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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

ASIA PACIFIC HOTEL GUAM, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

DONGBU INSURANCE CO., LTD,
Defendant-Appellee/Cross-Appellant.

GUAM ADVANCE ENTERPRISES, INC.,
Plaintiff-Appellee/Cross-Appellee,

v.

ASIA PACIFIC HOTEL GUAM, INC.,
Defendant-Appellant/Cross-Appellee.

Supreme Court Case No.: CVA14-005
Superior Court Case Nos.: CV0194-06 and CV0303-06

OPINION

Cite as: 2015 Guam 3

Appeal from the Superior Court of Guam
Argued and submitted on August 5, 2014
Hagåtña, Guam

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

TORRES, C.J.:

[1] This appeal presents a dispute over an arbitration award. We previously remanded this case for the arbitration panel to render a sufficiently final award after we found its conditional award in 2007 insufficient to satisfy 7 GCA § 42A701(b)(4)[1]. *Asia Pac. Hotel Guam, Inc. v. Dongbu Ins. Co., Ltd.* ("*Asia Pacific I*"), 2011 Guam 18 ¶¶ 21-22. Following remand, the arbitration panel issued a final award in 2013, and Plaintiff-Appellant/Cross-Appellee Asia Pacific Hotel Guam, Inc. ("Asia Pacific") again seeks vacatur of that award. The trial court denied Asia Pacific's motion to vacate and granted Defendant-Appellee/Cross-Appellant Dongbu Insurance Co., Ltd.'s ("Dongbu") motion for summary judgment confirming the arbitration award. For the reasons set forth below, including the requisite deference to arbitrators and arbitration panels, we affirm the trial court's denial of Asia Pacific's motion to vacate the arbitration award. Due to remaining disputes of material fact, however, we reverse the trial court's grant of summary judgment and remand. Finally, on Dongbu's cross-appeal, we affirm the trial court's award of prejudgment interest from the date of the final, post-remand 2013 award, rather than from the conditional non-final 2007 award.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] This case is before us for the second time. In 2011, we issued our first opinion, *Asia Pacific I*, 2011 Guam 18. The initial facts relevant to this appeal are amply recorded in

[1] Title 7 GCA, Chapter 42-A was enacted in 2004 and codified as 7 GCA, Chapter 42. In March 2014, the Compiler of Laws, pursuant to its authority granted by 1 GCA § 1606 renumbered the chapter and section numbers to adhere to its general codification scheme. All references to 7 GCA § 42701 will now reflect the renumbered section 42A701.

paragraphs two through four of that opinion. To recap, Asia Pacific owns the Fiesta Resort in Tumon and signed a contract with Harmon Corporation in 2004 to renovate the hotel. Dongbu issued a Performance and Payment Bond, with Harmon as contractor and Asia Pacific as obligee. Harmon defaulted on the contract, and Dongbu began working to complete the renovations pursuant to the Performance Bond. Disputes arose between Asia Pacific and Dongbu regarding Dongbu's work, and Asia Pacific brought suit in the trial court. The parties agreed to arbitrate this portion of their dispute, and the arbitration panel issued an award in 2007. The trial court granted Dongbu's motion to confirm and denied Asia Pacific's motion to vacate, and Asia Pacific appealed to this court.

[3] In *Asia Pacific I*, we held that the Guam International Arbitration Chapter ("GIAC") applied to the arbitration, that the arbitration panel's "conditional award" was insufficiently final to satisfy 7 GCA § 42701(b)(4), *Asia Pacific I*, 2011 Guam 18 ¶ 23, and that the non-final portion of the award could not be severed from the remainder of the arbitration panel's award. Though Asia Pacific had argued that the issue should be remanded to the Superior Court for trial, we remanded the case to the arbitration panel "to render a final and definite award, which may then be reviewed by the trial court in accordance with the agreement of the parties." *Id.* ¶ 30.

[4] We also addressed the same issue of prejudgment interest raised in this appeal and held that "the trial court erred in ordering pre-judgment interest back to the date of the partial award," because the arbitration panel never issued a "truly 'final' award." *Id.* ¶ 34.

[5] On remand, the arbitration panel calculated the total off-set for defective work as $798,604.00. It then calculated the "[n]et amount owed by Asia Pacific on the Project" as

$4,477,241.00.[2] Record on Appeal ("RA"), tab 115, Ex. C at 2 (Thomas C. Sterling Aff., Mar. 13, 2013).

[6] Dongbu filed a motion to confirm the award in the Superior Court and for summary judgment on the remaining issues which involve Dongbu's entitlement to be subrogated to the entire amount of the award, prejudgment interest and for foreclosure of the mechanic's liens securing the amount owed. Asia Pacific filed a motion to vacate the arbitration award. Asia Pacific essentially advanced the same arguments that it had raised previously seeking to vacate the 2007 award—namely, that the award resulted from a manifest disregard of the law, violated public policy, and did not draw its essence from the parties' contract and bond. Since this court found the 2007 award to be impermissibly indefinite or non-final under the standards of 7 GCA § 42A701(b)(4), we had not previously addressed Asia Pacific's further non-statutory arguments concerning vacation of the award.

[7] After briefs and oral arguments, the trial court issued its decision and order confirming the 2013 arbitration award. The trial court initially discussed its limited role in reviewing arbitration awards. The court then addressed Asia Pacific's manifest disregard of law argument, stated the proper standard for vacatur on this ground enunciated in *Government of Guam v. Pacificare Health Insurance Co. of Micronesia, Inc.*, 2004 Guam 17 ¶ 48, and held that it could not be concluded that the arbitration panel manifestly disregarded the law.

[8] The court then addressed Asia Pacific's argument that the award failed to draw its essence from the parties' contracts. The court correctly observed that this court has not yet

[2] The arbitration panel also awarded $885,000.00 worth of attoneys' fees to Dongbu. This amount was later lowered to $865,000.00. Neither party challenges the $865,000.00 figure. However, Dongbu seeks prejudgment interest on the entire award, including attorneys' fees, from the date of the initial 2007 arbitration awards.

adopted this ground for vacatur. Next, it set out the proper standard used by those jurisdictions that allow such grounds for vacatur and found that the standard was not satisfied.

[9] The court then turned to Asia Pacific's argument that a portion of the award violated public policy. Again, the court explained that this court has not adopted such a ground for vacatur but went on to set out the standard adopted by the United States Supreme Court in *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29, 42 (1987). Asia Pacific had argued that a portion of the award sought to remedy what Asia Pacific deemed was a bribe for securing the construction contract. The trial court did not address whether such an award would violated public policy, instead resting its conclusion on the apparent determination by the arbitration panel that the payment in question had not been a bribe. In sum, the court found that "the non-statutory grounds [for vacatur] do not support the vacation of the arbitration award." RA, tab 133 at 16 (Dec. & Order, Oct. 15, 2013).

