DISSENT BY ACOBA, J., IN WHICH CIRCUIT JUDGE CRANDALL, IN PLACE OF RECKTENWALD, J., RECUSED, JOINS

I would hold that (1) under Hawai'i Revised Statutes (HRS) § 658A-21(b) (Supp. 2007), the power of arbitrators to award reasonable attorneys' fees in assumpsit actions, where there is a contract in writing that provides for attorneys' fees, is subject to the twenty-five percent of judgment limitation set forth in HRS § 607-14 (Supp. 2007), and (2) in the instant case, the award of attorneys' fees violated the public policy of limiting the amount of reasonable attorneys' fees that may be awarded in assumpsit actions. Therefore, I respectfully dissent.

In my view, the circuit court of the third circuit (the court)[1] erred in entering the October 8, 2007 order confirming the arbitration panel's award of attorneys' fees to Respondents/Plaintiffs-Appellees Kona Village Realty, Inc., Brenda Tschida, and Robert Tschida [collectively, Respondents] and as against Petitioners/Defendants-Appellants Sunstone Realty Partners, XIV, LLC and Sunstone Realty Partners, IX, LLC [collectively, Petitioners]. Therefore, I would vacate the court's October 8, 2007 order and the January 25, 2010 judgment of the Intermediate Court of Appeals (ICA), entered pursuant to its June 29, 2009 published opinion,[2] which affirmed the court's

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[1] The Honorable Glenn S. Hara presided.

[2] The opinion was authored by Associate Judge Katherine G. Leonard, and joined by then-acting Chief Judge Corinne K.A. Watanabe and Associate Judge Craig H. Nakamura.

said order. Kona Village Realty, Inc. v. Sunstone Realty Partners, XIV, LLC, 121 Hawai'i 110, 117, 214 P.3d 1100, 1107 (App. 2009). Furthermore, I would remand to the court to enter an order confirming the arbitration panel's award of attorneys' fees in an amount consistent with HRS § 607-14.[3]

I.

The dispute in the instant case involves the award of attorneys' fees in an arbitration proceeding, pursuant to arbitration provisions included in a real estate brokerage contract (arbitration provisions) between the parties to the instant case.[4] During 2001 and 2002, the parties entered into

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[3] HRS § 607-14 provides in pertinent part as follows:

> **Attorneys' fees in actions in the nature of assumpsit, etc.** In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.
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> Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed.
>
> Where the note or other contract in writing provides for a rate less than twenty-five per cent, not more than the specified rate shall be allowed.

(Emphases added.)

[4] The following relevant facts are from the ICA's opinion and the submissions of the parties.

several different Project Brokerage Agreements [hereinafter brokerage contracts] in which Respondents agreed to act as Petitioners' exclusive sales agents, selling properties developed by Petitioners. On April 11, 2005, Respondents filed a seven-count complaint alleging that Petitioners had withheld commission payments, thereby violating the brokerage contracts. On August 18, 2005, Petitioners moved to compel arbitration pursuant to the arbitration provisions. The arbitration provisions provided in pertinent part:

> 14. Arbitration. Any dispute arising under this Agreement or any agreement incidental or ancillary to this Agreement or any other aspect of the relationship between the parties hereto shall be submitted to arbitration pursuant to the rules of the American Arbitration Association (hereinafter referred to as the "AAA") then in effect. Any party that desires to submit any issue or dispute to arbitration shall promptly so notify the other party in writing. Claims or disputes involving $25,000 or less shall be heard by a single arbitrator. Claims involving more than $25,000 or non-monetary issues shall be heard by a panel of three (3) arbitrators, which panel shall include no more than one (1) attorney. The panel arbitrators shall be selected by the AAA upon receiving notice from either party that a dispute exists. The decision of a majority of such arbitrators shall be final, conclusive and binding on the parties hereto. All proper costs and expenses of such arbitration including, without limitation, witness fees, attorneys' fees and the fees of the arbitrators shall be charged to the party or parties in such amounts as the majority of the arbitrators shall determine at the time of the award. In the event of the failure, inability or refusal of any arbitrator to act, a new arbitrator shall be appointed in his stead by the AAA. An award so rendered shall be binding in all aspects and shall be subject to the provisions of [c]hapter 658, [HRS], as the same may be amended from time to time;[5] provided, however, that no such award shall

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[5] As indicated, the arbitration agreement provides that the award "shall be subject to the provisions of [c]hapter 658, [HRS,] as the same may be amended from time to time[.]" (Emphasis added.) After determining that two of the counts in the complaint were within the scope of the arbitration provisions, the court compelled arbitration pursuant to HRS § 658-5 (1993). However, HRS chapter 658 was repealed in 2001 and replaced with HRS chapter 658A. Inasmuch as (1) all of the parties assumed that the issues presented were governed by HRS chapter 658A, (2) the arbitration panel conducted the arbitration in accordance with HRS chapter 658A, and (3) the language in the

(continued...)

> provide for an award of punitive damages.
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> . . . .
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> 15.9 Attorneys' Fees. Should either party hereto reasonably retain counsel for the purpose of enforcing or preventing the breach of any provision hereof, including, but not limited to, instituting any action or proceedings to enforce any provision hereof, for damages by reason of any alleged breach of any provision of this Agreement, for a declaration of such party's rights or obligations hereunder or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the other party for all costs and expenses incurred in connection therewith, including, but not limited to, reasonable attorneys' fees for the services rendered to such prevailing party.

(Emphases added.) On October 3, 2005, the court granted in part, Petitioners' motion to compel arbitration.

On April 7, 2007, a three-person arbitration panel found in favor of Respondents and awarded them (1) a lump sum judgment for damages in the amount of $45,441.75, (2) pre-judgment interest in the amount of $24,152.29, (3) attorneys' fees in the amount of $123,994.69, and (4) costs in the amount of $25,673.18. The arbitration panel further determined that the administrative fees of the arbitration proceedings and expenses of the panel, in the amount of $49,801.48, would be borne equally by the parties.

On July 12, 2007, Petitioners filed a motion to vacate the arbitration panel's award of attorneys' fees on three grounds. Petitioners argued before the court that (1) in awarding the full amount of attorneys' fees, the arbitrators

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[5](...continued)
agreement indicates an intent to follow amendments to HRS chapter 658, which may be construed as including the subsequent replacement of that chapter with HRS chapter 658A, the award of attorneys' fees is analyzed under HRS chapter 658A.

exceeded their authority in contradiction to HRS § 658A-21(b), (2) the award of attorneys' fees violated public policy, and (3) the award of attorneys' fees evinced a manifest disregard for the law.[6] The court denied Petitioners' motion and on October 8, 2007, entered an order confirming the award of attorneys' fees. Petitioners appealed the confirmation order to the ICA, raising the same three arguments. The ICA rejected each of those arguments, holding that the arbitration panel's award of attorneys' fees was valid. Kona Village, 121 Hawai'i at 111, 214 P.3d at 1101.

