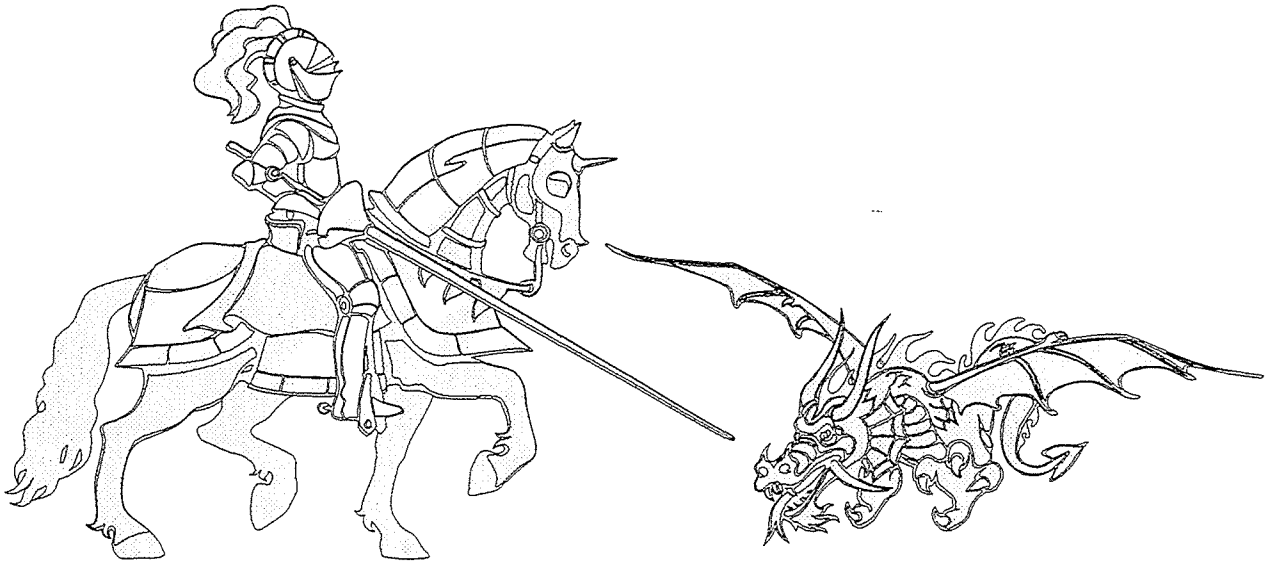
FIGHTING BATTLES IN MODERN AMERICAN CASTLES: CONDOMINIUM DISPUTE RESOLUTION



PAMELA MARTIN
Researcher

Report No. 6, 1996

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii

This report has been cataloged as follows:

Martin, Pamela.
Fighting battles in modern American castles: condominium dispute resolution. Honolulu: Legislative Reference Bureau, December 1996.

1. Condominiums - Hawaii. 2. Dispute resolution (Law) - Hawaii.
KFH421.5 L35 A25 96-6.

FOREWORD

This study was prepared in response to Senate Resolution No. 54, S.D. 2, adopted during the Regular Session of 1996. The Resolution requested the Legislative Reference Bureau to investigate the options of arbitration for disputes between condominium associations, condominium owners, and their managing agents. The findings and recommendations of our investigation are the culmination of this report.

The Bureau extends its appreciation to the agencies and organizations who cooperated and assisted with its investigation, specifically to the Judiciary, the Hawaii Independent Condominium & Cooperative Owners, the Real Estate Commission, the Hawaii branch of the Community Associations Institute, Hawaii State Bar Association, Hawaii Association of Realtors, the Hawaii office of the American Arbitration Association, and the Hawaii Council of Associations of Apartment Owners. This report could not be completed without your input. Mahalo.

Wendell Kimura
Acting Director

December 1996

Table of Contents

Figures

Tables

Appendices

Chapter 1
INTRODUCTION

This report from the Legislative Reference Bureau ("Bureau)" is in response to Senate Resolution No. 54, S.D. 2, Regular Session of 1996, entitled "*Senate Resolution Investigating the Options of Arbitration for Disputes Between Condominium Associations, Condominium Owners, and Their Managing Agents.* A copy of Senate Resolution No. 54, S.D. 2, is attached to this report as Appendix A.

BACKGROUND

Condominium-style living continues to fill an economic gap for home ownership that would not otherwise be available to some people in Hawaii.[1] These condominium owners must make some trade-offs that their single-family counterparts may not be required to make. Sharing common elements and abiding by the bylaws and house rules of an apartment association are some examples. An earlier study completed by the Bureau in 1989 confirmed that many of the problems condominium owners were experiencing resulted from misunderstandings and unfulfilled expectations of condominium living.[2] Despite these perceived disadvantages condominium occupancy has had a steady increasing rate of growth in the past five years. The Real Estate Commission reported the number of condominium apartment associations registered annually increased from 809 projects, representing 74,916 apartments, in 1990 to 1153 registered condominium projects, representing 99,383 apartments, in 1995.[3]

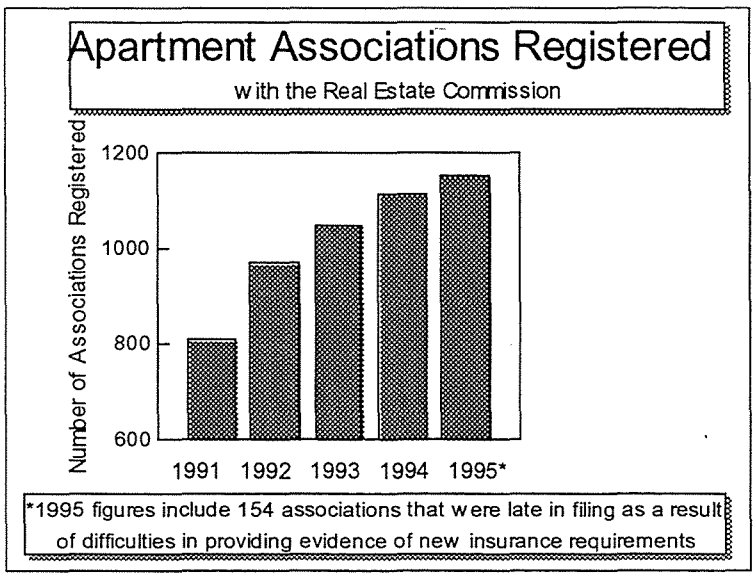


Figure 1-1

[1]In 1993 the average (mean) price for single-family residence was $436,898 versus $210,573 for a condominium. The median price for single-family residence was $358,500 versus $193,000 for a condominium. *State of Hawaii Data Book 1993*, Department of Business, Economic Development and Tourism, State of Hawaii, 1993.

[2]Carter-Yamauchi, Charlotte A., *Condominium Governance - An Examination of Some Issues,* Legislative Reference Bureau, State of Hawaii, Report No. 4 (Honolulu; 1989), p. 51.

[3]1995 Annual Report Hawaii Real Estate Commission, Department of Commerce and Consumer Affairs, Professional and Vocational Licensing Division, State of Hawaii (Honolulu: 1995), p. 9.

The democratic system of election of the board of directors to the apartment owners associations mimics the government process and provides in many ways similar assurances, for example giving apartment owners the opportunity to choose their representation on the board of directors through a voting process. While this process, in theory, allows for the fair handling of the issues that arise in the operation of and living in a condominium project, sometimes there is disagreement between the parties involved. This report focuses on when parties disagree and disputes arise between an owner, the condominium association or their managing agents.

Senate Resolution No. 54, S.D. 2, was generated as a result of a condominium dispute that was submitted to arbitration in 1995. The claimant, an owner of a condominium, chose to arbitrate the dispute under section 514A-121, *Hawaii Revised Statutes*, against the apartment owners association of the building, naming the board of directors as well as the association in the complaint. After full hearings and documentation the arbitrator issued an award in favor of the owner. The condominium board and association then lawfully moved for a *trial de novo*, under section 514A-127, *Hawaii Revised Statutes*. At that point, the condominium board and association were under no obligation to satisfy the award of the arbitrator. Once the *trial de novo* was requested, the responsibility shifted back to the claimant (the condominium owner). In order to resolve the dispute with the association, the claimant needed to re-initiate the action by filing in Circuit Court. Unless the claimant then files that new action in Circuit Court and proceeds with a full trial and prevails, no judgment can be ordered against the association or the board. This is despite the fact that the claimant had already expended time and money in the previous arbitration proceeding, and despite the fact that the claimant had already received a favorable award in the arbitration. Moreover, the losing party in arbitration (the association and board) is not penalized at all during these proceedings.

The troublesome issues about this *trial de novo* scenario under the existing statute are of fairness and efficiency. In fairness to a prevailing party in the arbitration, should they have to be the ones to re-initiate their action in another forum without penalty to the losing party in arbitration? In terms of efficiency, arguing about the same issues in two separate forums takes twice as much time and twice as much money. This report examines this current *trial de novo* option and explores other viable options.

LEGISLATIVE HISTORY

The focus of this report, the arbitration of disputes that arise between the parties involved with the operation of condominiums, invokes the Condominium Property Regime Law, chapter 514A *Hawaii Revised Statutes.* Originally enacted by the Legislature during the Regular Session of 1961 in Act 180,[4] this relatively new form of property ownership in the State of Hawaii has been the

[4]Originally enacted in 1961 as The Horizontal Property Regime and included in Chapter 170A, *Revised Laws of Hawaii 1955, 1961 Supplement.* It was renumbered to Chapter 514, Hawaii Revised Statutes in 1968. In 1977, Chapter 514, *Hawaii Revised Statutes* was repealed, and replaced with Chapter 514A, Hawaii Revised Statutes. Finally in 1988, the law was renamed to the Condominium Property Regime Law, Chapter 514A, *Hawaii Revised Statutes.*

source of a variety of issues.[5] The arbitration and *trial de novo* provisions were added by the Legislature to the Condominium Property Regime Law during the Regular Session of 1984 through Act 107. Most agreed that arbitration would provide an easier, cheaper method for owners to challenge the decisions of the apartment owners associations and provide a more amicable environment for the resolution of disputes among neighbors. But even in 1984, there was much debate on whether or not to make the requirement of arbitration voluntary or mandatory.

Testimony from the hearings on S.B. No. 1815-84, Regular Session of 1984, which became Act 107, reveals that there was support for mandatory binding arbitration.[6] On the other hand, testifiers also alluded to potential problems with mandatory binding arbitration.[7] The problems focused on constitutional issues as well as the inappropriate forum for certain types of disputes. Ultimately, the conference committee amended the bill to provide for mandatory arbitration with the protections of due process through *trial de novo*.[8] The law remains unchanged today requiring both parties to arbitrate if one party requests it (essentially mandating non-binding arbitration), but specifically states that arbitration does not abridge the right of either party to a *trial de novo*.[9]

---

[5]The Honorable Joan Hayes, Representative, 16th District rose to speak in favor of the bill that would become Act 107, Regular Session of 1984, commenting that, "When this session started, I became aware of the vast reservoir of complaints that were among condominium owners. Russell Nagata who is now head of the Consumer Protection Agency told us that [there] were hundreds of complaints each year on condominium problems and that there was nothing his agency could do to help them." House Journal Regular Session of 1984, p. 631.

[6]See Testimony regarding S.B. No. 1815-84 before the Senate Consumer Protection and Commerce Committee, March 2, 1984, specifically testimony of Allan Gifford, Esq. *"Mandatory arbitration rather than court hearings could eliminate unreasonable costs to both sides and perhaps remove the adversary relationship now existing in many condominiums between the board of directors and individual unit owners."*

[7]See Testimony regarding S.B. No. 1815-84 before the Senate Consumer Protection and Commerce Committee, March 2, 1984, specifically Real Property and Financial Services - HPR Committee, Hawaii State Bar Association. Testimony regarding S.B. No. 1815-84 before the Senate Consumer Protection and Commerce Committee, March 2, 1984.

[8]Conference Committee Report No. 70-84 on S.B. No. 1815-84, House Journal Regular Session 1984, p. 758.

[9]Sections 514A-121 and 514A-127, *Hawaii Revised Statutes:*

"**§514A-121 Arbitration of disputes.** (a) At the request of any party, any dispute concerning or involving one or more apartment owners and an association of apartment owners, its board of directors, managing agent, or one or more other apartment owners relating to the interpretation, application or enforcement of chapter 514A or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and the provision of chapter 658; provided that the Horizontal Property Regime Rules on Arbitration of Disputes of the American Arbitration Association shall be used until the commission adopts it rules' provided further that where any arbitration rule conflicts with chapter 658, chapter 658 shall prevail; provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.

(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:

(1) The real estate commission;

(2) The mortgagee of a mortgage of record;

(3) The developer, general contractor, subcontractor, or design professionals for the project; provided that when any person exempted by this paragraph is also an apartment owner, a director, or managing agent, such person shall, in those capacities, be subject to the provisions of subsection (a);

(4) Actions seeking equitable relief involving threatened property damage or the health or safety of apartment owners or any other

TERMINOLOGY

The terminology of alternative dispute resolution (hereafter "ADR") has become more familiar as people look to ADR methods to resolve conflict. Still, it is beneficial at this time to review the terminology to avoid any confusion. While other forms of ADR exist, this report focuses on arbitration and mediation, two forms of ADR already in practice under the Condominium Regime Property Law. A basic understanding of the differences between arbitration and mediation is essential before proceeding.

Arbitration

Arbitration is the submission of a dispute to a neutral third party, known as an **arbitrator**, who makes an award in favor of one of the parties after listening to both parties and examining the evidence. Arbitration proceedings in Hawaii are subject to Chapter 658, *Hawaii Revised Statutes.*

The arbitration can be binding or non-binding. Whether an arbitration is binding or non-binding is decided by the parties or the law at the beginning of the arbitration. The law allows the parties to agree that a decision will be **binding** and that a judgment of a circuit court may be rendered upon the award.[10] In the absence of an agreement from the parties sometimes an arbitration may be interpreted as **non-binding**. For example, under the Condominium Property Regime Law, Chapter 514A, *Hawaii Revised Statutes*, the opportunity, in section 514A-127, for "*trial de novo*" after an arbitration award has been interpreted to produce non-binding arbitration.

When an arbitration is **binding**, the award made by the arbitrator is final and cannot be appealed except if there is fraud, bias, or misconduct shown or action taken beyond the powers of

---

person;

(5) Actions to collect assessments which are liens or subject to foreclosure; provided that an apartment owner who pays the full amount of an assessment and fulfills the requirements of section 514A-90(d) shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment;

(6) Personal injury claims;

(7) Actions for amounts in excess of $2,500 against an association of apartment owners, a board of directors, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association of apartment owners or is a board of directors would be unavailable because action by arbitration was pursued; or

(8) Any other cases which are determined, as provided in section 514A-122, to be unsuitable for disposition by arbitration.

§**514A-127 Trial de novo and appeal.** (a) The submission of any dispute to an arbitration under section 514A-121 shall in no way limit or abridge the right of any party to a trial de novo.

(b) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties.

(c)The award of arbitration shall not be made known to the trier of fact at a trial de novo.

(d) In any trial de novo demanded under subsection (b), if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorney's fees of the trial. When in dispute, the court shall allocate its award of costs, expenses and attorney's fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity.

(e) Any party to an arbitration under section 514A-121 may apply to vacate, modify or correct the arbitration award for the grounds set out in chapter 658. All reasonable cost, expense, and attorney's fees on appeal shall be charged to the nonprevailing party.

[10]Section 658-2, *Hawaii Revised Statutes.*

the arbitrator.[11] If the arbitration is **non-binding**, it means a party has access to a court review of the proceedings, a "*trial de novo*", if requested within a certain time limit. This court review is a completely new trial proceeding that does not take into account any of the arbitration proceedings.

Mediation

Mediation is a process where the parties who disagree meet with a neutral party, known as the **mediator**, who facilitates negotiations between the parties and helps the parties come to an agreement. The mediator does **not** make an award, and does **not** act as judge deciding who is right and wrong. The mediator only talks to the parties to help define settlement positions. A mediation conference is a confidential discussion to encourage settlement. Generally, because of this confidential role, a mediator should not act also as an arbitrator in the event a settlement is not reached and the dispute proceeds to arbitration.

For clarity throughout the report, it also important at this point, to define the terms we are using with regard to the subjects of this report.

Owners are the individual people who hold the title to the apartments in a condominium project. They are not the developers and not the tenants.

Apartment Owners Associations (AOA) are the organizations comprised of owners that manage the condominium project as required under the Condominium Property Regime Law.

Managing agents are the people who are employed or retained for the purposes of managing the operation of the condominium.

METHODOLOGY

This report was approached as directed by Senate Resolution No. 54, S.D. 2, which required the Legislative Reference Bureau to seek input from various groups. All these groups were contacted in addition to several other groups that focused on ADR. A list of the organizations that participated in this study is included in Appendix B. The data that was available on condominium dispute resolution by arbitration was limited because of the private nature of the arbitration forum. In an attempt to avoid analysis of strictly anecdotal information the Bureau developed a Condominium Dispute Fact Sheet. The Fact Sheet is attached as Appendix C. All groups were asked to fill out the Condominium Dispute Fact Sheet and contribute their experience with condominium dispute resolution over the last five years.

[11]Section 658- 9, *Hawaii Revised Statutes.*

During the process of collecting the data, the Bureau met with each group as appropriate and discussed the substantive issues of Senate Resolution No. 54, S.D. 2. These brainstorming and discussion groups proved to be thorough and extremely helpful. Portions of the report were distributed to these groups. Comments from the groups were considered and included in the final analysis.

The report includes as much of the factual data collected as possible. The data appears in Chapter 2 along with an analysis of the information collected. Chapter 2 addresses the question directed by Senate Resolution No. 54, S.D. 2, "*Whether non-binding arbitration has been an effective means of resolving disputes between condominium owners, condominium boards, and managing agents.*"

Chapter 3 reviews the incentives and disincentives of keeping non-binding arbitration and "*trial de novo*". It identifies changes that could be made to give the process teeth and equity. This chapter handles the question directed by Senate Resolution No. 54, S.D. 2, "*Whether changes can be made to make non-binding arbitration more meaningful by assessing the losing party at a "trial de novo" with all fees and costs incurred at the trial level similar to Rule 68 of the Hawaii Rules of Civil Procedure.*"

Chapter 4 addresses the question asked by Senate Resolution No. 54. S.D. 2, "*Whether if "trial de novo" were retained, the trial could be held in courts other than the circuit court depending on the nature of the dispute and the amount in controversy.*" The chapter looks at the other possible forums a "*trial de novo*" could be held in, if the process is retained.