[10] The court granted Dongbu's motion to confirm the arbitration award. On summary judgment review of the remaining issues, the court awarded prejudgment interest to Dongbu from the date of the post-remand arbitration award, held that Dongbu was subrogated to the entire $4,447,241.00 awarded by the arbitration panel, and ordered foreclosure on the mechanic's liens.

[11] Final judgment was entered, Asia Pacific filed a timely notice of appeal, and Dongbu filed a timely notice of cross-appeal.

II. JURISDICTION

[12] We have jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-234 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[13] "When reviewing the decision of a lower court confirming an arbitration award, questions of law are reviewed de novo while questions of fact are reviewed under the clearly erroneous standard." *Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 9. However, though stated in the same language used to describe review of a trial court's decision in any context, review in an arbitration context is "extraordinarily narrow." *Pacificare*, 2004 Guam 17 ¶ 16.

[14] "The issue of whether a prejudgment interest award was liquidated is reviewed *de novo*." *Asia Pacific I*, 2011 Guam 18 ¶ 6 (citing *Tanaguchi-Ruth & Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 81).

IV. ANALYSIS

[15] Courts are loath to interfere with arbitral decisions, because to do so would diminish the efficacy of arbitration as an efficient, economical, and informal form of alternative dispute resolution. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). Accordingly, "in order to obtain [vacatur of an arbitration award], [appellants] must clear a high hurdle. It is not enough for [appellants] to show that the panel committed an error—or even a serious error." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010).[3] Rather, "[it is] only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Id.* (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Though it was presented in a different context, our most recent case on

[3] As we recognized in *Asia Pacific I*, the textual grounds for vacatur under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, are identical to those under the GIAC, 7 GCA § 42A701, and we consider federal case law interpreting the FAA "especially persuasive." *Asia Pacific I*, 2011 Guam 18 ¶ 19.

arbitration summed up the deferential standard of review by stating that "courts may not review the merits of the controversy, the validity of the arbitrator's reasoning, or the correctness of the arbitration award." *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7 ¶ 58 (holding that neither sovereign immunity nor Government Claims Act barred arbitration).

[16] With these foundational reviewing lenses established, we will address Asia Pacific's three main arguments for vacatur and its argument for recalculation of the trial court's summary judgment award before turning to Dongbu's cross-appeal for prejudgment interest.

A. Whether the Final Arbitration Award should be Vacated Based on Manifest Disregard of Law

[17] In light of the United States Supreme Court's recent focus on arbitration and the trend of the opinions in arbitration cases, there are two issues to be analyzed before turning to the specific facts of this case. First, we must query whether a non-statutory "manifest disregard of the law" ground still exists to vacate arbitration awards. *See, e.g., Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414-15 (9th Cir. 2011); *see also Stolt-Nielsen*, 559 U.S. at 672 n.3 ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."). Second, to the extent manifest disregard remains a viable ground with which to seek vacation, we must determine the showing that Asia Pacific must make to have the award vacated.

1. Whether Manifest Disregard of Law is Still Available as a Ground for Vacating an Arbitration Award

[18] We first adopted the "manifest disregard of law" ground for vacatur in *Pacificare*, 2004 Guam 17. We closely examined the case law surrounding this ground and noted that "[f]ederal courts have not ruled consistently on whether an arbitration award may be vacated for reasons

other than those set forth under section 10 of the [Federal Arbitration Act ("FAA")]." *Pacificare*, 2004 Guam 17 ¶ 19. However, our review of case law and treatises convinced us to "adopt [the manifest disregard] standard as a valid basis for vacating an arbitration award . . . ." *Id.* ¶ 48. In doing so, we connected the standard with a statutory basis—section 10(a)(3) of the FAA which provides, *inter alia*, for vacatur "where the arbitrators were guilty of . . . misbehavior by which the rights of any party have been prejudiced." *Id.* (quoting 9 U.S.C. § 10(a)(3)).

[19] Since our opinion in *Pacificare*, the United States Supreme Court has issued a string of important arbitration opinions, as it has taken a renewed interest in arbitration. Asia Pacific cites to *Hall Street* as potentially limiting vacation grounds to those set out in the FAA. Appellant's Br. at 10-11 (Apr. 8, 2014). In *Hall Street*, the Supreme Court addressed the question of "whether statutory grounds [found in 9 U.S.C. §§ 10, 11] for prompt vacatur and modification may be supplemented by contract." 552 U.S. at 578. The Court first noted a circuit split on "the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award[.]" *Id.* at 583. It then addressed the petitioner's contention that *Wilko v. Swan*, 346 U.S. 427 (1953), provided for "expandable judicial review authority" of arbitration awards, and in particular that *Wilko* established an independent "manifest disregard of the law" ground for vacatur of an arbitration award. *Id.* at 584-85. The Court was wholly unconvinced by this argument, stating that "this is too much for *Wilko* to bear," and that the manifest disregard of law language was perhaps "meant to name a new ground for review, but maybe it merely referred to the [section] 10 grounds collectively, rather than adding to them." *Id.* at 585. Alternatively, the Court stated that manifest disregard "may have been shorthand for [section] 10(a)(3) or [section] 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'" *Id.*

[20] The Court then turned to the statutory language of the FAA and applied canons of statutory interpretation to determine that "the text compels a reading of the [sections] 10 and 11 categories as exclusive." *Id.* at 586. However, the Court left open a potential avenue for judicial review beyond the FAA by stating that parties "may contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable." *Id.* at 590.

[21] After *Hall Street*, the circuits have split on whether non-statutory grounds for vacation of awards, including manifest disregard of law, are still cognizable. *Compare Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding "that an arbitral award may be vacated only for the reasons enumerated in the FAA"), *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323-24 (11th Cir. 2010) (same), *CitiGroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) ("[M]anifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA."), *and Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) ("'[M]anifest disregard of the law' is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act."), *with Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) ("[A]n arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under [section] 10(a)(4) of the Federal Arbitration Act."), *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) ("manifest disregard continues to exist either 'as an independent ground for review or as a judicial gloss'" on statutorily enumerated grounds for vacatur), *and Coffee Beanery, LTD v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008) (unpublished).[4]

[4] The First, Third, Tenth, and D.C. Circuits have addressed the issue, but have not been forced to decide it. *See Bangor Gas Co., LLC v. H.Q. Energy Servs. Inc.*, 695 F.3d 181, 187 (1st Cir. 2012); *Bellantuono v. ICAP Sec. USA, LLC*, 557 F. App'x 168, 173-74 (3d Cir. 2014) ("This Court has not yet ruled on the issue. . . . We need not do

[22] Indeed, the Supreme Court has acknowledged the uncertainty by refusing to decide whether "manifest disregard of the law" survives *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." *Stolt-Nielsen*, 559 U.S. at 672 n.3. The weight and trend of authority seems to support the end of "manifest disregard" as an independent ground for vacation,[5] and its continued vitality, if any, limited to a "gloss" on 9 U.S.C. § 10(a)(4)'s grounds for vacation. We have held "manifest disregard . . . [falls] within the rubric of a statutory ground, section 10(a)(3)," which prohibits "any . . . misbehavior by which the rights of any party have been prejudiced." *Pacificare*, 2004 Guam 17 ¶ 48. Accordingly, we reiterate that manifest disregard is not purely non-statutory—it is an argument for vacatur founded in 7 GCA § 42A701(b)(3), the GIAC analog of 9 U.S.C. § 10(a)(3).

