.*

1. Law Governing Arbitration

a. GIAC

[9] The GIAC was promulgated in May 6, 2004 under Guam Public Law 27:81:3, 4, and became effective immediately. This was several months[2] prior to our decision in *Pacificare*, which is the Supreme Court of Guam case most relevant to our determination of this case; however all of the facts underlying the *Pacifcare* case took place prior to the enactment of the GIAC, rendering it inoperative in that case. *See Pacificare*, 2004 Guam 17 ¶¶ 2-10.

[10] The GIAC, which describes itself as being modeled after the United Nations Commission on International Trade Law Model Law, provides a comprehensive territorial system of laws governing commercial arbitration in Guam. *See* 7 GCA § 42101. The provisions of 7 GCA § 42101 which are relevant to this case are as follows:

> . . . .
>
> (d) The provisions of this Chapter 42-A apply to international commercial arbitration and domestic arbitration, subject to any agreement in force between Guam and any other State or States.

[2] *Pacificare*, 2004 Guam 17, was filed on September 14, 2004.

(e) The provisions of this Chapter 42-A, except Sections 42202, 42403, and 42702 apply only if the place of the international commercial arbitration is in Guam.

(f) An arbitration is international if:

(1) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(2) one of the following places is situated outside the State in which the parties have their places of business:

(A) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(B) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(C) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

(g) An arbitration is domestic if:

(1) The arbitration is not an international commercial arbitration as defined in paragraph (f) above; and

(2) the place of the arbitration is Guam.

(h) For the purposes of paragraph (f) of this Section:

(1) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and

(2) if a party does not have a place of business, reference is to be made to his or her habitual residence.

7 GCA § 42101 (2005). Several individual sections warrant more detailed discussion.

[11] Subsections (f) and (h) of 7 GCA § 42101, when read against the facts of this case, establish that this was an "international" arbitration. Portions of the record indicate that Dongbu

is a Korean corporation. *See* ER at 57 (Power of Attorney, June 21, 2004); *see also* ER at 1 (First Amended Compl., Dec. 5, 2006) (stating Dongbu is a foreign corporation); ER at 27 (Answer to First Amended Compl. (Dec. 26, 2006) (admitting relevant portion of complaint). Dongbu has a different "place of business" than Asia Pacific, a Guam corporation, which under 7 GCA § 42101(f)(1) renders the arbitration "international". ER at 1 (First Amended Compl.). Although Dongbu has identified a Guam corporation as its "attorney-in-fact" while doing business in Guam, there is no indication that Dongbu itself has any place of business in Guam that might implicate the language of subsection (h). ER at 57 (Power of Attorney) (designating Guam insurance company as attorney-in-fact for business purposes).

[12] Subsections (d) and (e) establish that the entire GIAC may apply to *both* "domestic" and "international" arbitrations which take place in Guam. This arbitration would not necessarily be exempted from the GIAC simply because Dongbu is a foreign company, as argued by Asia Pacific. *See* Appellant's Br. at 9-10. The United States Supreme Court has found that local laws concerning arbitration are not pre-empted by the FAA where, as here, the parties have agreed to apply local law. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 485 (1989). As the *Volt* court stated:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration-rules which are manifestly designed to encourage resort to the arbitral process-simply does not offend . . . any . . . policy embodied in the FAA.

Id. at 476. Here, the argument against FAA pre-emption would be even stronger, as Guam law was identified not solely in a choice-of-law provision in an underlying contract, but in a separate Agreement entered into and executed by the parties, a distinction which was not recognized by

Asia Pacific. *See* ER at 62 (Agreement re Applicable Law); *see also* Reply Br. at 1-2 (May 2, 2011). The FAA has previously been found to pre-empt local law in instances where local law has shown "hostility" to the federal policy that private parties should be able to resolve their disagreements through arbitration rather than solely through litigation. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995)). In contrast, where local laws such as the GIAC do not obstruct arbitration of disputes, but rather provide an alternative regime under which parties can conduct such arbitrations, pre-emption is disfavored. *See Volt*, 489 U.S. at 476-77. Parties who conduct arbitrations in Guam should presume, as a default, that the GIAC applies to their arbitrations.[3] This general holding does not, however, end our analysis of what specific laws are to be applied to the arbitration in this case.

b. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

[13] GIAC, in its entirety, may be "subject to any agreement in force between Guam and any other State or States." 7 GCA § 42101(d). This provision restricts the scope of Guam law in arbitrations between Guam parties (or more generally American parties) and foreign parties, where Guam law is inconsistent with international treaties and agreements entered into by *the federal government* and codified into federal law. This is because the federal government has been, since its formation, the single voice of all of the United States of America (including the territories) in the realm of foreign affairs. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 263

[3] This ruling is not inconsistent with the proposition established in *Pacificare* and elsewhere that the FAA *can* govern arbitrations conducted in Guam. *See Pacificare*, 2004 Guam 17 ¶¶ 11-12; *see also Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971). For example, in situations where the FAA is designated by the parties as the law to govern a specific arbitration, the FAA would clearly be applicable. *See, e.g., Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 54 (2003). However, in situations where (as here) "Guam law" is designated to control the proceedings, the GIAC serves as the default governing authority.

