IN THE SUPREME COURT OF GUAM

GUAM YTK CORPORATION,
Plaintiff-Appellee,

v.

PORT AUTHORITY OF GUAM,
Defendant-Appellant.

Supreme Court Case No.: CVA17-014
Superior Court Case No.: CV1170-12

OPINION

Cite as: 2019 Guam 12

Appeal from the Superior Court of Guam
Argued and submitted on June 15, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; MARIA G. FITZPATRICK, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Defendant-Appellant Port Authority of Guam (the "Port") appeals from: (1) the trial court's Decision and Order, dated December 29, 2016 (the "December 2016 Order"); (2) the Judgment; and (3) the Decision and Order denying the Port's motion under Guam Rules of Civil Procedure 59(b) and 60(b). The orders and judgment collectively confirmed the Amended Arbitration Award finding for Plaintiff-Appellee Guam YTK Corporation ("Guam YTK").

[2] This is the second time this matter has come before us. In *Guam YTK Corp. v. Port Authority of Guam*, 2014 Guam 7 ("*Guam YTK I*"), we held that the parties had to arbitrate their dispute under the arbitration provision of the Development Agreement and Lease. 2014 Guam 7 ¶¶ 5, 62. As a matter of substantive arbitration law, we concluded in *Guam YTK I* that an arbitration clause is severable from the remainder of the contract within which it is contained, and it must be analyzed separately from the contract as a whole to determine whether it is valid and enforceable. *See id.* ¶¶ 35-36. The current appeal presents an altogether different question: Did the arbitrators exceed their authority by enforcing a substantively illegal contract? Put differently, can the arbitration process be used to legitimate an otherwise substantively illegal contract? We conclude that it cannot.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Guam YTK and the Port entered into a Development Agreement and Lease (the "Lease"). Under the terms of the Lease, the Port agreed to lease certain land and to provide certain amenities and services to Guam YTK, while Guam YTK agreed to construct, operate and maintain a fisheries facility.

[4] In signing the Lease, the Port provided several warranties, including: (i) "that the only approvals needed for this Lease shall be the Governor of Guam, the Attorney General's office, and its private legal counsel"; (ii) "that no other approvals or signatures are required to make this a binding and valid Lease (although [the Port] shall use its best efforts to also obtain the approval of the Legislature)"; (iii) "that no further government actions are required . . . pursuant to the procurement laws of the Government of Guam"; and (iv) that the Port would "indemnify [Guam YTK] from disturbances arising out of the breach of the warranties stated in this Lease." *See* Record on Appeal ("RA"), tab 43, Ex. 4 § 1.3 (Decl. Genevieve P. Rapadas Supp. Pl. Guam YTK Corp.'s Mot. Confirm Arbitration Award ("Decl. Rapadas"), May 19, 2016) ("Dev. Agreement & Lease").

[5] Under Section 2.1, the term of the Lease commenced upon approval of the parties, the Governor, the Attorney General, and the Port's legal counsel. *See id.* § 2.1. The Lease further provides that notwithstanding the immediate commencement of the Lease:

> this Lease shall be submitted by the parties to the Guam Legislature for approval and upon the date of approval by the Legislature then the actual and effective term of this Lease shall commence (hereinafter called the "effective commencement date"). The initial term of this Lease shall then be for a period of five (5) years from the effective commencement date . . . .

Id. Section 2.2 of the Lease then provides Guam YTK with "eight (8) consecutive options to renew this Lease, . . . with each option to be for a term of five (5) years each." *Id.* § 2.2. These options purported to renew automatically with no required action by Guam YTK, up to a maximum term of forty-five years. *Id.* The parties agreed that "[u]pon renewal of this Lease per the options . . . , this Lease and all renewal option periods shall not require the approval of . . . any . . . local government agency or authority," including "the Legislature." *Id.*

[6] The parties could earlier terminate the Lease if default occurs. *See id.* § 16.1. Section 21.1 establishes a buy-out provision if termination of the Lease occurs "before the end of 45 years after the effective commencement date," subject to and under certain conditions. *Id.* § 21.1.

[7] Pursuant to Article 17, the parties agreed to arbitrate "[a]ll disputes and controversies of every kind and nature . . . arising out of or in connection with this Lease." *Id.* § 17.1. "Any decision or award rendered" by an arbitration panel "shall be final and binding on all parties to the proceeding, and judgment on such award may be entered and confirmed by either party in the Superior Court of Guam pursuant to 7 G.C.A. Section 42107." *Id.* § 17.5.[1]

[8] The Lease also contains what appears to be an express waiver of sovereign immunity. Section 20.1 provides:

> After approval of this Lease by the Governor, the Attorney General, [the Port's] private legal counsel, and the Legislature, then [the Port] shall have final and sole and single authority to . . . sue and be sued by [Guam YTK] and its sub-lessees, and to deal with [Guam YTK] and the terms and conditions of the Lease without the additional or further approval or consent of the Governor, the Attorney General, the Legislature, and any other government agency. . . . In the event of any lawsuit, [the Port] shall be sued and shall sue in its own name, and any settlements or agreements resulting therefrom shall be valid and binding without the approval of the Governor, the Attorney General, the Legislature, and any other government agency.

Id. § 20.1.

[9] Following the execution of the Lease, the parties did not obtain legislative approval, but Guam YTK also did not elect to terminate the Lease under Section 18.1.

[1] 7 GCA § 42107 refers to the Guam Civil Arbitration Laws, which were subsequently repealed and replaced by the Guam International Arbitration Chapter, 7 GCA § 42A101 *et seq.* Section 17.6 of the Lease provides that if new arbitration procedures are adopted in Guam, they shall apply to any arbitration between the parties. *See* Dev. Agreement & Lease § 17.6. In *Guam YTK I*, we stated that "[a]lthough the award confirmation process of the Guam Civil Arbitration Law applies in this case, the analysis would still be the same if the GIAC applied." 2014 Guam 7 ¶ 50 n.10; *see also id.* ¶ 34 n.5 ("Although the Lease Agreement was executed prior to the GIAC's enactment, but when the Guam Civil Arbitration Law was in effect, our analysis would still be the same because the Civil Arbitration Law mirrors the Federal Arbitration Act.").

[10] By letter dated May 30, 2008, the Port provided Guam YTK with a notice of default under the Lease, alleging various ongoing breaches by Guam YTK. In response, Guam YTK claimed that the Port also defaulted under the Lease. In subsequent letters, the Port purported to terminate the Lease.