2. Requirements/Standard for Vacating for Manifest Disregard of Law

[23] In *Pacificare*, we established the relevant standard for evaluating manifest disregard of law claims. We stated that "manifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Pacificare*, 2004 Guam 17 ¶ 47 (citation and internal quotation marks omitted). To succeed on a manifest disregard of law claim, a party seeking vacation must show that "the error [was] obvious and capable of being readily and instantly perceived by the average person qualified to

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so here."); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 620 (10th Cir. 2011) (unpublished); *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App'x 4 (per curiam) (unpublished).

[5] This trend also includes some state courts. *See, e.g.*, *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 380-81 (Ala. 2009); *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725, 736 (Me. 2011) (interpreting Maine's state arbitration statute, which is substantially similar to the FAA); *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663, 666-67 (Ga. 2010). While many of these cases involve facts similar to *Hall Street*, in which parties attempted to expand judicial review of their arbitration decision through contract, each opinion also contains unequivocal language holding that the statutory grounds in their state's arbitration law are the exclusive grounds for vacatur.

serve as an arbitrator," that the law disregarded was "well defined, explicit, and clearly applicable," and that the arbitrator chose to ignore this well-defined law. *Id.* ¶ 46 (quoting *Sumitomo Constr. Co.*, 1997 Guam 8 ¶ 19.). We have made clear that judicial review under this standard is "extremely limited" and that the showing required is a "stringent test." *Id.* ¶¶ 46, 48.

3. Application of Manifest Disregard Standard to this Case

[24] The Superior Court applied the correct standard from our *Pacificare* decision. *See* RA, tab 133 at 6-9 (Dec. & Order). In its decision and order, the Superior Court determined that none of the requirements for vacating for manifest disregard of law had been met. *Id.* at 7-8. The court was "not convinced that expert testimony of a reasonable value was required in this case, as case law authority demonstrates that proof of reasonable value can be proven by other means." *Id.* at 8 (citing *Najjar Indus. v. City of New York*, 87 A.2d 329, 331-32 (N.Y. App. Div. 1982)). Thus, the requirement that the law allegedly disregarded be well defined, explicit, and clearly applicable was not met. Next, the court stated that it was not presented with evidence sufficient to establish either requirement that the arbitrators understood the legal principle or that they consciously disregarded the principle. *Id.*

[25] Asia Pacific cites *Taniguchi Ruth & Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 25, for the proposition that "Guam law . . . requires objective evidence of the market value of the services provided in a construction *quantum meruit* case." Appellant's Br. at 16. Dongbu counters that there was ample testimony regarding the work performed and the costs of that work. Appellee's Br. at 16-17 (May 22, 2014). Furthermore, Dongbu asserts that Asia Pacific is incorrect that Guam law requires expert testimony that the construction costs on a *quantum meruit* claim are reasonable. *Id.* at 18. In support of this second contention, Dongbu cites the *Najjar* case from the trial court's decision and order to claim that "[t]he customary method of

calculating reasonable value for *quantum meruit* in construction contract cases, both on completed contracts and contracts terminated before completion, is the actual job costs plus an allowance for overhead and profit minus amounts paid." *Id.* Dongbu asserts that it "presented evidence as to the actual job costs incurred and what in the view of its expert would be appropriate mark ups for overhead and profit." *Id.* As evidence of this fact, and to show that the arbitration panel understood that the award must represent reasonable value, Dongbu cites to the panel's award stating that it was the "fair and reasonable value of the work performed." *Id.* at 19.

[26] Asia Pacific is correct that only the reasonable value of services provided may be awarded on a *quantum meruit* claim. However, its argument requires us to recognize an additional rule—that the only way to establish a reasonable value is through expert testimony regarding the reasonableness of the costs incurred in providing the services. On this point, the trial court was correct that there is not a well-defined, explicit, and clearly applicable requirement of such expert testimony in Guam law. Asia Pacific relies solely on *Taniguchi* to support its claim; however, that case does not establish such a requirement. As the trial court stated, *Taniguchi* "stands for . . . the fact that measure of *quantum meruit* is the value of the services in the labor market where the service was sought," and "does not dictate how the value should be measured." RA, tab 133 at 8 (Dec. & Order). Though all states limit recovery on a *quantum meruit* claim to the reasonable value, some explicitly do not require expert testimony regarding the fact of reasonableness. *See, e.g.*, *Process Eng'rs & Constructors, Inc. v. DiGregorio, Inc.*, 93 A.3d 1047, 1056 (R.I. 2014) (citing construction law treatises to hold that "a plaintiff is not required to put forth expert testimony on the reasonableness of the value of the services during his or her *prima facie* case. If a defendant wishes to contest the fairness or

reasonableness of the value asserted . . . the burden shifts to the defendant to prove that the charges are unreasonable.").

[27] This Rhode Island case, as well as the general evidentiary informality of arbitration proceedings, *see, e.g.*, *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816-17 (D.C. Cir. 2007), also dispenses with Asia Pacific's "due process" argument. *See* Appellant's Br. at 20. Asia Pacific argues that with no expert witness testifying to reasonableness, it was left with no one to cross-examine and "nothing to rebut." *Id.* Accordingly, Asia Pacific claims that all it could have done "would be to demand a tentative ruling, and the right to cross-examine the arbitrators, and then put on rebuttal witnesses." *Id.* This is not true, especially in the arbitration context. Dongbu had apparently presented substantial evidence of its actual costs; Asia Pacific was well within its rights to present evidence and arguments that those costs were unreasonable in this context and market. The dispute surrounded reasonableness—all parties and the arbitration panel knew this—and there is nothing in Guam law that prevents an opponent from challenging the reasonableness of costs alleged in a *quantum meruit* dispute or requires that such a challenge be limited to a certain point in proceedings.