(1901) ("[I]n dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located.")

[14] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention") was opened for signature in 1958 and acceded to by the United States in 1970. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998). Chapter 2 of Title 9 of the United States Code, which codified the NY Convention in federal law, was passed later the same year. *Id.* By its terms, the Convention applies to "the . . . enforcement of . . . awards made in the territory of a State other than the State where the . . . enforcement of such awards are sought, and arising out of differences between persons . . . . It shall also apply to arbitral awards *not considered as domestic* awards in the State where their . . . enforcement are sought." *See* NY Convention art. I, ¶ 1 (emphasis added). Interpreting this provision, the federal courts have stated that "awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or *involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.*" *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2nd Cir. 1983) (emphasis added). Thus, the NY Convention would appear to apply to this case both (1) under Guam law defining "domestic" and "international" arbitrations, and (2) under federal case law interpreting the statutes codifying the NY Convention.

[15] However, even in cases where the NY Convention does apply to arbitration proceedings in Guam, it does not follow that the provisions of the GIAC are automatically "pre-empted" by those of the NY Convention. Instead, the provisions of the GIAC are only pre-empted where

they are inconsistent with the NY Convention. This is because provisions of the NY Convention, like those of the FAA, have only been found to pre-empt local law where that law is inconsistent with the goals of promoting international arbitration. *See Island Terr. of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1318-19 (2nd Cir. 1973) (finding that NY Convention did not pre-empt local law where local law did not interfere with the federal regulatory scheme) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).

[16] Neither party asserted that application of the NY Convention during the arbitration itself would in any way alter the proceedings. Therefore, we do not have to address that issue here. Indeed, there appears to be no dispute at all between the parties about the law governing the actual arbitration itself, but rather a dispute over what law should govern the *arbitration enforcement proceedings* in the trial court subsequent to the issuance of the arbitration award. The issue of which law governs the arbitration enforcement proceedings, including confirmation or vacation of arbitration awards, requires further analysis.

2. Law Governing Arbitration Enforcement Proceedings

[17] Having determined that GIAC governs the arbitration proceedings in this case, it seems commonsensical that GIAC would then govern the arbitration enforcement proceedings. However, the two sections of the GIAC which deal with the judicial enforcement of arbitration awards by the courts of Guam, 7 GCA §§ 42701 and 42702, contain a provision which is not found elsewhere in the GIAC. This provision, found in both sections, reads as follows: "This Section only applies where the place of the arbitration is Guam and neither the Federal Arbitration Act nor the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards apply." 7 GCA §§ 42701(a) and 42702(a) (2005). The court must interpret the language of this section to determine what law should govern judicial enforcement of arbitration

proceedings conducted in Guam. As discussed above, under one reading of the law, the NY Convention "applies" to this case by virtue of Dongbu's status as a foreign corporation. The FAA also "applies" in this case, as the definition of "commerce" found in the FAA includes "commerce . . . between any such Territory and any State or *foreign nation* . . . ." 9 U.S.C. § 1 (2006) (emphasis added). That the FAA *may* "apply" in this case is not a controversial proposition. *See Pacificare*, 2004 Guam 17 ¶¶ 11-12; *see also Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971).

[18] However, as we indicated previously, simply because the NY Convention or the FAA may apply to arbitration proceedings in Guam, it does not follow that the provisions of the GIAC are automatically "pre-empted or inapplicable". Any reading of 7 GCA § 42701(a) in a manner that creates a situation where the judicial enforcement proceedings for an arbitration award would be governed by a *different* regime than the one that governed the underlying arbitration would be an anomaly.[4] The underlying arbitration here is governed by the GIAC and we do not interpret 7 GCA § 42701(a) as requiring that arbitration enforcement proceedings be governed by either the FAA or the NY Convention simply because either of these laws *may* apply to the underlying arbitration. We are convinced that such a reading would (1) complicate the use of arbitration in Guam; (2) deter parties from seeking to arbitrate in Guam; and (3) run contrary to previous interpretations of similar laws in other jurisdictions. *See, e.g., Mount Diablo Med. Ctr. v. Health Net of California, Inc.*, 124 Cal. Rptr. 2d 607, 617 (Cal. Ct. App. 2002) ("[W]here the state arbitration provision is not inconsistent with the FAA policy of enforcing arbitration procedures chosen by the parties, choice-of-law clauses making no explicit reference to