[11] Guam YTK demanded arbitration, and thereafter sued in the Superior Court seeking arbitration of the parties' ongoing disputes. We held in *Guam YTK I* that the arbitration clause in the Lease Agreement was "valid and enforceable and that arbitration is not barred by sovereign immunity and the Government Claims Act." 2014 Guam 7 ¶ 62. The court found "that the Arbitration Agreement applies to Guam YTK's breach of contract claims for relief because the claims 'arise[] out of or in connection with' the Lease Agreement." *Id.*

[12] Following our decision in *Guam YTK I*, the parties arbitrated their dispute. During arbitration, the Port argued, among other things, that the Port and Guam YTK never entered into a legally binding contract, and the arbitration panel was prohibited from awarding expectancy damages based, in part, on sovereign immunity.

[13] The arbitration panel issued an award unanimously finding for Guam YTK. Guam YTK thereafter requested that the panel clarify and amend its order to correct two typographical errors and clarify that the arbitration occurred in Guam. The arbitration panel then issued an Amended Arbitration Award on May 17, 2016, *nunc pro tunc* to April 4, 2016.

[14] In its Amended Arbitration Award, the arbitration panel dispatched with the Port's arguments regarding the validity of the contract with no analysis: "The first issue raised by [the Port] is whether the Lease is void *ab initio* or void on other jurisdictional grounds. The Panel hereby rejects this argument and finds that the Lease is valid." RA, tab 43, Ex. 3 at 1 (Decl. Rapadas) ("Am. Arbitration Award"). The panel also found that the Port's purported letter of

termination did not terminate the Lease because under Section 16.1, the Port was required to "bring an action" to effectuate termination, which the Port failed to do. *See id.* at 2. The panel found, however, that performance of the Lease had become impracticable, and it was therefore terminated as of the final arbitration award. *Id.* at 2-3. The relevant paragraph of the Amended Arbitration Award states:

> Evidence and testimony was [sic] presented at the hearing regarding the significant delays associated with the construction and development of the fisheries facility from 2003 to 2008. It was undisputed that [Guam] YTK failed to pay rent to [the Port] for several years, however, testimony and evidence was [sic] also presented that [Guam] YTK may have been entitled to reduction in rents, or off-sets and credits subject to reconciliation of its accounts with [the Port]. The Panel finds that due to the conflicting differences and strained relationship between the parties over the course of a decade and a half, the parties are unable to continue in the performance of the conditions under the Lease, or may be otherwise precluded by law to perform, or that such performance may now be impracticable. Accordingly, the Panel concludes that the Lease is hereby terminated effective as of the date of this Order.

Id. at 3.

[15] The panel did not find that either party was in default or in breach of the Lease. But despite not finding fault or breach by either party, the panel found that "Article 21.1 of the Lease provides that in the event that the lease is terminated prior to 45 years from its effective commencement date, [the Port] is to pay [Guam] YTK the market value of its leasehold interest." *Id.* The panel determined that the value of the leasehold was $12.7 million and that interest of 10% per annum was owed on any unpaid balance running from the arbitration award. The panel also awarded Guam YTK attorney's fees and costs.

[16] Guam YTK sought confirmation of the Amended Arbitration Award in the Superior Court, and the Port moved to set aside the award. In the December 2016 Order, the trial court granted Guam YTK's motion to confirm the award and denied the Port's motion to vacate the

award. The court entered judgment shortly thereafter. The Port sought reconsideration of the Superior Court's December 2016 Order, which the court denied.

[17] The Port timely appealed. Three *amici curiae*—the 34th Guam Legislature, the Office of the Attorney General (the "OAG"), and an individual, John Thos. Brown—have appeared in this appeal in support of the Port. *See Amicus Curiae* 34th Guam Legislature's Br. (Nov. 13, 2017) ("Legislature Br."); *Amicus Curiae* Attorney General of Guam's Br. (Nov. 13, 2017) ("OAG Br."); *Amicus Curiae* John Thos. Brown's Br. (Apr. 30, 2018).

II. JURISDICTION

[18] This court has appellate jurisdiction over this matter under 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-29 (2019)) and 7 GCA §§ 3107 and 3108(a) (2005). *See Asia Pac. Hotel Guam, Inc. v. Dongbu Ins. Co.*, 2011 Guam 18 ¶ 5 ("*Asia Pac. Hotel I*") (exercising jurisdiction over an appeal of an order confirming an arbitration award).

III. ANALYSIS

[19] The Port argues that the award should be vacated (1) under the doctrine of sovereign immunity; (2) because the Lease is illegal; and (3) because Guam YTK waived its right to arbitrate by failing to initiate arbitration within the time prescribed under the Lease. The OAG and the 34th Guam Legislature raise the same general issues as the Port, but *amici* argue in certain instances that the issues on appeal are more appropriately analyzed in the context of a ground for vacatur different from the Port's position. The OAG and Brown raise additional issues that have not been raised by the Port. We do not consider these issues properly before us. *See Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 267 (3d Cir. 2016) ("An *amicus* normally 'cannot expand the scope of an appeal with issues not presented by the parties on appeal . . . .'" (quoting *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v.*

WithumSmith Brown, P.C., 692 F.3d 283, 300 n.10 (3d Cir. 2012))); *Mears v. Little Rock Sch. Dist.*, 593 S.W.2d 42, 44 (Ark. 1980) ("One coming before this court in the posture of Amicus curiae is bound by the questions which are properly before us." (collecting cases)).

[20] We conclude that sovereign immunity bars neither the enforcement nor the vacatur of an arbitration award in Guam courts. We further hold that the trial court erred in confirming the Amended Arbitration Award because the arbitrators exceeded their authority by purporting to enforce a substantively illegal contract.

A. Sovereign Immunity Is Not Implicated by a Party Seeking to Enforce or Vacate an Arbitration Award

[21] "There is no doubt that the doctrine of sovereign immunity applies to Guam." *Guam Econ. Dev. Auth. v. Island Equip. Co.*, 1998 Guam 7 ¶ 6. Thus, "[i]n order for someone to sue the Government of Guam or any governmental agency, sovereign immunity must be waived." *Wood v. Guam Power Auth.*, 2000 Guam 18, at *2. We review questions regarding sovereign immunity and any waiver of its protections *de novo*. *See Bautista v. San Agustin*, 2015 Guam 23 ¶ 17. The Port—along with *amici* the 34th Guam Legislature and the OAG—argues on appeal that the Legislature has not waived sovereign immunity and therefore the courts lack jurisdiction to enforce the Amended Arbitration Award. *See* Appellant's Br. at 8-14 (Nov. 6, 2017); Appellant's Reply Br. at 12-20 (Jan. 26, 2018); Legislature Br. at 3-17; OAG Br. at 14-20. Because alternative dispute resolution engaged in by the government or one of its agencies does not constitute a "suit" against the government, we disagree.