[28] In short, *Taniguchi* does not establish a well-defined, explicit, and clearly applicable requirement that reasonable value may be proved only by expert testimony attesting to the reasonableness of expenditures. Any *quantum meruit* award must be based on the reasonable value of the services, but that reasonableness may be found in a variety of ways. Thus, Asia Pacific's manifest disregard of law argument fails.

B. Whether the Arbitration Award should be Vacated as Violating the Public Policy of Guam

1. Whether Violation of Public Policy Remains Available Grounds for Vacating an Arbitration Award

[29] As with the manifest disregard of law ground, the public policy ground for vacating an arbitration award is non-statutory and of uncertain validity. *See, e.g.*, *Frazier*, 604 F.3d at 1322 ("Although our prior precedents have recognized these three non-statutory grounds for vacatur [including manifest disregard of law and violation of public policy], *Hall Street* casts serious doubt on their legitimacy." (citation omitted)). Much of the discussion surrounding *Hall Street* applies with equal force on this issue, and the circuits appear to be split in the same manner. There are at least two additional reasons why this court is wary of recognizing such a ground for vacation. First, we did not adopt this ground even prior to *Hall Street*. *See Pacificare*, 2004 Guam 17 ¶ 18 (discussing, without adopting, the public policy ground amongst other non-statutory grounds for vacatur). Second, outside of the collective bargaining context, it is not a well-established ground for vacating an arbitration award in any jurisdiction.[6] Rather than decide to adopt or deny this ground, we will follow the approach of the First, Third, Tenth, and D.C. Circuits and apply the standard to see if it is met, and, if not, we will reserve decision on whether the public policy ground for vacatur is valid in our jurisdiction. *See* note 3 above.

2. Requirements/Standard for Vacating for Violation of Public Policy

[30] In the rare circumstances in which the public policy ground has been argued, the Supreme Court has required that the public policy allegedly violated must be "well defined and dominant" and must be derived from "laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).

[6] Westlaw searches for citations to *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987)—the seminal public policy case—reveal no valid case law supporting a public policy ground for vacatur outside of the labor and employment context. Asia Pacific cites *Kadlec v. Kadlec*, 679 N.W.2d 914 (Wis. Ct. App. 2004), for a non-employment application. *See* Appellent's Br. at 27. There may be other non-employment applications in state cases that do not cite to *Misco*, but at the federal level—in FAA cases—the violation of public policy ground for vacatur is very rare.

Moreover, the award itself, rather than actions that lead to the award, must violate some public policy. *See, e.g.*, *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62-63 (2000) ("[T]he question to be answered is not whether Smith's drug use itself violates public policy, but whether the [arbitration award] to reinstate him does so."). The Court has stressed that this ground does not entail "a broad judicial power to set aside arbitration awards as against public policy." *Misco*, 484 U.S. at 43. When examining a claim for violation of public policy, we "[take] the facts as found by the arbitrator, but [review] his conclusions de novo." *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 249 (5th Cir. 1993) (quoting and citing Seventh and Eighth Circuit cases); *see also Misco*, 484 U.S. at 45 ("[T]he parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them . . . . If additional facts were to be found, the arbitrator should find them . . . .").

3. Application of Public Policy Grounds to this Case

[31] Asia Pacific argues that the arbitration panel's award of $255,000.00 to Dongbu violated Guam public policy and must be vacated. *See* Appellant's Br. 21-30. This argument is founded on its claim that the $255,000.00 amount constituted a bribe from Harmon Corporation to Asia Pacific's project manager Oley Chung. *See id.* at 21-23. Asia Pacific then cites 9 GCA § 46.45 to establish the necessary "well defined and dominant" public policy for purposes of vacating an arbitration award. *Id.* at 23.

[32] In addition to these arguments on public policy, Asia Pacific argues that Dongbu did not request the amount, because it had no standing to; thus, the arbitration panel's award of this amount to Dongbu was beyond the panel's authority and should be vacated. *Id.* at 25 (citing *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979)). Asia Pacific also argues "since Dongbu did not pay the $255,000[.00], the award of the $255,000.00

to it was purely a windfall." *Id.* at 30. Viewed as a windfall, Asia Pacific asserts that the award must be vacated, because "[a]n arbitration award that exceeds the monetary loss which an injured party suffered is considered to be punitive, and must be set aside if the parties did not submit a punitive damage claim to the arbitrators." *Id.*

[33] Dongbu counters that this court has not recognized public policy as a ground for vacating an award, that it is unclear that such a ground applies outside the collective bargaining context, and that any such ground has been applied very narrowly. *See* Appellee's Br. at 20-22. Dongbu does not strongly contest Asia Pacific's assertion that there is a well-defined public policy against bribery. *Id.* at 22. Instead, Dongbu states, "Even to the extent this Court may feel that there is a dominant public policy in preventing bribery, no bribery was clearly shown in this case." *Id.* Dongbu elaborates by asserting that the award does not "reflect a finding of bribery," and that the trial court "found there was insufficient evidence in the record to determine that bribery had occurred . . . and that the arbitrators did not find the payment to be a bribe." *Id.*

[34] In its reply brief, Asia Pacific reiterates its arguments regarding public policy. Reply Br. at 12-13 (June 19, 2014). Asia Pacific also correctly notes that Dongbu's brief did not address Asia Pacific's arguments that (1) Dongbu has no standing to recover the amount, because it did not pay it, and (2) the award was a windfall that should be considered punitive and vacated because punitive claims must be submitted to the arbitrators. *Id.* at 13.

[35] Asia Pacific presents a strong case that Guam law against bribery would be a sufficient foundation for a public policy ground to vacate. The trouble with its argument is that we have never recognized such a ground and courts in other jurisdictions do not appear to have applied the ground outside of the collective bargaining context in which it originated. Additionally, the award itself—here, forcing a recipient to pay back an alleged bribe—must run contrary to an

explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests. *See, e.g.*, *E. Associated Coal*, 531 U.S. at 62-63. Most importantly, Asia Pacific's argument requires that the payment be deemed a bribe. If we were reviewing this factual issue for the first time and with a full record, we may have found that the payment was a bribe. However, that is not the posture of this case. Instead, we are reviewing an arbitration panel's decision after it was presented with voluminous evidence on this and other issues. Arguments over this payment were presented to the arbitration panel. RA, tab 70 at 8-9 (Dec. & Order, July 7, 2008). After reviewing the evidence and hearing the arguments, the arbitration panel apparently did not consider the payment a bribe—we have been presented with no evidence that the arbitration panel deemed this payment a bribe but nonetheless decided to award the amount "according to their own brand of industrial justice." Appellant's Br. at 29.

