

**PROPOSAL FOR PILOT PROGRAM CONCERNING COURT ANNEXED  
ARBITRATION FOR COMMERCIAL LITIGATION IN THE FIRST CIRCUIT  
COURT, STATE OF HAWAII**

**REQUESTED BY THE AMERICAN JUDICATURE SOCIETY, HAWAII CHAPTER  
SPECIAL COMMITTEE ON BUSINESS COURTS AND BOARD OF DIRECTORS**

The AJS Special Committee on Business Courts is pleased to present its final report. The members of the Committee were:

Co-Chairs: Robert Clarke  
Judge Colleen Hirai

Reporter: Gary G. Grimmer

Members: Amy Agbayani  
Judge Michael F. Broderick  
Jerry Burris  
Associate Justice James E. Duffy, Jr.  
Judge Ronald Ibarra  
Cathy Kelihoomalau  
Deborah H. Kim  
Charles E. McKay  
Judge Marie N. Milks  
Judge Russel Nagata  
Nathaniel L. Smith  
Raymond J. Tam

**PREAMBLE**

Courts in New York, Delaware, Philadelphia, Rhode Island, Orange County Florida and Cook County Illinois have adopted court rules implementing commercial litigation divisions. Courts in California, North Carolina, New Jersey, Massachusetts, Nevada and Maryland have a complexity requirement that triggers different procedures for commercial cases. The goals of these efforts include shortening the time from being at issue to conclusion, developing a group of judges that are interested in commercial issues and willing to concentrate in such and become more proficient at same and in appropriate cases providing summary proceedings alternatives (e.g. waiving jury and punitive damages).

Most commercial disputes are based on duties created by agreement or contract among the litigants as compared to duties imposed by traditions developed with Anglo-American civilization and generally called torts. Therefore, commercial cases are much more susceptible and likely to be determined by legal issues as compared to factual issues. For example, the interpretation and enforceability of a contract that is clear and unambiguous is a question of law and often appropriate for summary judgment. Even when a contract is vague and ambiguous, and the court must determine the intent of the parties, sometimes that process is simple and/or subject to summary judgment. In that situation the court first looks at the course of performance, course of dealing and practice in the industry, and if these are not in dispute, the case can be resolved as a legal matter. Even where the litigants have also pled fraud in the inducement, negligent misrepresentation, unfair and deceptive trade practices, unfair methods of competition, breach of fiduciary duty and similar, these matters can be disposed of as questions of law because the parties' contract or agreement contains an integration clause or the parol evidence rule bars prior and contemporaneous representations or agreements, or the alleged misrepresentation is on the exact same subject for which the contract and agreement states otherwise.

Hawaii's economy is largely based on small businesses as compared to giant multi-national or multi-state businesses. A more efficient commercial division in First Circuit Court could provide an excellent service to this business community.

Much has been written about the need for commercial divisions, their implementation and performance to date. Rather than attempt to summarize that material here, and in view of the fact that we are not proposing a commercial division at this time and only proposing a pilot program for Court-annexed arbitration, we simply note that AJS can provide the materials to

anyone that might want to read them. The AJS Hawaii Chapter hopes that the pilot program will be implemented so that we here in Hawaii can evaluate it from our own performance and experience rather than simply read about it.

### **OVERVIEW**

The proposal is that the Chief Justice Ronald Moon implement a two-year pilot program within the Court Annexed Arbitration Program (“CAAP”) that will cover the commercial cases listed below. The keys are (1) not overwhelming the existing CAAP with too many cases, but to have enough cases in two years to provide meaningful evaluation and (2) recruit experienced commercial litigators to serve as arbitrators.

### **PROGRAM DURATION AND EVALUATION**

It is suggested that the pilot program be evaluated after two full years of existence. The evaluation gathering should start with the first case. The arbitrators should memorialize in writing the experience of each case. The arbitrators evaluations can be free form and often it is expected it would be a short paragraph. All attorneys in each case should be asked to evaluate the experience. AJS special committee members would gladly prepare an attorney evaluation form. Arbitrator and attorney evaluations should evaluate (1) overall party, arbitrator and attorney satisfaction with the processing of the arbitration, (2) time and efficiency of process, (3) arbitrator’s understanding of issues and consistency of logic, (4) justness of result, including timely rulings on issues of law to narrow issues during the process. AJS special committee members will assist in the evaluation in any way Chief Justice Moon deems appropriate, including but not limited to, acting as a depository for all evaluation data and preparing a composite report of the evaluation data.

## **GUIDELINES FOR ASSIGNMENT OF CASES TO THE PILOT PROGRAM**

Rules 6(B) & (D) of the Hawaii Arbitration Rules provide flexibility in the types of cases that can be submitted to CAAP. For the proposed Pilot Program, the plaintiff must be seeking compensatory damages of \$150,000.00 or less, not including interest and attorneys' fees and costs. The following types of cases would presumptively be sent to the pilot program:

1. Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), statutory violation arising out of business dealings (e.g., sales of assets or security, corporate structuring, partnership, shareholder, joint venture, and other business agreements, trade secrets and restricted covenants);
2. Transactions governed by the Uniform Commercial Code;
3. Transactions involving commercial real property or long-term leases of residential property (excluding summary possessions);
4. Interference with contractual relations or prospective contractual relations;
5. Actions relating to trade secret or noncompete agreements;
6. Shareholder derivative actions and commercial class actions;
7. Commercial bank transactions;
8. Internal affairs of business organizations or liability to third parties of officials thereof;
9. Malpractice by accountants, actuaries or attorneys in services for a business;
10. Complicated environmental insurance coverage litigation;
11. Corporate or partnership dissolutions;
12. Declaratory judgment actions brought by insurers and coverage disputes and bad faith claims brought by insureds, where the dispute arises from a business or commercial insurance policy such as a commercial general liability policy;

The following types of cases are examples of what presumptively would not be sent to the pilot program (some of these are covered by the existing CAAP).

- a. Personal injury, survivor of wrongful death matters;
- b. Individual (non-class) consumer claims against businesses or insurers, including products liability and personal injury cases.
- c. Matters involving occupational health or safety.
- d. Environmental claims not involved in the sale or disposition of a business and other than those addressed in no. 10 above.
- e. Matters in eminent domain.
- f. Malpractice claims other than those brought by business enterprises against attorneys, accountants, architects or other professionals.
- g. Employment law cases, other than those referenced in type no. 5 above.
- h. Administrative agency, tax, zoning or other appeals.
- i. Residential real estate and non-commercial landlord-tenant disputes other than those mentioned above in no. 3.

**A new form should be developed and implemented by the First Circuit Court that will serve as a further docketing sheet requesting assignment to the pilot program.**

**RULES GOVERNING ACTIONS IN THE PILOT PROGRAM**

The Hawaii Arbitration Rules (R.34 RCCH), Hawaii Rules of Civil Procedure, Rules of the Circuit Courts of the State of Hawaii and other current rules that might be applicable will govern.