[22] In *Guam YTK I*, we stated that "sovereign immunity is not implicated or threatened in cases such as this, where a valid and enforceable arbitration agreement exists." 2014 Guam 7 ¶ 41 (citing *Gov't of Guam v. PacifiCare Health Ins. Co. of Micronesia, Inc.*, 2004 Guam 17 ¶ 13

n.2). This is "because arbitration does not subject the state to suit." *State v. P.G. Miron Constr. Co.*, 512 N.W.2d 499, 501 (Wis. 1994) [hereinafter, "*Miron*"]; *see also E.C. Durr Heavy Equip. Co. v. Bd. of Comm'rs of Orleans Levee Bd. & Design Eng'g, Inc.*, 719 So. 2d 136, 138 (La. Ct. App. 1998) ("Arbitration is dispute resolution without resort to court action."); *Kenneth H. Hughes, Inc. v. Aloha Tower Dev., Corp.*, 654 F. Supp. 2d 1142, 1149 (D. Haw. 2009) ("[T]he arbitrator's decision is not a judgment of a court of law."). Rather, the arbitration process is a matter of contract, and "the doctrine of sovereign immunity is not in any way implicated or threatened by the Government's compliance with its contract obligations." *Guam YTK I*, 2014 Guam 7 ¶ 39 (quoting *PacifiCare*, 2004 Guam 17 ¶ 13 n.2). "[E]ven if . . . sovereign immunity is implicated, sovereign immunity is waived under the Government Claims Act, which waives actions in contract." *Id.* ¶ 43.

[23] In *Guam YTK I*, we found that the procedures under the Government Claims Act need not be complied with after an arbitration award—*i.e.*, a party that obtains a favorable arbitration award against the government may go straight to the Superior Court to seek enforcement, rather than filing its claims pursuant to the Government Claims Act. *See id.* ¶¶ 57-61. In so finding, we rejected the reasoning adopted by the Wisconsin Supreme Court in *Miron*. *See id.* ¶ 59. Under *Miron*, even though the arbitration process itself is not a "suit," the court nevertheless treated a subsequent motion to confirm or vacate an arbitration award as a suit against the state. *See Miron*, 512 N.W.2d at 504 ("Though the arbitration process is distinct from a judicial proceeding, any award granted at the conclusion of arbitration may itself become the subject of a suit, since at that point, an actual claim has come into existence."). In *Guam YTK I*, however, we adopted the alternative view that "[i]nasmuch as the binding arbitration conducted herein was an *alternative* to judicial adjudication, it is clear that there never was, *and will never be*, a judicial

adjudication of the parties' dispute." 2014 Guam 7 ¶ 46 (second emphasis added) (quoting *Paramount Unified Sch. Dist. v. Teachers Ass'n of Paramount*, 32 Cal. Rptr. 2d 311, 320 (Ct. App. 1994)). Thus, as we held in *Guam YTK I*, sovereign immunity limits neither the right of the government to engage in alternative dispute resolution nor the right of a party to seek enforcement of the result of that alternative dispute resolution process.

[24] Despite our finding that sovereign immunity is not implicated when a party seeks to enforce an arbitration award against a government agency, we do not imply that limits on the Legislature's waiver of liability are meaningless. The Port has argued that in a contract dispute with the government, a party is permitted to obtain only reliance damages and may not obtain expectation damages. *See* Appellant's Br. at 10. In support of this position, the Port relies upon restrictions in the Government Claims Act, such as 5 GCA § 6105. *See id.* (citing 5 GCA § 6105 (2005)). In finding that sovereign immunity is not implicated in this appeal, we hold only that provisions such as section 6105 of the Government Claims Act do not obviate a court's subject matter jurisdiction to enforce or vacate an award. An arbitration award that grants damages in violation of statutory provisions, such as sections 6105 and 6301 of the Government Claims Act, may nevertheless be subject to vacatur under 7 GCA § 42A701(b), assuming the standards under that statute have been met. *See, e.g.*, *Kenneth H. Hughes, Inc.*, 654 F. Supp. 2d at 1149 ("Respondent must demonstrate that the arbitrator's decision to include interest was 'completely irrational' or exhibited a 'manifest disregard of law' in violation of the State's sovereign immunity protections."); *State v. Alaska Pub. Emps. Ass'n, AFT, AFL-CIO*, 199 P.3d 1161, 1162-65 (Alaska 2008) (recognizing that arbitrators may exceed authority by awarding categories of damage in derogation of sovereign immunity; finding waiver on facts of case). In *Matter of Hawai'i State Teachers Ass'n*, 400 P.3d 582 (Haw. 2017), for example, the Hawaii

Supreme Court treated a sovereign immunity challenge to the award of prejudgment interest as a question of whether the arbitration panel exceeded its authority, not as a question bearing on the court's jurisdiction to confirm or vacate the award. *See id.* at 598-601.

[25] The type of "sovereign immunity" arguments raised by the Port and *amici* do not subject an arbitration award to *de novo* review in the Superior Court. To permit a party to frame their arguments as a jurisdictional challenge to court enforcement of an award would effectively allow the same sort of re-litigation of the merits that we rejected in *Guam YTK I* as contrary to our policies favoring arbitration. 2014 Guam 7 ¶ 59. Addressing these types of arguments *de novo* "would defeat the purpose of requiring the parties to adhere to their agreement to arbitrate." *Id.* We therefore find that Guam courts have the necessary jurisdiction to either confirm or vacate an arbitration award involving the government under the Guam International Arbitration Chapter ("GIAC"), and any challenge to an award based upon a lack of waiver of sovereign immunity must be pursued under 7 GCA § 42A701.[2]

B. The Trial Court Erred in Confirming an Arbitration Award That Enforced an Illegal Contract

[26] We turn now to the question of contract legality. In the Amended Arbitration Award, the arbitrators determined—without explanation—that the Lease was valid and enforceable. *See* Am. Arbitration Award at 2. We held in *Guam YTK I* that "the validity and enforceability of the Lease Agreement is an issue that was clearly and unmistakably reserved for arbitration." 2014 Guam 7 ¶ 26. In this appeal we must address the altogether different question of whether a court must confirm an arbitration award that would result in the parties engaging in substantively illegal conduct. We find that an arbitration panel exceeds its authority when it enforces an illegal

[2] In light of our resolution of other issues raised on appeal, we need not address any of the other arguments framed as "sovereign immunity" arguments by the parties. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33.

contract and that such an award is subject to vacatur under 7 GCA § 42A701(b)(4). We further find that the Lease between the Port and Guam YTK is substantively illegal, and the trial court therefore erred in confirming the Amended Arbitration Award.