[36] Asia Pacific argues that we are to review such public policy claims *de novo* giving "[n]o deference . . . to an arbitration award." *Id.* at 28. This is not precisely accurate as a description of our review; instead, a direct quote from Asia Pacific's leading case provides, "In this limited review we accept the facts found by the arbitration panel, but review its conclusions *de novo* to determine if they violate public policy." *Painewebber, Inc. v. Agron*, 49 F.3d 347, 350 (8th Cir. 1995). Since the existence of a bribe is a question of fact, *see, e.g.*, *Neely v. United States*, 274 F.2d 389, 392 (9th Cir. 1960), we will not exercise *de novo* review of the factual question surrounding the $255,000.00 payment.

[37] Asia Pacific makes two additional (and apparently uncontested) arguments in support of vacatur. Asia Pacific argues that Dongbu did not have standing to pursue this payment, because Harmon Corporation, not Dongbu, paid the commission to Asia Pacific's Project Manager. *See*

Appellant's Br. at 25 n.9. However, the case cited by Asia Pacific—*Totem Marine Tug & Barge*—is materially distinguishable from this case. *Totem Marine Tug & Barge* is clear that "[a]n arbitration proceeding is much less formal than a trial in court" and that "arbitrator[s] need not follow all the [evidentiary] niceties observed by the federal courts." 607 F.2d at 651 (quoting *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 923 (2d Cir. 1974)). Asia Pacific relies on both the holding of the case and language like "arbitrators are restricted to those issues submitted." *Id.* at 651. In *Totem Marine Tug & Barge*, the parties both agreed and argued in briefs that a particular issue was not before the arbitration panel. *Id.* This agreement led one party to prepare its case based on the issues before the panel and not on the one its opponent had conceded was not at issue. *Id.* The court then found that the arbitration panel's award on the issue constituted "dispens[ing] their own brand of industrial justice" and vacated the award. *Id.* at 652 (internal quotation marks omitted).

[38] The issue of the $255,000.00 dollar payment was brought to the attention of the arbitration panel before it issued its award. *See* RA, tab 57, Ex. 8 at 87 (Mem. Br. in Supp. of Asia Pacific's Mot. to Vacate Arbitration Award, Nov. 5, 2007) (a motion in limine on the subject of this payment was filed with the arbitration panel). Thus, because both parties were aware of the $255,000.00 payment and put the matter in front of the panel by way of motions, there are no due process fair hearing concerns as were present in *Totem Marine Tug & Barge*. *See, e.g.*, 607 F.2d at 651 (arbitrators "need only grant the parties a fundamentally fair hearing," and "[a]ll parties in an arbitration proceeding are entitled to notice and an opportunity to be heard.").

[39] Asia Pacific's other argument that the award is punitive is similarly unpersuasive. The cases to which Asia Pacific cites either did not find an award punitive, *see Desert Palace, Inc. v.*

Local Joint Exec. Bd., 679 F.2d 789, 793-94 (9th Cir. 1982), were issued in a collective bargaining context in which the award bore "no causal relationship to the actual loss of the [laid off] employees," *Commc'ns Workers of Am. v. GTEL Corp.*, 59 F.3d 174, at *4 (9th Cir. 1995) (unpublished), or began its inquiry "with the plain language of the opinion and award," *City of Chicago v. Bureau of Eng'g Laborers' Local 1092*, 707 N.E.2d 257, 262 (Ill. App. Ct. 1999). The $255,000.00 was a loss for Harmon Corporation, and "Dongbu was pursuing claims on [Harmon's] behalf by operation of the bonds Dongbu issued to guarantee Harmon's performance." *See* RA, tab 115, Ex. B at 10 (Sterling Aff.). It is clear from the arbitration panel's award that the $255,000.00 was not intended to be punitive, but was intended to compensate for Harmon's loss.[7]

C. Whether the Award Violated the Essence of the Construction Contract or the Performance and Payment Bond

[40] Like the other non-statutory grounds, whether violating the essence of the contract constitutes grounds for vacatur is uncertain following *Hall Street*. *See, e.g.*, *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 n.5 (4th Cir. 2010). Furthermore, even before *Hall Street*, we expressly "[left] open the question of whether the essence test is a proper ground for vacating an award." *Pacificare*, 2004 Guam 17 ¶ 52. In addition to the uncertainty about its continued vitality, this standard is perhaps the most difficult to satisfy of the three non-statutory grounds argued here. The United States Supreme Court has made clear that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his

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[7] Asia Pacific represents that Harmon's bankruptcy trustee made a claim against Asia Pacific's Project Manager for the $255,000.00. *See* Appellant's Br. at 25 n.9. It is not clear that the arbitration panel was provided with this information; Asia Pacific only states that it raised the trustee's claim in the trial court. *See id.*

decision." *Misco*, 484 U.S. at 38. Indeed, "[a]n award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to 'draw its essence' [from the contract]." *E.I. DuPont de Nemours & Co. v. Grasselli Emps. Indep. Ass'n*, 790 F.2d 611, 614 (7th Cir. 1986), *abrogated on other grounds by Misco*, 484 U.S. at 36. This deferential review exists because the parties have bargained for the arbitration panel's construction by agreeing to arbitrate their dispute. *See, e.g.*, *Oxford Health Plans*, 133 S. Ct. at 2068.

[41] Asia Pacific argues that the arbitration award violated the essence of the parties' contract as well as the Performance Bond issued by Dongbu. These arguments will be addressed in turn.

1. Whether the Arbitration Award Violated the Essence of the Parties' Construction Contract

[42] Asia Pacific argues that the $250,000.00 award violates the essence of the construction contract, because the contract included a clause establishing:

> The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide employee's established commercial or selling agencies maintained by the Contractor for purposes of securing business.

Appellant's Br. at 30-31; RA, tab 115, Ex. B at 10 (Sterling Aff.). Violation of this provision allowed the Owner "to annul the contract without liability or, in its discretion, to deduct from the Contract price . . . or otherwise recover, the full amount of such commission." RA, tab 57, Ex. 11 at 118 (Mem. Br. in Supp. of Asia Pacific's Mot. to Vacate Arbitration Award). Asia Pacific argues that these contract terms are not susceptible to any interpretation that allows the $255,000.00 award to Dongbu. Appellant's Br. at 34.

[43] Dongbu did not respond to this argument in its brief. *See generally* Appellee's Br. at 21-29. Asia Pacific notes this lack of response in its reply brief, and reiterates its arguments. Reply Br. at 13-14.