Chapter 5 handles a final direct question by Senate Resolution No. 54, S.D. 2, "*Whether disputes under chapter 514A, Hawaii Revised Statutes, should no longer be made subject to a "trial de novo" but to some other means of alternative dispute resolution.*" This chapter explores the legal ramifications of removing "*trial de novo*".

Finally, Chapter 6 gives findings and makes recommendations.

Chapter 2
FACTS AND FIGURES

This chapter deals with the question presented by Senate Resolution No. 54, S.D. 2, *"Whether non-binding arbitration has been an effective means of resolving disputes between condominium owners, condominium boards, and managing agents."* This chapter reviews data that the Bureau obtained to assist in that evaluation. The Bureau reviewed records provided by the Real Estate Commission from the American Arbitration Association, the Neighborhood Justice Center and Maui Mediation Center. The Bureau conducted original research within the court system and directly with the condominium owners, condominium boards, and managing agents in order to gather information beyond anecdotal evidence. The Bureau also approached the community of attorneys who practice in this area. This chapter reports the results of those inquiries.

MEASUREMENT

The question of *"Whether non-binding arbitration has been an effective means of resolving disputes between condominium owners, condominium boards, and managing agents"* necessarily poses the question: "How does one measure whether the non-binding arbitration process has been effective?" One indicator of the satisfaction level with the non-binding arbitration process might be the number of times a *trial de novo* has been requested from an arbitration award under section 514A-127, *Hawaii Revised Statutes*. The problem involved with obtaining that information exemplifies the problem inherent in much of the data the Bureau attempted to gather. No records are kept. The Judiciary does not record *trial de novo* processes from section 514A-127, *Hawaii Revised Statutes*. The Real Estate Commission Supervising Executive Officer could only remember hearing of two instances where the *trial de novo* procedure was invoked after an arbitration award, one on Oahu and one on Maui.[1] This was generally confirmed in discussions with attorneys practicing in the field.

Recognizing the lack of available data as well as other problems with collecting data on this issue, the Bureau ultimately decided to use two different approaches in attempting to measure effectiveness. The first approach was to ask the parties directly. A fairly accurate measure could be obtained if the parties who were directly involved could be polled as to their satisfaction level with the non-binding arbitration process. The difficulty with this approach was identifying the parties directly involved.

Arbitration is a private process. It is usually conducted by a private firm or individual where parties expect a high degree of confidentiality. The confidential aspect of arbitration is one of the reasons people choose arbitration over litigation. While the law *does* require apartment owners

[1]Telephone interview with Calvin Kimura, Supervising Executive Officer, Real Estate Commission, Department of Commerce and Consumer Affairs, State of Hawaii, May 28, 1996.

associations[2] to register with the Real Estate Commission, it *does not* require apartment owners associations to report any disputes that may have led to mediation, arbitration or litigation. Because arbitration is a private, confidential process and there are no requirements for reporting disputes, there is no direct way to identify the parties that have participated in non-binding arbitration. The Bureau attempted to identify these people by appealing to the entire list of registered apartment owners associations through the Real Estate Commission's quarterly publication of the *Condominium Bulletin* as well as to members of Hawaii Independent Condominium & Cooperative Owners through their mailing list.[3]

The second approach to measuring the satisfaction level of non-binding arbitration was to track the use of different resolution methods. The methods that parties choose to resolve disputes may shed some light on their satisfaction levels with the processes. The Bureau identified mediation, arbitration, and litigation as the methods currently used by owners, their apartment owners associations or managing agents to resolve disputes that arise between them. The Bureau was able to obtain some data in all three areas for this measurement. The results of this data collection follow.

DATA COLLECTED

There are currently 1153 registered apartment owners associations ("AOAs") in Hawaii. The distribution across the State includes 175 registered condominiums on Maui, 88 on the island of Hawaii, and 31 on Kauai, with the bulk of registered AOAs on Oahu, numbering 859. These AOAs represent 99,383 apartments across the State. The actual number of AOAs is estimated to be higher for two reasons, according to the Real Estate Commission's Condominium Specialist. The law only requires condominiums with six or more units to register so condominium projects of five or less units are not included. In addition, the Real Estate Commission suspects that all condominium AOAs that are required to register by law have not registered. Recognizing this gap in registration, when this report refers to data collected on AOAs, it does not include those unregistered AOAs or those not required to register.

Condominium Dispute Fact Sheet

The Bureau appealed to the contact person of each registered AOA. The Real Estate Commission maintains a mailing list of 1320 of these contacts. Each of those contacts was sent 11 copies of the "Condominium Dispute Fact Sheet" a copy of which is attached as Appendix C. A total of 14,520 fact sheets were distributed throughout the State with the Real Estate Commission's

[2]Section 514A-95.1, *Hawaii Revised Statutes.*

[3]The Condominium Association Institute and the Hawaii Council of Associations of Apartment Owners were approached and asked to distribute the Bureau's survey to their membership but declined because their membership would be included in the Condominium Bulletin's mailing list.

quarterly *Condominium Bulletin.* In addition, the Fact Sheet was sent to the members of the Hawaii Independent Condominium and Cooperative Owners. A similar version was distributed to the Hawaii State Bar Association's Section on Real Property and Financial Services, Condominium Sub-Committee, and the Section on Alternative Dispute Resolution. A total of thirty-nine responses were returned.

The Condominium Dispute Fact Sheet is a survey that asked members of the board of AOAs, managing agents and owners to submit information about their experience with condominium disputes. Of those who indicated the source of the response, fourteen responses came from managing agents, fourteen from members of the board of the AOAs and eight fact sheets were returned from a personal perspective. A compilation of the responses appears in Appendix D.

Twenty-nine of thirty-nine responses indicated that they had no experience with non-binding arbitration and in fact had never mediated or had not entered into litigation in the last five years to resolve a dispute between apartment owners associations, owners, and their managing agents. The management companies that were directly consulted confirmed that there had been little or no need to seek assistance in dispute resolution[4].

Approximately one-fourth of the respondents did report some experience with dispute resolution. The methods used to resolve the disputes were almost even across the board, with three mediations, four arbitrations and four instances of litigation reported. Only one respondent reported using all three methods to resolve a dispute. The other half-dozen who tried arbitration or litigation to resolve the dispute did not attempt mediation beforehand.

The nature of the disputes reported between owners and the apartment owners associations were varied. They included five instances of improper construction, four instances of the AOA's failure to act appropriately including conflicts of interest issues, and failure to maintain common elements, and three instances of quiet enjoyment which included pet, noise, and misuse of common element problems.

	Average Time to resolve	Average Costs to resolve
Mediation	12 months	$950
Arbitration	12 months	$15,025
Litigation	16 months	$30,500
ALL DISPUTE RESOLUTION METHODS	14 months	$20,000

Table 2-1. Average time and costs for resolution of disputes through mediation, arbitration and litigation as reported by owners, apartment owners associations and their managing agents on the Condominium Dispute Fact Sheet.

[4]Telephone interview with Rip Perdy, of Hawaiiana Management Co. On July 5, 1996, and Steve Pearmain, Certified Management, Inc., on July 3, 1996.

The time involved in resolving the disputes ranged from six months to two years. The average length of time involved was fourteen months, with a median time of twelve months. Costs to the parties ranged from $90,000 to $100, with an average cost of approximately $20,000. Averages for each dispute resolution method appear in Table 2-1. Settlement of disputes through arbitration reported less cost and time than those reporting dispute resolution through litigation.

The Condominium Dispute Fact Sheet asked the respondents to reply if they were satisfied with the non-binding arbitration process as mandated in section 514A-121, *Hawaii Revised Statutes*. On a scale from one to ten, with ten being most satisfied, the average response rated their satisfaction at 6, although the median response rated their satisfaction at 7. The Condominium Dispute Fact Sheet also asked how effective, as a means of resolving condominium disputes, is the non-binding arbitration process as mandated in section 514A-121, *Hawaii Revised Statutes*. The median and average response to this question was 6.

Several respondents included comments on the Condominium Dispute Fact Sheet. All of these comments are reproduced in the compilation in Appendix D. Several of the comments are particularly relevant to the subject matter of this report. Comments made by those who reported no experience with mediation, arbitration, or litigation posed queries as to whether or not the Legislature should dictate how private disputes are settled and the efficacy of any self-enforcing law. Two others who reported having experience with arbitrating and litigating the resolution of disputes suggested that certain types of disputes should be submitted to arbitration before going to court, while another commented that their Board of Directors was unaware that arbitration could be non-binding and perhaps more education was needed. These comments are addressed later in this report.

Court Records

The Bureau received assistance from the Judiciary in analyzing court records. The Circuit Court reviewed their records over the last ten years in relation to any condominium disputes. The Circuit Court normally categorizes the cause of action into one of fourteen different categories. The categories are: Contract; Motor Vehicle Tort; Assault and Battery; Construction Defects; Medical Malpractice; Legal Malpractice; Product Liability; Other Non-vehicle Tort; Condemnation; Foreclosure; Agreement of Sale Foreclosure; Agency Appeal; Declaratory Judgment; and Other. Normally, condominium disputes are

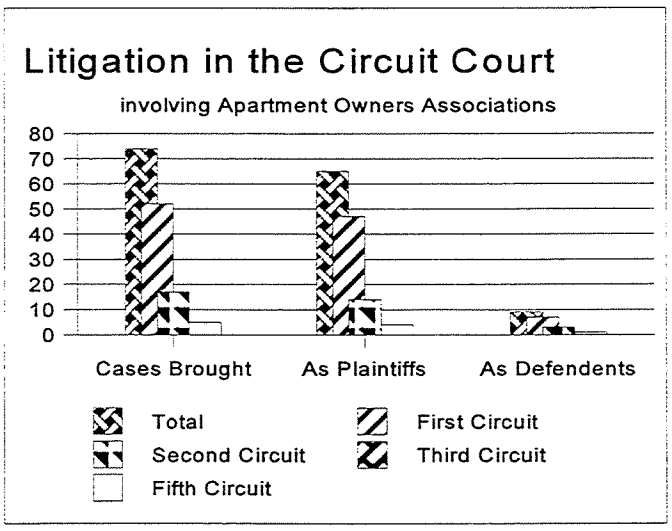


Figure 2-1. Cases filed in circuit court by and against apartment owners associations that involved owners as the opposing party from 1987-1996.

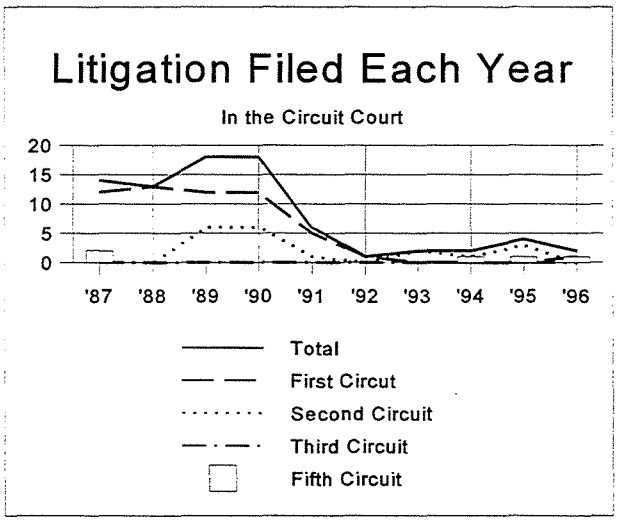


Figure 2-2. Number of actions filed each year in circuit court by or against apartment owners associations with individual owners named as the opposing party.

categorized under "Other". The Circuit Court could not isolate each condominium dispute case under the category of "Other" but did print-out the entire list of "Other" cases over the last ten years. This generated a list of approximately 3500 cases.

From that list of court cases the Bureau reviewed the names of the plaintiffs and defendants and identified 74 civil actions either brought by or against AOAs in all four judicial circuits of the State. The list is included as Appendix E. In the First Circuit (City and County of Honolulu and Kalaupapa) AOAs brought cases as plaintiffs 47 times and were sued as defendants only 7 times over a ten-year period. In the second circuit (Maui County) AOAs brought 14 cases as plaintiffs and defended 3 cases in the ten-year period. No litigation was identified in the Third Circuit (Hawaii County). Finally, AOAs were identified as plaintiffs 4 times compared with one time as defendants in the Fifth Circuit over the last ten years. Figure 2-1 illustrates these results.

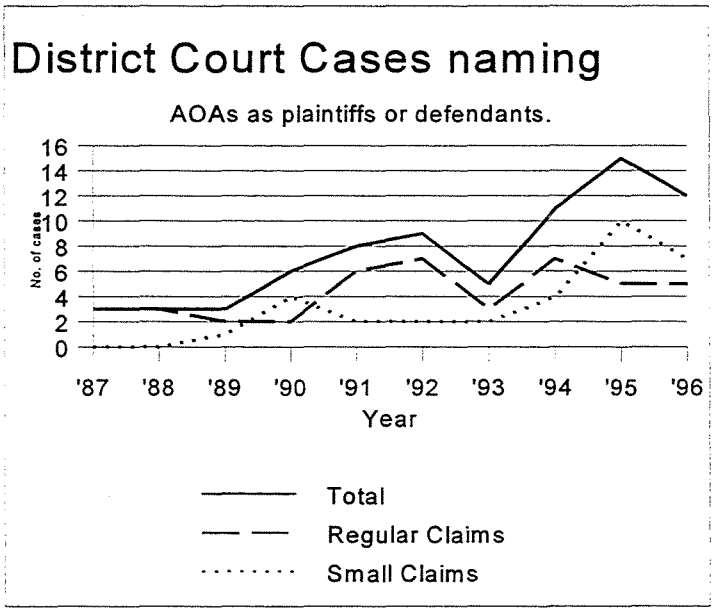


Figure 2-3. Total number of complaints filed in the District Court of the First Circuit (City and County of Honolulu) each year from 1987-1996 naming an apartment owners association as either plaintiff or defendant.

The Bureau also analyzed the time periods during which these cases were brought. The pattern of litigation over the last ten-year period that emerged in the First Circuit demonstrates the general trend of the litigation around the State in this area. In the First Circuit, from 1987 through 1990, the number of cases filed were 12 per year with the exception of 1988 when 13 were filed. In 1991, the number of cases drops off to five and then in 1992 there is one case filed. The Bureau could not identify any litigation filed in the first circuit court involving AOAs in 1993, 1994, and 1995. In 1996, there is one case.

The Second Circuit shows a similar pattern of litigation drop-off, but not quite as dramatic. In the Second Circuit, litigation involving AOAs was started six times in both 1989 and 1991. Then, in 1993, the Bureau identified only two cases, in 1994 one case was identified and finally in 1995, a total of three cases were identified that pertain to the topic of Senate Resolution No. 54, S.D. 2.

The Bureau identified a total of five cases in the Fifth Circuit over the last ten years. One case each in the years 1986, 1987, 1994, 1995, and 1996. The results of this time table are graphed in Figure 2-2[5].

The Bureau also reviewed the length of time the litigation lasted.[6] The amount of time for each case ranged from 1 month to 59 months. The average length of time a case was open was about 12.5 months with the median being closer to 8 months.

Finally, the Bureau reviewed the subject matter of some of the cases filed in Circuit Court. Of the twenty-five cases reviewed, the disputes could easily be categorized into three areas. One-third of the complaints could be categorized as actions against improper construction. These cases focused on improvements that owners would make to their apartments without proper approval from the Association through its Board of Directors. The improper construction cases could be categorized as a money issue because the owners had already invested funds in the improvements and in addition, the improvements would, theoretically, increase the value of their condominium.

Another one-third of the litigated cases could be categorized as quiet enjoyment of the condominium involving by-laws violations. This category included having pets when pets were prohibited as well as disruptive pets even where they were allowed. Additionally this category included complaints of excessive noise, uncleanliness, owners harassing other owners, and misuse of common elements.

The third noticeable category of complaints in civil court litigation focused on ordering owners to evict tenants leasing their apartments. These actions were based on the tenant's repeated violations of by-laws and house rules. Owners were named in the suit because they were the landlords and the only person with authority to evict, but the substance of the case was against the tenant who lived in the condominium.

---

[5]The print-out of "Other Civil Action" cases from the Judiciary, State of Hawaii, titled "First, Second, Third, and Fifth Circuit Courts Civil Cases with 599 Nature of Action Code Filed between May 1, 1986 and May 31, 1996" was inconsistent in the reporting dates for each circuit. The cases listed in the first circuit start from May 4, 1987 and in the Second Circuit the cases begin January 6, 1989. In the Fifth Circuit, the printout lists cases starting as early as May 9, 1985. The tally of cases includes all identifiable litigation with an AOA and so in the Fifth Circuit cases filed in 1986 and 1987 are combined in 1987. The Second Circuit does not list any cases for 1987 and 1988 because the printout starts at 1989,

[6]The Bureau examined the case files of 25 of 74 cases identified during the last ten years as being relevant to Senate Resolution No. 54, S.D. 2

The Bureau also received assistance from the District Court. The records of the District Court of the First Circuit (City and County of Honolulu) are computerized differently than the Circuit Court and the same type of information is not as easily available as in the Circuit Court. While the District Court computer system was able to generate a list of cases where AOAs were either named as plaintiffs or defendants in both regular and small claims courts, the system was unable to generate any in-depth information on the subject matter of the cases identified by the District Court. After reviewing the dockets of each identified case, the Bureau was able to eliminate those actions that appeared to be irrelevant to this study. A list of the cases identified by the District Court is included in Appendix E.

A total of 75 cases were identified in both regular and small claims over a ten-year period as relevant to this report. In the regular claims division AOAs filed as plaintiffs in 30 out of 43 appearances. The AOAs were named as defendants by owners in the remaining 13 cases. As expected, the scenario was reversed in small claims, with AOAs being named as defendants 25 times and only bringing 7 cases as a plaintiffs. No definite pattern seems to emerge looking at the cases brought over the years, although the total number of cases generally seems to be increasing. The last three years account for half of the litigation involving AOAs filed in the District Court of the First Circuit during the last ten years.