1. The Standard of Review and the Bases for Vacating an Arbitration Award

[27] We review the Superior Court's ruling on a motion to confirm or vacate an arbitration award *de novo*. *PacifiCare*, 2004 Guam 17 ¶ 14. But "while as a general matter[,] legal determinations are reviewed *de novo* and factual determinations are reviewed for clear error, an application of these general standards of review does not support vacating an arbitrator's decision absent the recognized narrow circumstances warranting vacatur." *Id.* ¶ 16.

[28] There are several bases upon which an arbitration award may be vacated. Under section 42A701(b) of the GIAC, the local analog to section 10 of the Federal Arbitration Act (FAA), an arbitration award may be vacated "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 § 42A701(b)(4) (2005); *see also id.* § 42A701(b)(1)-(3).

[29] Besides the statutory grounds for vacatur, there are also several non-statutory or quasi-statutory grounds for vacatur occasionally recognized by courts. *See PacifiCare*, 2004 Guam 17 ¶ 18. "Manifest disregard of the law is the seminal [quasi]-statutory ground for vacatur of commercial arbitration awards." *Id.* ¶ 45 (quoting Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. Rev. 731, 774 (Spring 1996)). In *PacifiCare*, we for the first time adopted this standard for vacating an arbitration award under the GIAC. *Id.* ¶ 48. More recently, in *Asia Pac. Hotel Guam, Inc. v. Dongbu Insurance Co.*, 2015 Guam 3 ("*Asia Pac. Hotel II*"), we reaffirmed that this remains a valid basis upon which to vacate an arbitration award as a judicial "gloss" on the relevant

statutory grounds for vacatur, even after the United States Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). *See Asia Pac. Hotel II*, 2015 Guam 3 ¶ 22. We have not recognized any other quasi-statutory or non-statutory ground for vacatur, and we have expressed skepticism toward adopting any in our jurisdiction. *See id.* ¶ 29 (expressing skepticism about public policy grounds for vacatur); *id.* ¶ 40 (expressing skepticism about the "essence of the contract" ground for vacatur); *see also PacifiCare*, 2004 Guam 17 ¶¶ 52-53.

[30] When none of the grounds for vacating an arbitration award under 7 GCA § 42A701(b) are present, the arbitration panel's award "must" be confirmed upon motion. 7 GCA § 42A702 (2005). While the Port and *amici* argue that several grounds for vacatur are implicated, our analysis below focuses on the ground for vacatur set forth in section 42A701(b)(4)—*i.e.*, whether the arbitrators exceeded their authority.

2. An Arbitration Panel Exceeds Its Authority by Enforcing an Illegal Contract

[31] "An arbitrator exceeds his authority in enforcing an illegal contract." *Glendale Prof'l Policemen's Ass'n v. City of Glendale*, 264 N.W.2d 594, 599 (Wis. 1978); *see also Moncharsh v. Heily & Blase*, 832 P.2d 899, 918 (Cal. 1992) (en banc). Because of this, several courts have found that even though they generally afford only limited review of an arbitration panel's award, "a court, not an arbitrator, makes the final determination of the legality of a contract before an arbitration award is enforced." *Bd. of Educ. of Charles Cty. v. Educ. Ass'n of Charles Cty.*, 408 A.2d 89, 93 (Md. 1979); *see also Teamsters Local Union 682 v. KCI Constr. Co.*, 384 F.3d 532, 537 (8th Cir. 2004) ("Notwithstanding our obligation to show great deference to most arbitration awards, we must not enforce illegal contracts."); *cf. Manitowoc Cty. v. Local 986B, AFSCME, AFL-CIO*, 484 N.W.2d 534, 535-39 (Wis. 1992) (reviewing legality of contract as interpreted by

arbitrator *de novo* and recognizing that trial court "gave no deference to the arbitrator's decision" on contract legality). When a contract "is illegal in light of conflicting statutes, it is not legitimated by the arbitration process; and if the agreement should not on that account be enforced, it is not rendered enforceable by an arbitrator's decision." *Bd. of Trs. for State Tech. Colls. v. Fed'n of Tech. Coll. Teachers, Local 1942, Am. Fed'n of Teachers, AFL-CIO*, 425 A.2d 1247, 1253 (Conn. 1979) ("*Tech. Colls.*"). *De novo* review of an arbitration panel's determination of substantive contract legality is therefore appropriate. *See Loving & Evans v. Blick*, 204 P.2d 23, 26 (Cal. 1949) (en banc).

[32] One of the earliest courts to address the narrow question of whether a court should confirm an arbitration award that would cause the enforcement of an illegal contract was the California Supreme Court in *Loving & Evans v. Blick*, 204 P.2d 23 (Cal. 1949).[3] There, the court held that "the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award." *Id.* at 26. When a party moves to vacate an arbitration award because confirmation of the award would cause a court to enforce an illegal contract, "the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator . . . should not be held to be binding upon the trial court." *Id.* Put differently, "an unlawful transaction cannot be given legal v[i]tality by the arbitration process." *Id.* at 28. While the *Loving & Evans* court split 4-3 in its decision, even the dissent agreed with the majority's proposition that a law declaring certain

[3] This case was abrogated on other grounds by *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*, 115 P.3d 41 (Cal. 2005), as explained in *Templo Calvario Spanish Assembly of God v. Gardner Constr. Corp.*, 129 Cal. Rptr. 3d 574, 582 (Ct. App. 2011). This does not, however, affect this portion of the analysis. *See, e.g., Ahdout v. Hekmatjah*, 152 Cal. Rptr. 3d 199, 210-13 (Ct. App. 2013) (noting continued vitality of *Loving & Evans* regarding the manner in which arbitration awards are reviewed).

contracts illegal may not be circumvented through arbitration and subsequent court confirmation. *Id.* at 30 (Shenk, J., dissenting). The California Supreme Court reaffirmed this basic principle more recently in *Moncharsh v. Heily & Blase*, 832 P.2d 899, 917 (Cal. 1992), and again last year in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, 425 P.3d 1, 8-13 (Cal. 2018) ("*Sheppard, Mullin*").