[44] As discussed above, this argument requires us to reach a conflicting factual finding regarding the $255,000.00 payment than what the arbitration panel reached. The argument presented here was also presented to the arbitration panel before it reached its decision. RA, tab 57, Ex. 8 at 94-95 (Mem. Br. in Supp. of Asia Pacific's Mot. to Vacate Arbitration Award). In addressing the arbitration panel's interpretation, the absence of a reasoned arbitration award makes the inquiry much more difficult. The parties' agreement to arbitrate stated that there would be no reasoned award, *see* RA, tab 115, Ex. A at 5 (Sterling Aff.), but this does not preclude our review as Dongbu seems to argue. *See, e.g.*, Appellee's Br. at 13-16. It is difficult to interpret the contractual language to allow the $255,000.00 payment. However, we are presented with a limited record and no evidence[8] that the panel's award was based on its "own notions of industrial justice," rather than an interpretation of the contract. *E. Associated Coal*, 531 U.S. at 62. While such an interpretation would be a stretch, the panel may have viewed the "except bona fide employees" clause to cover the situation at issue here. *See* RA, tab 115, Ex. B at 10 (Sterling Aff.). We may strongly disagree with such an interpretation, but as we have made clear, we do not set aside an arbitration award that in our view "grossly erred in interpreting the contract," so long as it appears the panel did interpret the contract. *Pacificare*, 2004 Guam 17 ¶ 56 (citing *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987)). We cannot say

[8] Asia Pacific states that "[b]y doing the exact opposite of what the construction contract required, the arbitrators dispensed their own weird brand of industrial justice." Appellant's Br. at 34. This is not evidence that the arbitration panel did so; it is merely a disagreement with the panel's interpretation.

with "positive assurance" that the arbitrators did not draw this portion of the award from an interpretation of the contract. *See id.* ¶ 55.

2. Whether the Arbitration Award Violated the Essence of the Performance and Payment Bond

[45] Asia Pacific also argues that the award of Dongbu's completion expense "in addition to the contract balance violates the essence of the parties' construction bond." Appellant's Br. at 34. Asia Pacific asserts that "[t]he only financial obligation an owner has to a surety in a construction bond is that, in the event of contractor default, the owner must turn over to the surety any remaining contract balance owed . . . up to, but not exceeding, the amount the surety actually spent." *Id.* at 35. Asia Pacific cites to Dongbu's Performance & Payment Bond to establish that "Asia Pacific's maximum liability to Dongbu was the amount of the contract balance owed." *Id.* at 36.

[46] Dongbu responds that Asia Pacific "fails to perceive the difference between insurance and surety bonds." Appellee's Br. at 24. Dongbu cites *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 139 (1962), for the proposition that a performance surety that completes a construction contract is "subrogated to its principal's claim for amounts remaining payable on the construction project." *Id.*

[47] In its reply, Asia Pacific concedes that if we find that the trial court erred in calculating Dongbu's subrogation amount on summary judgment, discussed below in section IV. E., its argument in this section is moot. *See* Reply Br. at 20 n.1. Because we decide below that the trial court should not have granted summary judgment in light of disputes of material fact, we will not analyze or decide Asia Pacific's argument on this ground.

D. Whether "Cumulative Defects" in the Award Require it be Vacated

[48] Asia Pacific next argues that, even if none of the previous grounds for vacating are sufficient in and of themselves, "[t]hese grounds may be considered cumulatively." Appellant's Br. at 41. In its estimation, "[t]he infidelity of the arbitrators here to their obligation was extreme." *Id.* Accordingly, Asia Pacific argues that this case "should be remanded to the Superior Court for trial." *Id.* at 42. Dongbu counters that "cumulative defect" is not a recognized ground for vacating an arbitration award. Appellee's Br. at 25.

[49] Asia Pacific cites only one case to support its "cumulative defects" theory. *See* Appellant's Br. at 41; Reply Br. at 17-18 (citing *George A. Hormel & Co. v. United Food & Commercial Workers*, 879 F.2d 347, 349 (8th Cir. 1989)). The Eighth Circuit in *Hormel* did not intend to create an additional ground for vacating an arbitrator's award, and no case that has cited it treated the opinion as such. *See, e.g.*, *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers*, 309 F.3d 1075, 1086-87 (8th Cir. 2002).

[50] Instead, the *Hormel* opinion concluded that the arbitrator did not base his award on the contract. 879 F.2d at 350-52. The passage Asia Pacific relies on—"we have considered the claims as a group, and conclude that the arbitrator's decision manifests an infidelity to his obligation," *id.* at 349—is merely a way of saying that the myriad failures of the arbitrator to follow contractual terms raises a strong inference that such failure was willful, not merely unintentionally erroneous. *See, e.g.*, *Boise Cascade Corp.*, 309 F.3d at 1086-87; *Chi. Typographical Union v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991).

[51] No court has adopted cumulative defects as an independent ground for vacating arbitration awards, and courts are much less likely to do so following the uncertainty created by *Hall Street*. We refuse to adopt such a ground here.

E. Whether the Trial Court Erred in Calculating Dongbu's Subrogation Amount on Summary Judgment

[52] Asia Pacific's final argument on appeal is that the trial court's calculation of the amount of the award must be reassessed. Appellant's Br. at 43. Asia Pacific asserts that $3,841,757.55 is the maximum Dongbu can recover, including attorneys' fees. *Id.* at 49, 53. Asia Pacific computes this figure by adding the $865,000.00 attorneys' fees awarded in arbitration to its calculation of Dongbu's expenses at $2,976,757.68.[9] *Id.* at 49; RA, tab 133 at 22-23 (Dec. & Order). Dongbu counters that "[t]he basic fallacy in Asia Pacific's 'accounting' argument is the baseless assertion . . . that the 'actual amount to which Dongbu was entitled must be decided outside the arbitration.'" Appellee's Br. at 26. Dongbu argues that "the trial court's responsibility [was merely] to determine whether Dongbu had become subrogated by its payments so that it could recover those contract balances." *Id.* at 26-27.

[53] The relevant portion of the pre-remand Final Arbitration Award provides: "The arbitrators have not attempted to, and do not intend to, set forth a final accounting of those 'subrogation rights' in this proceeding." RA, tab 115, Ex. B at 11 (Sterling Aff.). This declaration appears to echo the parties' pre-arbitration discussions[10] as well as their submission

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[9] Asia Pacific uses its calculation of Donbu's expenses ($2,976,757.68) in determining subrogation rights since it claims this amount is less than the contract balance which, when subtracting the $798,604.00 award to Dongbu from the asserted total amount of $4,547,066.00, yields a balance of $3,748,462.00. *See* Appellant's Br. at 48; Reply Br. at 19.