Other Data

The American Arbitration Association (hereafter "AAA") supplied the Real Estate Commission with its statistics for Condominium Property Regime Caseload in 1993, 1994, and 1995. These statistics are attached to this report as Appendix F. During the last three years the AAA reported administering nine cases in 1993, four cases in 1994 and nine cases in 1995, for a total of twenty-two cases in the last three years. The average time involved for these cases was five months. The subject matter of the disputes varied but the most frequently recurring reason for disputes was improper construction followed by failure to properly maintain common elements.

Although the condominium law specifically requires that arbitrations be conducted in accordance with the Horizontal Property Regime Rules of the American Arbitration Association,[7] it should be noted that many attorneys choose an arbitrator not associated with the AAA to avoid their administrative costs. Attorneys practicing in the field of condominium law confirmed that this is often the practice.[8] It is fair to assume that in fact there are more arbitrations held each year than are administered by the American Arbitration Association.

---

[7]Section 514A-121, *Hawaii Revised Statutes.*

[8]Telephone interviews with Dana Sato, Esq., Pitlock, Kido Sato and Stone, on October 23, 1996, and with Joyce Neeley Esq. Neeley and Anderson, , October 31, 1996 with Pamela Martin, Researcher, Legislative Reference Bureau.

The Real Estate Commission is actively involved in promoting mediation as a dispute resolution method for AOAs, owners, and managing agents. It has working agreements with the Maui Mediation Center, and the Neighborhood Justice Center. Some of the education funds collected by the Real Estate Commission from the registration of AOAs goes to supporting these mediation programs. The records of the mediation centers are irregular in reporting periods and the extent of information reported has been inconsistent over the years.

The Neighborhood Justice Center (hereafter "NJC") reported intake procedures on eight cases classified as condominium disputes in calendar year 1995. Of these eight cases, four were closed either because one party refused to mediate, or because additional efforts outside the NJC arena were made by parties to resolve the disputes. The remaining four cases were mediated and resulted in one agreement. Agreement was reached on an issue that included allegations of unfairly obtaining owners votes in an election for the president of the board of directors. Seven of the eight cases were initiated by owners attempting to resolve issues with their AOAs or a member of the Board of Directors. The eighth case involved a resident manager who was terminated and allegedly used equipment during his employment for illegal uses.

Organization & Year	*Cases processed through intake*	*Cases closed*	*Mediations conducted*	*Agreements reached*	*Owner initiated cases*
NJC 1995	8	4	4	1	7
NJC 1994-93	8	6	2	1	8
NJC 1992-93	12	9	3	1	11
NJC 1991-92	19	11	8	6	unknown
MSM 1994-95	2	2	0	0	unknown

Table 2.2 Mediation Statistics from Neighborhood Justice Center (NJC) and Mediation Services of Maui, Inc. (MSM) as reported to the Real Estate Commission.

During fiscal year 1993-1994, the NJC reported intake procedures for condominium related dispute mediations in eight cases.[9] All eight cases were initiated by individual owners who had disputes with a member of the Board of Directors or the Association. Five cases were closed without mediation. No explanation for closed cases is provided. One case was resolved by the parties without mediation and the two remaining cases were mediated. The two mediations resulted in an agreement in one of the cases. The agreement was reached in a case involving house rules.

[9]The NJC also reported a ninth case during fiscal year 1993-1994 that dealt with an AOA complaining about loud noises from a neighboring late-night club. This is not within the scope of the study and has not be included.

The NJC reported intake of twelve cases relevant to this study in fiscal year 1992-1993. Nine of the twelve cases were closed without mediation. No explanation for closed cases is provided. Mediation was conducted in the remaining cases and one agreement was reached. The issue where an agreement was reached involved the house rules about items on the lanai. Eleven of the twelve cases were initiated by owners and one case initiated by the Board of Directors against the management company for service and repairs outstanding.

Finally, in fiscal year 1991-1992, the NJC reported intake for mediation on nineteen cases. Six of those cases were closed without providing mediation. No explanation for closed cases is provided. Five of the cases were resolved without mediation. Of the eight cases that were mediated only two did not reach agreement. The specific parties involved were not identified so it is unknown who initiated each case.

Mediation Services of Maui, Inc. provided the Real Estate Commission with the following intake and mediation services statistics. In 1994-1995, there were two intake cases. One reconciled without mediation and the other was closed without mediation. In fiscal year 1993-1994, three cases were reported. Two of the cases were closed, although in one there were conciliation attempts made over the phone. A mediation was held in the third case but no agreement was reached.

These mediation statistics are summarized in Table 2-2.

ANALYSIS AND SUMMARY

The data kept by the Real Estate Commission and the Judiciary about condominium disputes is limited in scope. Reviewing the available data over the last five to ten years, the number of disputes the Bureau identified that led to some type of formal resolution, *i.e.* mediation, arbitration or litigation, in relation to the number of registered apartment owners associations is very small. The disputes identified were between owners and the apartment owners associations. Managing agents were named in only an insignificant number of dispute resolution data and therefore this study focuses on the disputes between owners and the apartment owners associations. Over a ten-year period, for the 99,383 apartments in 1153 registered apartment owners' associations the Bureau identified:

21 mediations;
27 arbitrations;
74 civil court actions statewide;
43 district court actions in the first circuit regular claims division;
32 district court actions in the first circuit small claims division; and
2 *trial de novos.*
199 Total actions

The data collected by the Bureau in this study indicated that owners selected Small Claims Court and mediation most often as their preferred methods of dispute resolution. Apartment owners associations appear to prefer resolution of disputes through court litigation with the preference of apartment owners associations shifting in more recent years from the Circuit Court to the District Court. In the District Court, they chose the Regular Claims Division rather than the Small Claims Division. This is not surprising and all these choices could be attributed to an attempt to limit costs by both parties. District Court fees are lower than Circuit Court and apartment owners associations can recover legal fees in the Regular Claims Division. Likewise, the owners choose mediation to resolve the dispute through mediation and Small Claims Court because they are avenues that may be pursued without hiring an attorney and therefore cost less. Arbitration appears to be a middle ground for owners and apartment owners associations.

Despite the small number of occurrences of disputes between owners, condominium associations, and managing agents that could be identified by the Bureau, the relative importance of the resolution of any disputes regarding neighbors cannot be understated. An owner's perception of entitlement to their quiet enjoyment of their home is an emotionally charged issue that is usually tied to the biggest debt carried by that owner. These two factors individually can create unreasonable amounts of stress in a person. When complicated or aggravated by unresolved disputes, these disagreements can escalate into avoidable physical violence and damage to persons and property. It is thus essential to recognize the importance of each individual dispute and to ensure that an effective and efficient method is available to resolve it.

Addressing the question "*Whether non-binding arbitration has been an effective means of resolving disputes between condominium owners, condominium boards, and managing agents,*" the Bureau identified only two instances where *trial de novo* was invoked after a non-binding arbitration award was made. Evidence that owners and apartment owners associations prefer the opposite ends of the spectrum with regard to venues for the resolution of disputes, would indicate that arbitration provides a middle ground for both parties. The Condominium Fact Sheet indicated that on the average respondents believed non-binding arbitration was closer to being an effective means of resolving disputes than being ineffective. Based on the information available for this study, non-binding arbitration appears to be an effective means of resolving disputes between condominium owners, condominium boards, and managing agents.

Chapter 3
"TEETH" AND EQUITY

This chapter addresses the question directed by Senate Resolution No. 54, S.D. 2, "*Whether changes can be made to make non-binding arbitration more meaningful by assessing the losing party at a trial de novo with all fees and costs incurred at the trial level similar to Rule 68 of the Hawaii Rules of Civil Procedure.*" This chapter reviews the incentives and disincentives of retaining non-binding arbitration and "trial de novo". It identifies elements that could give the statute both "teeth" and equity.

In the previous chapter this report concluded that non-binding arbitration has been an effective way to resolve disputes. This chapter focuses upon making non-binding arbitration more "meaningful." While the non-binding arbitration process can be an effective method of dispute resolution for most, the few cases where it is not, need to be addressed. In fact, the problem may be not the arbitration process itself but rather the activity that precedes and follows the arbitration.

PRE-ARBITRATION PROCEEDINGS

By the time a dispute reaches the arbitration stage, the parties are sufficiently at odds with each other to pursue arbitration. Remembering that alternative dispute resolution (hereafter "ADR") has two purposes, to effect a speedy, just, and inexpensive resolution of the dispute, as well as repairing any damaged relationships, ADR is useful at various stages of a dispute, and especially at early stages. One early intervention method of ADR is mediation. Mediation can be an effective tool in resolving disputes between condominium owners, apartment owners associations (hereafter "AOAs"), and managing agents. The Real Estate Commission encourages owners and AOAs to participate in mediation sessions, through the educational materials it distributes to condominium owners and AOAs. The Real Estate Commission also provides some financial support to the Neighborhood Justice Center and Mediation Services of Maui, Inc. for these services.

There is no statutory requirement to participate in mediation when there is a dispute between owners, AOAs, or managing agents, under the condominium law, although section 514A-90, *Hawaii Revised Statutes,* requires an AOA to mediate if requested by an owner disputing the amount or validity of an assessment claimed by the AOA. The law adds some incentive for the owner to request mediation in this instance, as well as encouraging an AOA's cooperation during mediation by tying the possibilities of reimbursement of attorney's fees to whether or not mediation and other resolution methods were attempted before submitting the issue to court.[1] Other related instances

[1]Section 514A-94, *Hawaii Revised Statutes.*

where state laws require parties to mediate include disputes between shareholders of cooperative housing corporations,[2] and disputes regarding mandatory seller disclosures in real estate[3].

In other situations where maintaining and preserving the relationship between parties is important, state law requires participation in mediation to resolve certain issues. For example, the Hawaii Labor Relations Board is required to use mediation procedures when an impasse is reached under the collective bargaining laws,[4] the Board of Land and Natural Resources is required to mediate with the community on issues at public hearings over geothermal resource subzones,[5] and the Family Court is authorized to mediate rather than pursue court prosecution as part of the "informal adjustment" of certain juvenile offenders.[6] While analyzing the effectiveness of all these mediation programs is beyond the scope of this study, its broad use and acceptance is an indication that mediation is recognized as a tool that can be used in the resolution of disputes that are the subject of this study. In addition, the fact that mediation addresses broader, sometimes emotional, issues that may not be apparent from the articulated "surface" dispute, provides opportunity to add meaningful substance to the resolution process.

While mediation can be an effective tool in resolving disputes, there are also instances in which mediation is not appropriate. Situations involving imminent danger to personal safety or substantial property damage are not appropriate for compulsory mediation. Requiring parties to participate in mediation if one party requests would require an amendment to the law. Sample legislation for including mediation in the dispute resolution of condominium disputes is included in Appendix G.

A second point needs to be made regarding pre-arbitration proceedings. A comment made by a respondent to the Condominium Dispute Fact Sheet articulates a problem of awareness that could be remedied by a simple requirement to give notice to parties. The respondent stated that, "Had we been informed of our options, we would not have agreed to binding arbitration prior to receiving the arbitrator's decision."[7] While the arbitration called for under section 514A-121, *Hawaii Revised Statutes,* is non-binding, this does not prevent the parties from agreeing to binding arbitration before the proceeding. If parties agree to binding arbitration before the proceeding their rights of appeal are strictly limited to those articulated under the arbitration law, chapter 658, *Hawaii Revised Statutes,* and the *trial de novo* right to litigation is waived. On the other hand, if the parties

---

[2]Section 421I-9, *Hawaii Revised Statutes* (initially, mediation specifically required).

[3]Section 508D-18, *Hawaii Revised Statutes (*mediation or arbitration required).

[4]Section 89-11, *Hawaii Revised Statutes.*

[5]Section 205-5.1, *Hawaii Revised Statutes.*

[6]Section 571-31.4, *Hawaii Revised Statutes.*

[7]See "Comments" from The Palms, Appendix D.

are notified of their options before the arbitration but continue to proceed with non-binding arbitration, they at least would have notice of the opportunity for *trial de novo* at the conclusion of the arbitration. Sample legislation implementing this type of notice requirement by an arbitrator is included in Appendix H.

POST-ARBITRATION PROCEEDINGS

Senate Resolution No. 54, S.D. 2, suggests that non-binding arbitration could be made more meaningful by assessing the losing party at *trial de novo* with costs incurred at the trial level similar to Rule 68 of the Hawaii Rules of Civil Procedure. Rule 68 of the Hawaii Rules of Civil Procedure is a defendant's tool that may act to limit the liability of a defendant in trial. Rule 68 allows a party defending a claim to make an offer of judgment at any time more than ten days before a trial begins. If the offer is refused and the eventual judgment ordered is not more favorable than the offer, the offeree (*i.e.* the plaintiff) must pay all the costs incurred after the time the offer was made. Applying this theory to the non-binding arbitration process, Senate Resolution No. 54, S.D. 2 seems to be suggesting that the arbitration award could be used to serve the same role of an offer of judgment under Rule 68 so that if a party seeks a *trial de novo* and fails to obtain a trial judgment more favorable to them than the arbitration award then the party requesting the *trial de novo* must pay all the costs after the arbitration in addition to the costs of the original arbitration. Applying the Rule 68 concept to the non-binding arbitration process is a little different than Rule 68 itself, because Rule 68 applies to regular trial proceedings where plaintiffs and defendants are assessing their positions in a complaint for the first time. While Rule 68 is normally a defendant's tool, this application to the condominium arbitration process would make it useful to the winning party at the arbitration, whichever side that happened to be.

A similar application of this principle can be seen in the Court Annexed Arbitration Program (CAAP).[8] This program requires all torts involving jury awards not likely to be in excess of $150,000 to be subject to arbitration before trial. When the arbitration award is issued, if a party chooses to pursue the matter further in a full court trial, the party requesting the *trial de novo* must obtain a result at least thirty percent better than that of the arbitration award or be assessed all the costs of the proceeding.[9]

The CAAP works for several reasons. The first reason is because the program is court annexed. That is, the plaintiff has already accessed the court system by filing the claim. This means that requesting a *trial de novo* only activates their case to be further processed within the court system and does not require a party to file a completely new claim in a different forum. The second

[8]The Court Annexed Arbitration Program (CAAP) is a mandatory, non-binding arbitration program that requires all tort matters involving a liability not in excess of $150,000 be assigned to arbitration proceedings before trial. See the Hawaii Arbitration Rules.

[9]Rules 25 and 26, Hawaii Arbitration Rules.

reason is Rule 25 of the Hawaii Arbitration Rules. Rule 25 requires a party who appeals a CAAP award to improve their position by thirty percent in order to be considered a "prevailing" party. By raising both the threshold for victory as well as the cost of failing to achieve it, Rules 25 and 26 provide sharp teeth that cause many parties to weigh their options carefully. Rule 26 reinforces the "bite" of Rule 25 by imposing strict penalties for those who pursue claims beyond arbitration and do not better their position to the extent required by Rule 25, by requiring them to pay all costs.

Comparing the operation of the CAAP *trial de novo* process to the condominium law provisions for *trial de novo* reveals two distinct differences. The condominium law allows for private arbitration proceedings, while the CAAP arbitration is court administered. First, privately arbitrated matters require re-initiation of the claim in Circuit Court for *trial de novo* while CAAP *trial de novo* do not. Second, the arbitration proceeding is tied to the result of the *trial de novo* proceeding under CAAP but is not under the condominium law. CAAP requires the party demanding a *trial de novo* to meet a set standard with respect to the result of the *trial de novo* that encourages the parties to seriously evaluate whether or not to pursue action after arbitration. The condominium law has no such penalty or standard of comparison for *trial de novo* and as a result a *trial de novo* can be used to simply delay or prolong issues without harm to those who demand the *trial de novo*.

Allowing private arbitration proceedings has been perceived more positively than negatively according to results of the Condominium Dispute Fact Sheet reported in Appendix D. Therefore, it would not appear to help matters to remove the ability of the parties to engage in private arbitration. Additionally, one respondent specifically mentioned that "the legislature should not dictate how private disputes are settled."[10] Using this guidance, this report has focused on the second difference articulated. The fact that the *trial de novo* proceedings are not tied in any way to the arbitration proceedings may operate to make the non-binding arbitration feel "meaningless". Requiring a prevailing party at arbitration who filed the complaint to then further initiate *trial de novo* proceedings on the same issues is redundant. If the result of the arbitration is not tied to the *trial de novo* in some way, the arbitration may easily be meaningless by the simple refusal of the losing party to comply. Therefore, if the arbitration could be connected to the *trial de novo* in some way, non-binding arbitration would be made considerably more meaningful.

CONNECTING NON-BINDING ARBITRATION AND *TRIAL DE NOVO*

A conflict arises naturally when we attempt to connect an arbitration proceeding with a *trial de novo* proceeding because *trial de novo* is defined as "a new trial or retrial had in which the whole

[10]See "Comments" in Appendix D.

case is retried as if no trial whatever had been had in the first instance."[11] A *trial de novo* must review the evidence as if it were the first time. This makes introducing aspects of the arbitration an issue. In the CAAP, it is only the amount of the arbitration award that connects the arbitration and *trial de novo* processes. The CAAP *trial de novo* uses the arbitration award amount compared to the *trial de novo* judgment to define the prevailing party as one who improves their position by at least thirty percent from the arbitration award. This type of standard that imposes penalties based on the comparison of results of the proceedings has been challenged constitutionally and upheld by the Hawaii Supreme Court.[12] This type of standard is one effective way to connect the non-binding arbitration required by section 514A-121, *Hawaii Revised Statutes*, to the trial de novo proceedings allowed by section 514A-127, *Hawaii Revised Statues.*

A different way to make the non-binding arbitration more meaningful might be to require the party appealing the decision to post a bond for the amount of the arbitration award before a *trial de novo* is allowed. The State of Massachusetts makes a similar requirement for manufacturers who appeal Lemon Law (motor vehicle warranty) arbitration proceedings.[13] The requirement of posting a bond acts as a deterrent to those who may demand a *trial de novo* simply to delay the payment of an award. Posting a bond requires tying up collateral that would essentially have a similar effect to payment. An additional cash bond amount of $2,500 payable to the consumer to cover anticipated attorney's fees and costs is also required under the Massachusetts law before a manufacturer can proceed to *trial de novo*.[14]

A third way to make non-binding arbitration more meaningful could be to require the party demanding *trial de novo to* have the burden of proving that the arbitration award was incorrect. This is a process used in Maryland that creates a screening mechanism for medical malpractice claims.[15] This method has been tested against the constitutional principles of right to jury trial and due process and has been upheld in Maryland state courts.[16] It operates by allowing the arbitration award as evidence in the *trial de novo*. The award is presumed correct and the party demanding *trial de novo* has the burden to show otherwise. The case law that has developed around this method makes it clear that the burden only shifts with regard to the presumption that the arbitration award is correct. The plaintiff still has the common law burden of proof as to liability on the defendant's part.[17] This

---

[11] *Black's Law Dictionary, 6th Ed.*. West Publishing Co., St. Paul, Minnesota, 1990.