II.

Petitioners list the following question in their Application: "Did the [ICA] err in affirming [the court's] Order Granting [Respondents'] Motion to Confirm Arbitration Award and Denying [Petitioners'] Motion to Vacate or Correct the Arbitration Award Filed October 8, 2007 ('Confirmation Order')?" In their Application, Petitioners pose the same three arguments raised in the prior proceedings.

III.

A.

With respect to Petitioners' first argument, that the arbitrators exceeded their powers, the scope of the arbitration

[6] Petitioners also argued that the arbitration award "contained an evident mathematical miscalculation as to the attorneys' fees component thereof." However, Petitioners did not make this argument in their Application and, thus, it is not addressed.

panel's authority is determined by the relevant arbitration agreement. See Hamada v. Westcott, 102 Hawai'i 210, 214, 74 P.3d 33, 37 (2003). As stated, the arbitration provisions allowed the arbitration panel to award attorneys' fees to the prevailing party, subject to chapter 658 of the HRS. Under that chapter, specifically HRS § 658A-21(b), "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." (Emphasis added.)

To reiterate, HRS § 607-14 provides that, "in all actions in the nature of assumpsit," the court may award attorneys' fees to the prevailing party so long as such award does "not exceed twenty-five per cent of the judgment." Petitioners aver that under the first clause of HRS § 658A-21(b), the arbitration panel had the authority to award attorneys' fees in an amount not exceeding twenty-five percent of the judgment. According to Petitioners, under HRS § 658A-21(b), the existence of HRS § 607-14 "effectively cancelled out the second clause of HRS § 658A-21(b), and implicated the first clause of [that provision.]"

On the other hand, Respondents argue that Section 14 of the arbitration agreement "authorize[d] an award of all reasonable attorneys' fees to . . . the prevailing party."

(Emphasis added.) Respondents maintain that in the instant case, HRS § 607-14 was effectively waived by the parties "by conferring upon the [a]rbitrators the authority to award the prevailing party all attorneys' fees and costs without limitation." (Internal quotation marks omitted.) See HRS § 658A-4 (Supp. 2007) ("Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this chapter to the extent permitted by law.")

The ICA determined that under the arbitration agreement, "[t]he [a]rbitrators were expressly authorized to determine the issue of attorneys' fees[]" and "exercised the power granted to them in the agreements to arbitrate." Kona Village, 121 Hawai'i at 114, 214 P.3d at 1104. While acknowledging that HRS § 658A-21(b) "might be read to allow attorneys' fees in arbitrations in the nature of assumpsit pursuant to HRS § 607-14[,]" the ICA stated, "[W]e will not read the first clause of HRS § 658A-21(b), coupled with HRS § 607-14, to displace the parties' freedom to otherwise bargain for arbitration attorneys' fees awards. Such a reading would render the 'or by the agreement of the parties' language superfluous." Id. at 115, 214 P.3d at 1105 (citations and emphasis omitted). It would seem that, in the ICA's view, because the arbitration provisions authorized an award of attorneys' fees in an amount to be "determine[d by the arbitrator] at the time of the award[,]"

see supra, the first clause of HRS § 658A-21(b) was rendered inapplicable.[7]

B.

As indicated, HRS § 658A-21(b) provides that "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." (Emphasis added.) The term "or," as used in HRS § 658A-21(b), ordinarily denotes the disjunctive. See Webster's Third New Int'l Dictionary 1585 (1961) (explaining that "or" is "used as a function word to indicate (1) an alternative between different or unlike things, states, or actions, . . . [and] (2) choice between alternative things, states, or courses"). Thus, pursuant to HRS § 658A-21(b), arbitrators have the authority to award attorneys' fees in two alternative instances: (1) where such award is "authorized by law in a civil action involving the same claim[,]"[8] or (2) "by agreement of the parties[.]"

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[7] Respondent would also seem to take this position.

[8] I respectfully disagree with the ICA's determination that because HRS § 607-14 authorizes an award of attorneys' fees "in all the courts, in all actions in the nature of assumpsit[,]" it is inapplicable to the awards of attorneys' fees in the context of arbitration. Kona Village, 121 Hawai'i at 114-15, 214 P.3d at 1104-05. The ICA relied in part on Hamada, 102 Hawai'i at 210, 74 P.3d at 33. Hamada however, does not govern this case.

In Hamada, the appellees argued that, as the prevailing party, they should be awarded attorneys' fees notwithstanding the fact that there was no provision in the arbitration agreement allowing for such an award. Id. at 218, 74 P.3d at 41. At that time, HRS chapter 658 did not contain a provision allowing for an award of attorneys' fees as authorized by law. The Hamada court declined to award attorneys' fees pursuant to HRS § 607-14, stating that (continued...)

In certain instances, however, as in the instant case, an award of attorneys' fees may be authorized under both the "law in a civil action involving the same claim" and "by agreement of the parties[.]" HRS § 658A-21(b). On the one hand, where there is a law authorizing an award of attorneys' fees, HRS § 658A-21(b) may be read to require arbitrators to award attorneys' fees in accordance with such law. Under that interpretation, the second clause, authorizing arbitrators to award attorneys' fees "by agreement of the parties" would be applicable only if there was no law authorizing an award of attorneys' fees. On the other hand, in such instances, the statute may be read to permit arbitrators to award attorneys' fees in accordance with the law or agreement, at their discretion. Because the statute is susceptible to more than one construction, it is ambiguous.

1.

"If statutory language is ambiguous or doubt exists as to its meaning, courts may take legislative history into consideration in construing a statute." Hawaii Providers Network, Inc. v. AIG Hawaii Ins. Co., 105 Hawai'i 362, 369, 98

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[8](...continued)
HRS § 607-14 "applies only to court actions and not arbitration proceedings." Id.

The current version of HRS chapter 658A differs from its predecessor in that HRS § 658A-21(b) expressly permits arbitrators to award attorneys' fees as authorized by law. As a result, there is no doubt now that in the absence of an agreement between the parties allowing an award of attorneys' fees and/or costs, an arbitrator or arbitration panel would be authorized to award attorneys' fees pursuant to HRS § 607-14 under HRS § 658A-21(b). Thus, the ICA's reliance on Hamada was misplaced.

P.3d 233, 240 (2004) (brackets, internal quotation marks, and citations omitted). The legislative history indicates that where an award of attorneys' fees is authorized by "law in a civil action involving the same claim[,]" HRS § 658A-21(b), arbitrators have the authority to award attorneys' fees in accordance with the law. The second clause, which vests arbitrators with the authority to award attorneys' fees "by agreement of the parties[,]" is applicable in instances where there is no such law authorizing an award of attorneys' fees.