[33] "Like a contract, an arbitration award that is contrary to law will not be enforced." *Johns-Manville Sales Corp. v. Int'l Ass'n of Machinists, Local Lodge 1609*, 621 F.2d 756, 758 (5th Cir. 1980) (collecting cases). Courts in California and elsewhere have continued to adhere to this basic principle by applying *de novo* review to questions of substantive contract legality, even after the United States Supreme Court determined in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), that questions of contract legality should be decided by an arbitrator, not the courts, in the first instance. *See Sheppard, Mullin*, 425 P.3d at 8; *Teamsters Local Union 682*, 384 F.3d at 537; *Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 292, A.F.L.-C.I.O.*, 414 F.3d 896, 899 (8th Cir. 2005); *Prince George's Cty. Police Civilian Emps. Ass'n v. Prince George's Cty. ex rel. Prince George's Cty. Police Dep't*, 135 A.3d 347, 356 (Md. 2016); *see also Adam Assocs. Int'l, Inc. v. William A. Berry & Son, Inc.*, No. 05-0997-BLS2, 2007 WL 1296879, at *4 (Mass. Super. Ct. May 2, 2007). This is because there is no controlling precedent in these jurisdictions requiring deference to an arbitration award where an arbitrator or arbitration panel allegedly exceeded its powers. *See Prince George's Cty.*, 135 A.3d at 356 ("[N]o . . . precedent indicates that a court must give deference to an arbitration award where the issue is whether the arbitrator exceeded the arbitrator's power."); *see also City of Somerville v. Somerville Mun. Emps. Ass'n*, 633 N.E.2d 1047, 1049-50 (Mass. 1994); *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 467 N.E.2d 87, 91 (Mass. 1984)

("In determining whether an arbitrator exceeded his authority in a provision of an arbitration award, judicial review of the award is independent. . . . [The court] need not defer to the arbitrator . . . .").

[34] Our decision in *Guam YTK I*, in which we compelled the parties to arbitrate this dispute, does not bear on the questions presented in this appeal. Both *Guam YTK I* and the federal cases we relied upon in resolving that earlier appeal—including *Buckeye Check Cashing*—were resolved under section 42A202 of the GIAC or its federal analog, section 2 of the FAA. This appeal, in contrast, presents questions regarding the appropriate standard of review under section 42A701 of the GIAC, the federal equivalent of which is section 10 of the FAA. In an unpublished case from the California Court of Appeals, the court specifically rejected the argument that the rationale of *Buckeye Check Cashing*—or any other pre-arbitration (*i.e.*, section 42A202 or section 2) decisions—required deference to an arbitrator's determination regarding the substantive legality of a contract. *See Borisoff v. Pullman Grp., LLC*, B259675, 2016 WL 4547868, at *6 (Cal. Ct. App. Sept. 1, 2016). As that court explained:

> *Buckeye* held that under the Federal Arbitration Act, a motion to compel arbitration may not be denied on the ground that contractual provisions (other than the arbitration clause itself) are illegal, as the issue of illegality is to be determined by the arbitrator, not the court. *Buckeye* did not hold a trial court must enforce an arbitration award that depends on, incorporates, or purports to effect an illegal contract.
>
> On that point the law is clearly to the contrary: Courts will not enforce arbitration awards rendered pursuant to illegal contracts.

Id.; *see also Zephyr Equities & Dev., LLC v. Brookfield Natomas, LLC*, G050001, 2015 WL 6948632, at *16 (Cal. Ct. App. Nov. 10, 2015) ("We conclude the trial court correctly conducted a de novo review of the evidence to determine if the negotiation of Landowner Agreements

required a real estate license under section 10130. The arbitrator's finding no license was required was not binding on the trial court.").

[35] The above line of caselaw follows prior precedent from our jurisdiction regarding contract legality. We have held, for example, that "the question of illegality of the contract sued on may be raised *at any time*." *Pangelinan v. Gutierrez*, 2004 Guam 16 ¶ 9 (emphasis added) (quoting *Maynard Inv. Co. v. McCann*, 465 P.2d 657, 666 (Wash. 1970)), *overruled on other grounds by San Miguel v. Dep't of Pub. Works*, 2008 Guam 3 ¶ 47. We see nothing in the text of the GIAC that alters this general principle in this case.[4] "[C]ourts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent." *Id.* ¶ 9 (quoting *Maynard*, 465 P.2d at 661); *see also Mathewson v. Aloha Airlines, Inc.*, 919 P.2d 969, 995 (Haw. 1996) (affirming modification of arbitration award because "the circuit court's 'modification' could be viewed as no more than a recognition of the legal 'given,' which would obtain even if left unstated, that [defendant] was duty-bound to comply with the arbitration award only to the extent that it would not be obligated to perform an illegal act").

[36] We note that not all courts agree with the common-sense view expressed in those cases noted above. The leading case expressing an alternative view is *Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Medical Center, Inc.*, in which the Florida Supreme Court found that "courts cannot review an arbitration award based on a claim of contract illegality." 154 So. 3d 1115, 1124 (Fla. 2014). No court has relied upon *Visiting Nurse* for this proposition, but there have

[4] *But cf.* 7 GCA § 42A401 ("A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified."). The Port argued before the arbitration panel that the contract between the parties was illegal and that "[n]o portion of an illegal lease . . . can be enforced" by the arbitration panel. RA, tab 49, Ex. B at 9 (Def.'s Opp'n to Pl.'s Mot. to Confirm Arbitration, June 20, 2016); *see also* 7 GCA § 42A401.

been a handful of unpublished opinions adopting a similar view. *See City of Alturas v. Adkins Consulting Eng'rs, Inc.*, No. 2:13-cv-00354-TLN-CMK, 2014 WL 1255848, at *5 (E.D. Cal. Mar. 26, 2014); *Nelson v. Ochsner*, No. 1 CA-CV 12-0121, 2013 WL 773045, at *3 (Ariz. Ct. App. Feb. 28, 2013); *Infinity Capital II, LLC v. Strasburger & Price, LLP*, No. 01-15-00691-CV, 2016 WL 4254137, at *6-7 (Tex. Ct. App. Aug. 11, 2016), *review denied*, Mar. 31, 2017. We find *Visiting Nurse* less than convincing. The Florida Supreme Court based its final determination, in part, upon reading the United States Supreme Court's decision in *Hall Street*, 552 U.S. 576, inconsistent with the view we recently adopted in *Asia Pacific Hotel II*, 2015 Guam 3 ¶ 22. We therefore reject the Florida Supreme Court's analysis in *Visiting Nurse*. The rule expressed by the *Borisoff* court and the litany of other cases cited above is the sounder approach.