[12] *Richardson v Sport Shinko*, 76 Hawaii 494 (1994).

[13] Section 7N1/2 Chapter 90, *Annotated Laws of Massachusetts* (1994, Supp. 1995) .

[14] *Ibid.*

[15] Section 3-2A06(d) Courts Article, *Maryland Code* (1995)

[16] *Attorney General v Johnson,* 282 Md. 274, 393-394; 385 A2d 57, 67-69.

[17] *Newell v Richards*, 323 Md. 717, 594 A2d 1152 (1991)

shifting of the burden method would not have as much an impact on close cases but would be more likely to dissuade parties from demanding *trial de novo* in frivolous appeal attempts.

All of these suggested methods to make the non-binding arbitration process more "meaningful" still require the plaintiff to re-initiate the claim in Circuit Court if a *trial de novo* is demanded after an arbitration award has been made. As stated previously, the removal of the opportunity for private arbitration by incorporating the arbitration process into the Circuit Courts similar to the CAAP program would be more limiting rather than more "meaningful". Instead, this report focuses on striking a balance between keeping the arbitration process private and imposing standards and penalties on those who demand *trial de novo* under the Condominium Property Regime Law.

IMPLEMENTATION OF PENALTIES

The three possible methods of making the non-binding arbitration more meaningful as discussed above can be referred to as: (1) the CAAP standard, (2) the posting bond method, and (3) the burden of proof method. All these methods impose a penalty of sorts. The purpose of the penalty systems is to induce good faith efforts at the arbitration level, acceptance of the arbitration award, and to encourage a waiver of the right to litigate.[18] The penalties must also balance basic due process and right to jury trial issues in order to pass constitutional muster[19]. All of the proposed methods are currently operational in the state of their origin. Determining how to implement these possibilities requires an examination of how each one would interact with the current law.

Applying the CAAP standard (which is the closest alternative to Rule 68 of the Hawaii Rules of Civil Procedure) to the *trial de novo* statute would entail amending the arbitration provisions of the condominium law by adding provisions similar to Rules 25 and 26 of the Hawaii Arbitration Rules. This would <u>not</u> incorporate the arbitration process into the CAAP program, but would require the same comparison to be made between the arbitration award and the *trial de novo* judgment along with any penalty provisions for failing to change the arbitration award by at least thirty percent. Sample legislation for this type of amendment is included as Appendix I.

Implementing the requirement to post a bond also requires amending the arbitration provisions of the condominium law. Requiring the posting of a bond as a prerequisite to a demand for *trial de novo* can be a cumbersome requirement. It simulates payment in the sense that the party demanding *trial de novo* must encumber collateral in the amount of the award if a surety company is to issue the bond. Currently the law requires that a demand for trial de novo be within ten days after the arbitration award is made. If a bond is required this would be difficult to obtain in a ten-day

[18]Golan, Dwight, "Making Alternative Dispute Resolution Mandatory: The Constitutional Issue," *Oregon Law Review*, Vol. 68, 1989, p. 487, 495.

[19]This issues are discussed in more detail in Chapter 5.

period. To give the demanding party more time, the bond requirement could be imposed and the demand deemed not perfected until the bond is issued. If the bond is not issued within thirty days of the arbitration award then the demand for *trial de novo* is rejected and the arbitration award is final. Sample legislation for this method is included as Appendix J.

Finally, implementing the burden of proof method would require the most dramatic policy changes to the current law. The current law provides that the "award of arbitration shall not be known to the trier of fact at a trial de novo."[20] Implementing the burden of proof method requires that the arbitration award be known to the trier of fact. The award is presumed correct and can be used as evidence at the *trial de novo*. The party demanding the *trial de novo* has the burden of showing the trier of fact why the award was incorrect. This burden of proof only relates to the arbitration award and the plaintiff's burden of proving the liability issues is not affected. Sample legislation for this method is included as Appendix K.

These three methods of making non-binding arbitration more "meaningful" are not mutually exclusive. They affect different aspects of the arbitration and *trial de novo* processes and can be imposed separately or concurrently. The selection or combination of the approaches implemented will determine the severity of the "bite" to those who choose to demand *trial de novo* after an arbitration award has been made under the Condominium Property Regime Law.

COMMENTS

The draft legislation suggested in this chapter was reviewed by the organizations named in Senate Resolution No. 54, S.D. 2. More of the responding parties supported the introduction of the draft legislation for mandatory mediation than opposed it. The Community Associations Institute (CAI) expressed concern that the cases where mediation is inappropriate is larger than suggested by the draft legislation. The CAI cited instances where the Board has limitations in its ability to compromise where mediation is inappropriate. With regard to this point, the Bureau recognizes there may be limitations on both parties. Mediation may still be effective in resolving these type of disputes through the use of a neutral party articulating the issues to parties in an attempt to reconcile the differences. The CAI, is joined by the Hawaii Association of Realtors in believing mandatory mediation may be a waste of time.

The Bureau believes that requiring parties to mediate would be more helpful than not. There is also concern about wasting time with regard to imposing a delay to proceed with the arbitration or trial. Imposing a time restriction to allow the mediation would resolve these concerns. If nothing else, a limit would be placed on the amount of time wasted. Following similar procedures in the labor laws, a thirty-day performance period was incorporated into the suggested legislation appearing in Appendix G.

---

[20]Section 514A-127(c), *Hawaii Revised Statutes.*

The CAI also commented regarding the right to mediate disputed assessments that is conditioned upon the payment of the disputed amounts. This is addressed in section 514A-90(d), *Hawaii Revised Statutes.* The mandatory mediation as proposed in this report is not meant to supersede the provisions regarding an owner's remedy for disputed assessments in subsection 514A-90(d), *Hawaii Revised Statutes*, and a clarifying provision has also been incorporated into the draft legislation for mandatory mediation.

None of the parties that responded objected to requiring arbitrators to provide notice to the parties of their options regarding binding or non-binding arbitration and the availability of *trial de novo* after the arbitration. The Hawaii Council of Associations of Apartment Owners expressed specific support of the draft legislation requiring notice to parties.

The CAI, the Hawaii Association of Realtors, and the Hawaii Council of Associations of Apartment Owners and the Hawaii Real Estate Commission all objected to the draft legislation that incorporated the Court Annexed Arbitration Program standards and penalties for a *trial de novo* after a non-binding arbitration proceeding. All three made the point that many of the disputes did not involve monetary issues and proving that a position was improved by thirty percent where an injunction was at issue would be difficult. The Bureau agrees that where an injunction is involved there are usually not monetary issues that can be measured by degrees of numerical value. Nonetheless, if a party is not satisfied after the arbitration of a claim that involves an injunction and requests a *trial de novo*, that party who seeks the *trial de novo* will try to obtain the opposite result of the arbitration. If during the arbitration an injunction is granted, and after a *trial de novo* the injunction is not granted, the result can be said to have achieved a 100 percent improvement, meeting the CAAP standard imposed in the draft legislation. Claims involving injunctions could easily be evaluated in this all or nothing manner and still subscribe to the CAAP standards.

Comments from parties, with regard to draft legislation requiring the posting of a bond before a demand for a *trial de novo* would be perfected, suggested that this would be a greater burden on an owner than on an apartment owners association. The Bureau acknowledges that this may be true. The draft legislation is offered as an incentive to give meaning to arbitration. Evidence gathered in this study did reveal that an owner, as well as an association, had pursued *trial de novo.* Regardless of whether an owner or an association attempts to use *trial de novo* from acknowledging the arbitrator's award, the imposition of the bond would require both parties to consider both the arbitration and *trial de novo* more seriously.

Comments were also received from CAI and the Hawaii Association of Realtors on the draft legislation that shifted the burden to the requester of the *trial de novo* to prove the arbitrator's award was incorrect. The Hawaii Association of Realtors supports this draft legislation while the CAI felt that it would have little impact. This draft legislation represents the most dramatic policy change

in that the arbitration award is entered as evidence[21] into the *trial de novo* proceedings that must be proved incorrect.

The Hawaii Independent Condominium & Cooperative Owners did not support any of the suggested legislation. Their response suggests that they believe the only way to make non-binding arbitration more meaningful under the condominium property regime law is to impose mandatory binding arbitration.[22] The legal ramifications of this proposal are discussed in Chapter 5.

SUMMARY

Resolving disputes through non-binding arbitration has for the most part been successful. A problem exists in the case where a party demands a *trial de novo* after the arbitration award has been made. Under the current law this renders the arbitration "meaningless" because the plaintiff must re-initiate their complaint in another forum and start from ground zero. There is no connection between the arbitration and the *trial de novo*. This chapter examined issues that arise both pre-arbitration hearing and post-arbitration award that can be modified to add meaning to non-binding arbitration.

Two suggestions to give meaning to non-binding arbitration before the arbitration process begins include requiring mediation and requiring arbitrators to articulate to the parties their options as to whether or not the proceeding is binding or non-binding, and deciding those issues before commencing the arbitration. Requiring parties to mediate under condominium law would extend existing dispute resolution methods in the Condominium Property Regime Law to a broader scope of issues. Limitations to required mediation would have to recognize circumstances where mediation is not appropriate. Requiring arbitrators to articulate the options of parties to agree to binding arbitration or to proceed under the non-binding arbitration of section 514A-121, *Hawaii Revised Statutes*, provides awareness of the *trial de novo* process which may occur.

Examination of the post-arbitration process this chapter revealed that the principles behind Rule 68 of the Hawaii Rules of Civil Procedure are exercised in the Court Annexed Arbitration Program (CAAP). This chapter analyzed the aspects of that program and how it works. Evaluating what is "meaningful" to parties in non-binding arbitration included the opportunity for private arbitration. Therefore, this chapter also concluded that retaining the opportunity to engage in private arbitration is more meaningful than imposing the CAAP process on disputes between owners,

---

[21]CAI indicated the prejudice created by this fact could be remedied through bifurcation but would not be worth the expense of the proceedings.

[22]Supporting material submitted by the Hawaii Independent Condominium & Cooperative Owners included an excerpt from Colliers Encyclopedia that referred to the instance where both parties *agree* to arbitrate and therefore the arbitration would be binding and final. Disputants who agree to arbitrate are not the subject of this study as that situation is currently allowed in Hawaii and is governed by Chapter 658, *Hawaii Revised* Statutes. This study focuses on when only one party wants to arbitrate and the other would rather take the issue to court.

apartment owners associations, and their managing agents. Instead, this chapter focused on connecting the arbitration award to the *trial de novo* in order to make non-binding arbitration more meaningful.

Three methods of connecting the arbitration award and the *trial de novo* are suggested. The three methods are referred to as: (1) the CAAP standard; (2) imposing a bond; and (3) burden of proof method. Briefly, the CAAP standard imposes the same requirements and penalties on the party who demands a *trial de novo* under the Condominium Property Regime Law as those under the CAAP without requiring the arbitration to be court annexed. The "imposing a bond" method requires the party demanding a *trial de novo* to obtain a bond as a prerequisite. Finally, the "burden of proof method" allows the arbitration award to be entered as evidence at the *trial de novo* and presumed to be correct. This burden of proof method does not affect the liability issues.

Sample legislation to implement each of the five suggested actions to make non-binding arbitration more meaningful are included in Appendices G through K. They are not mutually exclusive. Each action may be proposed individually or combined with others. The decisions as to which actions should be implemented are dependent on the degree of severity that the Legislature seeks to impose. Imposing simply the pre-arbitration actions would contribute to providing more "meaningful" non-binding arbitration, but imposing the post-arbitration actions would give non-binding arbitration some "teeth".

Chapter 4
POSSIBLE FORUMS FOR *TRIAL DE NOVO*

This chapter addresses the question specifically asked by Senate Resolution No. 54., S.D. 2, *"Whether if "trial de novo" were retained, the trial could be held in courts other than the circuit court depending on the nature of the dispute and the amount in controversy."* This chapter looks at the *trial de novo* issue from the aspect of the nature of the dispute and the amount in controversy, drawing from the data collected in Chapter 2. This chapter also reviews the jurisdictional requirements for all the possible forums that currently exist. Finally, this chapter completes a compatibility test of sorts, comparing possible forums with the type of disputes and the amount in controversy issues.

NATURE OF THE DISPUTE AND AMOUNT IN CONTROVERSY FOR *TRIAL DE NOVO*

In Chapter 2 this report identified only two instances of *trial de novo* demanded under section 514A-127, *Hawaii Revised Statues.* One instance was on Maui and involved improper construction when an apartment owner expanded the unit and was accused of violating roof lines limitations. The costs involved in the improper construction were substantial. The apartment owners association (hereafter "AOA") completed arbitration with the owner and the award required the owner to essentially put the unit back to its original state. The owner demanded a *trial de novo*. The case eventually settled before it went to trial.

The second instance of a *trial de novo* was a claim made by an owner on Oahu that focused on an accommodation issue. The owner was requesting permission to use and store a shopping cart that was needed as a result of medical and health constraints. There were house rules that limited or prohibited the use and storage of certain items within the common areas. There was little or no monetary value to the accommodation issue, at the beginning. After the owner received a favorable arbitration award, the AOA demanded a *trial de novo.* The costs involved in participating in arbitration as well as having to pursue the issue further in Circuit Court generated a monetary issue. The final outcome of this case was still pending at the time this report went to press.

The two *trial de novo* cases this report could identify do not paint a clear picture of what the nature of disputes and the amount in controversy are in *trial de novo*. In fact, the two examples presented appear to paint fairly different pictures. Reviewing the material from Chapter 2 and information collected directly from the Circuit Court files, this report categorized the nature of disputes into three areas: (1) improper construction, (2) quiet enjoyment, and (3) requiring owners to evict their tenants for assorted violations of house rules and bylaws. For the purposes of this chapter the actions for eviction of tenants can be set aside because the nature of the dispute does not represent a dispute directly between owners and AOAs. Alternatively, the evictions could be grouped with the quiet enjoyment because the heart of the dispute focuses on the tenant's violations

of house rules and bylaws disrupting the quiet enjoyment of the remainder of the residents of the condominium. On either of these theories the categories of improper construction and quiet enjoyment are left to consider.

The majority of complaints regarding quiet enjoyment are actions for injunctive relief to stop someone from doing something. This may include accommodation issues, such as the keeping of a pet. Quiet enjoyment also includes complaints regarding excessive noise levels and failure to maintain the proper appearance of the building. Typically, these cases are not associated with large monetary values, as compared to improper construction cases.

In improper construction cases, the owner has already improved or is in the process of improving the property without the necessary approvals from the AOA. Similar to quiet enjoyment cases, the action in improper construction will be for injunctive relief or a judgment that restores the property to its original state. Unlike quiet enjoyment issues, however, the monetary value in improper construction cases is two-fold. First, the cost of renovation to the owner is at stake, as well as the cost to restore it to the original condition if not approved. Second, the improvement usually increases the value of the unit itself which could translate into even larger monetary figures over several years.

Worth mentioning is the fact that one case reviewed in Appendix E ("Condominium Cases Reviewed") involved libel and slander charges brought by an owner against an AOA. This cause of action was unique among the cases identified for disputes between owners, AOAs, and their managing agents and does not fit into either of the stated categories above.

Summarizing the material from Chapter 2, it can be said that the nature of the disputes are all civil actions claiming damages based on violations or requests for waivers of the bylaws or house rules of an apartment owners association. The amount in controversy appears to vary widely according to the type of dispute.

JURISDICTIONAL FACTORS OF POSSIBLE FORUMS

The demand for a *trial de novo* under section 514A-127, *Hawaii Revised Statutes,* may be characterized as an appeal of the arbitration but a *trial de novo* is a trial where evidence is heard and evaluated as if for the first time. Accordingly, a court that hears a *trial de novo* must have original jurisdiction and not appellate jurisdiction to hear that type of case. Original jurisdiction means a court conducts an independent review and is not reliant on another courts proceeding or judgment.[1] This is commonly referred to as a trial court. Appellate jurisdiction does not evaluate evidence but reviews the proceedings and judgments of another court.

[1]American Jurisprudence 2d, Courts, Volume 20, Section 66.

The scope of the issues each forum will hear is defined by its jurisdictional authority in the Constitution of the State of Hawaii[2] and *Hawaii Revised Statutes*. Hawaii has several different forums that can be explored, the Courts of Appeal, the Circuit Court, and the District Court.

The Courts of Appeal

The State of Hawaii has two courts of appeal, the Supreme Court and the Intermediate Appellate Court. These courts have jurisdiction to hear and determine all questions of law, or of mixed law and fact brought before it on appeal from any other court or agency.[3] The Supreme Court assigns cases at its discretion to the Intermediate Appellate Court. While cases heard at the Intermediate Appellate Court may be appealed to the Supreme Court, the Supreme Court and Intermediate Appellate Court are considered the final opportunity for dispute resolution of state litigation. Although the Supreme Court has authority to exercise original jurisdiction in limited circumstances that do not apply to this report,[4] neither the Supreme Court nor the Intermediate Appellate Court is a trial court. Therefore, these appellate courts are not appropriate forums for a *trial de novo*.

The Circuit Court

The Circuit Court has original jurisdiction over many types of court actions. It is the designated forum to determine unsuitability for arbitration,[5] or to confirm an arbitration award[6] under the condominium law. While it is not specifically articulated in the statute, the Circuit Court also has authority to hear a *trial de novo* under section 514A-127, *Hawaii Revised Statutes*. Other actions the Circuit Court has original jurisdiction over include both jury and non-jury actions, criminal offenses, actions for penalties and forfeitures, probate, and other civil actions and proceedings.[7]

For jurisdictional purposes, while the Circuit Court has exclusive jurisdiction in civil actions and proceedings where the amount in controversy exceeds $20,000, there is no statutory minimum.[8]

---

[2]Art. VI, section 1, Constitution of the State of Hawaii.

[3]Sections 602-5 and 602-57, *Hawaii Revised Statutes*.

[4]Section 602-5(4), *Hawaii Revised Statutes*.

[5]Section 514A-122 *Hawaii Revised Statutes*.

[6]Section 514A-125, *Hawaii Revised Statutes*.