The legislative history pertaining to HRS § 658A-21(b) states generally, that "[t]he purpose of this bill is to standardize Hawaii's arbitration laws with those used in other states by replacing the current statutory chapter on arbitration and awards with the Uniform Arbitration Act [(UAA)]." Conf. Comm. Rep. No. 115, in 2001 House Journal, at 1093.[9] HRS § 658A-21(b) was specifically modeled after Section 21(b) of the UAA,[10] and therefore, the comment applicable to that section is instructive. The comment supports the first of the two alternative interpretations aforementioned.[11]

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[9] There is no legislative history specifically regarding HRS § 658A-21(b).

[10] Section 21(b) of the UAA is identical to HRS § 658A-21(b).

[11] Although the ICA did not explore the commentary to UAA Section 21(b), which is identical to HRS § 658A-21(b), it is well-established that the legislative history may be consulted to confirm an interpretation of a statute. See State v. Entrekin, 98 Hawai'i 221, 227, 47 P.3d 336, 342 (2002) (noting that, although this court's interpretation of the statute was grounded in the plain language of the statute, the legislative history confirmed its interpretation) (internal citations omitted).

The UAA comment to Section 21(b) (2000) states that (1) "Section 21(b) authorizes arbitrators to award reasonable attorney's fees and other reasonable expenses of arbitration where such would be allowed by law in a civil action[,]" and (2) "in addition, parties may provide for the remedy of attorney's fees and other expenses in their agreement even if not otherwise authorized by law." (Emphases added.) The comment suggests that arbitrators have the power to award attorneys' fees as provided by the agreement of the parties, where attorneys' fees are "not otherwise authorized by law." Under the foregoing, the second clause pertaining to fee agreements is implicated in instances where an award of attorneys' fees is not otherwise authorized by the "law in a civil action involving the same claim[.]" HRS § 658A-21(b). The comment indicates that the second clause is an "additional" source of authority for the award of attorneys' fees. Thus, it is only in the absence of a law providing the authority to award attorneys' fees that the second clause of HRS § 658A-21(b) is implicated.

In this light, the foregoing construction would not, as the ICA suggests, "displace the parties' freedom to otherwise bargain for arbitration attorneys' fees awards[,]" or render the second clause "superfluous." Kona Village, 121 Hawai'i at 115, 214 P.3d at 1105 (emphasis omitted). Under the second clause, parties are free to bargain for attorneys' fees awards in instances where there is no law authorizing such an award.

Thus, under HRS § 658A-21(b), the arbitrators must first determine whether there is a "law" authorizing an award of attorneys' fees. If there is, then attorneys' fees are awarded in accordance with such law.

2.

Additionally, it would seem that HRS § 658A-21 was intended to vest arbitrators with the same authority to award attorneys' fees and punitive damages as the courts. HRS § 658A-21(a) (Supp. 2007) vests arbitrators with the authority to "award punitive damages or other exemplary relief [only] if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." Thus, HRS § 658A-21(a) ensures that parties who choose to arbitrate their claims are not subjected to more liability, with respect to punitive damages, than they would be subjected to had they chosen to litigate their claims in court.

With respect to attorneys' fees, "'normally, pursuant to the "American Rule," each party is responsible for paying his or her own litigation expenses.'" Sierra Club v. Dep't of Transp. of State of Hawai'i, 120 Hawai'i 181, 218, 202 P.3d 1226, 1263 (2009) (quoting Fought & Co. v. Steel Eng'g & Erection, Inc., 87 Hawai'i 37, 50-51, 951 P.2d 487, 500-01 (1998) (brackets omitted)). Thus, where parties litigate their claims in court,

pursuant to the "American Rule," attorneys' fees may not be awarded absent statute, agreement, or stipulation of the parties. See Hamada, 102 Hawai'i at 217, 74 P.3d at 40. Consistent with the authority of the courts to award attorneys' fees, HRS § 658A-21(b) also vests arbitrators with the authority to "award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim" and by "agreement of the parties to the arbitration proceeding."

C.

Applying the foregoing to arbitration proceedings in the nature of assumpsit, attorneys' fees are authorized by the "law in a civil action involving the same claim," HRS § 658A-21(b), under HRS § 607-14. Thus, in arbitration proceedings in the nature of assumpsit, arbitrators have the authority to award attorneys' fees in accordance with that law. It is apparent that pursuant to HRS § 658A-21(b), the twenty-five percent limitation set forth under HRS § 607-14 applies to arbitration proceedings in the nature of assumpsit. In the instant case, then, the arbitration panel had the authority to award reasonable attorneys' fees, "provided that [the] amount [did] not exceed twenty-five per cent of the judgment." HRS § 607-14.

IV.

A.

The ICA upheld the award of fees in this case, in part, based on its determination that HRS § 658A-4[12] allows the parties to waive or vary the effects of HRS § 658A-21(b). See Kona Village, 121 Hawai'i at 116, 214 P.3d at 1106. While the argument was not raised in Respondents' Response to Petitioners' Application (Response), Respondents had argued on appeal that even if HRS § 607-14 applied to the instant case, because HRS

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[12] HRS § 658A-4 (Supp. 2007) provides:

> **Effect of agreement to arbitrate; nonwaivable provisions.** (a) Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this chapter to the extent permitted by law.
>
> (b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement shall not:
>
> (1) Waive or agree to vary the effect of the requirements of section 658A-5(a), 658A-6(a), 658A-8, 658A-17(a), 658A-17(b), 658A-26, or 658A-28;
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> (2) Agree to unreasonably restrict the right under section 658A-9 to notice of the initiation of an arbitration proceeding;
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> (3) Agree to unreasonably restrict the right under section 658A-12 to disclosure of any facts by a neutral arbitrator; or
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> (4) Waive the right under section 658A-16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this chapter, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.
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> (c) A party to an agreement to arbitrate or arbitration proceeding shall not waive, or the parties shall not vary the effect of, the requirements of this section or section 658A-3(a) or (c), 658A-7, 658A-14, 658A-18, 658A-20(d) or (e), 658A-22, 658A-23, 658A-24, 658A-25(a) or (b), or 658A-29.

(Emphasis added.)

§ 658A-21 is not one of the "nonwaivable provisions" set forth under HRS § 658A-4, it could be waived by the parties.

Insofar as the ICA read HRS § 658A-4 to allow the parties to waive or vary the effects of HRS § 658A-21(b) where there is law authorizing and limiting the award of attorneys' fees, I respectfully disagree. The discussion above indicates that the second clause of HRS § 658A-21(b) is implicated only where there is no applicable law authorizing an award of attorneys' fees.