[10] For the correspondence between the parties, see CVA10-021 Excerpts of Record at 139-140 (Thomas Sterling Letter, Mar. 30, 2007; Bill R. Mann E-mail, Mar. 30, 2007). The Sterling letter stated:

> It is Dongbu's position in the litigation and in any related arbitration that, under no circumstances, can it collect an amount in excess of what it has paid in connection with this project. Specifically, despite the fact that our claim for *quantum meruit* is approximately $6,000,000[.00], our losses to date total approximately $3,000,000[.00] (although they . . . are rising) and our ultimate recovery will be limited by the amount of the loss which we have incurred since we are pursuing our claims in subrogation. . . . I would gladly stipulate to this in the Superior Court. After the arbitrators have made a ruling and in the event the ruling is favorable to Dongbu, we can the address the specific amount of Dongbu's subrogation rights, if necessary, in the confirmation proceeding.

to arbitration. *See* RA, tab 115, Ex. A at 4 (Sterling Aff.). Based on these discussions and the submission, both parties agree that "Dongbu may recover the lesser of the contract balance or the amount Dongbu expended on the project." Reply Br. at 20; *see also* Appellee's Br. at 27.

[54] The trial court was correct that its task in determining Dongbu's subrogation rights was to find two figures—the contract balance and the amount Dongbu spent completing the project—and award the lesser of those two figures. RA, tab 133 at 21 (Dec. & Order). However, on summary judgment the trial court erred by deciding that there was no dispute as to material fact. *Id.* at 21-23. It is well settled that disagreement in the computation or amount of damages constitutes a material dispute sufficient to preclude summary judgment. *See, e.g.*, *T.G. Plastics Trading Co. Inc. v. Toray Plastics (Am.), Inc.*, 958 F. Supp. 2d 315, 325 (D.R.I. 2013); *Melaleuca, Inc. v. Foeller*, 318 P.3d 910, 916 (Idaho 2014). In this case, there remain at least two fundamental, material disputes of fact. First, Asia Pacific argued that the full arbitration award was not the correct figure to use as the contract balance, because the parties had submitted a *quantum meruit* dispute to the arbitration panel, *see, e.g.*, RA, tab 115, Ex. A at 4 (Sterling Aff.), and the full award represented Dongbu's potential *quantum meruit* recovery, not merely the contract balance. Appellant's Br. at 47-49; *see also* RA, tab 115, Ex. B at 10 (Sterling Aff.) (noting that the parties had tasked the arbitration panel to decide "amounts allegedly owed under the original contract . . . as well as a claim under a theory of *quantum meruit*."). Examining the figures of the arbitration award, *see* RA, tab 115, Ex. B at 19 (Sterling Aff.), Asia Pacific's argument is that the contract balance is only those figures awarded to Guam Advance and Harmon Corporation and does not include the $728,779.00 amount awarded as "Reasonable Project Costs," *id.*, to Dongbu, because that amount was a quintessential *quantum meruit* figure.

Id. at 139 (Sterling Letter).

In addressing this argument, the trial court misinterpreted the arbitration award as evincing the arbitration panel's finding of "contract balance" when the $728,779.00 figure was in fact the arbitration panel's calculation of the reasonable costs component of a *quantum meruit* claim. *See* RA, tab 133 at 11 (Dec. & Order). This confusion is particularly meaningful because it altered the scope of the trial court's review—instead of examining the award and its component figures to determine the accurate contract balance, the trial court deferred to what it mistakenly deemed was the arbitration panel's interpretation of the contract terms and thus used the full award amount as the contract balance in its subrogation calculation. *See id.*[11] This misinterpretation led the court to erroneously conclude that remaining disputes regarding the contract balance and Dongbu's entitled recovery had been resolved in arbitration when they in fact had not.

[55] Second, Asia Pacific raised a dispute of material fact over Dongbu's project expenses by arguing that Dongbu claimed $1,326,743.00 as its expenditures on the project before the arbitration panel, that the arbitration panel's award of $728,799.00 was a binding calculation of Dongbu's project costs, and that Dongbu alleged an even higher project cost ($1,521,756.00) in the trial court following the arbitration award, which the trial court ultimately used in its calculation. *See* RA, tab 126 at 6-7 (Asia Pac.'s Opp'n to Dongbu's Mot. for Confirmation of Arbitration Award & for Summ. J. as to Remaining Issues, Apr. 10, 2013);[12] *see also* RA, tab 133 at 22 (Dec. & Order). The court is skeptical of the merits of Asia Pacific's argument that

[11] Though this misunderstanding is made explicit in the "essence of the contract" analysis, it represents the trial court's understanding of the award that was then carried over to its later calculation of the contract balance on summary judgment.

[12] Asia Pacific also argued that there was a double award of $76,216.00. *See* RA, tab 126 at 8 (Asia Pac.'s Opp'n to Dongbu's Mot. for Confirmation of Arbitration Award & for Summ. J. as to Remaining Issues,). We affirm the trial court on this question because, though it is clear that the arbitrators included the amount in the $728,779.00 awarded to Dongbu, *see* RA, tab 115, Ex. B at 19 (Sterling Aff.), Asia Pacific does not point to evidence, and we cannot discern any from the record, that establishes the arbitration panel also included this figure in one of the other portions of its final award.

Dongbu's "project costs" for the purposes of subrogation accounting were limited to $728,799.00, because the arbitration award represents a *quantum meruit* recovery, which includes reasonable project costs rather than actual project costs, and the arbitration award delineates the figure as "Reasonable Project Costs." RA, tab 115, Ex. B at 19 (Sterling Aff.); *see also* RA, tab 133 at 22 (Dec. & Order) (noting this distinction). Even so, this claim, together with the additional argument regarding Dongbu's nearly $200,000.00 increase in alleged project costs between the time of the arbitration hearing and the trial court hearing, sufficiently raised a second dispute of material fact that rendered summary judgment inappropriate.

[56] In light of these disputes of material fact, we reverse the trial court's grant of summary judgment on Asia Pacific's motion for confirmation of the arbitration award, and we remand for the trial court to resolve these factual issues and recalculate Dongbu's subrogation rights.

F. Whether the Trial Court Erred in Ordering Foreclosure on Dongbu's Mechanic's Liens

[57] The court now turns to the foreclosure order on the mechanic's liens. In granting summary judgment, the trial court ordered Asia Pacific to pay to Dongbu the debt reflected in two mechanic's liens, recorded as Instrument Numbers 722607 and 718487 with the Department of Land Management. RA, tab 133 at 23-24 (Dec. & Order). These liens amounted to $2,500,000.00 and $2,016,692.97, respectively. *Id.* This order was premised on the fact that the trial court believed that a final subrogation amount of $4,477,241.00 was determined by the arbitration panel. *Id.*

[58] In Guam, mechanics, contractors and others performing necessary services are authorized by statute to establish a lien for the value of their labor. 7 GCA § 33201 (2005). In order to enforce such a lien, a party is required to substantially comply with various filing and notice requirements. *See* 7 GCA §§ 33301-33305 (2005); *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 23.