[37] When a party to an arbitration proceeding seeks to vacate an arbitration award because the contract on which it was based is substantively illegal—*i.e.*, it would cause illegal conduct by a party if enforced—a reviewing court should independently review the question of contract legality. In conducting this review, "we are not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award." *Tech. Colls.*, 425 A.2d at 1252-53. Deference to the arbitrator's decision is therefore not justified where enforcing the award would cause enforcement of a substantively illegal contract. *See id.* at 1253 n.6 (discussing reasons deference is not required in this context); *see also Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. (UAW) Local 985, AFL-CIO v. W.M. Chace Co.*, 262 F. Supp. 114, 117 (E.D. Mich. 1966) ("In looking beyond the opinion, the Court is . . . actually concerned with the lawfulness of its enforcing the award and not with the correctness of the arbitrator's decision."); *Botany Indus., Inc. v. N.Y. Joint Bd., Amalgamated Clothing Workers of Am.*, 375 F.

Supp. 485, 490 (S.D.N.Y. 1974) (same), *vacated on other grounds sub nom. Robb v. N.Y. Joint Bd., Amalgamated Clothing Workers of Am.*, 506 F.2d 1246 (2d Cir. 1974).

[38] We emphasize the narrowness of the rule we adopt today. We find only that in deciding whether an arbitration award should be vacated, a court reviews *de novo* the narrow question of whether confirming the award would cause the enforcement of a substantively illegal contract. Nothing in our Opinion today alters or modifies the general deference courts should apply when deciding whether to confirm or set aside an arbitration award, and we adopt no grounds for vacatur beyond those set forth in 7 GCA § 42A701(b). We continue to adhere to the principle that arbitration is not simply a prelude to full judicial review of the merits of the dispute.

[39] The law does not demand that courts be made into unwitting participants in illegal conduct simply because the parties appearing before them have previously arbitrated the dispute. In a slightly different context, the District Court of Guam, Appellate Division noted "the absurdity of . . . asking [a] court to enforce a clearly illegal contract." *Nateroj v. Haruyama*, Civ. No. 91-00039A, 1992 WL 97207, at *3 (D. Guam App. Div. Apr. 16, 1992). Such a request becomes no less absurd simply because the parties have gone through the arbitration process. "Just as private parties cannot expect a court to enforce a contract between them to engage in conduct which is illegal . . . , they cannot expect an intervening arbitral award approving (or ordering) that conduct to receive judicial endorsement." *Tech. Colls.*, 425 A.2d at 1252 (quoting Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law, Unionization & Collective Bargaining* 593 (1976)). An arbitration panel exceeds its authority in attempting to enforce an illegal contract, and any award issued in excess of the arbitration panel's powers is subject to vacatur under 7 GCA § 42A701(b)(4). *See Sheppard, Mullin*, 425 P.3d at 8; *see also Tech. Colls.*, 425 A.2d at 1253.

3. *De Novo* Review Applies to the Port's Request to Vacate the Arbitration Panel's Award in This Case

[40] In establishing the civilian Government of Guam, the United States transferred ownership of both real and personal property to the Government of Guam, *see* 48 U.S.C.A. § 1421f(a) (Westlaw through Pub. L. 116-21 (2019)), and it placed plenary power in the legislative branch "to legislate with respect to such property," *id.* § 1421f(b). "[T]he Organic Act allows the legislature to act in reference to this land so long as it does not do so inconsistently with acts of Congress." *Bordallo v. Camacho*, 475 F.2d 712, 713 (9th Cir. 1973). Thus, where any land owned by the Government of Guam is transferred without legislative consent, the purported transfer or the possession of land by the transferee is illegal. *See id.* at 713-15 (finding that where legislature preserved the right to consent to land transfer by statute, the Governor lacked independent authority to transfer land without legislative consent).

[41] In determining whether *de novo* review is appropriate in accordance with our discussion above, we are concerned only with the substantive illegality of the contract, not questions regarding how the contract was formed. *Accord Sheppard, Mullin*, 425 P.3d at 10. Only when enforcing the contract at issue would cause one or more of the parties to act in an illegal manner should a reviewing court apply *de novo* review. *Cf. Tech. Colls.*, 425 A.2d at 1252. Here, the Port argues that the Lease is illegal because the parties never obtained specific legislative approval in violation of 12 GCA § 10105(i) and 21 GCA § 60112. Under its plenary power, the Guam Legislature has prohibited any transfer of land without its consent, which must be evidenced "by duly enacted legislation." 21 GCA § 60112(a) (2005). Unless a statutory exception provides the legislative consent—and the Port argues that none exists in this case—the act of transferring the right to use and enjoy the land or the ongoing possession of land by Guam

YTK was and is illegal. Thus, assuming the Port's position is correct, the Lease would be substantively illegal. This is not merely a question of the Port's capacity to enter into a lease. Accordingly, we must apply *de novo* review of the arguments presented by the Port. *See Tech. Colls.*, 425 A.2d at 1252; *W.M. Chace Co.*, 262 F. Supp. at 117.

4. It is Illegal for the Port to Lease Land for a Term Greater Than Five Years Without Legislative Approval Under 12 GCA § 10105(i) and 21 GCA § 60112, and the Option Agreements Cannot be Severed from the Lease as a Whole

[42] On appeal, the Port asserts that because the Lease is for a term longer than five years and the parties never obtained legislative approval, the Lease itself violates 12 GCA § 10105(i) and 21 GCA § 60112. Guam YTK argues that the Lease is not subject to more specific legislative approval because it is for a term of only five years, with consecutive options to renew for additional five-year periods. In other words, Guam YTK argues that the Legislature has provided approval under its plenary power over Government of Guam land because the Lease falls under 12 GCA § 10105(i), thereby exempting it from more specific legislative approval. Guam YTK further argues that even if the option agreements do violate 12 GCA § 10105(i) and 21 GCA § 60112, the options should be severed from the Lease and the initial five-year term of the Lease was substantively legal and should be enforced. Upon our *de novo* review, *see supra* Part III.B.3, we find that Section 2.2 of the Lease operates as an illegal attempt to circumvent the requirements of 12 GCA § 10105(i) and 21 GCA § 60112, and the option agreements cannot be severed from the remainder of the Lease. The Lease therefore required specific legislative approval. Because this was not obtained, the parties' attempt to transfer land over which the Government of Guam has plenary authority is substantively illegal. We therefore conclude that the arbitration panel exceeded its authority by enforcing this illegal contract.