Moreover, in the instant case, the arbitration agreement did not waive or vary the effect of HRS § 658A-21(b). First, the parties did not expressly waive or vary the effect of HRS 658A-21(b). The arbitration agreement specifically provided that the arbitration proceedings would be "subject to" the provisions of chapter 658 of the HRS, and did not state that the applicability or effect of HRS § 658A-21 would be varied or waived in any way. Second, the language in the arbitration agreement providing that the "prevailing party shall be entitled to be reimbursed by the other party for all costs and expenses . . . , including, but not limited to, reasonable attorneys' fees[,]" is general and cannot be construed to have varied the effect of HRS § 658A-21(b). (Emphasis added.) Here, the parties did not qualify the applicability of any section of that chapter.

It is further observed that Section 14 of the brokerage contracts provides that attorneys' fees "shall be charged to the

party or parties in such amounts as the majority of the arbitrators shall determine at the time of the award." However, Section 15.9 of the brokerage contracts, specifically entitled "Attorneys Fees," authorized the arbitration panel to award reasonable attorneys fees. Reading the arbitration provisions in conjunction with each other, the arbitration panel was vested with the authority to award "reasonable" attorneys' fees "in such amounts as the majority of the arbitrators shall determine at the time of the award". Additionally, it must be noted that Section 15.9 specifically stated that any award of attorneys' fees "shall be subject to the provisions of [c]hapter 658[A.]" (Emphasis added.) As indicated, Section 658A-21(b) of that chapter provides that arbitrators may award attorneys' fees as authorized by law or by agreement of the parties. A fair reading of the arbitration provisions is that the "law," HRS § 607-14, was not waived by the parties, but rather, was applicable by virtue of the "reasonableness" and "subject to" limitations on the arbitration panel's discretion.[13] The parties clearly did not waive the applicability or effect of HRS § 658A-21(b).

[13] The majority states that "the existing party-agreement authorizes the arbitrator to award attorneys' fees 'in such amounts as the majority of the arbitrators shall determine at the time of the award.'" Majority opinion at 3; see also id. at 4. As indicated, however, the arbitration provisions specifically required that the amount of such award be "reasonable" and "subject to the provisions of [c]hapter 658[A.]" With all due respect, the majority simply disregards the foregoing arbitration provisions and misleadingly focuses on one sentence of the arbitration provisions to suggest that the arbitration panel had the authority to award attorneys' fees in any amount.

B.

It may be observed that HRS § 658A-4 authorizes the parties to "waive[] or . . . vary the effect of[] the requirements of [chapter 658 of the HRS] to the extent permitted by law." (Emphasis added.) In other words, the parties' autonomy or right to contract with respect to arbitration, is restricted in that regard. The comment to Section 4 of the UAA,[14] after which HRS § 658A-4 was modeled, indicates that the "to the extent permitted by law" language was included in Section 4(a) "to inform the parties that they cannot vary the terms of an arbitration agreement from the UAA if the result would violate applicable law." (Emphasis added.) The comment further explains that "[t]his situation occurs most often when a party includes unconscionable provisions in an arbitration agreement." For example, "[t]he law in some circumstances may disallow parties from limiting certain remedies, such as attorney's fees and punitive damages or other exemplary damages." Cmt. to UAA § 4. The comment states that "although parties might limit remedies, such as recovery of attorney's fees or punitive damages in Section 21, a court might deem such a limitation inapplicable where an arbitration involves statutory rights that would require these remedies."

[14] Section 4 of the UAA is virtually identical to HRS § 658A-4.

In that connection, the comment to Section 21 of the UAA, after which HRS § 658A-21 was specifically modeled, states that "[b]ecause Section 21 is a waivable provision under Section 4(a), the parties can agree to limit or eliminate certain remedies 'to the extent permitted by law.'" The comment notes, however, "that in arbitration cases, where, if the matter had been in litigation, a person would have been entitled to an award of attorneys fees or punitive damages or other exemplary relief, there is doubt whether one of the parties by contract can eliminate the right to attorney's fees or punitive damages or other exemplary relief." (Emphases added.) In other words, the parties may not contractually agree to eliminate attorneys' fees to which a party would be entitled had the matter been litigated in court.

This court has recognized that "[t]here is a statutory entitlement, pursuant to HRS § 607-14, to an award of reasonable attorneys' fees." Finley v. Home Ins. Co., 90 Hawai'i 25, 38, 975 P.2d 1145, 1158 (1998) (emphasis added and emphasis omitted). The plain language of HRS § 607-14 further supports this proposition. It would seem manifest that because Petitioners would have been entitled to an award of attorneys' fees "if the matter had been in litigation, . . . there is doubt whether one of the parties by contract [could] eliminate [that right]." Cmt. to UAA § 21.

It would appear further evident that likewise, the parties may not contractually agree to awards in excess of that which would have been awarded had the matter been litigated in court. It would be anomalous if a prevailing party's right to statutory remedies is preserved for purposes of arbitration, but at the same time, a limitation upon a non-prevailing party's liability is not. In any event, for the reasons discussed in the subsequent section, I would hold that such an agreement would violate public policy.

V.

A.

The public policy exception to the general deference given to arbitration awards was adopted in Inlandboatmen's Union v. Sause Brothers, 77 Hawai'i 187, 194, 881 P.2d 1255, 1262 (App. 1994). The ICA noted that "[a] court will not enforce 'any contract that is contrary to public policy.'" Id. at 193, 881 P.2d at 1261 (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757 (1983)) (ellipsis omitted). According to the ICA, "[i]t follows then that if the contract as interpreted [by] an arbitrator violates some explicit public policy, the courts are obliged to refrain from enforcing it." Id. (brackets, internal quotation marks, and citation omitted). Inlandboatmen's Union thus held "that there is a limited public policy exception to the general deference given arbitration awards [but that t]he exception is to

be applied under the guidelines set forth in [United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987),] and as such guidelines may be refined in future cases." 77 Haw. at 194, 881 P.2d at 1262. The Inlandboatmen's Union court explained that in Misco, the Supreme Court established a test for application of the public policy exception, requiring a court to determine that "(1) the award 'would violate some explicit public policy that is well defined and dominant, and that is ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests,' and (2) the 'violation of the public policy is clearly shown.'" Id. at 193-94, 881 P.2d at 1261-62 (quoting Misco, 484 U.S. at 43-44 (some internal quotation marks, brackets, ellipsis and internal citation omitted).

Petitioners urge that the fact that HRS § 607-14 allows an award of attorneys' fees to "the prevailing party in assumpsit actions up to a maximum of twenty-five percent . . . of the judgment amount[,]" embodies a public policy of limiting attorneys' fees recoverable in assumpsit actions. Petitioners thus argue that an award in the instant case of "an amount over ten . . . times the maximum allowable attorneys' fees and nearly three . . . times the lump sum judgment" violates the established public policy.

