



**LATE TESTIMONY**

## Collection Law Section

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Senator Clayton Hee, Chair  
Senator Maile S.L. Shimabukuro, Vice Chair  
Senate Judiciary Committee  
State of Hawaii

### TESTIMONY IN SUPPORT OF **HB 1140, H.D. 1** RELATING TO ARBITRATION

Bill Numbers: HB 1140, H.D. 1  
Date and Time: **Thursday, April 7, 2011 at 9:30 pm**  
Location: **Conference Room 016**

Committee: **Committee on the Judiciary**

*Reply to:* **STEVEN GUTTMAN, CHAIR**  
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April 6, 2011

Dear Senator Hee, Senator Shimabukuro and Committee Members:

The Collection Law Section of the Hawaii State Bar Association supports passage of HB 1140, H.D. 1.<sup>1</sup>

HB 1140, H.D. 1 amends HRS 658A-15 to add a new subsection (f) to empower arbitrators to enter a default against a commercial entity that is a party to the arbitration who fails to pay the arbitration fees or costs directed by an arbitrator or arbitration organization. The effect of the entry of default would constitute a ruling against that party. As currently written, the arbitration statute does not clearly empower the entry of default in arbitration cases under these circumstances. In litigation, under the various rules of the courts and rules of civil procedure, failure to participate in the litigation can be met with the entry of default against the party failing to participate. Unlike litigation, in arbitration, one of the ways that a party can fail to participate is by not paying the required fees and/or costs, since parties to arbitration must directly pay for the arbitration services. In litigation, those similar services are not paid directly by the litigants.

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<sup>1</sup> The opinions of the Collection Law Section are not necessarily the opinions of the Hawaii State Bar Association proper.

The effect in arbitration of failing to pay the required fees and/or costs, is that the arbitration does not move forward until those fees and/or costs are paid. Therefore, a party to a dispute which has previously been submitted to arbitration can forestall the process simply by not paying that party's share of the fees and/or costs. The current effect is that the claims of the other party(s) to the arbitration, who in fact paid their required fees and/or costs, do not proceed until the defaulting party fulfills its commitment to pay its share of the fees and/or costs. This is an oversight that frustrates the very purpose of the arbitration statute itself.

Thank you.

Respectfully,

/s/ James Hochberg

James Hochberg, Esq.  
Director,  
Collection Law Section  
HSBA

cc: Steve Guttman  
Lyn Flanigan

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**LATE TESTIMONY**

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Senator Clayton Hee, Chair  
Committee on Judiciary and Labor

## Testimony in opposition of **HB 1140**, HD1 RELATING TO ARBITRATION

**Date:** Thursday, April 7, 2011  
**Time:** 9:30 a.m.  
**Place:** Conference Room 016

Chairman Hee & Members of the Committee:

My name is **Tom Grande**. I am an attorney in private practice and am testifying today as an individual.

I strongly **oppose** this bill because it is legally and technically flawed. This bill also discriminates against small business.

First, HB 1140, HD 1 is legally flawed because it gives an arbitrator powers that conflict with other provisions of HRS Chapter 658A. For example, the section sought to be amended, HRS § 658A-15, involves only the "Arbitration Process." However, the "Remedies" available to an arbitrator are contained in section 658A-21, which is not being amended.

HB 1140, HD 1 is also legally flawed because as drafted, it provides no remedy of appeal for default entered by the arbitrator and it conflicts with the model law on which the statute was based, the Uniform Arbitration Act (2000).

Second, HB 1140, HD1 is technically flawed because it does not define what a "commercial entity" is. Although the term "commercial entity" is used in several sections of the Hawaii Revised Statutes, it is nowhere defined. Nor does any Hawaii judicial opinion define what a "commercial entity" is. Under this bill, does "commercial entity" include a sole proprietorship or a non-profit organization? Does it include a labor organization? Does it include commercial activities of a school or club that is engaging in fundraising? These are only a few of the examples that make this bill technically flawed.

Last, and perhaps most important, the proposal discriminates against small business in the state of Hawaii. A small business may have a valid reason for not paying unreasonable arbitration costs. Under the present statutory scheme, the party seeking to compel arbitration must apply to the Court to compel the arbitration to go forward. With this amendment, the party compelling arbitration is at an advantage simply by engaging an arbitrator and having an invoice for the arbitration costs sent to the small business. The small business owner will have no option and must pay even totally unreasonable expenses to avoid a default.

In summary, this flawed bill will give large commercial interests an overwhelming advantage in the arbitration process. It should be held in Committee. Thank you very much.