[7]Sections 603-21.5, and 603-21.6, *Hawaii Revised Statutes*.

[8]$10,000 is an implied statutory minimum due to the exclusive jurisdiction of the District Court, section 604-5, *Hawaii Revised Statutes*.

The Circuit Court may also hear actions where a jury trial has been demanded and the amount in controversy exceeds $5,000.[9] The Circuit Court has four different judicial circuits that generally reflect each of the county borders.[10] As a trial court this gives the Circuit Court credibility when evaluating issues within a community context. Additionally, the Circuit Court also has jurisdiction over some types of appeals from other courts and agency decisions.[11]

The fee schedule for actions in Circuit Court ranges from $100 to file a general action or transfer a case from district court for jury trial to $1 for certification under seal copy of a pleading.[12]

The District Court

The District Court also has jurisdiction in civil matters similar to the Circuit Court although it does not have jurisdiction over real actions (i.e., actions involving real property), or actions for libel and slander, among others not relevant to this report.[13] Disputes between the parties in a condominium sometimes encompass actions that would be considered real actions.[14] The District Court would not have jurisdiction in those disputes. But, in fact, the District Court does hear many actions regarding the disputes between condominium owners and apartment owners associations. Claims that are not based on enforcement of the apartment owners association's bylaws and are not considered real actions continue to be heard in District Court without question of authority from the legal community.

Beyond the subject matter jurisdiction of District Court, the claim must also comply with the lower thresholds on the amount in controversy. Civil jurisdiction in District Court is limited to

---

[9]Section 604-5, *Hawaii Revised Statutes*, in defining the civil jurisdiction of the District Court prohibits cases where the amount in controversy exceeds $20,000 and requires that jury trials be removed to Circuit Court if the amount in controversy exceeds $5,000.

[10]With the exception of the district of Kalawao, each of the counties make up a judicial circuit as follows:
The First Circuit is Oahu and the district of Kalawao on Molokai
The Second Circuit is Maui, Molokai, Lanai, Kahoolawe and Molokini
The Third Circuit is the island of Hawaii; and
The Fifth Circuit is Kauai and Niihau.
Note there is no fourth circuit. Section 603-1, *Hawaii Revised Statutes.*

[11]Sections 603-21.8 and 91-14, *Hawaii Revised Statutes.*

[12]Section 607-5, *Hawaii Revised Statutes.*

[13]Section 604-5(d), *Hawaii Revised Statutes*

[14]Condominium bylaws are considered covenants running with land and actions that enforce them would be considered real actions. It is not clear whether enforcing house rules would be considered a covenant running with the land and a real action, but analysis on this issue is beyond the scope of this study.

actions where the amount in controversy or "the debt, amount, or damages, or the value of the property claimed, does not exceed $20,000."[15]

In the interest of just, speedy, and inexpensive determination of certain matters there is a Division of Small Claims within District Court where claims of less than $3,500 can be resolved within thirty days.[16] It is in the Small Claims division where tenant-landlord security deposit proceedings are brought. In fact, the Small Claims division of District Court has exclusive jurisdiction over landlord-tenant disputes related to security deposits.[17] Special restrictions are in place that attempt to balance the playing field between landlords and tenants. For example, tenants and landlords must appear in person and are not allowed to have a lawyer represent them.[18] The District Court of the First Circuit, Division of Small Claims has also instituted a mandatory mediation policy.

The mandatory mediation policy requires all parties who bring actions in the Small Claims division of District Court of the First Circuit to first meet with a mediator before the case will be heard before a judge. The mediators are volunteers from the Neighborhood Justice Center and spend twenty to forty minutes with the parties exploring settlement opportunities. If no settlement is reached the parties continue with the trial. This project has been in place for almost two years.

The fee schedule for claims brought in District Court is substantially lower than in Circuit Court. The cost of filing an initial claim in District Court, including the Small Claims Division is only $25 as opposed to $100 in Circuit Court. Lower fees make the District Court more readily accessible to a wider range of people.

CREATING A NEW FORUM

There are some forums within the court system that have specialized subject matter jurisdictions, for example the Tax Appeal Court[19] and the Land Court.[20] These courts are set up to focus on a group of issues that have common features or subject matters. The disputes between owners, AOAs and their managing agents are usually centered around a set of bylaws or house rules

[15]Section 604-5(a), *Hawaii Revised Statutes.*

[16]Section 633-27, *Hawaii Revised Statutes.*

[17]Section 521-44(g), *Hawaii Revised Statutes*

[18]Section 633-28, *Hawaii Revised Statutes.*

[19]See sections 232-8 to 232-13, *Hawaii Revised Statutes.*

[20]See chapter 501, *Hawaii Revised Statutes.*

that may be unique to each particular association. The condominium dispute cases do not appear to have the requisite common features that would rationalize setting up a specialized court.

In addition, the data from Chapter 2 indicates that the number of disputes is not great. Figures from the Judiciary did not present an unmanageable situation by the current court systems that are already operational. In conclusion, it does not appear that setting up an entirely new system exclusively for disputes between owners, AOAs, and their managing agents would be efficient.

COMPATIBILITY OF FORUMS AND DISPUTES

In *trial de novo* situations a court requires original jurisdiction. This eliminates the Courts of Appeal. The Circuit Court and the District Court are both courts of original jurisdiction.

The disputes that arise between condominium owners, apartment owners associations, and their managing agents are all civil matters that qualify for subject matter jurisdiction in both Circuit Court and District Court. Depending on the nature of the dispute, the District Court may be prohibited from exercising jurisdiction as discussed earlier with regard to the libel and slander claim and claims that are considered real actions. The amount in controversy is the final element that determines where a claim could be made.

The costs to initiate and proceed with a *trial de novo* claim should be considered. For issues that do not have large monetary values, costs can be lowered by bringing an action in District Court. Claims that exceed the dollar limitations of District Court necessarily must be brought in Circuit Court. The condominium statutes do not give specific jurisdiction for *trial de novo* to any particular court so it appears that under the present law, both District Court and Circuit Court would be eligible forums for *trials de novo* in condominium cases.

Chapter 5
REMOVING "*TRIAL DE NOVO*"

This chapter addressees the question posed by Senate Resolution No. 54, S.D. 2, "*Whether disputes under chapter 514A, Hawaii Revised Statutes, should no longer be made subject to a "trial de novo" but to some other means of alternative dispute resolution.*" This chapter explores the legal ramifications of removing "*trial* de novo" and substituting other means of alternative dispute resolution.

WHY DO WE HAVE *TRIAL DE NOVO*?

Before examining whether *trial de novo* should be removed from the dispute process under chapter 514A, Hawaii Revised Statutes, it is important to understand why it was enacted. This report reviewed the legislative history of the law in Chapter 1. The Legislature deliberated whether to mandate binding or non-binding arbitration in section 514A-121, *Hawaii Revised Statutes*. The debate focused on several constitutional issues. Significant in the debate was testimony received from the Real Property and Financial Services - HPR (Horizontal Property Regime) Committee of the Hawaii State Bar Association articulating four areas of concern that mandatory arbitration would constitute:

-- Denial of the constitutional right of trial by jury.

-- Denial of the constitutional right of substantive due process.

-- Denial of the constitutional right of procedural due process.

-- Unconstitutional delegation by the Legislature of its legislative function.[1]

The Attorney General agreed[2] with the argument of the HPR Committee that mandatory binding arbitration would violate constitutional principles. The Legislature resolved the constitutional issues by enacting section 514A-121, *Hawaii Revised Statutes*, mandating non-binding arbitration and section 514A-127, *Hawaii Revised Statutes*, which allows parties to request a *trial de novo* after an arbitration award has been issued. Now, more than ten years later, this study reviews the constitutional arguments that caused the Legislature to enact the *trial de novo* process for the Condominium Property Regime Law.

---

[1] Real Property and Financial Services - HPR Committee, Hawaii State Bar Association testimony regarding S.B. No. 1815-84 before the Senate Consumer Protection and Commerce Committee, March 2, 1984.

[2]House Standing Committee Report No. 665-84, on S.B. No. 1815-84, House Journal Regular Session 1994, p. 1176.

TRIAL BY JURY

One question raised when mandatory arbitration is substituted for court proceedings is whether a party's constitutional rights to a jury trial under the Hawaii constitution are being impaired.[3] Article I, Section 13, Constitution of the State of Hawaii states:

> In suits at common law where the value in controversy shall exceed one thousand dollars, the right to trial by jury shall be preserved. The Legislature may provide for a verdict by not less than three-fourths of the members of the jury.[4]

Professor Dwight Golan of Suffolk University Law School analyzed the current legal opinions in his 1994 law review article, "Making Alternative Dispute Resolution Mandatory: The Constitutional Issues".[5] Professor Golan suggests the key factors in analyzing whether or not a statute restricts the constitutional right of a trial by jury when that statute imposes an alternative dispute process is "first, whether a process applies to legal causes of action and, second, the extent to which the outcome of the process, as well as participation in it, is mandatory."[6]

The first part of the analysis, as applied to the condominium law, whether the mandatory arbitration would apply to a legal cause of action, must be answered "yes". The disputes between a condominium owner, the apartment owners association, or the managing agent are legal causes of action based on chapter 514A, *Hawaii Revised Statutes*.

The second part of the analysis addresses participation and outcome. For condominium arbitrations, the statute now reads "[at] the request of any party, any dispute...shall be submitted to arbitration."[7] The word "shall" makes participation mandatory. The extent to which the outcome of the process is mandatory is the major issue here and critical to the determination of the constitutionality of the provision. When the opportunity for *trial de novo* is provided, the outcome of the process is not mandated because after an arbitration award has been issued there is access to a trial by jury through *trial de novo* under section 514A-127, *Hawaii Revised Statutes*. The fact that

---

[3]The Seventh Amendment of the United States Constitution has a similar provision that reads, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." however, this federal provision does not apply to the states. See R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law: Substance and Procedure*, Section 17.8 (1986).

[4]Section 13, Article I, Constitution of the State of Hawaii.

[5]Golan, Dwight. "Making Alternative Dispute Resolution Mandatory: The Constitutional Issues," *Oregon Law Review*, vol. 68, p. 487-568, 1989.

[6]*Ibid.*, p. 503

[7]Section 514A-121, *Hawaii Revised Statutes*.

the arbitration is non-binding makes the arbitration more of a precondition to gaining access to a trial by jury than a bar to the opportunity for a jury trial. This type of precondition,[8] as well as penalties imposed on the results of a trial after an arbitration award has been entered,[9] have been upheld by state courts including Hawaii's appellate courts.

This analysis indicates that the *trial de novo* opportunity in section 514A-127, *Hawaii Revised Statutes,* is critical to the constitutionality of section 514-121, *Hawaii Revised Statutes*, and together mandate non-binding arbitration. Removing the opportunity for *trial de novo* would create mandatory binding arbitration. This would limit the extent of the outcome and the arbitration provisions in section 514-121, Hawaii Revised Statutes, could be subject to constitutional challenges that the right to a jury trial is obstructed. Repealing *trial de novo* and replacing it with another form of alternative dispute resolution, as Senate Resolution No. 54, S.D. 2, queries, would not resolve the constitutional problems. Replacing *trial de novo* with another form of alternative dispute resolution still deprives parties of their constitutional right to a jury trial. This analysis indicates that *trial de novo* should be retained.

The above analysis should not be interpreted to state that binding arbitration does not exist. There are circumstances when binding arbitration is an accepted method of dispute resolution that does not violate the state constitutional right to a civil jury trial. The first instance is when both parties agree to arbitrate. In essence, the parties have agreed to waive their right to a civil jury trial and the arbitration is governed by chapter 658, *Hawaii Revised Statutes.* The second instance is when the right to a jury claim is transformed in the law so that it no longer carries jury trial rights.[10] Examples of the second instance in Hawaii's law can be seen in the handling of disputes between a public employer and firefighters, police officers, state and county government employees in collective bargaining units 2,3,4,6, 10, 11, or 12 among others.[11]

Mandatory binding arbitration has also been enacted in Hawaii's residential leasehold condominiums and cooperatives law. This law requires every residential lease to contain a provision for the mandatory arbitration of any rent renegotiation re-opening. Where no provision in the lease appears, the law imposes a mandatory arbitration procedure that is final and binding on the parties.[12] This provision works to remove the civil jury claim of lessors and lessees by imposing a mandatory provision into all residential lease agreement. If this type of approach is to be used for the resolution of disputes under the condominium property regime law then all condominium bylaws would have to provide for mandatory binding arbitration of disputes between owners, apartment owners

---

[8]*Capital Traction v Hof,* 174 U.S. 1 (1899).

[9]*Richardson v Sport Shinko* (Waikiki Corp.), 76 Hawaii 494, 880 P.2d 169 (1994).

[10]Golan, p. 504.

[11]Section 89-11(d), *Hawaii Revised Statutes.*

[12]Section 516D-12, *Hawaii Revised Statutes.*

associations, and their managing agents. The Bureau believes that the comparatively small number of cases do not demonstrate a problem significant enough at this time to warrant a radical procedure change that could remove constitutional protections from an entire group of condominium owners.

DUE PROCESS AND DELEGATION OF LEGISLATIVE POWER

The HPR Committee stated in their testimony:

> The "substantive due process" objection might be predicated upon an absence in the Bill of the standards that the arbitrator must use in rendering his decision concerning the interpretation, application or enforcement of Chapter 514A...
>
> The "procedural due process" objection might be predicated on the failure of the Bill to establish the rules of procedure, including the rules of evidence and review, that would apply to the arbitration process...
>
> The "unconstitutional delegation of legislative function" issue might be based on the requirement in the Bill that the dispute be settled and conducted in the manner provided for by the AAA's HPR Rules. Substantive and procedural lawmaking is the responsibility of the Legislative [Branch].[13]

Due process, both substantive and procedural, and the unconstitutional delegation of legislative power objections are integrally tied to the lack of substantive standards set by the Legislature for arbitration under section 514A-121, *Hawaii Revised Statutes*. Due process objections focused on the actual rules and standards available within the section. The objections based on unconstitutional delegation of legislative power focused on wrongfully giving away the authority to make rules and standards to private institutions not under the authority of the Legislature. In section 514A-121, the Legislature requires that arbitrations be conducted in accordance with the Horizontal Property Regime Rules of the American Arbitration Association.

These HPR Committee arguments address earlier versions of the bill than was eventually passed and address the Legislature's considerations of mandatory arbitration without *trial de novo* opportunity. The inclusion of *trial de novo* addresses the issues raised by the HPR Committee. If arbitration is the ultimate resolution of a dispute, then parties would be subject to uncertainty and lack of uniformity in arbitration proceedings. The court system provides protection against these due process concerns. The Hawaii Supreme Court has recently addressed some of these issues. In a case where the appellant complained that *trial de novo* restrictions in the Court Annexed Arbitration Program violated due process, the Court concluded that if a party's right to civil jury trial has not

[13]Testimony regarding S.B. No. 1815-84 before the Senate Consumer Protection and Commerce Committee, March 2, 1984, specifically testimony of Real Property and Financial Services - HPR Committee, Hawaii State Bar Association, p 4.

been impermissibly impaired, then no violation of due process has occurred.[14] All of these arguments indicate that *trial de novo* should not be eliminated from the condominium property regime law or be replaced with any other form of alternative dispute resolution.

SUMMARY

Senate Resolution No. 54, S.D. 2, poses the question, "*Whether disputes under chapter 514A, Hawaii Revised Statutes, should no longer be made subject to a "trial de novo" but to some other means of alternative dispute resolution.*" This report concludes that disputes under chapter 514A, *Hawaii Revised Statutes*, should continue to be subject to "*trial de novo*" and not some other means of alternative dispute resolution. Replacing *trial de novo* in the condominium law with binding arbitration would likely be subject to constitutional challenge on the grounds of the constitutional right to a jury trial provided in Article I, Section 13, of the Constitution of the State of Hawaii. Substituting other means of alternative dispute resolution for *trial de novo* would not be adequate to satisfy constitutional requirements. For the foregoing reasons, the Bureau believes that taking steps to strengthen the non-binding arbitration requirements is a more appropriate course of action at this time.

[14] *Richardson v Sport Shinko* (Waikiki Corp.), 76 Hawaii 494, 514 (1994)

Chapter 6
FINDINGS AND RECOMMENDATIONS

FINDINGS

(1) Disputes between condominium owners, apartment owners associations, and their managing agents that end up in court proceedings, arbitration or documented mediation proceedings, are a small percentage of the total amount of all dispute resolution proceedings. In a ten-year period, the Bureau was only able to identify a total of 199 incidents.

(2) On the average, respondents to the survey distributed by the Bureau to gather data, were slightly more satisfied with non-binding arbitration and felt slightly more satisfied with its effectiveness than not.

(3) Under the Condominium Property Regime Law, *trial de novo* proceedings provided in section 514A-127, *Hawaii Revised Statutes*, have no clear link to the arbitration proceedings allowed under section 514A-121, *Hawaii Revised Statutes*. The lack of connection may be the cause of the sentiment that non-binding arbitration is "meaningless".

(4) The forums for *trial de novo* must have original and subject matter jurisdiction. The Circuit Court meets all the criteria. The District Court meets the criteria when the claim is not a real action (i.e. real property) and the amount in controversy does not exceed the District Court's jurisdictional limitations ($20,000).

(5) *Trial de novo* cannot be removed and replaced with other forms of alternative dispute resolution without raising constitutional concerns about the right to jury trial under the Constitution of the State of Hawaii, and other considerations. Restrictions on the steps or process one must take and the penalties that may be imposed have been upheld in various state courts, including the Hawaii Supreme Court in *Richardson v. Sport Shinko,* 76 Hawaii 494 (1994).

RECOMMENDATIONS

Replacing non-binding arbitration and *trial de novo* in the resolution of condominium disputes with mandatory binding arbitration is not appropriate at this time. The relatively small number of cases do not demonstrate a problem significant enough to warrant a comparatively radical change that may trigger constitutional concerns about the denial of the right to jury trial.