[43] "In cases involving statutory construction, the plain language of a statute must be the starting point." *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23. Under Guam law, specific legislative approval is needed for any lease of government land:

> Notwithstanding any other provisions of law, government-owned real property *shall not* be sold, leased, sub-leased, exchanged or otherwise transferred without the prior approval of *I Liheslatura* (the Legislature) by duly enacted legislation, which specifically authorizes a particular sale, lease, exchange or transfer, and includes the real property description of the government-owned real property with particularity, and a Department of Land Management recorded map showing the alienated parcel and the remaining parcel of the original lot.

21 GCA § 60112(a). The Port, however, has apparently[5] been partially exempted from this requirement under 12 GCA § 10105(i) of its enabling legislation, in which the Legislature provided that "[t]he Board may: . . . [n]otwithstanding any other provision of law, make, negotiate and enter into a commercial lease, or issue a permit or license for the use of its real property and other related facilities for a term not to exceed five years." 12 GCA § 10105(i) (2005). All parties agree that: (i) any attempt by the Port to lease any of its land for a period over five years requires specific legislative approval for that lease to be legal and valid; and (ii) the Legislature did not specifically approve of the Lease at issue in this appeal. Under the Lease, the eight consecutive option agreements are automatic and self-effectuating "without any action on [Guam YTK's] part." Dev. Agreement & Lease § 2.2. Furthermore, "all renewal option periods

[5] Both parties have assumed in their respective arguments that if a lease falls within the scope of section 10105(i), it does not have to comply with the legislative-approval requirement of 21 GCA § 60112. A plain reading of these statutes does not compel this result. Each of these statutory provisions uses the introductory phrase "[n]otwithstanding any other provision of law," and to the extent that these statutes directly overlap, they would be in direct conflict. Because section 10105(i) does not mention legislative approval or the need *not* to obtain legislative approval if a lease falls within its scope, these two statutes could potentially be read in harmony such that legislative approval is required even when a lease falls within the scope of section 10105(i). We need not and do not resolve this interpretive question today because, as explained below, we find that the Lease is for a period of more than five years and 12 GCA § 10105(i) therefore does not apply. We assume for purposes of our analysis that the parties' interpretation of these statutes in this regard is the correct reading. We further note, however, that to the extent that the Legislature intended to exempt the Port from the legislative-approval requirements of 21 GCA § 60112 for leases not exceeding five years in length, the mere use of the introductory phrase "[n]otwithstanding any other provision of law" in 12 GCA § 10105(i) does not of necessity compel this interpretation.

shall not require the approval of . . . any . . . local government agency or authority," including the governor or the Legislature. *Id.*

[44] By their plain terms, 12 GCA § 10105(i) and 21 GCA § 60112 prohibit the Port from entering into non-approved leases that "exceed five years." 12 GCA § 10105(i); 21 GCA § 60112. In *E.C. Development, Ltd. v. General Conference Corp. of the Seventh-Day Adventist*, we addressed the status of a lease agreement that continued past its original term. *See* 2005 Guam 9 ¶¶ 24-28. There, we adopted the "extension" theory used by some California courts. *Id.* ¶ 28. Under this doctrine, "where a lease gives an option to the lessee 'to renew' the lease for a specified term without requiring the execution of a new lease, the extension is a continuation of the tenancy under the original lease." *Id.* ¶ 24 (quoting *Knox v. Wolfe*, 167 P.2d 3, 8 (Cal. Dist. Ct. App. 1946)). This doctrine applies where a "lease lack[s] formal requirements regarding the exercise of the option." *Id.* Here, the option renewals are "automatic without any action on [Guam YTK's] part." Dev. Agreement & Lease § 2.2. Thus, under the "extension" theory, the option agreements result in the continuation of the original lease rather than constituting nine separate, identical contracts all lasting for five years each. Assuming that even just one of the option agreements was exercised, the term of the Lease would exceed five years. Under the plain terms of 12 GCA § 10105(i) and 21 GCA § 60122, specific legislative approval is required, and the parties obtained no such approval.

[45] In addition, governing law "cannot be avoided through artifice." *Commonwealth Mortg. Assurance Co. v. Superior Court*, 259 Cal. Rptr. 425, 428 (Ct. App. 1989); *see also Cook v. Frazier*, 765 S.W.2d 546, 549 (Tex. Ct. App. 1989) (finding that "[c]hoice of law provisions . . . may not be utilized as a subterfuge to avoid the usury law that would otherwise apply"). And where "legislation was established for a public reason," it "cannot be contravened by a private

agreement." *Commonwealth Mortg.*, 259 Cal. Rptr. at 428. "The primary objective in construing a contract is not to label it with specific definitions or to look at form above substance, but to ascertain and enforce the intent of the parties as shown by the contents of the instrument." *Bogle Farms, Inc. v. Baca*, 925 P.2d 1184, 1190 (N.M. 1996) (quoting *Shaeffer v. Kelton*, 619 P.2d 1226, 1229 (N.M. 1980)); *see also Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 920 N.E.2d 359, 363 (N.Y. 2009) (in contract interpretation, "[f]orm should not prevail over substance" (quoting *William C. Atwater & Co. v. Panama R. Co.*, 159 N.E. 418, 419 (N.Y. 1927))). With these interpretive rules in mind, and under our prior precedents, we interpret the Lease as having one continuous term lasting for forty-five years. This is evident in the fact that even the most basic requirements of the Lease were contemplated to extend beyond the first five years of the Lease. Moreover, under Guam YTK's proffered interpretation of the Lease, the Lease violates various laws other than 12 GCA § 10105(i). The option agreements are illusory and do not allow the parties to avoid the requirement of specific legislative approval.

[46] The Lease, by its own wording, contemplates that its term is for more than five years. In Section 3.4 of the Lease, for example, the parties agreed that a re-appraisal of the land would be undertaken "[a]t the expiration of *the first seventeen (17) years of this Lease* after the effective commencement date." Dev. Agreement & Lease § 3.4 (emphasis added). Even at a more fundamental level, however, the Lease contemplates that its term will last beyond five years. In the Recitals, the parties indicated their intent that Guam YTK would "construct, develop, manage, maintain, and operate on the Premises a fisheries facility." Dev. Agreement & Lease at Recitals. Under Section 9.2 of the Lease, however, the parties agreed that Guam YTK: (i) did not have to submit plans and designs until one year after the effective commencement date; (ii) did not have to start construction until 18 months after the effective commencement date; and

(iii) did not have to finish construction until "1,825 days (5 years) after *the commencement of construction*." *Id.* § 9.2 (emphasis added). The parties thus agreed that construction of the project did not have to be completed until *after* the first five years of the Lease had run. Even then, the contract was not simply for constructing a fisheries facility, but the parties intended for Guam YTK to operate and manage a fisheries facility once constructed. *See id.*, Recitals, Art. 3.

[47] The buy-out provision of the Lease also demonstrates the illusory nature of the option agreements. That provision applies if the Lease is terminated "before the end of 45 years after the effective commencement date." *Id.* § 21.1; *see also id.* § 2.2 (referring to forty-five years as "maximum term of *this Lease*" (emphasis added)). Similarly, at the arbitration hearing, Guam YTK sought damages related to the full 45-year term, and the panel awarded these damages. If each individual option amounted to a separate Lease agreement—as would be necessary to avoid the requirement of specific legislative approval—then expectancy damages would need to be limited to five-year increments; otherwise, such a provision would constitute a prohibited damages penalty under 18 GCA § 88103. *See* 18 GCA § 88103 (2005); *see also* 18 GCA § 88104 (2005); *In re Montgomery Ward Holding Corp.*, 326 F.3d 383, 390 (3d Cir. 2003) (finding that a clause meant to "secure performance" was an unenforceable penalty, not a liquidated-damages clause).

[48] This is not the only statutory provision that the Lease would violate were we to view each five-year lease term in isolation to permit the parties to avoid specific legislative approval. Under 5 GCA § 22601, all contracts with the Government of Guam can be executed only with the approval and signature of the Governor. *See* 5 GCA § 22601 (2005) ("All contracts of whatever nature shall be executed upon the approval of the Governor."). Thus, if each option period constituted a new contract, then the Governor's signature would be required for each

individual new contract. Section 2.2 of the Lease, however, specifically disclaims any such requirement. *See* Dev. Agreement & Lease § 2.2.

[49] Beyond the plain terms of the relevant statutes, the legislative history of section 10105(i) strongly supports finding that the Lease required legislative approval. The Legislature added subsection (i) to 12 GCA § 10105 with the passage of Guam Public Law 26:028. Section 2 of the originally submitted bill that ultimately became Guam Public Law 26:028, and was codified as 12 GCA § 10105(i), authorized the Port to "negotiate and enter into a commercial lease or issue a permit or license for the use of its real property and other related facilities for *an initial* term not to exceed five (5) years." Bill No. 113(COR), 26th Leg., 1st Reg. Sess. (Guam 2001). At a committee hearing, however, "Senator Ben Pangelinan questioned the section that allows leases to be renewed. He said they should not be able to go beyond five years." Tourism, Transp. & Econ. Dev., Comm. Rep. on Bill No. 133(COR), 26th Leg., 1st Reg. Sess. (Guam 2001). The "initial term" language was ultimately removed from the final bill. *Compare* Bill No. 113(COR), *with* 12 GCA § 10105(i). Given this legislative history, the Lease appears to be exactly the sort of structured long-term lease that the Legislature intended to prohibit by removing the phrase "initial term" from the draft legislation. Though the veracity of including option agreements in a lease that may extend the lease term beyond five years is not addressed in section 10105(i), the legislative history imparts a policy disfavoring leases like that at issue here. *See* 18 GCA § 88101 (2005) (a contract is not lawful under Guam law where it is "[c]ontrary to the policy of express law, though not expressly prohibited").

[50] As a final argument, Guam YTK posits that even if a portion of the Lease is illegal, such as the option agreements, that portion is severable from the rest of the agreement, and the initial five-year term should be enforced. *See, e.g.*, Appellee's Br. at 44. "The rule is settled that

partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal." *Pangelinan*, 2004 Guam 16 ¶ 13 (quoting *Mailand v. Burckle*, 572 P.2d 1142, 1152 (Cal. 1978)). But, "[i]f the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." *Id.* (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000)). In deciding whether a provision is severable, the court must determine whether the illegal provision "is the central purpose of the contract, and if so, then the contract is unenforceable in its entirety." *Id.* ¶ 14. When the illegal provision "is collateral to the main purpose of the contract, and if it can be severed or restricted, then such severance or restriction will apply to save the remaining, valid portions of the contract." *Id.* (emphasis omitted). This is "a question of [contract] construction," guided by "the language and subject-matter of the contract . . . according to the intention of the parties." *Id.* ¶ 15 (omission in original) (citations omitted).

[51] Section 19.12 of the Lease provides that "[i]f any provision or provisions of this Lease are determined to be illegal or unenforceable, such determination shall not affect any other provision of this Lease, and all such other provisions shall remain in full force and effect." Dev. Agreement & Lease § 19.12. Although the Lease has a severability clause, "when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract." *Pangelinan*, 2004 Guam 16 ¶ 17 (quoting *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. Ct. App. 1996)). Here, the option agreements in section 2.2 of the Lease are not severable from the rest of the agreement. The contract contemplates that fundamental aspects of the parties' agreement—including the completion of construction—would occur after the first five years of the Lease. If the Lease were to end before or shortly after construction was completed, Guam YTK would have been unable to reap any significant benefits from the Lease;

it would have been required under the Lease to make a large capital outlay, but would not be in a position to recoup that investment by using the constructed facilities. As Guam YTK readily admits, it "would never agree to finance capital improvements under a short-term lease." Appellee's Br. at 64.

[52] We find that the Lease has a term lasting forty-five years. Absent specific legislative approval of the Lease, any attempt by the Port to transfer possession or the right to use and enjoyment of land under these circumstances would be substantively illegal. *Cf. Gutierrez v. Guam Election Comm'n*, 2011 Guam 3 ¶ 38 (*ultra vires* acts are void); *State ex rel. Bain v. Clallam Cty. Bd. of Cty. Comm'rs*, 463 P.2d 617, 621 (Wash. 1970) (en banc) ("[W]hen one deals with [a government entity] in a manner not in compliance with the law one does so at one's peril."). The arbitration panel therefore exceeded its authority by attempting to enforce a substantively illegal contract, and the Amended Arbitration Award should have been vacated under 7 GCA § 42A701(b)(4).

IV. CONCLUSION

[53] We **VACATE** the Judgment, dated February 3, 2017, and the Decision and Order, dated June 27, 2017, and **REVERSE** the Decision and Order, dated December 29, 2016. We **REMAND** with directions for the trial court to vacate the Amended Arbitration Award, dated May 17, 2016, *nunc pro tunc* to April 4, 2016.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
MARIA G. FITZPATRICK
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice