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The Center for Alternative Dispute Resolution Newsletter
State of Hawaii, Judiciary



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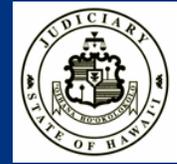


Summary — for those who missed the forum on legislative, judicial, and arbitration updates

Legislative Update: Elizabeth Kent reported that the Center for Alternative Dispute Resolution tracked approximately 30 ADR-related bills and resolutions during the past session. Subject matters included restorative justice, geothermal resources (ADR provisions), arbitration, condominiums (mediation provisions), the Uniform Mediation Act (UMA), and mediation and judicial foreclosure. Three of these measures became law. [Act 62](#) provides that informal adjustment in a juvenile case may include participation in a restorative justice program, [Act 187](#) addresses mediation of condo disputes and the education trust fund that may be used to support mediation of condo-related disputes, and [Act 284](#) is the UMA. Governor Abercrombie signed Acts 62 and 187 and the UMA became law without his signature.

UMA: Chuck Hurd discussed Act 284, which creates a privilege for mediation communications, addresses when mediators may submit reports or communicate with courts or other authorities that may make a ruling on the dispute in mediation, and addresses disclosure by mediators of their conflicts of interest. Hurd explained that the act applies to all mediators, with some limited and specific exceptions. He distinguished between two categories of exceptions in Section 6; in camera review is required for some exceptions and not for others.

The discussion promoted an exchange of viewpoints about the UMA and additional issues for consideration were identified. Issues include how to discuss confidentiality in an opening statement and the role of the mediator in working with *pro se* clients. The ADR Section may host future forums to further explore these issues.



Hawaii Court Updates: Lou Chang summarized [three arbitration-related cases](#). First, he discussed provisions in the parties' condominium documents that were presented to the appellate courts in [AOAO Waikoloa Beach Villas Board of Directors v. Sunstone Waikoloa LLC](#). Chang pointed out that although the Supreme Court struck down some of the provisions, it did not strike down the pre-dispute arbitration provisions. Second, Chang turned to [County of Hawaii v. Unidev LLC](#), which holds that an order compelling arbitration is an appealable final order. Finally, Chang discussed [Hawaii Teamsters and Allied Workers, Local 996 v. Airgas West](#), in which the District Court for the District of Hawaii confirmed an arbitrator's award reinstating a terminated employee where the arbitrator conducted independent factual inquiry without the knowledge or consent of the parties. The court stated that it is "procedurally questionable for an arbitrator to consult with family members or to conduct independent internet research . . ." but that the investigation did not invalidate the arbitrator's finding. A second aspect of the case involved the District Court's determination that the arbitrator's award of full back pay failed to "draw its essence" from the collective bargaining agreement when the evidence showed that the employee had not done anything to mitigate his damages. Both the employer and the union have appealed the decision.

Key Recent Cases on Arbitration (US Supreme Court and 9th Circuit): Jeff Crabtree represents consumers and believes it is unfair to force consumers to arbitrate through pre-dispute arbitration clauses inserted into consumer contracts. Crabtree quickly reviewed recent Supreme Court cases on arbitration: [AT&T Mobility LLC v. Concepcion](#), [American Express v. Italian Colors](#), [Oxford Health Plans v. Sutter](#), and some [ninth circuit cases](#). He concluded that even-handed pre-dispute clauses will withstand judicial review but ones in which the drafter gets "greedy" may be stricken. Crabtree stated that the Federal Arbitration Act (FAA) is certainly "alive and well" and it may prevail when there is a clash between the FAA and other public policy. Crabtree said that in response to the endorsement of the FAA in the courts, some bills are pending in Congress that would provide more protection for consumers, but they do not seem likely to be enacted. Some controls are being enacted by federal regulatory agencies, which may lead to a patchwork system of limitations for universal pre-dispute arbitration clauses.

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Report to the ADR Section of the Hawaii State Bar Association

Recent Hawaii Court Cases on Arbitration:

I. **Condominium Provisions Requiring Arbitration and Imposing Procedural Conditions Upheld.**

In January, 2013, the Hawaii ICA rejected an unconscionability argument and upheld a condominium provision requiring super-majority vote of association members before proceeding with construction deficiency arbitration

In AOAO Waikoloa Beach Villas v. Sunstone Waikoloa LLC, the Hawaii Intermediate Court of Appeals CAAP-11-000998 (January 29, 2013) upheld a provision in the condominium documents that established a procedure for obtaining an attorney's opinion letter, 2/3 Board approval and 75% ownership approval before the condominium association could undertake a "development controversy" involving the project. The ICA rejected the Association's arguments that the provision written into condominium documents effectively on a "take it or leave it" basis were unconscionable. The Court's analysis concluded that the provision was a rational and reasonable provision stating that "the provisions are a justifiable means of obtaining the owners' informed, collective decision about initiating a major proceeding...." The Court found no procedural or substantive unconscionability.

On appeal, the Hawaii Supreme Court in AOAO Waikoloa Beach Villas Board of Directors v. Sunstone Waikoloa LLC, No. SCWC-11-0000998, June 28, 2013, vacated the ICA decision in part and affirmed it in part and remanded the matter for further proceedings. The Supreme Court upheld the condominium document provisions that established classifications for a wide category of “Operational Controversies” and a narrow category of “Development Controversies” (claims against the Developer) and required approval by 75% of the unit owners before proceedings could be commenced. “Development Controversies” were required to proceed through negotiation, mediation, then finally arbitration or litigation. The Supreme Court also upheld a condominium provision that required arbitration of Association and homeowner claims for defect claims relating to the common elements or individual units under a “Home Builder’s Limited Warranty” program.

The Supreme Court found invalid that portion of the condominium document provisions that imposed conditions with regard to “Development Controversies” which (a) required the Condominium Association to obtain an attorney opinion letter indicating that the Association had a substantial likelihood of success on the merits and not have a substantial likelihood of incurring any material counterclaim liability by an attorney with at least a “bv” Martindale-Hubbell rating and (b) required distribution of the attorney opinion letter to all owners. The Supreme Court found such provisions in violation of the condominium statutory provision found in HRS Sec. 514B105 because they imposed restrictions or limitations upon the Association in actions against the Developer that were more restrictive than those imposed on other persons.

[1. The Hawaii Supreme Court did not find objectionable the ICA consideration of procedural or substantive unconscionability arguments. Dispute resolution provisions and the Home Builder’s Limited Warranty program was clearly and consistently disclosed in sales documents, CC & Rs, public reports, copies of warranty given to buyers who signed for receipt of the document helped to support the claim that there was no procedural unconscionability.

2. Developers likely will take note of this decision. Pre-dispute arbitration provisions in the condominium documents upheld. (1. High vote requirement (75%), 2. distinction between “Operational Controversies” and ‘Development Controversies” where Development Controversies required a special assessment for funding and 3. Validation of Limited Warranty program and its ADR provisions including provision that parties were to pay their own legal expenses.]

II. **Order Compelling Arbitration is an Appealable Order. Claims “Arising Under” Given Broad Interpretation.**

In County of Hawaii v. Unidev LLC, the Hawaii Supreme Court ruled that under the RUAA, HRS Sec.658A-28, although it specifically provides that an order denying a motion to compel arbitration is appealable but is silent as to an order compelling arbitration, an order compelling arbitration is also an appealable final order.

The Court also ruled, after discussing a split of authority on the matter, that a contractual arbitration clause that stated that “any dispute arising under the terms of the agreement” is to be accorded a broad interpretation. Thus in a breach of a land development contract, such arbitration clause was broad enough to encompass causes of action alleging false claims, intentional misrepresentation, negligent misrepresentation, fraudulent inducement, negligence, breach of contract, quantum meruit, intentional interference with contract, fraudulent transfer and unfair and deceptive practices.

[Drafting tip: The Court suggested that the phrase: “arising out of or in relation to or in connection with the contract, or for the breach thereof” would be more clearly intended to be interpreted as broad in scope.]

II. **Hawaii District Court Confirms Arbitrator’s Award In Part and Reverses the Award In Part.**

In a sexual harassment labor arbitration case, the District Court for the District of Hawaii confirmed an arbitrator’s award reinstating the terminated employee where the arbitrator conducted independent factual inquiry without the knowledge or consent of the parties. The issue concerned whether there were popular alternative sexually suggestive meanings to the local terms “manapua”, “aloha” and “holoholo”. Being unaware of the contention that such terms have a sexually suggestive meaning among some people, the arbitrator (post hearing and outside the presence of the parties) inquired of some long term Hawaii residents, and researched statutes and articles and did an internet search (“googled”) the terms to see if they had some Hawaiian slang meaning. The CBA contained the following common provision:

The arbitrator shall make his decision in the light of the whole record and shall decide the case upon the weight of all substantial evidence presented.

Finding substantial evidence to support the arbitrator's decision, the Court confirmed the Arbitrator's determination that the Employer did not have just cause to terminate the employee and stated:

The Court agrees that it is procedurally questionable for an arbitrator to consult with family members or to conduct independent internet research in order to define the meaning of disputed words. The Court, however, agrees with the union that the Arbitrator's ex parte investigation does not invalidate his finding here that Mr. Oamilda was not fired for "just cause," and finds that neither party was disadvantaged by the evidence acquired outside of the arbitration.

However, with regard to the arbitrator's award of full back pay, the Employer was able to establish that the employee had not attempted to mitigate his damages by seeking other work during the period of his termination from the company because he was "depressed". The employer established in the arbitration case that the employee's uncontroverted testimony that had no documents or evidence to support his claimed inability to work. After discussing the duty imposed pon terminated employees to mitigate their damages, the Court concluded that the arbitrator's award of full back pay did not "draw its essence" from the CBA and thus vacated the back pay award. On this point, the Court stated:

To the extent the Arbitrator ruled that Airgas had some additional "burden" to prove the defense of failure to mitigate, the Court finds that the Supplementary Award does not draw its essence from the CBA. That is, the Arbitrator's refusal to consider the clear evidence of failure to mitigate and to then impose an additional evidentiary burden on Airgas is not a plausible interpretation of the CBA, which requires the Arbitrator to make his decision in light of the whole record and decide the case upon the weight of all substantial evidence presented.

Hawaii Teamsters and Allied Workers, Local 996 v. Airgas West;; cv-00517-LEK-KSC Document 34 Filed 04/30/13.

[Cross appeals have been filed. The Union has appealed that portion of the Order that vacated the Arbitrator's award of full back pay as not "drawing its essence from the CBA. The Employer has filed a cross appeal on that portion of the Order

that confirmed the Arbitrator's decision after doing independent factual research to grant the grievance.]

Key Recent Cases on Arbitration: USSC and 9th Circuit

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

Class action bans approved for arbitration agreements. State laws to the contrary are trumped by the FAA. (About 20 states and a number of federal circuits had held that class action bans were void if a class action was the only realistic way to get relief.)

American Express v. Italian Colors (USSC, June 20, 2013).

Expanded Concepcion to preclude class relief for a group of merchants who were alleging anti-trust violations.

Murphy v Direct TV (9th Circuit, July 30, 2013).

Consumers can pursue their class claims against Best Buy, which did not even have an arbitration clause. (Best Buy tried to piggy-back the arbitration clause of their joint-venturer, Direct TV, which the court did not allow). The claims against Direct TV must be arbitrated per Concepcion.) So two defendants are intertwined in a consumer case. One will have individual arbitration claims (if any), and the other will be in a class action.

Oxford Health Plans v Sutter (USSC June 10, 2013--unanimous)

If the arbitration clause is silent on class relief, the Arbitrator can certify a class action. The sole question is did the Arbitrator **interpret** the arbitration contract, not whether he/she did so correctly.) The limited judicial review of Arbitrator's decision includes class relief. Contrast with the Stolt-Neilsen decision (559 US at 684), where the parties stipulated there was no agreement on class arbitration, and the arbitrator did not interpret the contract, eg, the arbitrators abandoned their interpretive role. This gives an arbitrator a largely unfettered ability to "interpret" the arbitration clause, combined with the arbitrator's (not the court's) role to determine whether preconditions to arbitration have been met (see, eg, John Wiley & Sons, 376 US 543, and Howsam v. Dean, 537 US 79).

Mortensen v. Bresnan Communications, LLC (9th Circuit, July 15, 2013)

The FAA preempts Montana's public policy against adhesive arbitration agreements that run contrary to a party's reasonable expectations. *Concepcion* requires preemption under the FAA of any general state law contract defense that has a disproportionate impact on arbitration. This case expands *Concepcion* beyond unconscionability (the FAA has a savings clause for fraud, duress and unconscionability) into any state rule that is adverse to arbitration.

Kilgore v. Key Bank (9th Circuit, en banc, 4/11/2013).

Must claims for public injunctive relief be arbitrated post-Concepcion? Answer: probably, but not always. The “public injunction” exception as developed in *Broughton v. Signa Healthplans of Cal.*, 988 P.2d 67, 73, 78 (Cal. 1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003), and by the 9th Circuit in *Davis v. O'Melveny & Myers* 485 F.3d at 1081-84, must be narrowly construed after Concepcion. The exception only applies when the “benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered.”

Where do we go from here?

Answer: patch-work efforts to limit universal pre-dispute arbitration clauses by Congress and regulators:

- Franken Amendment to Appropriations Act (civil rights/employment claims)
- Dodd-Frank (whistle-blower claims)
- Carmack Amendment—Interstate Commerce (shippers)
- SEC authorized to restrict or prohibit by rule pre-dispute arbitration clauses between brokers, dealers, advisers and their customers)
- CFPB fact-finding and rule making (motor vehicle franchise contracts between dealer and manufacturer. The next item along these lines may be pre-dispute arbitration clauses between consumers and car dealerships).
- CFPB can now ban or limit by regulation pre-dispute arbitration clauses for consumer financial products or services. Recent examples: residential mortgages, home equity lines for loan applications received after 6/1/13.