The Bureau recommends that the Legislature instead take steps to make the existing non-biding arbitration more meaningful. This can be accomplished by implementing some or all of the following measures, none of which are mutually exclusive:

(1) Require mandatory mediation within thirty days of a party's demand as a pre-arbitration procedural requirement. To ensure that mediation is not used unreasonably as a delaying tactic, time limits can be imposed after which any party may demand arbitration;

(2) Before arbitrations actually commence, require arbitrators to inform all parties that they may agree to enter into binding arbitration, instead of non-binding arbitration with the opportunity for *trial de novo*, and the differences between the respective courses of action;

(3) Require the party demanding *trial de novo* to improve their position by at least thirty percent in order to be considered the "prevailing" party. This measure is calculated to deter parties from treating decisions in non-binding arbitrations lightly and cavalierly demanding *trial de novo*. This approach would impose the same requirements and penalties as the Court Annexed Arbitration Program now used in the civil courts, and would operate in a manner similar to Rule 68 of the Hawaii Rules of Civil Procedure.

Concerns about the use of this approach center upon the fact that many condominium disputes are based on nonmonetary issues (for example, where a party seeks injunctive relief). This simply means, however, that decisions in these cases will not be obvious or easy--it does not mean that the courts cannot decide them;

(4) Require the party seeking *trial de novo* to post a bond in the amount of the arbitration award plus reasonable attorney's fees. This approach is generally perceived to be a greater burden upon an individual apartment owner than upon an apartment owners association;

(5) Allow the award from the non-binding arbitration to be (a) entered as evidence in the trail de novo, and (b) presumed to be correct. This will require the party demanding the *trial de novo* to prove that the arbitration award is incorrect.

The Bureau recommends implementing both pre- and post-arbitration proceeding amendments to the existing law. Implementing recommendations (1), (2), and (3) would provide meaningful changes to arbitration of disputes under the condominium law. Draft legislation for this combined approach is attached as Appendix L.

Appendix A
SENATE RESOLUTION No. 54, S.D. 2

THE SENATE
EIGHTEENTH LEGISLATURE, 1996
STATE OF HAWAII

S.R. NO. 54 S.D. 2

SENATE RESOLUTION

INVESTIGATING THE OPTIONS OF ARBITRATION FOR DISPUTES BETWEEN CONDOMINIUM ASSOCIATIONS, CONDOMINIUM OWNERS, AND THEIR MANAGING AGENTS.

WHEREAS, an association of apartment owners of a condominium property regime consists of all of the apartment owners acting as a group in accordance with the bylaws and declaration; and

WHEREAS, the managing agent of a condominium property regime is the person employed or retained for the purposes of managing the operation of the property, which means the administration, fiscal management, and operation of the property and the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements; and

WHEREAS, the bylaws of the association govern whether the association's board of directors may engage the services of a manager or managing agent, or both, and specify which of the powers and duties granted to the board under chapter 514A, Hawaii Revised Statutes, may be delegated by the board to either or both of them; and

WHEREAS, disputes can arise between the association and the managing agent under the bylaws over any number of issues concerning the operation of the property, the payment of common expenses, and the determination and collection of the common charges, the manner of collecting common expenses, and other expenses, costs, and fees recoverable by the association, and any penalties and late charges, and restrictions on and requirements respecting the use and maintenance of the apartments and the use of the common elements; and

WHEREAS, a more cost-efficient method for either party to resolve disputes is arbitration rather than formal, protracted litigation; and

WHEREAS, the Hawaii Revised Statutes already provides for arbitration of disputes between owners and the association, board, or managing agent; and

WHEREAS, this arbitration is not binding and is subject to a trial de novo request by any party; and

WHEREAS, the parties to the arbitration are not necessarily informed of this trial de novo provision, and when one is requested, the winning party's expenses and efforts are made futile as a victory at the arbitration level means nothing and has no impact on a trial de novo; now, therefore,

BE IT RESOLVED by the Senate of the Eighteenth Legislature of the State of Hawaii, Regular Session of 1996, that:

(1) All associations of apartment owners of condominium property regimes and the individual owners are respectfully encouraged to arbitrate their disputes with each other and with their managing agents; and

(2) In its rulemaking process, the Real Estate Commission is encouraged to adopt rules to require that any arbitration entered into under section 514A-121, Hawaii Revised Statutes (HRS), include a written warning mailed to each party by the Commission or other appropriate entity stating that the arbitration is not binding and is subject to a trial de novo, and defining the term "trial de novo";

and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau is requested to conduct a study of the current state of arbitration of condominium disputes pursuant to section 514A-121, HRS, and to submit a report of its findings and recommendations to the Legislature twenty days before the convening of the Regular Session of 1997, which report is requested to include discussion of:

(1) Whether non-binding arbitration has been an effective means of resolving disputes between condominium owners, condominium boards, and managing agents;

(2) Whether disputes under chapter 514A, Hawaii Revised Statutes, should no longer be made subject to a "trial de novo" but to some other means of alternative dispute resolution;

(3) Whether changes can be made to make non-binding arbitration more meaningful by assessing the losing party at a "trial de novo" with all fees and costs incurred at the trial similar to Rule 68 of the Hawaii Rules of Civil Procedure; and

(4) Whether if "trial de novo" were retained, the trial could be held in courts other than the circuit court depending on the nature of the dispute and the amount in controversy;

and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau is requested to seek input on the study from the Hawaii State Bar Association, the Hawaii Association of Realtors, the Real Estate Commission, the Hawaii office of the American Arbitration Association, the Hawaii branch of the Community Associations Institute, the Hawaii Independent Condominium and Cooperative Owners, and the Hawaii Council of Associations of Apartment Owners, and that these organizations are requested to respond promptly to the Legislative Reference Bureau's requests; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the President of the Hawaii State Bar Association, the President of the Hawaii Association of Realtors, the Regional Vice President of the Hawaii branch of the American Arbitration Association, the Supervising Executive Officer of the Real Estate Commission, the President of the Hawaii branch of the Community Associations Institute, the President of the Hawaii Independent Condominium and Cooperative Owners, the President of the Hawaii Council of Associations of Apartment Owners, the Director of Commerce and Consumer Affairs for dissemination to all associations of apartment owners through the department's condominium specialists, and the Director of the Legislative Reference Bureau.

Appendix B
ASSOCIATIONS PROVIDING INPUT TO THIS STUDY AS DIRECTED BY SENATE RESOLUTION NO. 54, S.D. 2

Hawaii State Bar Association
1136 Union Mall, PH #1
Honolulu, Hawai'i 96813
Contacts: Tracey S. Wiltgen, Chairperson-Alternative Dispute Resolutions Section;
c/o The Neighborhood Justice Center, 200 N. Vineyard, Ste. 320, Honolulu, HI 96817
Mitchell A. Imanaka, Chairperson-Section on Real Property & Financial Services
c/o P.O. Box 2727, Honolulu, HI 96803
Joyce Y. Neeley, for Condominium Subcommittee of the Section on Real Property & Financial Services; c/o Neeley & Anderson
Grosvenor Center, Makai Tower, 733 Bishop Street, Suite 2301, Honolulu, HI 96813

Hawaii Association of Realtors
1136 12th Ave., Suite 220
Honolulu, HI 96817
Contacts: Merrily Leong, Vice President of Government and Public Affairs
Lela Getzler, Legislative Specialist
Len Kacher, Condominium Specialist, Legislative Committee
c/o Herbert K. Horita Realty, 2024 N. King St., Suite 200 Honolulu, HI 96819

Real Estate Commission
Kamamalu Building
250 S. King Street, Room 702
Honolulu, HI 96813
Contact: Calvin Kimura
Supervising Executive Officer

American Arbitration Association
810 Richards St., Suite 641
Honolulu, HI 96813
Contact: Lance Tanaka
Regional Vice President

Community Associations Institute
P. O. Box 976
Honolulu, HI 96808
Contacts: Chuck Kinsey, Executive Director
Richard Ekimoto, Esq. Chair of the Legislative Action Committee;
c/o Elisha, Ekimoto & Harada,
Bishop Trust Building
100 Bishop St., Suite 702
Honolulu, HI 96813

Hawaii Independent Condominium and Cooperative Owners
c/o Susan Kinsler
Legislative Specialist
2525 Date Street, Apt. 3801
Honolulu, HI 96826

Hawaii Council of Associations of Apartment Owners
677 Ala Moana Blvd, Suite 701
Honolulu, HI 96813
Contact: Nancy Tomczak
Executive Director

Appendix C

Condominium Dispute Fact Sheet

For Senate Resolution 54, S.D. 2

"Investigating the Options of Arbitration for Disputes Between Condominium Associations, Condominium Owners, and Their Managing Agents"

THE LEGISLATIVE REFERENCE BUREAU WOULD APPRECIATE YOUR ASSISTANCE IN COMPILING INFORMATION ON THE RESOLUTION OF CONDOMINIUM DISPUTES. THE BUREAU WOULD LIKE YOU TO SUMMARIZE YOUR EXPERIENCE OVER THE LAST FIVE YEARS WITH REGARD TO CONDOMINIUM DISPUTES. **CALL PAMELA MARTIN, 587-0666** IF YOU HAVE QUESTIONS.

CONDOMINIUM ADDRESS:_____

THE ANSWERS ON THIS FORM REPRESENT: (MARK ONLY ONE)
___ THE BOARD'S EXPERIENCE OR
___ THE MANAGING AGENT'S OR
___ YOUR PERSONAL EXPERIENCE

A. Please fill in the number of condominium disputes participated in, include all disputes that included mediation, arbitration or court filed actions.

PARTIES TO DISPUTES:	1991	1992	1993	1994	1995
Owners v. Board					
Owners v. Managing Agent					
Board v. Managing Agent					
Board v. Owner					
Other: _____ v. _____					
Total cases mediated:					
Total cases submitted to arbitration:					
Total cases filed court action:					

B.Please summarize the types of disputes the above cases involved.

TYPES OF DISPUTES:	1991	1992	1993	1994	1995
Proxies/Elections					
Late fees or other assessments					
Board Meetings/Agenda issues					
Accounting/Financial					
By-law amendments					
Conflict of interest					
Improper Construction					
Failure to maintain common elements					
Other:_____					

(continued on other side)

C.Please summarize the following information related to the resolution of condominium disputes.

	1991	1992	1993	1994	1995
Average time case was open (in months)	____	____	____	____	____
Average legal and other fees per dispute (Do not include award or settlement amounts)	$____	$____	$____	$____	$____
Number of cases that tried mediation first, before arbitration or litigation	____	____	____	____	____

D. On a scale of 1 to 10, are you satisfied with the non-binding arbitration process as mandated in Section 514A-121, *Hawaii Revised Statutes*?

1 2 3 4 5 6 7 8 9 10

On a scale of 1 to 10, how effective as a means of resolving condominium disputes is the non-binding arbitration process as mandated in Section 514A-121, *Hawaii Revised Statutes*?

1 2 3 4 5 6 7 8 9 10

E. Please make any comments or suggestions regarding Senate Resolution 54, S.D. 2 that you believe should be considered in the Bureau's report to the Legislature.

Thank you for taking the time to fill this out. Please return as soon as possible, but no later than September 15, 1996 to:

Pamela Martin
Legislative Reference Bureau
State of Hawaii
Capitol Building, Room 446
Honolulu, Hawaii 96813-2407

Appendix D
CONDOMINIUM DISPUTE FACT SHEET RESULTS

Printed: *12/09/96*

Condominium	Mediations	Arbitrations	Litigation	Nature of Dispute	Costs	Time	Satisfied?	Efficient?	Comments
					$0				
*Fairway Villa, Inc., 2345 Ala Wai Blvd. 96815	0	0	0	*1991-1993: Civil Rights Comm. v. Owner/Ass/Man. Ag.: Real Property Transactions, Public Accomodations.	$0	*27 mos.	1	1	*Based on our experience the Civil Rights Commission should be listed as "Parties to Dispute" and be compelled to go through mediation in lieu of the present policies and procedures that they have established.
*Princeville Paniolo-Princeville, Hawaii	1	0	0	*1994: Ass v Builder: Improper Construction	$70,000	*36 mos.	na	na	Damage related to Hurrican Iniki
1010 Wilder Ave	0	0	0	na	$0	na	na	na	No experience to make comment.
1212 Punahou St.	0	0	0	na	$0	na	1	1	I feel the legislature should not dictate how private disputes are settled.
1600 Ala Moana, Hon. HI 96815	0	1	0	1995: Own v. Ass; Conflict of Interest;	$100	24 mos	1	1	none
1617 Keeaumoku St., Hon. 96822	0	0	0	na	$0	na	10	10	none
2531 S. Kihei Rd. , Maui	0	0	0	1995: Own v Bd.: Recycling	$0	0	NA	NA	Board approved recycling. Some onwers object to appearance of containers on grounds and threaten legal action if not removed. Board removed bins.
280 Hauoli St., Maalaea Village, Maui	0	0	0	na	$0	na	na	na	Unable to rate above as we (the board) have never used any method.
2881 South Kihei Rd.	0	0	0	1993 & 1994: One or two Ass v. Own: Other 1) Owner wanted to keep a pet inside. 2-Owner of a downstairs unit wanted as much quiet as in a detached house.	$0		10	10	Haven't used non-binding arbitration to my recollection.
3006 Puale Circle, Hono.96815	0	0	0	na	$0	na	na	na	none
4095 Honoapliilani Rd, Lahaina 96761	1	?	?	1994: Ass v Own: Improper Construction / 1995: Ass v. Own: Improper Construction	$900	12 mos.	9	9	none
4095 L. Honoapiilani, Lahaina 96761	1	0	0	1995: Ass v. Owner; Improper Constuction	$1,000	12 mos.	8	8	None
46 Walaka St, Kihei, HI	0	0	0	na	$0	na	na	na	none
Chateau Waikiki	0	0	0	na	$0	na	na	na	none
Collonade on the Greens, Aiea HI	0	0	0	na	$0	na	na	na	none
Financial Plaza of the Pacific, 111 S. King	0	0	0	na	$0	na	na	na	none
Hilo Lagoon Center, 101 Aupuni St.	0	0	0	na	$0	na	na	na	none
Kona Eastwind Corporation, 77-305 Kalanai Wy 96740	0	0	0	na	$0	na	na	na	I question the efficacy of any self-enforcing law. In my experience, most people will

* These cases were not included in computations because the nature of the dispute is beyond the scope of this study.

na=no answer

Condominium	Mediations	Arbitrations	Litigation	Nature of Dispute	Costs	Time	Satisfied?	Efficient?	Comments
									avoid pecuniary costs and loss of time and effort involved.
Kona Polynesian , Kailua Kona Hi	0	0	0	na	$0	na	7	8	none
Leinani Apts. 3750 L. Honoapiilani Rd. Lahaina	0	0	0	na	$0	na	7	6	We have not had to go to arbitration in the 27 years the property has been in existence. However, in 1977 or 78, the Board had to take an owner to court to remove her extremely loud barking dog from the property. This was an owner occupant and after the court decision, she and her dog moved out of the building. We try very hard to work on the "good neighbor" policy and so far it has been successful. We are a small 30 unit property with one third owner occupancy.
Makua Village	0	0	1	1993: Own v Ass: Improper Construction	$90,000	24 mos	na	4.5	none
Nob Hill, 94-180 Anania Dr. #354, Mil.96789	1	1	1	1993: Own v Ass: Failure to maintain common elements.	$5,000	9 mos.	6	6	
Opua Hale	0	0	1	1994: Ass v. Own/ Man/Contractor:/Prior Board Chair: Improper Construction	$12,000	18 mos.	8	8	None
Opua Hale Patio Homes	0	0	1	1994: Ass v Man/Contractor v Ass: Non-payment to contrator, so Board sued man. agent.	$15,000	12 mos.	4	4	Possibly-certain types of disputes must be submitted to arbitration before allowed to go to court?
Pohakea Point Phase IVE, Kanehoe, HI	0	0	0	na	$0	na	na	na	none
Punahoa Beach Apts., 2142 Iliili Rd. Kihei 96753	0	0	0	na	$0	na	na	na	none
Puu Alii Phase I, Kanehoe, HI	0	0	0	na	$0	na	na	na	none
Puu Alii Phase II, Kaneohe	0	0	0	na	$0	na	na	na	none
Rainbow S Kauhale, Mopua Loop	0	0	0	na	$0	na	na	na	none
Rainbow S, Mopua Loop	0	0	0	na	$0	na	na	na	none
Rainbow Series Kauahale Waipio ,Mopua Loop	0	0	0	na	$0	na	na	na	none
Rainbow Series Kauhale, Mopua Loop	0	0	0	na	$0	na	5	5	none
Rainbow Series Kauhale, Mopua Loop	0	0	0	na	$0	na	5	5	none
Regency Tower	0	1	0	1991: Own v Ass: Failure to perform fiduciary duty.	$30,000	6 mos	na	na	Used binding arbitration.
Summit at Kaneohe Bay, Kanehoe	0	0	0	na	$0	na	na	na	none
Sunset Kahili, 1763 Pe'e Rd., Koloa, HI 96756	0	0	0	na	$0	na	na	na	none
The Palms, 431 Nahua St., Honolulu 96815	0	1	0	1995-96: Own v. Ass: Board Meetings/Agenda issues/By-law	$25,000	9 mos	see	see	Satisfaction: The Association was led to believe that all arbitration was automatically

* These cases were not included in computations because the nature of the dispute is beyond the scope of this study.

na=no answer

Condominium	Mediations	Arbitrations	Litigation	Nature of Dispute	Costs	Time	Satisfied?	Efficient?	Comments
				amendments/Conflict of Interest:					binding. Had we been informed of our options, we would not have agreed to binding arbitration prior to receiving the arbitrator's decision. Effective: While it might not have made a difference in the final decision by our board, more information needs to be disseminated about the rules and options afforded by arbitration.
Waiuna, Aiea/Pearl City, Hi	0	0	0	na	$0	na	na	na	none
Whaler, 2481 Kaanapali Pkwy., Lahaina 96761	0	0	0	na	$0	na	10	na	We have been lucky, I think. It seems unfair to consider our response as we have had no issues involving such disputes.

* These cases were not included in computations because the nature of the dispute is beyond the scope of this study.

na=no answer

Appendix E

CONDOMINIUM COURT CASES REVIEWED

Printed: *12/09/96*

Court No.	Case Name	Parties	Comments
1-CC-87-0001631	AAO Poinciana Manor v. R.Yoder & E.Seaman	Ass v Own	AAO wanted Yoder to evict tenant Seaman from apartment and have Seaman barred from Managing Apts. in the project. AAO said Seaman committed criminal acts as a former tenant of #425 and it was unsafe to have him remain. Seaman moved out some time in 88 after filing a counterclaim caseno. 1CC-88-0002925-09 on 9/15/88. The last activity was dated 4/6/92 and the case was dismised for lack of prosecution on 5/15/95. Managing Agents were Chaney Brooks: Kendell J. Whitten, apt 441 and Michael Keyes, apt 325.
1-CC-87-0001995	AOAO Waikiki Parkway Apts. v. Lee et a l	Ass v Own	Lee assigned interest to defendent Nunez without approval of board. Defendents were never served. Rule 29 dismissal.
1-CC-87-0001996	AOAO Holiday Apts. Condo v. A.G. Calizo et al	Ass v Own	Five or more people were living in the apartment when 4 is the limit. Assoc. had charged the family an extra $25. per month and were suing for $200. due. Case dismissed.
1-CC-87-0002158	AOAO Waikiki Grand v Norman Lum et al	Ass v Own	Asking owner Lum to evict tenant defendant who was loud, boisterous, and drunk and proceeded to threaten resident manager with physical harm and later urinated in lobby. No pre-trial statement was ever filed, case dismissed.
1-CC-87-0002169	AOAO Makaha Beach Cabanas v. G. Newman et al	Ass v Own	Assoc. wanted owner to evict tenant because tenant was loud boisterous, drunk and threatened resident manager. Default judgment entered against Lum and costs of $2693.50 were awarded to Plaintiffs. Dismissed against tenant.
1-CC-87-0002244	AOAO Pono Kai v. Glen Ivy Resorts		Took a 2-bed, 2-bath apartment and made two separate apartments, a 1-bedroom and a studio.
1-CC-87-0002626	Hawaii Loa RIdge Onwers Ass. v. Nam Ky Park	Other/NA	Master Declaration of Covenants, Conditions and Restirctions violated. Not a condo assoc.
1-CC-87-0002769	AOAO Ewa Apts. v. Jaime Quirmit et al	Ass v Own	Remove unathorized retaining wall. Dismissed without prejudice Rule 41(a)(1)(A).
1-CC-87-0002770	AOAO Kapiolani Terrace v. Ty H. Kimura	Ass v Own	Remove unathorized washer/dryer. Dismissed w/prejudice.
1-CC-87-0002805	Ewa Apts AOA v. D. Bligio et al	Ass v Own	
1-CC-87-0003218	AOA Waikiki Grand v N. Delaney et al	Ass v Own	
1-CC-87-0003274	AOAO 965 Prospect St. v Leon Leong Mung Chun et al	Ass v Own	
1-CC-87-0003775	P.D. Jeffers et al v Bd Dir AOAO Tropic Manor	Own v Ass	
1-CC-87-0004023	AOAO Victoria Plaza v Vipco Corp et al	Other/NA	
1-CC-88-0000035	AOAO Pacific Grand Condo v H. Unebasami et al	Ass v Own	
1-CC-88-0000600	D. Gabrielsen et al v AOAO 2987 Kalakaua	Own v Ass	

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
1-CC-88-0001096	C.R. Hoelzel v Chaney Brooks, & Con et al	Other/NA	
1-CC-88-0001372	AOAO Pacific Village v Jack Martinez et al	Ass v Own	
1-CC-88-0001875	AOAO Royal Aloha v R. Miano	Ass v Own	
1-CC-88-0001926	AOAO Pacific Village v M. Potts et al	Ass v Own	
1-CC-88-0002000	G.M. Ellyot v AOAO Acacia Park et al	Own v Ass	
1-CC-88-0002694	AOAO Highlander Condo et al v John Billianor et al	Ass v Own	
1-CC-88-0002873	AOAO Ewa Apts v Y. Roldan	Ass v Own	
1-CC-88-0003092	P. Jacobi v AOAO Marco Polo Cond et al	Own v Ass	
1-CC-88-0003376	AOAO Isles at Diamond Head v A. Wiener et al	Ass v Own	
1-CC-88-0003622	AOAO Hawaiian Monarch v C. Wong et al	Ass v Own	
1-CC-88-0003707	AOAO Ewa Villa Estates v T.S. Salausa et al	Ass v Own	
1-CC-88-0004006	M. McMahon v AOAO Kuhio Village I	Own v Ass	
1-CC-89-0000006	AOAO Sky Tower Apts v T. Lam	Ass v Own	
1-CC-89-0000123	AOAO Royal Kuhio Condo v H. Nagata	Ass v Own	
1-CC-89-0000124	AOAO Royal Kuhio Condo v Z. Tsuchida et al	Ass v Own	
1-CC-89-0000265	AOAO Kalapaki etc et al v P. Worthington et al	Ass v Own	
1-CC-89-0000835	AOAO Opua Hale Patio Homes v. J. Britos et al	Ass v Own	
1-CC-89-0001906	AOAO Chateau Waikiki v E. Venti et al	Ass v Own	
1-CC-89-0002513	AOAO Makah Surfside v R. Marken et al	Ass v Own	
1-CC-89-0003156	AOAO 1717 Ala Wai v K. Deosingh	Ass v Own	
1-CC-89-0003307	AOAO Poinciana Manor v J.A. Strauser et al	Ass v Own	
1-CC-89-0003359	AOAO Pearl Horizon v D. Yen	Ass v Own	
1-CC-89-0003413	R. Culberson et al v AOAO Park at Pearlridge	Own v Ass	
1-CC-89-0003437	AOAO Discovery Bay v Condotech's Hawaiiana Resort	Other/NA	
1-CC-90-0000073	Kealoha v. Kulanat Nani Apt. et al	Other/NA	Slip and Fall case. Off slide at playground. Stipulation for dismissal with prejudice.
1-CC-90-0000132	Brett White v. Waikiki Grand AOAO	Own v Ass	Libel and defamation claim at annual meeting. Sitpulation to dismiss w/prejudice.
1-CC-90-0000255	Vilage Park Comm. Assoc. v. Foley	Other/NA	Master Declaration of Covenents, Conditions and Restrictions violated. Not a condo assoc.
1-CC-90-0000283	Mililani Town Assoc. v. Creagh	Other/NA	Master Declaration of Covenents, Conditions and Restrictions violated. Not a condo assoc.
1-CC-90-0000338	AOAO Marco Polo v. T. Schmidt et al	Ass v Own	Sign in commercial window complained of a roof leak in a residential apartment and a pending lawsuit. Dismissed.
1-CC-90-0000412	AOAO Pacific Grand v. T. Uyeda et al	Ass v Own	Dismissed Rule 29, want of prosecution. Injunction to demand owner Uyeda evict tenant Cho who hangs laundry from his lanai, makes excessive noise, leaves trash in hallway and has unregistered guest living in building.
1-CC-90-0000678	AOAO Kahe Kai v. D. Graham et al	Ass v Own	Dismissed Rule 12 & 17. Ass. sought order for owner

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
			Graham to evict tenatn Gagne for assaulting security guard, making excessive noise and keeping a pet.
1-CC-90-0000682	AOAO Ewa Apts. v. T. Albert	Ass v Own	Injunctive relief to remove or start approval process for unaproved sun screen and rollup screen on lanai. Dismissed with prejudice.
1-CC-90-0000737	AOAO Pearl Harbor Gardens v. R. Pacariem	Ass v Own	Removal of unauthorized carport. Dismissed without prejudice.
1-CC-90-0000788	AOAO Ewa Apts v. M. Thomas	Ass v Own	Remove unathorized enclosed lanai construction. Dismissed without prejudice.
1-CC-90-0001015	AOAO Pomaikai v. A. Lonsdale	Other/NA	Dismissal Rule 29. Injunctive relief TRO for resident manager to leave apartment and return keys after being fired as resident manager.
1-CC-90-0001417	AOAO Prospect Estates v. G. Baker	Other/NA	Dismissal Rule 12Q. TRO for resident manger to leave apartment after resident manager was fired for failure to be bonded.
1-CC-90-0001863	Newtown Estates Comm. Ass. v. Mikami et al	Other/NA	Master Declaration of Covenents, Conditions and Restrictions violated. Not a condo assoc.
1-CC-90-0001864	Newtown Estates Comm. Ass. v. Chun et al	Other/NA	Master Declaration of Covenents, Conditions and Restrictions violated. Not a condo assoc.
1-CC-90-0001935	Mililani Town Assoc. v. Palakiko et al	Other/NA	Master Declaration of Covenents, Conditions and Restrictions violated. Not a condo assoc.
1-CC-90-0002304	Newtown Estates Comm. Ass. v. Teraoka et al.	Other/NA	Master Declaration of Covenents, Conditions and Restrictions violated. Not a condo assoc.
1-CC-90-0002744	AOAO Owners of Club View Gardens II v. McKeague	Ass v Own	Cease and desist loud parties w/alchol in the parking lot in front of unit and unmarked areas for guest parking. Dismiss without prejudice.
1-CC-90-0002855	Newtown Estates Com. Assoc. v. S. Nakano et.al	Other/NA	Master Declaration of Covenants, Conditions and Restirctions violated. Not a condo assoc.
1-CC-90-0002857	AOAO of the Pearl Number One v. M. Schmidt	Ass v Own	Dismissed without prejudice per Rule 41. Injunction to get rid of cat.
1-CC-90-0002859	Newtown Estates Com. Assoc. v. W. Nishimoto et al	Other/NA	Master Declaration of Covenants, Conditions and Restirctions violated. Not a condo assoc.
1-CC-90-0002860	AOAO Tropicana Manor Maoanalua v. L. Arquero et a	Ass v Own	Tenant's loud behavior, screaming & beating on the walls and dangerous activity with stove caused the Ass to ask owner to evict tenant. Default judgment. Attorney fees of $6,219.00 awarded.
1-CC-90-0002987	Newtown Estates Comm. Assoc. v. R.Tabsolo et al	Other/NA	Master Declaration of Covenants, Conditions and Restirctions violated. Not a condo assoc.
1-CC-90-0003435	AOAO Waialea Pl. v. Lynette Mckay	Ass v Own	Injunction to remove cats and clean unit of cockroaches and

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
			pick up yard, and replace ripped drapes. Default judgment for plaintiff awarded $2,387.50 in attorney fees and costs.
1-CC-90-0003468	AOAO Waiau Gardes Kai G-IIv Mary Hongo	Ass v Own	Injunction to restrict or remove pitbull dogs. Mediation attempted after filing of court action was inaffective in Defendents keeping dogs restrained. Lawyer fees of $3,645 before mediation and $8,321. on default judgment.
1-CC-90-0003633	Millilani Town Assoc. v. Ernest Rowdard	Other/NA	Master Declaration of Covenants, Conditions and Restirctions violated. Not a condo assoc. Storage of unsightly items including lumber and cement mixer, in plain view.
1-CC-90-0003690	Waterfront Management LTd. v. Montore et al	Other/NA	Management company seeking to terminate agency relationship and have files returned.
1-CC-90-0003940	Newtown Estates Comm. Assoc. v. D. Mikamie et al	Other/NA	Master Declaration of Covenants, Conditions and Restirctions violated. Not a condo assoc.
1-CC-90-0003968	Joan Riddell v AOAO Makaha Valley Plantation	Other/NA	Slip and fall case against AOAO. Stipulation for dismissal after CAAP referral.
1-CC-91-0000178	AOAO Prospect Estates v. Jeanine M. Brennan	Other/NA	Resident manger refused to move after being fired from position. Rule 29 dismissal.
1-CC-91-0000841	AOAO Craigside v SSW Sakuma & SKL Kashiwara	Ass v Own	Injunction to restore enclosed lanai to original conditions. Request to enclose had been denied by board and owner proceeded regardless. Rule 29 dismissal.
1-CC-91-0000987	411 Kaiolu, Inc. v Thomas Eugene Joseph	Ass v Own	Injunction to stop drunken, lewd behavior and harassing and throwing objects at people. Rule 29 dismissal. (Ronald Stebbins, property manager, Certified Management)
1-CC-91-0001138	AOAO Hale Kaheka v. Jae Yun Lee	Ass v Own	Action for injunction to stop Defendent, either a guest, tenant, or daughter of tenant, from entering the building. Accused of violating rules and bylaws. Caught on the outside of the 36th floor scaling down the building in a ninja costume with a knife taped to her arm and a sack of robbery tools. Parties settled for a dismissal.
1-CC-91-0001831	AOAO Ewa Apts. v. Frederick Yadao	Ass v Own	Injunction was stipulated to by parties to stop harrassing occupants and managers (due to owner's alcholhism) Lawyer fees awarded: $1,781.05
1-CC-91-0003079	AOAO Kailani v. Kihkai Prop. et. al.	Other/NA	Case not relevant to study because Assoc. is suing a developer of a neighboring building that is damaging the structure of the Plaintiff building.
1-CC-91-0003197	AOAO Kamaaina v. Kenrick Chee	Ass v Own	Injuciton and summary possession of tenant. Cease and desist behior in violation of bylaws. Noisy. Action dismissed.
1-CC-91-0003349	Newtown Estates Com. Assoc. v Cabalo	Other/NA	Master Declaration of Convenants, Conditions and

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
			Restrictions violated. Not condo assoc. Dismissed. Def. didn't paint house the right color.
1-CC-92-0002195	AAO Waipuna Condo Project v. Wolfgang Frankel et.	Ass v Own	Owner enclosed an entry way, and removed a bedroom wall. Issue was whether entry way was limited-common element. Settled, without removal of changes, question remains as to cloud on title. Cost to defendent owner $12,000 per Exhibit 12, of Plaintiff's settlement conference statement.
1-CC-95-0003045	Lee v. Kapalele Assoc. et.al.	Other/NA	Action against developer for not forming a AOAO. Plaintiff dismissed w/prejudice.
1-CC-96-0001856	AOAO Bluestone v Lee Koenig	Ass v Own	Action for TRO on construction work not authorized by Board and in violation of bylaws. Making windows bigger. Cites 514A-94 as authority. TRO now in effect.
1RC-93-02975	G. Cochrane v AODO Kalani Iki Estates	Own v Ass	
1RC-93-04476	AOAO ? v J. Almedia, Jr.	Ass v Own	
1RC-93-06293	Marija Salon de Beaute v AOAO Waikiki Grand	Other/NA	
1RC-93-06716	AOAO ? v Ronald Stover/Island Meterdat	Other/NA	
1RC-93-09681	AOAO Makaha Valley Towers v T. Scullark	Ass v Own	Damages;
1RC-93-10402	AOAO of Waikiki Grand v Seven Winners, Inc dba ...	Other/NA	
1RC-94-00684	R. Su & J. Chong v AOAO of the Pearl Ridge Garden	Own v Ass	Assumpsit;
1RC-94-00937	Oahu Gas v AOAO Pearl Harbor View	Other/NA	
1RC-94-01260	AOAO Yacht Harbor Tower v Marble Inovations	Other/NA	
1RC-94-01944	AOAO Waimalu Park v. M. Austin & K. Bowman	Ass v Own	Summary possession/assumpsit/damages
1RC-94-03191	G. Taniguchi v AOAO King Manor	Own v Ass	
1RC-94-04519	J. Fenderson v AOAO Cathedral Point	Own v Ass	
1RC-94-05209	AOAO Kapiloani Terrace v T. Omine	Own v Ass	
1RC-94-06480	E. Yamamoto/State Farm Ins. v AOAO King's Gate	Other/NA	Car accident
1RC-94-07410	AOAO Waikiki Banyan v Dachner Investments	Other/NA	
1RC-94-09665	AOAO Fairway Gardens v D. Scott	Ass v Own	
1RC-94-09699	B. Riedl v AOAO Island Colony	Own v Ass	Commited to circuit court for jury trial
1RC-95-00601	R. Lerud v AOAO Maile Cove	Own v Ass	
1RC-95-03207	AOAO 1330 Wilder Ave v N. Zinkus	Ass v Own	Summary possession; dismisssed
1RC-95-04404	Solid Foundation, a RE Corp. v. AOAO Monte Vista	Other/NA	
1RC-95-05548	AOAO 965 Prospect v. J. Blitz	Ass v Own	Damages
1RC-95-06578	AOAO Waikiki Sunset v Manbou Restaurant	Other/NA	
1RC-95-08305	AOAO Lawai v W.M. Beppu ?	Ass v Own	Assumpsit;
1RC-95-10722	AOAO Pearlridge Gardens and Towers v. Rene Reeves	Ass v Own	Summary possession; dismissed.
1RC-96-02646	Elisha, Ekimoto, & Harada v AOAO Kings Manor	Other/NA	
1RC-96-02708	AOAO Hawaiian Monarch v. J. Kai	Ass v Own	Assumpsit;
1RC-96-02965	G. Spliikey v AOAO Royal Aloha	Other/NA	Trustee of an estate.

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
1RC-96-03796	E. Knight v AOAO Windward Cove et al	Own v Ass	Replevin
1RC-96-04228	AOAO Hale Kulanui v M. Harrison	Ass v Own	Summary possession.
1RC-96-04490	AOAO Pacific Monarch v J. Lewis & P. Hossack	Ass v Own	Assumpsit;
1RC-96-05567	AOAO Jason Apartments v Hawaiian Flooring	Other/NA	
1RC-96-08285	AOAO of Spruce Ridge Villas v L. & R. Hamili	Ass v Own	Assumpsit;
1SC-93--02916	T. Araki v AOAO Pikake Manor	Own v Ass	
1SC-93-02148	T. Burton v AOAO Waikiki Banyan	Own v Ass	Damages
1SC-94-00263	T. Araki v. AOAO Pikake Manor	Own v Ass	
1SC-94-01403	AOAO Iwilei Business v Gaylord & Sons, Inc.	Other/NA	
1SC-94-01694	D. Bingham v AOAO Honolulu Park Place	Own v Ass	Assumpsit; dismissed.
1SC-94-02419	A. Lee, Trustee v. AOAO for Harbour Ridge	Other/NA	
1SC-94-02946	E. Schrekengast v. AOAO Kalakauan	Own v Ass	
1SC-94-03625	H. Kishida v. AOAO Hale Kaheka	Own v Ass	
1SC-95-00180	D. Minn v AOAO Colony Surf	Own v Ass	Damages;
1SC-95-00749	AOAO of Island Colony v. W. Schaffer	Ass v Own	Damages; dismissed.
1SC-95-00787	J. & A. Lee v AOAO Pacific Palms	Own v Ass	Damages;
1SC-95-00949	D. Lien v Zenith Roofing & Pres. of AOAO Cliffs	Other/NA	
1SC-95-01214	P. Levy v. AOAO Makakilo Hale I	Own v Ass	Damages; dismissed.
1SC-95-01232	D. Nagata v. AOAO Palm Villas	Own v Ass	Damages; dismissed
1SC-95-01375	D. Nagata v.AOAO Palm Villas	Own v Ass	Damages; dismissed
1SC-95-01488	J. Loke v AOAO 965 Prospect Ave	Own v Ass	TRO against harrasment.
1SC-95-01734	A. Lee & D. Fan v AOAO Hale Moani, Inc.	Own v Ass	Assumpsit; dismissed
1SC-95-02046	A. Lee & D. Fan v AOAO Hale Moani	Own v Ass	
1SC-95-03046	P. McCurdy v AOAO Summer Palace c/o Ind-Com Manag	Own v Ass	Damages; dismissed.
1SC-96-00204	AOAO Kapiloani Townhouse v Schied, Chun, OK	Other/NA	
1SC-96-00365	Hau v AOA	Other/NA	Caption information incomplete; Plaintiff and defendant at different addresses, so categorized as "other".
1SC-96-00510	P. Gushiken v. AOAO Piikoi Villa	Own v Ass	Damages
1SC-96-00619	H.E.M. Lee Kwai v AOAO Kapiolani Terrace	Own v Ass	Damages; judgment for defendant.
1SC-96-01407	AOAO Punahou Gardens v. T. Barker	Ass v Own	Assumpsit; default judgment.
1SC-96-01479	AOAO Prospect Estate v. B. Mayer?	Ass v Own	Assumspit; default judgment.
1SC-96-01498	J. O'Bannon v AOAO Pearl Horizons	Own v Ass	Assumpsit; dismissed
1SC-96-01530	Flawless Flooring v. AOAO Jason Apts	Other/NA	
1SC-96-01693	B. Riedl v. AOAO Hawaiian Monarch	Own v Ass	Judgment for defendent.
1SC-96-01994	AOAO Hi dden Valley Estates v. G. Gellepes	Ass v Own	Assumpsit; judgment for plaintiff
1SC-96-02073	Northstar Cleaning v. AOAO Country Club Vista	Other/NA	
1SS-93-00315	AOAO 1260 Richard Lane v. P. Gabriel	Ass v Own	TRO against harrasment.
2-CC-89-0000105	P. Eismann et al v. Menehune Shores Own Ass.	Own? v Ass	
2-CC-89-0000279	AOAO Pohailani Maui v S.P. Kirley et al	Ass v Own?	

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
2-CC-89-0000280	AOAO Pohailani Maui v. S. P. Kirley et al	Ass v Own?	
2-CC-89-0000348	Kaanapali Plantation AOAO v W. J. McCauley	Ass v Own?	
2-CC-89-0000534	AOAO Hale kaanapali v Hale Kaanapali Hotel et al	Ass v ?	
2-CC-89-0000628	AOAO Kihei Surfside v ?	Ass v ?	
2-CC-90-0000235	AOAO Lahaina Roads v R. Block	Ass v Own?	
2-CC-90-0000527	AOAO Paniolo Hale v R. Thornberry et al	Ass v Own?	
2-CC-90-0000560	AOAO Milowai-Maalaea v T.R. Viola et al	Ass v Own	
2-CC-90-0000561	AOAO Waiohuli Beach Hale v H. Bhimji et al	Ass v Own?	
2-CC-90-0000575	AOAO Kanai a' Nalu v T. E. McGann	Ass v Own?	
2-CC-90-0000700	AOAO International Colony Club v L. Factor et al	Ass v Own?	
2-CC-91-0000635	AOAO Kauhale Makai v J.L. Brittin	Ass v Own?	
2-CC-93-0000362	L. E. Spencer v AAO Whaler Kaanapali Beach	Own? v Ass	
2-CC-93-0000390	Wavecrest AOAO et al v J.Luke et al	Ass v Own?	
2-CC-94-0000717	N.H. Suzuki v. AOAO Napili Ridge et al	Own? v Ass	
2-CC-95-0000145	AAO Kihei Villages Phase I et al v E. Varga	Ass v Own?	
2-CC-95-0000800	AOAO Polo Beach Club v Royal Insurance Co	Ass v ?	
2-CC-95-0000836	AOAO Kihei Villages et al v A. J. Duda	Ass v Own?	
5-CC-86-0000047	M. Corbett v. AOAO Waialua Bayview Apartment	Own? v Ass	
5-CC-87-0000118	AAO Kawaihau Sports Villa v J.Wofgruber et al	Ass v Own?	
5-CC-94-0000284	AOAO Kuhio Shores et al v First Indem Ins. et al	Ass v ?	
5-CC-95-0000396	AOAO Pu'u Po'a et al v L. G. Ucko et al	Ass v Own	
5-CC-96-0000103	AOAO Halelani Village at Puhi v. G. Oshiro	Ass v Own	
A -91-00273	AOAO Ka he Kai Estates v A. Acosta, Jr.	Ass v Own	Summary possession.
A -92-00746	AOAO Makaha Surfside v R.W. Scully	Ass v Own	Assumpsit; dismissed.
A- 92-00323	AOAO Makaha Shores v A. Unik, et al	Ass v Own	Dismissed.
E -85-00749	AOAO Palehhua Hillside v K. Tyler & J. Mangeldorf	Ass v Own	Judgment for plaintiffs: $620.
E -86-00590	AOAO Palehuahale v R.E. Hoffman	Ass v Own	$1,323. Judgment for plaintiff. Action in assumpsit/damages..
E -87-00997	AOAO Penakii v L.R. Rafto	Ass v Own	$1322.79 complaint for.
E -89-01460	AOAO of Palehua Villas-Phase2 v H.I. Jackson	Ass v Own	$696. Judgment in assumpsit
E -90-01173	AOAO Nob Hill Manage. v. J. Murphy	Other/NA	
E -91-00338	AOAO Palehua Nani v R. Hicks	Ass v Own	Damages; dismissed.
H -85-02804	AOAO Bishop Gardens v A.R. Amigable	Ass v Own	$1,408.10 judgment against defendent.
H -87-02230	AOAO Alii Plantation v L. Heckadon	Ass v Own	Damages and Summary possession $1,254.35
H -88-01185	AOAO Admiral Towers v S.C. Jhaveri	Ass v Own	Dismissed.
H -89-06607	J. Whaley et al v. AOAO Gardenia Manor	Own v Ass	Damages; dismissed
H -90-00839	J. Sakuma v AOAO Marine Surf-Waikiki Condo	Own v Ass	Commited to circuit court for jury trial
H -90-02762	AOAO Mauna Luan v. L.Truitt	Ass v Own	Commited to circuit court for jury trial.
H -90-04024	Y. Allalouf v. AOAO Kaimana Lanais	Own v Ass	Committed to circuirt court for jury trial.
H -90-04983	AOAO Waikiki Grand v. Marija Beauty Salon	Other/NA	

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Court No.	Case Name	Parties	Comments
H -91-01624	Wiss, Jenney, Eisner, Ass v. AOAO Punahou Regency	Other/NA	
H -91-01717	Medcah, Inc. v AOAO Wakiki Grand	Other/NA	
H -91-02622	B. Tan v AOAO Windward Cove	Own v Ass	Assumpsit; dismissed.
H -91-02781	AOAO Waikiki Grand v Marija Beauty Salon, Inc	Other/NA	
H -91-04008	AOAO Waiikiki Grand v Marija Beauty Salon Inc	Other/NA	
H -91-04314	AOAO Waikiki Grand v Sandy Kantori dba Easy Rider	Other/NA	
H -91-04888	AOAO Nanea v J. Hannon	Ass v Own	Damages.
H -91-05079	AOAO Waikiki Grand v. E.G. Suh	Ass v Own	Summary possession.
H -91-05173	HH Engineering v AOAO McCully Villa	Other/NA	
H -92-01346	AOAO Kaimana Lanais v R. Zakharova	Ass v Own	Summary possession; Dismissed.
H -92-02039	AOAO Royal Kuhio v J. Paulison & T Meisenheimer	Ass v Own	Damages. Dismissed.
H -92-04029	AOAO Royal Kuhio v Paradise Management	Other/NA	
H -92-04164	AOAO Ala Wai Townhouse v J.B. Selner, J.Y. Lee	Ass v Own	Commited to circuit court for jury trial.
H -92-05773	D. Davenport v AOAO Harbor Square	Other/NA	AOAO third party defendent
L -90-00019	Foundation International v AOAO Hanahano Hale	Other/NA	
L -91-00161	AOAO Pat's at Punaluu v Gill's Crane Service	Other/NA	
L -91-00210	AOAO Honolulu Tower v Hercules Remodeling	Other/NA	
M -87-00177	AOAO Mokuleia Sands v T. Starner	Ass v Own	Assumpsit; default judgment
M -88-00083	AOAO Mokuleia v D. Travis	Ass v Own	Assumpsit; dismissal.
P -88-00885	AOAO Nani Koolau v. M. Sheppard	Ass v Own	
P -91-00508	AOAO Yacht Club Knolls v J. Bustamonte	Ass v Own	Summary possession; default judgment.
P -92-00500	P. & L. Maki v AOAO Bluestone	Own v Ass	
SCD-89-01917	SERVCO v AOAO Waikiki Grand Hotel	Other/NA	
SCD-89-01947	AOAO Big Surf v J. Stacey?	Ass v Own	Assumpsit; default judgment.
SCD-90-00385	M. Palcic v AOAO Waikiki Grand Hotel	Own v Ass	Assumpsit; dismissal.
SCD-90-00444	L. Lee v. AOAO Waikiki Townhouse	Own v Ass	Assumpsit; stipulated judgment.
SCD-90-00518	AOAO Hale Luana v. Ranco	Other/NA	
SCD-90-00519	AOAO Foster Heights Villa v S. Rickey	Ass v Own	Assumpsit; dismissal.
SCD-90-01517	AOAO Cannery Row v. J. Wallace	Ass v.Own	Commercial Condominiums
SCD-91-00437	G. North v AOAO Windward Cove	Own v Ass	Damages; dismissed after trial.
SCD-91-00438	G. North v AOAO Windward Cove	Own v Ass	Damages; dismissed after trial
SCD-92-00021	L. Ignaz v AOAO Waikiki Grand	Own v Ass	Restitution; dismissal.
SCD-92-00962	M. King v AOAO Diamond Head Sands	Own v Ass	Damages; judgment for defendant.
SPH-92-00077	AOAO 1260 Richard lane v P. Gabriel	Ass v Own	TRO against harrassment granted for 1 year.
W -92-00228	AOAO Pauna Malu v W. Blake et al	Ass v Own	Damages; judgment for plaintiff

Circuit Court Number Key:
1-CC-87-01234=First Circuit; Circuit Court-Year-Case Number

District Court Number Key:
After 1992: 1RC-93-01234=First Circuit; Regular Claims (or Small Claims SC)-Year-Case Number
Before 1993: A=Waianae; E=Ewa; H=Honolulu; L=Koolaupoko; M=Wailua; W=Wahiawa.

Appendix F
AMERICAN ARBITRATION ASSOCIATION'S CONODMINIUM PROPERTY REGIME CASELOAD STATISTICAL INFORMATION

PARTIES TO DISPUTE	1993	1994	1995
Owners or Owners Assn. vs. Board		1	1
Owner vs Manag. Agent	2		2
Board vs. Manag. Agent			
Owner Assn. vs. Owner			1
Management vs. Owner		1	
Owner vs. Owner	1	1	1
CPR housing partnership		1	
Owner vs. Assn.	4		4
Board vs. Owner			

TYPES OF DISPUTE	1993	1994	1995
Proxies/Elections	1	2	1
Late fees or other assesments			2
Assn mtgs/Agenda mtgs			
Board meetings			
Accounting/Financial			
Minutes of Board Mtg			
By law amendments		2	1
Conflict of interest of Board or prop. mgr.			1
Access to information			
Noise complaints			
Parking			2
Improper construction	5	2	2
Failure to properly maintain common elements	3	1	1

NUMBER OF CASES	1993	1994	1995
Awarded	5	3	3
Settled	4	1	1
In progress			5
Total Submitted	9	4	9

AVERAGE TIME FOR CASES

1993	5 mos.
1994	6 mos.
1995	5 mos.

Appendix G
DRAFT LEGISLATION -- MEDIATION

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

CONDOMINIUM PROPERTY REGIME LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514A-121 Hawaii Revised Statutes, is amended by amending subsection (a) read as follows:

"(a) At the request of any party, any dispute concerning or involving one or more apartment owners and an association of apartment owners, its board of directors, managing agent, or one or more other apartment owners relating to the interpretation, application or enforcement of chapter 514A or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall first be submitted to [arbitration.] mediation except:

(1) Where a party seeks equitable relief involving threatened property damage or the health and safety of apartment owners or any other person; or

(2) Disputes concerning the amount or validity of an assessment shall be mediated as required in subsection 514A-90(d).

The mediation shall commence within thirty days of the initial request. Each party shall be required to participate in good faith. If the parties are unable to resolve the dispute at

mediation, or the mediation has not occurred within forty-five days of the request, any party may request the dispute be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and the provisions of chapter 658; provided that the Condominium Property Regime Rules on Arbitration of Disputes of the American Arbitration Association shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658, chapter 658 shall prevail; provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect."

SECTION 2. Statutory material to be repealed is bracketed.New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

Appendix H
DRAFT LEGISLATION -- NOTICE

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

CONDOMINIUM PROPERTY REGIME LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514A-121 Hawaii Revised Statutes, is amended by amending subsection (a) read as follows:

"(a) At the request of any party, any dispute concerning or involving one or more apartment owners and an association of apartment owners, its board of directors, managing agent, or one or more other apartment owners relating to the interpretation, application or enforcement of chapter 514A or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and the provisions of chapter 658; provided that the Condominium Property Regime Rules on Arbitration of Disputes of the American Arbitration Association shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658, chapter 658 shall prevail; provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall

inform both parties of the differences between binding and non-binding arbitration, and of the trial de novo proceedings authorized in section 514A-127. The parties may agree to proceed with binding arbitration in accordance with chapter 658. If the parties do not agree to binding arbitration the parties shall proceed with non-binding arbitration. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect."

SECTION 2. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

Appendix I
DRAFT LEGISLATION--CAAP STANDARD

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

CONDOMINIUM PROPERTY REGIME LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514A-127, Hawaii Revised Statutes, is amended by amending subsections (c) and (d) to read as follows:

"(c) The award of arbitration shall not be made known to the trier of fact at a trial de novo[.] but the party demanding the trial de novo shall be required to improve upon the arbitration award by thirty per cent or more to be deemed the prevailing party in the trial de novo. For the purposes of this section "improve" means to increase the award in the case of the plaintiff or to decrease the award in the case of the defendant.

(d) In any trial de novo demanded under subsection (b), if the party demanding a trial de novo [does not prevail at trial,] is not the prevailing party as defined subsection (c), the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial[.] and the arbitration. The court shall make a specific finding in every trial de novo as to whether a party is the prevailing party as defined in subsection (c). When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses

and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity."

SECTION 2. Statutory material to be repealed is bracketed.New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

Appendix J
DRAFT LEGISLATION -- IMPOSING A BOND

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

CONDOMINIUM PROPERTY REGIME LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514A-127, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Written demand for a trial de novo by any party desiring a trial de novo shall be [made]:

(1) Made upon the other parties within ten days after service of the arbitration award upon all parties[.]; and

(2) Accompanied by a bond within thirty days of the service of the arbitrarion award in the amount of the sum of money awarded by the arbitrator plus $2,500 for anticipated attorney's fees secured by cash or its equivalent, payable to the other parties."

SECTION 2. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

Appendix K
DRAFT LEGISLATION -- SHIFTING THE BURDEN

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

CONDOMINIUM PROPERTY REGIME LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514A-127, Hawaii Revised Statutes, is amended to read as follows:

"**[[]§514A-127[]] Trial de novo and appeal.** (a) The submission of any dispute to an arbitration under section 514A-121 shall [in no way limit or] not abridge the right of any party to a trial de novo[.] as set out in this section.

(b) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties.

(c) [The] Unless vacated under chapter 658, the award of arbitration shall [not be made known to the trier of fact at a trial de novo.] be admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.

(d) In any trial de novo demanded under subsection (b), if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all

reasonable costs, expenses, and attorneys' fees of the trial. When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity.

(e) Any party to an arbitration under section 514A-121 may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party."

SECTION 2. Statutory material to be repealed is bracketed.New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

Appendix L
DRAFT LEGISLATION -- RECOMMENDATION

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

CONDOMINIUM PROPERTY REGIME LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514A-121 Hawaii Revised Statutes, is amended by amending subsection (a) read as follows:

"(a) At the request of any party, any dispute concerning or involving one or more apartment owners and an association of apartment owners, its board of directors, managing agent, or one or more other apartment owners relating to the interpretation, application or enforcement of chapter 514A or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall first be submitted to [arbitration.] mediation except:

(1) Where a party seeks equitable relief involving threatened property damage or the health and safety of apartment owners or any other person; or

(2) Disputes concerning the amount or validity of an assessment shall be mediated as required in subsection 514A-90(d).

The mediation shall commence within thirty days of the initial request. Each party shall be required to participate in good faith. If the parties are unable to resolve the dispute at

mediation, or the mediation has not occurred within forty-five days of the request, any party may request the dispute be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and the provisions of chapter 658; provided that the Condominium Property Regime Rules on Arbitration of Disputes of the American Arbitration Association shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658, chapter 658 shall prevail; provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall inform both parties of the differences between binding and non-binding arbitration, and of the trial de novo proceedings authorized in section 514A-127. The parties may agree to proceed with binding arbitration in accordance with chapter 658. If the parties do not agree to binding arbitration the parties shall proceed with non-binding arbitration. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure;

discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect."

SECTION 2. Section 514A-127, Hawaii Revised Statutes, is amended by amending subsections (c) and (d) to read as follows:

"(c) The award of arbitration shall not be made known to the trier of fact at a trial de novo[.] but the party demanding the trial de novo shall be required to improve upon the arbitration award by thirty per cent or more to be deemed the prevailing party in the trial de novo. For the purposes of this section "improve" means to increase the award in the case of the plaintiff or to decrease the award in the case of the defendant.

(d) In any trial de novo demanded under subsection (b), if the party demanding a trial de novo [does not prevail at trial,] is not the prevailing party as defined subsection (c), the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial[.] and the arbitration. The court shall make a specific finding in every trial de novo as to whether a party is the prevailing party as

defined in subsection (c). When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity."

SECTION 3. Statutory material to be repealed is bracketed.New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.