[4] For instance, in this case while the arbitration performed was conducted under the GIAC, this reading of 7 GCA § 42701(a) would dictate that the arbitration enforcement proceedings conducted in the trial court would have been governed by either the FAA or the NY Convention.

arbitration, commonly have been interpreted to incorporate the state's law governing the enforcement of arbitration agreements.")[5]; *see also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2nd Cir. 1997) ("[M]any commentators and foreign courts have concluded that an action to set aside an award can be brought *only* under the domestic law of the arbitral forum, and can never be made under the Convention."). Therefore, the only logical reading of 7 GCA § 42701(a) is that the judicial enforcement provisions of GIAC will not apply to a particular arbitration where either the FAA or the NY Convention applies to the *underlying arbitration*, either by virtue of a specific choice-of-law clause or by some other device. Under this reading, a legal single regime will govern both an underlying arbitration and any subsequent judicial enforcement of an award generated by that underlying arbitration.

[19] We therefore consider the arbitration enforcement proceedings in this case as governed by the GIAC rather than by the FAA or by the NY Convention. Although this was the position taken by Dongbu and rejected by Asia Pacific, this distinction is of little practical significance to what we need to consider here, as both parties acknowledge the statutory grounds for vacation of an arbitration award found under the GIAC and the FAA are textually identical. *Compare* 7 GCA § 42701(b) *with* 9 U.S.C.A. § 10(a) (West 2009). In examining a similar case, we previously found in *Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8, that federal case law interpreting the FAA can be considered especially persuasive in situations where, as here, Guam law mirrors federal law. *See Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶¶ 5-8. Having determined that the GIAC governs the arbitration enforcement proceedings in this case, we turn to the statutory ground for vacation of the award suggested by Asia Pacific.

[5] In relation to this issue, we re-emphasize that in this case, the agreement between the parties stated in relevant part: "3. Any confirmation proceeding in connection with an Award will be held in the Courts of Guam and will be subject to Guam law." *See* ER at 62 (Agreement re Applicable Law).

B. Statutory grounds for vacation of the arbitration award

[20] The relevant provision of the GIAC reads as follows:

> In any of the following cases, the court may make an order vacating the award upon the application of any party to the arbitration:
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence that is pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

7 GCA § 42701(b)(2005). Both of Asia Pacific's main statutory arguments address the language of subsection 7 GCA § 42701(b)(4); Asia Pacific argues that a portion of the Partial Award was not sufficiently "final" or "definite" under GIAC standards to be confirmed, and that the arbitrators also exceeded their powers by rendering an impermissible "indefinite" or "non-final" award. *See* Appellant's Br. at 15-20.

1. No "final" or "definite" award

[21] Asia Pacific's argument that the award in this case was defective because it was not final or definite centers on the following section of the Partial Award issued by the arbitrators (hereinafter the "Conditional Award"):

> A portion of the amounts awarded to Asia Pacific is conditional . . . . The amounts awarded conditionally with respect to specific claims made by Asia Pacific . . . means that the specific amount awarded is the maximum payable to Asia Pacific 1) after Asia Pacific substantially completes so much of the work covered by that claim as it chooses, and 2) upon presentation of reasonable documentation confirming that the work has been substantially completed and

> paid for; and 3) if Asia Pacific does "1)" and "2)" above within one year from the date of this Arbitrator's Partial Award.

See Appellant's Br. at 15-16 (citing ER at 70 (Arbitrators' Partial Award). Asia Pacific correctly maintains that federal courts have interpreted a "final and definite" award, as required by 7 GCA § 42701(b)(4), to be an award which "resolve[s] all issues submitted to arbitration, and determine[s] each issue fully so that no further litigation is necessary to finalize the obligations of the parties." *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.*, 157 F.3d 174, 177 (2nd Cir. 1998) (citing *ConnTech Dev. Co. v. Univ. of Conn.*, 102 F.3d 677, 686 (2nd Cir. 1996)). The "final and definite" requirement supports the public policy rationale that one of arbitration's main functions should be to reduce future litigation expenses by the parties. *See, e.g., Mercury Oil Ref. Co. v. Oil Workers Int'l Union, CIO*, 187 F.2d 980, 982 (10th Cir. 1951), *disapproved on other grounds by Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957) ("Arbitration is designed to settle controversies . . . between parties by a method other than through the [courts]. Its purpose is to eliminate future disputes and litigation. To accomplish this, decisions . . . must be final and complete and leave no doubt as to the manner in which they are to be made effective."). Applying these standards, Asia Pacific highlights sections of the award's text which invite further litigation, including the terms "substantial" and "reasonable," along with the identification of a potential arbiter for any further disputes between the parties. *See* Appellant's Br. at 16-17. The trial court addressed a similar argument and rejected it as a basis for overturning the award. *See* ER at 169-71 (Dec. & Order, July 7, 2008).