However, in this case, Asia Pacific has not disputed the validity or procedural compliance of Dongbu's mechanic's liens. *See* Appellant's Br. Notwithstanding this legitimacy, foreclosure on these liens appears inappropriate at this time. Mechanic's liens were established only to protect whatever amounts were found due and payable to those companies and prevent unjust enrichment at their expense. *See Castino*, 2010 Guam 3 ¶ 48; *Core Tech Int'l Corp. v. Hanil Eng'g & Constr. Co.*, 2010 Guam 13 ¶ 48. Indeed, this purpose has been explicitly acknowledged by Dongbu. *See* RA, tab 116 at 8 (Dongbu Ins. Co., Ltd.'s Mem. in Supp. of Mots. for Confirmation of Arbitration Award, Mar. 13, 2013). As this court has vacated the final award and ordered the trial court to recalculate proper subrogation amounts, foreclosure of the mechanic's liens has become premature. Accordingly, this court must set aside any lien foreclosure orders until such time as the dispute regarding amounts due and payable to each party is resolved. *See Apana v. Rosario*, 2000 Guam 7 ¶ 24 (remanding foreclosure proceeding on mechanic's lien to determine the outstanding amount due).

G. Whether Dongbu was Entitled to Prejudgment Interest Dating Back to the Initial 2007 Arbitration Award

[59] Title 20 GCA § 2110 provides for prejudgment interest to litigants "who [are] entitled to recover damages certain, or capable of being made certain by calculation" from the day on which this right to recover became vested. 20 GCA § 2110 (2005). Prejudgment interest is designed to compensate the prevailing party for monetary loss during the period between vesting of a right to recover a sum certain and entering of judgment. *See, e.g., Guam Top Builders, Inc. v. Tanota Partners*, 2012 Guam 12 ¶ 64; *see also Tenzera, Inc. v. Osterman*, 140 Cal. Rptr. 3d 96, 100 (Ct. App. 2012).

[60] The standard for recovery of prejudgment interest "is whether the defendant actually knows the amount owed or from reasonably available information could the defendant have computed that amount." *Guam Top Builders*, 2012 Guam 12 ¶ 68. Prejudgment interest is warranted "where the amount due . . . is fixed by the terms of the contract or is readily ascertainable by reference to well-established market values." *Id.* However, prejudgment interest is not allowable "where there is a dispute between the parties concerning the basis of computation of damages so that the amount of damages depends upon a judicial determination based on conflicting evidence." *Id.*

[61] Because 20 GCA § 2110 was adopted as an analog of California Civil Code section 3287(a), we consider California case law interpreting section 3287(a) persuasive. *See, e.g.*, *Asia Pacific I*, 2011 Guam 18 ¶ 32. As such, we have followed California courts in stating that "prejudgment interest may accrue from the day a final arbitration award is returned by the arbitrators." *Id.* (citing *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 40 Cal. Rptr. 2d 700, 713–14 (Ct. App. 1995)).

[62] On cross-appeal, Dongbu argues that "the amount owed on the project was definite and certain as of August 3, 2007," the date of the Arbitration Panel's Partial Award. Appellee's Br. at 34. Dongbu bases its argument for prejudgment interest on two California cases dealing with prejudgment interest in light of an unliquidated off-set for defective work. *See id.* at 33-34 (citing *Burnett & Doty Dev. Co. v. C.S. Phillips*, 148 Cal. Rptr. 569 (Ct. App. 1978); *Bentz Plumbing & Heating v. Favaloro*, 180 Cal. Rptr. 223 (Ct. App. 1982), *superseded on other grounds by Tesco Controls, Inc. v. Monterey Mech. Co.*, 21 Cal. Rptr. 3d 751, 760-61 (Ct. App. 2004)). Each of these cases held that where a party brought a liquidated sum, it was entitled to prejudgment interest on the balance between the liquidated sum and the unliquidated off-set for

defective work. *See Burnett & Doty*, 148 Cal. Rptr. at 569; *Bentz Plumbing*, 180 Cal. Rptr. at 223.

[63] Asia Pacific argues that neither of these cases applies in this context, because the *quantum meruit* claim involved here was not liquidated. Reply Br. at 26. Accordingly, Asia Pacific argues that the trial court erred in granting Dongbu any prejudgment interest—even following the arbitration panel's final award following remand. *Id.* at 25.

[64] With its argument regarding *quantum meruit*, Asia Pacific seems to misunderstand or misrepresent Dongbu's argument. In essence, Dongbu argues that the arbitrator's award converted its unliquidated *quantum meruit* claim into a liquidated sum certain subject only to an unliquidated off-set for defective work. Dongbu does not argue with Asia Pacific's well-settled position that a *quantum meruit* claim is not liquidated. *See* Reply Br. at 26 n.3. Instead, the award itself—not the original *quantum meruit* claim—serves as the liquidated sum certain for which Dongbu seeks prejudgment interest. *See* Appellee's Br. at 33-34.

[65] Even after this clarification, Dongbu cannot be awarded prejudgment interest from the date of the non-final awards in 2007. Dongbu is correct that our opinion in *Asia Pacific I* strongly implied that parties with a liquidated sum of damages following an arbitration award would be entitled to prejudgment interest from the date of the award despite a potential unliquidated offset for defective performance. *See Asia Pacific I*, 2011 Guam 18 ¶ 34. However, we explicitly held that "because a truly 'final' award was never issued by the arbitrators [in 2007], the trial court erred in ordering pre-judgment interest back to the date of the partial award." *Id.* Thus, the trial court was correct to award prejudgment interest only from the date when the arbitration panel issued its 2013 final award after remand. RA, tab 133 at 21 (Dec. & Order).

V. CONCLUSION

[66] In light of the highly deferential review accorded to arbitration awards, and on the facts and arguments presented, we affirm the trial court's denial of Asia Pacific's motion to vacate the arbitration award. However, we reverse the trial court's confirmation of the award on summary judgment, because there were disputes of material fact regarding the meaning of figures within the arbitration award as well as the proper figures for the trial court to use in calculating Dongbu's subrogation rights. Lastly, we also set aside the trial court's order of foreclosure on Dongbu's mechanic's liens.

[67] On Dongbu's cross-appeal, we affirm the trial court's prejudgment interest decision, because Dongbu's argument is foreclosed by our previous opinion. *See Asia Pacific I*, 2011 Guam 18 ¶ 34.

[68] Accordingly, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for proceedings not inconsistent with this opinion.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Alexandro C. Castro**

ALEXANDRO C. CASTRO
Justice *Pro Tempore*

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice