

LATE TESTIMONY

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF S.B. NO. 878

DATE: Thursday, January 31, 2013
TIME: 10:00 am

To: Chairman Clayton Hee and Members of the Senate Committee on Judiciary and Labor:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in SUPPORT of S.B. No. 878, relating to Arbitration.

The purpose of this measure is to clarify the authority of an arbitrator to award costs in arbitration proceedings.

SB 878 will improve arbitration in two ways. First, it will help standardize the award of costs in litigation and arbitration by adding the term "costs" because that is the term traditionally used by the courts. The current statute uses the term "expenses" which has lead to some confusion whether that is the same as the more traditional term "costs." The existing case law, standards, and court decisions regarding awarding "costs" in court would become easily transportable to arbitration hearings. The change from "same" claims to "comparable" claims will give arbitrators the same discretion as judges to award costs when appropriate, and not deny reasonable requests for costs based on technical legalities.

HRS 658A-21(b), provides: "An arbitrator may award attorney's fees and other reasonable *expenses of arbitration*" Use of the term "expenses" has resulted in confusion whether or not it is intended to have the same meaning as "costs" because "costs" has become a term of art in legal jargon. Accordingly, some are construing

“expenses” of arbitration to include only the arbitrator(s) fees and not the more traditional “costs” of deposition transcripts, witness fees, copying costs, and similar expenditures routinely allowed as “costs” in lawsuits. This issue is strictly one of terminology and is in the nature of a housekeeping amendment.

The change from “same” to “comparable” claims will give arbitrators similar discretion as judges to award costs in related or similar claims. Some disputes have both litigation and arbitration aspects to them so some issues may be handled in court while others are handled through arbitration. This will allow arbitrators to consider the big picture when deciding whether to award costs, and if so, the amount of such award. This also recognizes that arbitrations may not follow the “same” legal theories or bases as traditional lawsuits because the arbitration procedure is more flexible in addressing a wide range of disputes or issues. Thus, arbitrations may not involve the “same” types of claims as traditional lawsuits or may include additional issues not traditionally litigated through the courts.

Second, this bill will help people who have smaller arbitration claims. The result of this measure is that people with smaller claims who prevail in arbitration can receive the same award of costs as they would in court so their small recovery is not eaten up by the expenses of the arbitration (which is supposed to be less expensive than going to court). This also provides a disincentive for people to unnecessarily run up expenses because they may become responsible to pay the costs of the other party.

Thank you for the opportunity to testify on this measure. Please feel free to contact me should there be any questions.