[22] The Conditional Award is indeed impermissibly indefinite. The language of the Partial Award leaving open the issues of (1) whether or not Asia Pacific substantially completed the work at issue, and (2) if Asia Pacific provided reasonable documentation on the work, invited

further disputes. Although an arbitration panel may permissibly attempt to pass on future issues, it must do so in a manner where only "ministerial computations" which are "easily ascertainable" from the facts of the case remain. *See Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F. Supp. 2d 594, 640 (S.D.Tex. 2002) (citing *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992)). This requirement was not satisfied here. The trial court's discussion of the "final and definite" issue is unconvincing as it relies upon several cases which are either unreported or not factually similar to what is considered here. *See ER* at 169-70 (Dec. & Order) (citing *Int'l Union of Operating Eng'rs, Local No. 49 v. Indep. Sch. Dist. No. 742*, 1997 WL 527250 (Minn. App. 1997) (not reported); *Bruno v. United Steelworkers of Am.*, 1993 WL 2300 (6th Cir. 1993) (unpublished opinion); *Hodges v. Atl. Coast Line R.R. Co.*, 310 F.2d 438 (5th Cir. 1962) (ruling on propriety of award by administrative board, rather than by an arbitration panel)). The trial court's lengthy citation to the case of *Crofoot v. Blair Holdings Corp.*, 260 P.2d 156, 190-91 (1953), is similarly unpersuasive; Asia Pacific's argument is that the very terms of the Conditional Award ('substantial' and 'reasonable') were fatally defective, contrary to the "elections" at issue in the *Crofoot* case, which were "clear and definite".[6] *See* ER at 170 (Dec. & Order). The trial court's statement that "[t]he only arguably uncertain aspect of the conditional award . . . is based on a hypothetical that Asia Pacific does not pose, namely: what to do in the event that Asia Pacific decides to perform the work but that it is not 'substantially completed' or performed to Dongbu's satisfaction" sidesteps the issue of whether defects in the language of the award require it to be vacated, regardless of the subsequent actions

[6] The *Crofoot* case does not state the terms of the "elections" in its text, but described them as "set forth in detail in the award". *Crofoot*, 260 P.2d at 165. The Partial Award cannot be said to be as detailed, perhaps intentionally, as by the wishes of the parties it did not contain any "reasoned award". ER at 162-63 (Dec. & Order) (trial court's discussion of limitations of awards not accompanied by detailed reasoning).

of the parties. *Id.* at 170-71. It is apparent that the trial court failed to properly consider Asia Pacific's claim that the Conditional Award was defective under the standards of 7 GCA § 42701(b)(4). Accordingly, we next discuss the significance of the trial court's error.

2. The Arbitrators exceeded their powers or improperly executed them

[23] Relying upon the same language of 7 GCA § 42701(b)(4), Asia Pacific compares the arbitrator's error in ordering the conditional awards to several federal cases in which different errors committed by arbitrators have been grounds for vacation of awards. *See* Appellant's Br. at 17-20 (citing *Cat Charter L.L.C. v. Shurtenberger*, 691 F. Supp. 2d 1339 (S.D. Fla. 2010) (vacating for failure to supply reasoned award) and *Coast Trading Co., Inc. v. Pac. Molasses Co.*, 681 F.2d 1195 (9th Cir. 1982) (vacating for extending time to perform under contract rather than entering damages)). In this case, Asia Pacific alleges that a similar mistake was made by the arbitrators when they issued the Conditional Award. Although these cases are not directly on point, we find them sufficiently convincing to establish the proposition that at least the Conditional Award section of the arbitrators' award must be vacated under 7 GCA § 42701(b)(4). While it can persuasively be argued that the "finality" or "definiteness" issue of the Conditional Award could have been resolved by the lapse of time between the delivery of the Partial Award and the entry of judgment in the case,[7] the language of the Arbitration Agreement

[7] The Conditional Award reads in relevant part: "A portion of the amounts awarded to Asia Pacific is conditional . . . . The amounts awarded conditionally with respect to specific claims made by Asia Pacific...means that the specific amount awarded is the maximum payable to Asia Pacific 1) after Asia Pacific substantially completes so much of the work covered by that claim as it chooses, and 2) upon presentation of reasonable documentation confirming that the work has been substantially completed and paid for; and *3) if Asia Pacific does "1)" and "2)" above within one year from the date of this Arbitrator's Partial Award.*" ER at 70 (Arbitrators' Partial Award) (emphasis added). At oral argument, Dongbu compared the arbitrator's decision to leave this issue open for one year to a court's power to issue a continuing injunction, which allows a court to monitor a party's compliance with a previous order on an ongoing basis. *See* 7 GCA § 7107 (2005) (listing incidental powers of the courts of Guam). This argument fails because unlike a court, the power of an arbitrator to consider a case is entirely dependant on the language of the contract or clause detailing the scope of their power, rather than upon statutory authority. Here, the language of the Arbitration Agreement dictated that any award "shall be final;" the issuance of

between the parties in this case read in part that "[t]he award rendered by the Arbitrators shall be *final* . . . ." ER at 59, Ex. 3 (Submission to Arbitration) (emphasis added). Thus, the issuance of a portion of an award,[8] which at one point was "non-final," exceeded (or otherwise imperfectly executed) the powers conferred upon the arbitrators by the Arbitration Agreement. 7 GCA § 42701(b)(4).

3. Severability of Conditional Award

[24] Dongbu argues that even if the Conditional Award is improper, it can properly be severed and excised from the award granted by the arbitrators, and the remainder can be confirmed. *See* Appellee's Br. at 27. Closer scrutiny of Dongbu's arguments reveals that severance of the Conditional Award in this case is not appropriate.

[25] Dongbu is correct in contending that in cases where courts have considered arbitration awards which only partially resolved the issue presented for resolution, courts have generally held that "if an award is valid in part and invalid in part, and the valid portion [is] 'separable' from and 'non-dependent' on . . . the invalid portion, the valid portion . . . is confirmable, notwithstanding the absence of an award that finally disposes of all . . . claims . . . submitted to arbitration." *Puerto Rico Mar. Shipping Auth. v. Star Lines Ltd.*, 454 F. Supp. 368, 372 (S.D.N.Y., 1978) (citing *Moyer v. Van-Dye-Way Corp.*, 126 F.2d 339 (3rd Cir. 1942)). This doctrine is premised on recognition of the fact that the parameters of an arbitration award are dictated by the nature of the conflict submitted to the arbitrators by the parties; if all facts of the

an award that was not "final" at its inception was not within the scope of the Agreement. ER at 59, Ex. 3 (Submission to Arbitration).

[8] This defect could also have been avoided had the arbitrators resolved the issue of the Conditional Award before or in concert with the issuance of the Final Award. However, there is no portion of the Final Award that appears to touch upon this issue, leaving the Conditional Award section of the Partial Award unresolved.

dispute have already taken place, then a full, final and definite award is appropriate, *but* if the dispute is ongoing, then arbitrators are obligated only to return an award "as final as the nature of the thing [submitted]." *J.H. Leavenworth & Son v. Kimble*, 128 So. 354, 355 (Miss. 1930) (citation omitted).

[26] The power of severance described in *Puerto Rico Maritime Shipping Authority* springs from the language of 9 U.S.C. § 10(a)(4)[9], which disposes of Asia Pacific's argument that any such severance would be improper under the standards of 9 U.S.C. § 11.[10] *See Puerto Rico Mar. Shipping Auth.*, 454 F. Supp. at 371-72; *see also* Reply Br. at 7-9; 24-25. However, the bigger question is whether or not the Conditional Award rendered in this case is sufficiently "separable" and "non-dependent" in relation to the rest of the award to render application of this power appropriate. ER at 70 (Arbitrators' Partial Award).

[27] As the *Puerto Rico Maritime Shipping Authority* court noted, "there is little case law which illuminates the precise contours of the separability doctrine . . . ." *Puerto Rico Mar. Shipping Auth.*, 454 F. Supp. at 373. The majority of cases applying the doctrine do so with little analysis. *See, e.g., Swift Indus., Inc. v. Botany Indus., Inc.*, 325 F. Supp. 577, 579 (D.C. Pa. 1971); *see also Wolff & Munier, Inc. v. Diesel Const. Co.*, 340 N.Y.S.2d 455, 457 (N.Y. App. Div. 1973). At the trial court, Asia Pacific argued that severance would be inappropriate on two main grounds because; (1) the amount Dongbu may recover pursuant to its subrogation rights

[9] The basis for the severability discussion found in *Puerto Rico Maritime Shipping Authority* was former 9 U.S.C. § 10 (d), which is textually identical to current section 9 U.S.C. § 10(a)(4). *See* 454 F. Supp. at 371-72; 374-75.

[10] Title 9 U.S.C. § 11 permits courts to "modify" or "correct" arbitration awards upon application of a party where: (1) there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award, (2) the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted, or (3) the award is imperfect in matter of form not affecting the merits of the controversy. 9 U.S.C. § 11. There is no analogous section in the GIAC.

was dependent on how much work Asia Pacific completed on the "conditional project" and; (2) the attorney's fees and costs portions of the Final Award was based in part on the Partial Award which included the Conditional Award, thus making the various awards inter-related. *See* Appellant's Supplemental Excerpts of Record ("ASER") at 23-24, 33 (Asia Pacific's Reply to Mot. to Vacate Arbitration Award and Opp'n to Mot. to Confirm Arbitration Award, Dec. 21, 2007). Asia Pacific's argument concerning the allocation of attorney's fees and costs is unconvincing; courts have previously held in the same context that claims concerning attorney's fees are "analytically separable" from underlying claims concerning liability. *See Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562, 567 (D.C.N.Y. 1979). In contrast, Asia Pacific's claim concerning the subrogation amount appears to have merit.

[28] The amount to which Dongbu was entitled under subrogation was dependent upon how much of the conditional work Asia Pacific performed during the pendency of the Partial Award. *See* ER at 143 (Dongbu's Mot. to Confirm Award and for Summ. Judgment, Opp'n to Asia Pacific Mot. to Vacate Award (Dec. 4, 2007) ("Dongbu's total subrogation amount if the conditional work is not performed is $5,060,497.10 or $4,927,397.10 if the conditional work is performed.") Asia Pacific was entitled to reduce its obligation under the Partial Award by an amount corresponding to the value of the conditional work it completed. Other courts have found that the ability to similarly reduce or modify the overall award based on the resolution of the offending portion renders severance inappropriate. In the case of *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280 (2nd Cir. 1986), the Second Circuit upheld a trial court's confirmation of an admittedly "partial" arbitration award, stating that "[b]ecause the award in the instant case finally and conclusively disposed of a separate and independent claim and was

subject to *neither abatement nor set-off*, the district court did not err in confirming it." *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2nd Cir. 1986) (emphasis added). Similarly, courts have held that "awards [which] address *both liability and damages* and *no further litigation is necessary to finalize the obligations of the parties* . . . may be confirmed independent of [other claims]." *Zephyros Mar. Agencies, Inc. v. Mexicana De Cobre, S.A.*, 662 F. Supp. 892, 894 (S.D.N.Y. 1987) (emphases added); *see also Michaels v. Mariforum Shipping, S. A.*, 624 F.2d 411, 413-14 (2nd Cir. 1980).[11] Although Asia Pacific was liable for payment under the Conditional Award, the arbitrators did not determine the extent of that liability or, alternatively, the amount by which the liability could be set-off or abated by further performance on the part of Asia Pacific. *See* ER at 143 (Dongbu's Mot. to Confirm Award and for Summ. Judgment, Opp'n to Asia Pacific Mot. to Vacate Award). The overall award was susceptible to alteration based on resolution of the Conditional Award, and the awards cannot be considered "independent," rendering severance improper.

[29] As the court finds that the trial court's analysis on the issue of the Conditional award was impermissible under 7 GCA § 42701(b)(4), the order confirming the award and the judgment issued pursuant to that award cannot stand. *See* 7 GCA § 42701(b)(4). Although we acknowledge and continue to emphasize the strong policy favoring confirmation of proper arbitration awards, this particular award was not final and definite and the Conditional Award cannot be severed. *See Pacificare*, 2004 Guam 17 ¶ 16 (policy favoring confirmation of

[11] This general rule, that in order to be independently confirmable a claim must dispose of both liability and damages is qualified by other case law which states that if the parties agree to bifurcate an arbitration into two separate stages, with one contemplating liability and the other contemplating damages, the prior award may properly be confirmed. *See, e.g, Andrea Doreen, Ltd. v. Bldg. Material Local Union 282*, 250 F. Supp. 2d 107, 112 (E.D.N.Y. 2003). There is no indication that such a two-part arbitration was the intent of the parties here, rendering this exception inapplicable to this case.

arbitration awards). Accordingly, the entire award must be vacated. The court need not address Asia Pacific's further non-statutory arguments concerning vacation of the award.

C. Remand of the Case to the Arbitrators

[30] Asia Pacific asserts that the proper disposition of this case would be to remand the matter to the trial court for trial on the issue in dispute. *See* Appellant's Br. at 49 (citing *Coast Trading Co., Inc.* 681 F.2d 1195 (9th Cir. 1982)). The *Coast Trading Co.* opinion does not appear to directly support the proposition that this case should be remanded to the trial court (rather than to the panel) for determination; the only issue remanded to the trial court in that case was the issue of attorney's fees for the cost of pursuing the appeal. *See* 681 F.2d at 1198-99. The trial court touched on several related issues in its Decision and Order confirming the arbitration award, and ruled that a remand to the arbitration panel would be appropriate under applicable provisions of Guam law, before ultimately concluding that such a remand was not necessary in the case. *See* ER at 171 (Dec. & Order, July 7, 2008) (citing 7 GCA § 42701 (e)[12]); *see also* ER at 175 (Dec. & Order, July 7, 2008). We agree with the trial court that the proper course of action is a remand to the arbitration panel; even in the absence of a similar provision, federal courts interpreting the FAA have achieved similar results, remanding cases to arbitrators rather than to trial courts. *See United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 41 n.10 (1987) (citing *Amalgamated Food & Allied Workers Union, Local 56 v. Great A & P Tea Co.*, 415 F.2d 185 (3rd Cir. 1969)); *see also* ER at 172 (Dec. & Order, July 7, 2008) (citing numerous cases

[12] Title 7 GCA § 42701(e) reads as follows: "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside." 7 GCA § 42701(e) (2005).

establishing power of court to remand to arbitration panel).[13] The trial court's analysis on these issues is technically *dicta*, as the trial court phrased the discussion as superfluous to its holdings. *See Id.* at 174. However, this fact alone does not rob the analysis of all persuasive value. *See, e.g., People's Lumber Co. v. Gillard*, 90 P. 556 (Cal. Ct. App. 1907) (discussion of persuasive value of *dicta*); *Cnty. of Fresno v. Super. Ct. of Fresno Cnty. ex rel. O'Neal*, 146 Cal. Rptr. 880, 882 (Cal. Ct. App. 1978) ("*Dicta* are not to be ignored. *Dicta* may be highly persuasive . . . ."). We therefore remand the case not to the trial court, but to the arbitration panel in order to settle the single unresolved issue of the Conditional Award and to render a final and definite award, which may then be reviewed by the trial court in accordance with the agreement of the parties. *See, e.g., Cofinco, Inc. v. Bakrie & Bros., N.V.*, 395 F. Supp. 613, 616 (D.C.N.Y. 1975) (remanding to arbitration panel for determination of issues not previously properly heard).

D. Other Issues

[31] If and when the arbitration panel resolves the issue of the Conditional Award, the trial court will presumably next have an opportunity to re-calculate the amount of what is to be awarded to each party. The issue of a proper calculation was also brought to this court's attention on appeal. The court agrees with the characterization of the trial court's previous

[13] Asia Pacific apparently conceded the point that the trial court could permissibly remand the case to the arbitrators but argued that the power of the arbitrators to modify the remanded award would be limited under the doctrine of *functus officio*. *See* ER at 171, 172-73 (Dec. & Order, July 7, 2008). The trial court rejected Asia Pacific's *functus officio* argument. *Id.* This would appear to be correct in this case; as the trial court noted "[t]he policy which lies behind [the *functus officio* doctrine] is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a *final* decision which he has already rendered . . . ." *Id.* at 173 (emphasis added) (citing *Int'l Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997)). Further, "[i]t has been recognized in common law arbitration that an arbitrator can . . . complete an arbitration if the award is not complete . . . ." *Id.* As the main thrust of Asia Pacific's current argument is now that the arbitration award was impermissibly non-final (or incomplete), the doctrine is inapplicable here. The trial court also cited authorities describing how the doctrine has generally fallen into disfavor in recent years.

decision and order on the issue as unclear, and due for re-evaluation; any new award from the arbitrators may likely assist in clarifying the remaining issues.

[32] The final issue that needs to be addressed is the awarding of pre-judgment interest. Asia Pacific's argument that the award of pre-judgment interest was improper because the award was not certain or capable of calculation is primarily based on 20 GCA § 2110, which provides as follows:

> Every person who is entitled to recover *damages certain, or capable of being made certain by calculation*, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt.