Respondents argue that the amount of the award does not violate public policy because "[i]f every statute established a

public policy, review of arbitration awards would be expanded to allow for full review and would permit awards to be vacated upon a mistake of law." Respondents maintain that the fact the award was greater than that authorized by law does not establish an explicit public policy that is well defined and dominant. (Citing Inlandboatmen's Union, 77 Hawai'i at 193-94, 881 P.2d at 1261-62.)

The ICA, while acknowledging that "maintaining arbitrations as a cost-effective alternative to litigation is clearly consistent with well-established public policy," stated that it was not its role "to establish a new rule of law mandating a cap on attorneys' fees awarded in arbitrations." Kona Village, 121 Hawai'i at 116, 214 P.3d at 1106. The ICA deemed this to be "a matter for legislative action or the parties' own agreements." Id. Thus, the ICA determined that Petitioners failed to establish that the arbitration panel "clearly violated some explicit, well-defined and dominant public policy." Id.

B.

By its express terms, HRS § 607-14[15] sets forth an "explicit" and "well defined" public policy of limiting attorneys' fees in actions in the nature of assumpsit. See HRS

[15] While HRS § 607-14 states that it shall apply "[i]n all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract[,]" see supra note 3, as discussed, HRS § 658A-21(b) makes HRS § 607-14 applicable in arbitration proceedings.

§ 607-14 ("The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.") (Emphasis added.).

The version of HRS § 607-14 prior to 1993 set forth a specific fee schedule for the award of attorneys' fees. That statute permitted the award of attorneys' fees of twenty-five percent for the first one-thousand dollars "or fraction thereof" of the total judgment awarded to the prevailing party. HRS § 607-14 (Supp. 1992). For each additional thousand dollars awarded in the judgment, a lesser percentage of attorneys' fees was awarded. Id. In 1993, the legislature amended HRS § 607-14 to allow the court to award reasonable attorneys' fees "not [to] exceed twenty-five percent of the judgment." The objective of the legislature was to "fairly compensate" the prevailing party in actions in assumpsit for the expense of retaining an attorney to prosecute its claim in the case of a creditor, or adequately defending against such claims, in the case of a defendant. Conf. Comm. Rep. No. 1089, in 1993 House Journal, at 932 (emphasis added). The legislative history states:

> The purpose of this bill is to change the manner in which attorneys' fees are determined in assumpsit actions.
>
> Your Committee finds that attorneys' fees in assumpsit actions are often based on a percentage as opposed to an hourly rate, and that the current law does not fairly compensate the creditor for the expense of retaining an attorney to prosecute its claim, nor does it fairly compensate the defendant who prevails against a creditor's faulty claim.
>
> Your Committee further finds that [HRS] § 607-17, should be

> eliminated, and its provisions incorporated within [HRS] § 607-14. In doing so it is not your Committee's intention to expand the category of cases in which attorneys' fees are awarded, but to bring uniformity to the procedure for taxing attorneys' fees in the type of cases described for this measure.
>
> Further, your Committee finds that an increase in the fees permitted garnishees is long overdue.

Id. (emphases added). HRS § 607-14 thus establishes a cap on attorneys' fees that the legislature viewed as "fair."

As indicated in the legislative history, HRS § 607-17 (Supp. 1992) was repealed and the provisions of that section were incorporated into HRS 607-14.[16] See id. Thus, Thornley v. Sanchez, 9 Haw. App. 606, 857 P.2d 601 (App. 1993), is of further instruction. In Sanchez, the ICA similarly determined that HRS § 607-17 reflected the legislature's attempt to prevent over-compensation in awards of attorneys' fees. According to Sanchez, "[t]he legislative history of HRS § 607-17 indicate[d] clearly,

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[16] HRS § 607-17 provided in relevant part:

> **§ 607-17 Attorney's fees when provided for in promissory notes, etc.** Any other law to the contrary notwithstanding, where an action is instituted in the district or circuit court on a promissory note or other contract in writing which provides for an attorney's fee the following rates shall prevail and shall be awarded to the successful party, whether plaintiff or defendant:
>
> (1) Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed;
>
> (2) Where the note or other contract in writing provides for a rate less than twenty-five per cent, not more than the specified rate shall be allowed;
>
> provided that the fee allowed in any of the above cases shall not exceed that which is deemed reasonable by the court.

(Emphases added.)

[] that the statute was intended to prohibit the collection of excessive attorney's fees[.]" Id. at 620, 857 P.2d at 608 (emphasis added). The ICA explained that, as originally enacted, HRS § 607-17 "imposed a thirty-three[-]and[-]one-third percent cap, not to exceed $250, on the amount of attorney's fees awardable in lawsuits instituted in the district courts on written contracts." Id. According to the ICA,

> [i]n 1959, the legislature extensively revised the statute to, among other things, reduce the amount of attorney's fees which could be awarded, prohibit the collection of such fees unless collection was provided for by a written instrument, prohibit the practice of pyramiding fees,[17] and apply the cap on attorney's fees to lawsuits brought in both the district and circuit courts.

Id. (citing 1959 Haw. Sess. Laws Act 218, § 1 at 146) (emphases added). Having determined that the award of attorneys' fees violated that established policy, the ICA "remand[ed] the case to the trial court with instructions to revise its judgment to conform to the principles announced in [its] decision." Id. at 621, 857 P.2d at 609.

Inasmuch as Sanchez reinforces the established policy of limiting attorneys' fees in actions in the nature of assumpsit, it also sheds light on the underlying concerns which the legislature sought to address. In enacting the twenty-five percent limitation on attorneys' fees, the legislature also

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[17] The ICA described "pyramiding" as the practice of "charging attorney's fees on a principal amount which already included an attorney's fee." Sanchez, 9 Haw. App. at 621, 857 P.2d at 609.

sought to protect debtors from "the collection of excessive attorney's fees[.]" Id. at 620, 857 P.2d at 608 (emphasis added). That is consistent with the policy reflected by HRS § 607-14 of limiting awards of attorneys' fees as a means of "fairly compensat[ing]" the prevailing party in assumpsit actions for the expense of retaining an attorney to prosecute its claim in the case of a creditor, or adequately defending against such claims, in the case of a defendant. Conf. Comm. Rep. No. 1089, in 1993 House Journal, at 932 (emphasis added).

C.

As indicated, the public policy must be "ascertained by reference to the laws and legal precedents[.]" Inlandboatmen's Union, 77 Hawai'i at 194, 881 P.2d at 1262 (internal quotation marks and citations omitted). The established policy of limiting attorneys' fees in assumpsit actions has been consistently reinforced by the courts in this jurisdiction. See Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 307, 141 P.3d 459, 480 (2006) (stating that the court did not abuse its discretion in awarding attorneys' fees because the "amount of attorneys' fees awarded was well within the statutory limitation[]" set forth under HRS § 607-14); Employee Mgmt. Corp. v. Aloha Group, Ltd., 87 Hawai'i 350, 351, 956 P.2d 1282, 1283 (App. 1998) (holding that HRS § 607-14 "places a twenty-five percent maximum combined total limit that can be taxed against a losing party by both the trial and appellate courts"); Forbes v.

Hawaii Culinary Corp., 85 Hawai'i 501, 508, 946 P.2d 609, 616 (App. 1997) (noting that "[a]n award of attorneys' fees taxed by the court under HRS § 607-14, however, shall not exceed twenty-five percent of the judgment") (citation omitted); see also Wong v. Takeuchi, 88 Hawai'i 46, 51, 961 P.2d 611, 616 (1998) (holding that the "total amount awarded to all parties may not exceed the maximum amount allowable under the statutory schedule[,]" which was in effect prior to the twenty-five percent cap).

D.

Inasmuch as the public policy of limiting the amount of attorneys' fees recoverable in actions in the nature of assumpsit is well defined, that policy is also manifestly "dominant." HRS § 607-14 states that it applies "[i]n all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee[.]" (Emphases added.) In other words, HRS § 607-14 governs in district and circuit courts and the limitation "places a twenty-five percent maximum combined total limit that can be taxed against a losing party by both the trial and appellate courts." Employee Mgmt. Corp., 87 Hawai'i at 351, 956 P.2d at 1283.

Moreover, as indicated, the provisions of HRS § 607-17 were incorporated into HRS § 607-14 as a means of "bring[ing] uniformity to the procedure for taxing attorneys' fees in

[assumpsit actions]." Conf. Comm. Rep. No. 1089, in 1993 House Journal, at 932. It was the intent of the legislature, then, that HRS § 607-14 be the dominant policy for awarding attorneys' fees in such actions.[18]

VI.

Because the attorneys' fees award in the instant case exceeds the maximum recovery allowed by law, the award would not be consistent with the award that a party would have received had the case been tried in court.[19] It is further apparent, then, that an attorneys' fees award of almost two times the amount of judgment and over seven times the twenty-five percent cap set forth under HRS 607-14 violates that established public policy.[20]

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[18] Although the policy of limiting attorneys' fees in assumpsit actions has not been explicitly established as a "dominant" policy specifically with respect to arbitration proceedings, this court has not yet had the opportunity to address the applicability of HRS § 607-14 to arbitration proceedings. The discussion above indicates, however, that HRS § 607-14 is made applicable to arbitration proceedings by virtue of HRS § 658A-21(b). Accordingly, the well-defined and dominant policy of limiting attorneys' fees in assumpsit actions applies equally to arbitration proceedings.

[19] It should be noted that Domke's treatise on Commercial Arbitration explains that "[a]n award violates public policy when it . . . exceeds the maximum recovery allowed by law[.]" 1 M. Domke, Commercial Arbitration § 39:9 at 21-22 (3d ed. 2003). Similarly, the National Academy of Arbitrators has adopted guidelines relating to the award of attorneys' fees, inter alia, in the context of employment related claims, stating that "[r]emedies should be consistent with the statutory, common law, or contractual rights being applied and with remedies a party would have received had the case been tried in court." Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems, Art. 4(D) (May 21, 1997). See also Academy of Arbitrators, a Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Section C(5) ("The arbitrator should be empowered to award whatever relief would be available in court under the law.").

[20] Petitioners asserted that the award in the instant case was over ten times the maximum allowable amount under HRS § 607-14, and nearly three times the amount of the judgement. See supra at 20-21. However, under HRS

(continued...)

Hence, "the violation of the public policy" limiting attorneys' fees in assumpsit cases "is clearly shown." Inlandboatmen's Union, 77 Hawai'i at 194, 881 P.2d at 1262 (internal quotation marks and citations omitted).

VII.

It must be observed that "[t]his court has long recognized the strong public policy supporting Hawai'i's arbitration statutes as codified in HRS [c]hapter 658." Lee v. Heftel, 81 Hawai'i 1, 4, 911 P.2d 721, 724 (1996) (internal quotation marks and citation omitted). We have stated "that the proclaimed public policy of our legislature is to encourage arbitration as a means of settling differences and thereby avoid litigation." Dorrance v. Lee, 90 Hawai'i 143, 147, 976 P.2d 904, 908 (1999) (internal quotation marks and citations omitted); see also Gadd v. Kelley, 66 Haw. 431, 436, 667 P.2d 251, 255 (1983) ("'[T]he proclaimed public policy of our legislature is to encourage arbitration as a means of settling differences and thereby avoid litigation.'" (Quoting Gregg Kendall & Assocs. v. Kauhi, 53 Haw. 88, 93, 488 P.2d 136, 141 (1971)) (other citations omitted); Mars Constructors, Inc. v. Tropical Enters., Ltd, 51

[20](...continued)
§ 607-14, the amount of the judgment upon which attorneys' fees are calculated includes prejudgment interest. Forbes v. Hawaii Culinary Corp., 85 Hawai'i 501, 511, 946 P.2d 609, 619 (App. 1997). As indicated, in the instant case, the arbitration panel awarded a lump sum judgment for damages in the amount of $45,441.75 and prejudgment interest in the amount of $24,152.29 for a total judgment of $69,594.04. Thus, the attorneys' fees award of $123,994.69 was over seven times the amount allowable under HRS § 607-14, and nearly two times the amount of the judgment.

Haw. 332, 334, 460 P.2d 317, 318-19 (1969) ("It is generally considered that parties resort to arbitration to settle disputes more expeditiously and inexpensively than by a court action[.] . . . Thus, it must be deemed that the primary purpose of arbitration is to avoid litigation."); In re Arbitration Between Carroll & Travis, 81 Hawai'i 264, 267, 915 P.2d 1365, 1368 (App. 1996) ("We recognize that public policy favors the resolution of disputes by arbitration.") (Citations omitted.).

Allowing the award to stand in the instant case would not promote the policy of encouraging arbitration as a means of settling disputes, thereby avoiding litigation. First, allowing arbitrators to award attorneys' fees far in excess of the amount authorized by law in civil actions involving the same claim would not advance the policy of promoting arbitration as a "more expeditious[] and inexpensive[]" means of settling disputes "than by a court action[.]" See Mars Constructors, Inc., 51 Haw. at 334, 460 P.2d at 318-19. Second, if the authority of arbitrators is not circumscribed by the law, the parties may well be encouraged to litigate their disputes in courts where the scope of their liability is established and predictable.

VIII.

The majority maintains that (1) HRS § 658A-21(b) permits parties to contract for attorneys' fees outside the purview of applicable law, notwithstanding any limitation on

attorneys' fees under the law, see majority opinion at 6; (2) the scope of arbitrators' authority is determined by the arbitration agreement and here, the parties agreed to an award of attorneys' fees "'in such amounts as the majority of the arbitrators shall determine at the time of the award[,]'" id. at 3-4; (3) in so agreeing, "the parties assumed the 'hazards' of the arbitration process," id. at 4; (4) although this court has acknowledged that arbitration is meant to be a more expeditious and inexpensive means of settling disputes, this court has also recognized the freedom and autonomy of the parties to enter into arbitration agreements, and this right stems from the constitutionally protected right of freedom to contract, see id. at 3, 5; (5) HRS § 658A-21 and the relevant comment to its UAA counterpart, UAA Section 21(b), "embod[y] the principle that parties have the freedom to contract," id. at 6; and (6) the non-existence of a specific twenty-five percent limitation on attorneys' fees under chapter 658A of the HRS demonstrates that the legislature did not intend a similar limitation to apply to arbitration proceedings[,] see id. at 6-7.

A.

With respect to the majority's first assertion, the majority maintains that the phrase "'even if not otherwise authorized by law'" in the comment to UAA Section 21(b), after which HRS § 658A-21(b) is modeled, "confirms that parties can permissibly contract for attorneys' fees that are outside the

purview of applicable law." Id. at 6 (quoting Cmt. to UAA § 21). However, as noted supra, the UAA comment to Section 21 also states that the parties' agreement to an award of attorneys' fees is "in addition" to instances where fees "would be allowed by law in a civil action[.]" Such agreement is permitted where an award of attorneys' fees is "not otherwise authorized by law." Cmt. to UAA § 21(b) (emphasis added). The foregoing language indicates that under HRS § 658A-21(b), an agreement between the parties as to fees cannot avoid fee provisions set forth under law. Rather, in civil actions, the parties may agree to such awards where there is no law authorizing attorneys' fees.

Also, as discussed above, this interpretation is supported by the fact that HRS § 658A-21(b) seemingly vests arbitrators with the same authority to award attorneys' fees as the court. Pursuant to the "American Rule," courts may also award attorneys' fees as authorized by law, agreement, or stipulation of the parties. See Hamada, 102 Hawai'i at 217, 74 P.3d at 40. Thus, parties have the autonomy to contractually agree to attorneys' fees where such award is not otherwise authorized by law. However, in some instances, the law prohibits such an agreement. For example, as noted previously, HRS § 607-14, applicable in arbitration proceedings pursuant to HRS § 658A-21, provides that notwithstanding a "note or other contract in writing [which] provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than

twenty-five per cent shall be allowed." (Emphases added.) With respect to assumpsit actions, it would be anomalous if the parties' autonomy is restrained where the matter is litigated in court, but not restrained simply because the agreed parties are arbitrating their assumpsit claims, an anomaly which the comment to UAA Section 21(b) would seem to address. Indeed, the parties agreed that an award would be "subject to" HRS § 658A-21, which specifically makes the law and its limitations applicable to arbitration proceedings.

B.

With respect to its second assertion, as discussed, the majority indicates that notwithstanding applicable law, i.e., HRS § 607-14, pursuant to HRS § 658A-21(b) the arbitrators were free to award attorneys' fees in any amount because the parties "specifically agreed that the arbitrators were authorized to award attorneys' fees 'in such amounts as the majority of the arbitrators shall determine at the time of the award.'" Majority opinion at 4. However, the majority's reading of the arbitration provisions excludes the language limiting the authority of the arbitration panel to award attorneys' fees.

First, the agreement expressly stated that any award of attorneys' fees "shall be subject to the provisions of [c]hapter 658[A.]" See supra. Additionally, the agreement expressly required any award of attorneys' fees to be "reasonable." HRS

§ 658A-21(b) likewise requires an award of attorneys' fees to be "reasonable." In other words, all limiting language contained within the arbitration provisions governed the scope of the arbitrators' discretion to award attorneys' fees. To read the arbitration provisions as allowing an award in any amount, as the majority does, without reference to the limiting language, ignores the autonomy of the parties to contract, as expressed by the arbitration provisions in this case.

C.

In connection with its third assertion, the majority states that because the parties agreed that the arbitration panel was authorized "to award attorneys' fees 'in such amounts as the majority of the arbitrators shall determine at the time of the award[,]'. . . the parties assumed the 'hazards' of the arbitration process[.]" Id. at 4. Again, the majority ignores the language in the arbitration provision which clearly limited the arbitration panel's authority to award attorneys' fees in this case. In any event, the "hazards" of the arbitration process are irrelevant where such "hazards" result in an award that violates public policy. See Inlandboatmen's Union, 77 Hawai'i at 193, 881 P.2d at 1261 (stating that a violation of public policy is an exception to the general deference given to arbitration awards). The fact that the attorneys' fees award violated the well-defined and established public policy of limiting attorneys' fees in assumpsit actions is a ground in and

of itself for overturning the award. Parties do not assume the "hazards" of an award that violates public policy.

D.

As to the majority's fourth assertion, the majority concedes that "[t]his court has repeatedly recognized the policy that arbitration is meant to be 'more expeditious and inexpensive' than traditional court processes." Majority opinion at 3 (citing Mars Constructors, Inc., 51 Haw. at 334, 460 P.2d at 318) (emphasis in original). But the majority maintains that the parties have autonomy to enter into agreements to arbitrate, and that this autonomy "is directly correlated to and stems from the constitutionally protected right of freedom to contract." Id. at 3, 5. The majority further states that this court has acknowledged that the freedom to contract is rooted in the notion that individuals should have power to organize their affairs. See id. at 5 (citations omitted).

However, the majority's assertion that the agreement to arbitrate stems from the right to contract is without any citation to authority and is not relevant to this case. The right of freedom to contract is set forth under "[a]rticle I, section 10 of the United States Constitution, [which provides that] 'no State shall . . . pass any . . . Law impairing the Obligation of Contracts.'" In re Application of Herrick, 82 Hawai'i 329, 340 n.10, 922 P.2d 942, 953 n.10 (1996) (brackets

omitted) (ellipsis in original).[21] Inasmuch as this case does not involve a challenge to state law, but rather, to an arbitration panel's award of attorneys' fees, the majority seemingly misapplies that right.

Furthermore, Express Partners and Venture 15 did not involve arbitration agreements. In Express Partners, this court held that "[i]n the context of construction litigation, . . . economic loss damages are limited to contractual remedies[.]" 87 Hawai'i at 469, 959 P.2d at 839 (emphasis added). Venture 15 likewise involved construction litigation. The quoted language upon which the majority relies, specifically states that "[c]onstruction projects are characterized by detailed and comprehensive contracts that form the foundation of the industry's operations. [Thus, c]ontracting parties are free to adjust their respective obligations to satisfy their mutual expectations." Venture 15, 115 Hawai'i at 286, 167 P.3d at 279. The majority, therefore, incorrectly suggests that the foregoing cases support the proposition that there is a "recognized

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[21] The constitutional prohibition more specifically involves the question of whether a state law impairs the right of parties to a contract.

> In deciding whether a state law has violated the federal constitutional prohibition against impairment of contracts, U.S. Const., art. I, § 10, cl. 1, we must assay the following three criteria: (1) whether the state law operated as a substantial impairment of a contractual relationship; (2) whether the state law was designed to promote a significant and legitimate public purpose; and (3) whether the state law was a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose.

82 Hawai'i at 340, 922 P.2d at 953 (citation omitted).

autonomy of parties to enter into an arbitration . . . [that] is directly correlated to and stems from the constitutionally protected right of freedom to contract." Majority opinion at 5 (emphasis added). These cases do not apply to arbitration agreements at all.

E.

The majority's fifth assertion is that the plain language of HRS § 658A-21 embodies the policy that parties are free to enter into arbitration agreements and provide the applicable terms of arbitration. But the plain language of HRS § 658A-21(b) does not resolve whether arbitrators must award attorneys' fees under the law or by the agreement of the parties where both provisions exist. As the comment to UAA Section 21(b) indicates, where attorneys' fees are authorized by the law and by agreement, the agreement does not govern simply because parties should have the autonomy to agree to arbitration and the scope of the arbitrators' powers. The majority ignores the very terms of the arbitration provisions that reference the applicability of HRS chapter 658A and the limits on awards of attorneys' fees. See generally, discussion supra.

It may be noted also that the parties' autonomy or right to contract is not unfettered. In fact, HRS § 607-14 highlights the foregoing proposition. That provision expressly states that even "[w]here the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides

for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed." (Emphases added.) Thus, HRS § 607-14 limits or restricts the right to contract. The right and autonomy to contract with respect to arbitration is likewise restricted in certain respects. For example, although HRS § 658A-4 authorizes the parties to "waive, or . . . vary the effect of, the requirements of [chapter 658A of the HRS,]" it does so only "to the extent permitted by law."

Moreover, as noted previously, a violation of public policy is an exception to the general deference given arbitration awards. See Inlandboatmen's Union, 77 Hawai'i at 193, 881 P.2d at 1261. The fact that an award violates a public policy is ground for overturning the award, even if other policies may be implicated to some extent. See id. (stating that because "[a] court will not enforce 'any contract that is contrary to public policy[,]' . . . [i]t follows then that if the contract as interpreted [by] an arbitrator violates some explicit public policy, the courts are obliged to refrain from enforcing it") (ellipsis, brackets, internal quotation marks and citations omitted).

F.

Finally, in connection with its sixth assertion, the majority states that "HRS § 607-14 [] limits the award of attorneys' fees in court actions[,]" but chapter 658A which governs arbitration proceedings, does not. Majority opinion at

6. The majority states that this "demonstrates that the legislature did not intend a similar limitation on arbitration awards." Id. at 7. However, nothing in the legislative history indicates this and the majority cites to no authority supporting the foregoing proposition.

Rather, as indicated, the legislative history pertaining to chapter 658A states that, "[t]he purpose of this bill is to standardize Hawaii's arbitration laws with those used in other states by replacing the current statutory chapter on arbitration and awards with the [UAA]." Conf. Comm. Rep. No. 115, in 2001 House Journal, at 1093 (emphasis added). Consequently, the fact that the legislature did not "inject[] similar language into [c]hapter 658[,]" majority opinion at 6, only confirms, as the legislative history states, that the legislature's clear intent was to "standardize" the law pertaining to arbitration proceedings with that applied in other states. Therefore, there was no need for the legislature to include the special language sought by the majority. HRS § 658A-21(b) already comprehensively covers "attorneys' fees and other reasonable expenses," as "authorized by law in a civil action[.]" (Emphasis added.) HRS § 607-14 is such a law. Accordingly, it would be superfluous for HRS § 658A-21(b) to specifically refer to HRS § 607-14, inasmuch as HRS § 607-14 is a law authorizing attorneys' fees in a civil action. The majority is incorrect, then, in maintaining that "the legislature has not evinced an

intent one way or the other" with respect to whether the twenty-five percent cap applies in arbitration proceedings in the nature of assumpsit. See majority opinion at 7. Plainly, by virtue of the plain language of HRS § 658A-21(b), it has.

IX.

The attorneys' fees award exceeding the twenty-five percent cap set forth under HRS § 607-14 violates the established public policy of limiting attorneys' fees in actions in the nature of assumpsit.[22] I would vacate the order of the court and the January 25, 2010 judgment of the ICA pursuant to its June 29, 2009 published opinion, which affirmed the order, and would

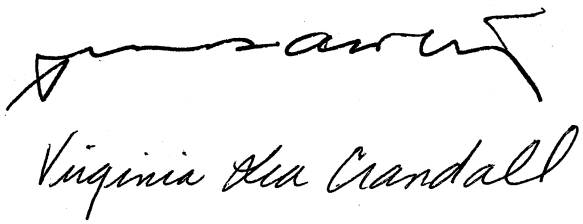
[22] In light of my position, Petitioners' final argument that the arbitration panel evinced a manifest disregard of the law need not be addressed.

Briefly noted, Respondents argued in their Response that Petitioners are judicially estopped from arguing that HRS § 607-14 limits attorneys' fees because Petitioners argued during the arbitration proceedings that they were entitled to an award of all attorneys' fees incurred in connection with the arbitration proceedings. Petitioners correctly assert that judicial estoppel does not apply in the instant case.

This court weighs several factors in deciding whether a party should be judicially estopped from making an argument. The first factor is that "a party's later position must be 'clearly inconsistent' with its earlier position." Lee v. Puamana Cmty. Ass'n, 109 Hawai'i 561, 576, 128 P.3d 874, 889 (2006). The second factor is that the party being estopped must have persuaded "a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled[.]" Id. (some emphasis omitted). Finally, the court considers "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped[.]" Id.

As to the first factor, Petitioners' current position is inconsistent with the position taken during arbitration. However, as to the second factor, Petitioners have never taken an inconsistent position in court, and, therefore, no risk of "judicial acceptance of an inconsistent position" has occurred. Id. Finally, as to the third factor, although capping attorneys' fees would require Petitioners to pay a smaller amount to Respondents, nothing indicates that, as a result of their change in positions, Petitioners have "derive[d] an unfair advantage." Inasmuch as a larger award would be against public policy, it cannot be said that the reduction in the award is unfair.

remand to the court to enter an order confirming the arbitration panel's award of attorneys' fees in an amount consistent with the principles set forth in this opinion.



Virginia Lea Crandall