20 GCA § 2110 (2005) (emphasis added). When damages are "certain" or "capable of being made certain by calculation" is not an issue that has not been addressed at any length by this court. *Id.* In the *Tanaguchi* case, a similar issue (the award of pre-judgment interest on a *quantum meruit* claim) was raised, but was ultimately not considered because it was improperly raised for the first time on appeal. *See Tanaguchi-Ruth + Assoc. v. MDI Guam Corp.*, 2005 Guam 7 ¶¶ 74-82. We elucidated that the issue of pre-judgment interest on a *quantum meruit* claim arguably was as an issue "purely . . . of law and [not dependant] on the factual record developed below . . . ." *Id.* at ¶ 81 (citing *Folgers Architects Ltd. v. Kerns*, 633 N.W.2d 114, 128 (Neb. 2001) (further citations omitted)). As Asia Pacific explains, 20 GCA § 2110 was adopted as an analog of California Civil Code § 3287 and, therefore, California decisions on the same statute can be considered persuasive. *See* Appellant's Br. at 59 (citing *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 15). The general rule under California law is that pre-judgment interest may accrue from the day a final arbitration award is returned by the arbitrators. *See, e.g., Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 40 Cal. Rptr. 2d 700, 713-14 (Cal. Ct. App. 1995)

(stating that an arbitration award results in a new and fixed liability). The *Britz* court states, perceptively, that a refusal to allow any pre-judgment interest in arbitration cases where there have been definite awards would amount to "[punishment] . . . for using arbitration instead of the court system to resolve [disputes]." *Id.* at 714. Such a decision would therefore cut against the general public policy arguments in favor of arbitration. However, simply because pre-judgment interest can generally be awarded in arbitration cases does not mean that it was or is appropriate to award pre-judgment interest in this case; the real question is whether or not the amounts Asia Pacific had to pay were "certain, or capable of being made certain by calculation" at any point before the trial court issued judgment. 20 GCA § 2110.

[33] The California case of *Wisper Corp. v. California Commerce Bank*, 57 Cal. Rptr. 2d 141 (Cal. Ct. App. 1996), provides an in-depth discussion of the "certainty" term at issue in this case. 57 Cal. Rptr. 2d 141, 146-50. As the *Wisper* court notes, "[Cal. Civ. Code § 3287] looks to the certainty of the damages suffered by the plaintiff, rather than to a defendant's ultimate liability, in determining whether prejudgment interest is mandated." *Id.* at 147. The *Wisper* court considered the applicability of pre-judgment interest in comparative negligence cases, eventually affirming a lower court's decision not to award any pre-judgment interest. *Id.* at 149.

[34] One of the Justices who considered the case, Associate Justice McDonald, filed a lengthy partial concurrence and partial dissent to the *Wisper* opinion, dissenting solely on the pre-judgment interest issue. *Id.* at 150-56. Justice McDonald rejected the reasoning of the majority, observing other cases where pre-judgment interest had been awarded, despite potential offsets or reductions in the amounts due to prevailing plaintiffs. *See id.* at 151-52 (citing *Hansen v. Covell*, 24 P.2d 772 (Cal. 1933); *Cal. Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785 (Cal. 1955); *Leaf v. Phil Rauch, Inc.*, 120 Cal. Rptr. 749 (Cal. Ct. App. 1975)). Justice McDonald stated that

"case law clearly supports an award of [Cal. Civ. Code § 3287] pre-judgment interest where a plaintiff's contractual claim is liquidated but the defendant asserts an unliquidated offset based on the plaintiff's defective performance of that contract." *Wisper*, 57 Cal. Rptr. 2d at 152; *see also E.L. White, Inc. v. City of Huntington Beach*, 187 Cal. Rptr. 879, 886-87 (Cal. Ct. App. 1982). The cases described by Justice McDonald are more analogous to the facts considered in this case than those contemplated by the majority in *Wisper*. In this case, it would have been proper to have ordered pre-judgment interest back to the date of a final award resolving the open issue of the Conditional Award. However, because a truly "final" award was never issued by the arbitrators, the trial court erred in ordering pre-judgment interest back to the date of the partial award.

V. CONCLUSION

[35] The GIAC governed the arbitration and judicial enforcement proceedings in this case. Pursuant to the provisions of the GIAC, the trial court erred in confirming the arbitrators' award, as the award was impermissibly indefinite or non-final under the standards of 7 GCA § 42701(b)(4). Accordingly, the judgment of the trial court is **REVERSED** and the matter is **REMANDED** to the Arbitration Panel for further proceedings consistent with this opinion.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Alexandro C. Castro**
ALEXANDRO C. CASTRO
Justice *Pro Tempore*

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice