MEMORANDUM

To: Dean Ed Sherman, Reporter

From: Claire Popovich

Date: January 21, 2014

Re: ADR – Compelling and Enjoining Arbitration Procedures

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1. Can a suit to compel arbitration be a summary proceeding? If so, what would the procedure be?

Using broad brushstrokes, a summary proceeding can be likened to an "intermediate" court proceeding falling between ordinary and executory proceedings. This moderate position is a result of, in part, Code of Civil Procedure Article 2595 which provides that summary proceedings are tried without a jury unless the law provides otherwise. The expeditious intent is made more through the provisions that, "The court shall render its decision as soon as practicable after the conclusion of the trial of a summary proceeding and, whenever practicable, without taking the matter under advisement."[1] These provisions allow for greater speed in the deciding of those actions brought as a summary proceeding because less procedural steps are required thereby allowing a quicker disposition of the issues.

Code of Civil Procedure Article 2593, provides that a summary proceeding can be commenced by the filing of a contradictory motion or by a rule to show cause, unless otherwise provided by law. In keeping with the intent to make summary proceedings quicker than ordinary proceedings, the Code provides that citation and service are not necessary.[2] Nevertheless, the defendant must be served with a copy of the contradictory motion, rule to show cause, or other pleading filed by the plaintiff in the proceeding.[3] As with other dilatory exceptions, the defendant will waive his objection to the use of the summary proceeding if he does not plead it timely.[4]

For arbitration procedure, the most relevant provisions of Louisiana law are found in the provisions of R.S. 9:4203:

> A. The party aggrieved by the alleged failure or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties, or of the property, for an order directing that the arbitration proceed in the manner provided for in the agreement. Five

[1] C.C.P. Art. 2595
[2] C.C.P. Art. 2594
[3] Ibid
[4] C.C.P. Art. 926

> days' written notice of the application shall be served upon the party in default. Service shall be made in the manner provided by law for the service of a summons.
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> B. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

The language of the Statute makes it clear that a party believing that they had a valid agreement to arbitrate with the other party can petition the court to get the court to order arbitration. For the court, the question as to whether a court should compel arbitration is a question of law.[5] In *International River*[6] the Louisiana supreme court ruled that the trial court can only decide: (1) whether there is a valid underlying agreement between the parties to arbitrate, and (2) whether party has failed to comply with the agreement.[7] If neither of these issues is in contest between the parties, when a party defaults, "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not at issue, the court *shall issue* an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[8] This language would seemly give a court the authority to compel arbitration; however, it is silent as to whether this can be done through a summary proceeding.

Revised Statute 9:4203(A) provides that, "Five days' written notice of the application shall be served upon the party in default. Service shall be made in the manner provided by law for the service of a summons." These provisions would seem to indicate that the procedure for compelling a party to arbitrate is more stringent than those required for summary proceedings because Code of Civil Procedure Article 2594 states that service is unnecessary for a summary proceeding.[9] Thus, the mandatory requirement in the Statute that written notice be served upon a default party may prevent an order to compel arbitration from being a summary proceeding as a summary proceeding does not require citation and service upon the party in default.[10] The language of 9:4203 unmistakably requires that specific steps be taken before a court will order a party to arbitrate. These additional steps seem to remove Louisiana Binding Arbitration procedure from utilizing summary proceedings to compel a party to arbitrate due to the necessary additional procedural steps. In order to clarify the law on this issue, the Committee could revise or eliminate these additional steps so that a party can use summary proceedings to compel another party to arbitrate.

Alternatively, in section 5:3 of his treatise *Louisiana Civil Law Treatise – Civil Procedure*, Professor Frank Maraist provides an alternative, theoretical basis as to why a motion to compel arbitration could be brought as a summary proceeding. He does so by examining the definition of a summary proceeding as found in Code of Civil Procedure Article 2592:

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[5] *Johnson v. Blue Haven* (928 So.2d 594, 595)
[6] (861 So.2d 139)(La. 2003)
[7] *Arkel Constructors, Inc. v. Duplantier & Merc.* (965 So.2d 455, 458-9)
[8] Ibid, (emphasis in original)
[9] C.C.P. Art. 1201
[10] Ibid

> The summary proceeding, as described in the Code, encompasses two separate concepts: (1) a summary proceeding by which the parties obtain a trial on the merits without the formalities and delays of the ordinary proceeding, and (2) a summary procedure which is used to determine incidental issues arising in the course of an ordinary, executory or summary proceeding.

This two-part definition of a summary proceeding explains the inclusive definition for a summary as exists in practice and gives further support for bringing an order to compel arbitration as a summary proceeding. The inclusivity of the definition is most clearly seen in the extensive list of actions that can be tried as summary proceedings:

> (1) An incidental question arising in the course of judicial proceedings, including the award of and the determination of reasonableness of attorney fees.
>
> (2) An application for a new trial.
>
> (3) An issue which may be raised properly by an exception, contradictory motion, or rule to show cause.
>
> (4) An action against the surety on a judicial bond after judgment has been obtained against the principal, or against both principal and surety when a summary proceeding against the principal is permitted.
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> (5) The homologation of a judicial partition, of a tableau of distribution or account filed by a legal representative, or of a report submitted by an auditor, accountant, or other expert appointed by the court; and an opposition to any of the foregoing, to the appointment of a legal representative, or to a petition for authority filed by a legal representative.
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> (6) A habeas corpus, mandamus, or quo warranto proceeding.
>
> (7) The determination of the rank of mortgages, liens, and privileges on property sold judicially, and of the order of distribution of the proceeds thereof.
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> (8) The original granting of, subsequent change in, or termination of custody, visitation, and support for a minor child; support for a spouse; injunctive relief; support between ascendants and descendants; use and occupancy of the family home or use of community movables or immovables; or use of personal property.
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> (9) An action to annul a probated testament under Article 2931.

> (10) An action to enforce the right to a written accounting provided for in R.S. 9:2776.
>
> (11) An action for dissolution or specific performance of a compromise entered pursuant to Article 1916(B) or by consent judgment.
>
> (12) All other matters in which the law permits summary proceedings to be used. [11]

Importantly, Code of Civil Procedure Article 2592 purports to list those matters that can exclusively be tried or disposed of through summary proceedings. This ostensibly exclusive list becomes longer still when one examines the last entry in the list of actions. The permissive language used (i.e., "all other matters") allows for almost limitless expansion of the types of actions that can be brought as summary proceedings. This gives a party considerably more leeway in having many more actions being brought as a summary proceeding than the "exclusive" twelve-item list would otherwise seem to allow.[12] The list in C.C. Art. 2592 is *not* exclusive, but rather, impressively inclusive.

Significantly, the third item on the list provided in the Article lists those actions that can be tried as a summary proceeding. The list specifically includes those issues that can be "raised by an exception, contradictory motion, or rule to show cause." This listing provides a possible means for a party to file a suit to compel arbitration through the filing of an exception.

According to the definitional bifurcation of summary proceedings, a suit to compel can be brought as a summary proceeding. This follows because the order to compel arbitration could be brought as an order for the court that would be brought in tandem with the dilatory exception of prematurity owing to the adverse party's failure to participate in arbitration. This conclusion is supported by the fact that this order to compel arbitration would be just one of the "incidental issues" that the parties would be in disagreement that would need to be resolved by the court so that the parties can proceed to arbitration.[13] In order to comply with Louisiana's stated policy of favoring arbitration, the Committee can and should designate within the law specific language authorizing an order to compel arbitration as a summary procedure.

In sum, it would appear that the long, inclusive list provided by C.C. Art. 2592 would afford the Committee the ability to designate the compulsion of arbitration as a summary proceeding. Thus, it would be in the best interest of the community for the Committee to

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[11] C.C.P. Art. 2592

[12] This fact can be easily seen by referencing the general index of the Louisiana Revised Statues of 1950. Moreover, in the Westlaw general index pages are devoted to listing the actions that can be tried or disposed by summary proceedings under the heading of "summary proceedings."

[13] Countless cases have held that arbitration is favored in Louisiana law. See *Hodges v. Reasonover*, 103 So.3d 1069

explicitly provide in the law that a party can bring a motion to compel arbitration as a summary proceeding.

2. Should a suit to enjoin arbitration be brought as an injunctive proceeding?

Louisiana Binding Arbitration Law provides specific provisions if a party wishes to compel a party to perform as promised. Specifically, R.S. 9:4203(A) states that when a party fails or refuses to *perform* as was agreed in a written agreement for arbitration, the other party can petition the proper court to order the recalcitrant party to perform as he had previously agreed.

Nevertheless, as Judge Schott pointed out in his concurring opinion in *Tower Hill Trading Co., Ltd. v. Howard, Weil, Labouisse, etc.* (687 So.2d 1096, 1100):

> There is no authority in the Louisiana arbitration law for a party to seek redress in court to prevent arbitration. There is only the right to compel arbitration…A party may invoke the equitable power of the court to enjoin arbitration, but to succeed he must show that he will suffer irreparable injury unless the injunction issues…This equitable power is sparingly exercised in the face of a binding arbitration agreement.

Moreover, in *Conagra Poultry Co. v. Collingsworth* (705 So.2d 1280, 1281), the Second Circuit Court of Appeal states in footnote number three, that Louisiana law only permits a stay order to enjoin court proceedings in favor of arbitration, and not to prevent it. Specifically, the court states that, "the stay procedure provided in § 4202 is not applicable to a party seeking to enjoin arbitration." If a party wishes to enjoin arbitration, he must make recourse to Code of Civil Procedure Article 3601.[14]

Code of Civil Procedure Article 3601 provides that an injunction will only be issued when irreparable injury, loss, or damage may occur to the applicant. The standard for finding irreparable injury is "a loss sustained by an injured party which cannot be adequately compensated in money damages or for which such damages cannot be measured by a pecuniary standard."[15] Civil Code Article 2752 gives the procedure for petitioning for filing a petition for an injunction. Specifically, the petition for an injunction must be filed in the court where the executory proceeding is pending or in a separate suit. While seeking an injunction, the party can seek—and the court can issue—a temporary restraining order or a preliminary injunction.[16] Nevertheless, unless the law provides otherwise, an application for injunctive relief must be made by petition.[17]

[14] *Conagra Poultry Co. v. Collingsworth* (705 So.2d 1280, 1281)
[15] *Daigre Engineers, Inc. v. city of Winnfield*, 385 So.2d 866, 869
[16] C.C.P. Art. 3601(C)
[17] C.C.P. Art. 3601(D)

Recently the jurisprudence has stated that, "Not all arbitration provisions are valid under state law; rather, the application of arbitration law presupposes the existence of a written agreement not subject to any grounds at law or in equity for its revocation."[18] When a valid contract is found to be lacking, a court can then issue a permanent injunction—as was done in *French's Welding v. Harris*.[19] This decision held that an arbitration could be permanently enjoined if there had previously been a trial on the merits in which the burden of proof was a preponderance of the evidence.[20] This case is exceptional, among other factors, because there was no written agreement that was signed by all of the parties. As arbitration law presupposes the existence of a written agreement, it is clear that *French's* holding is extraordinary and would likely not apply to those cases where a valid contract between the parties exists and an aggrieved party is seeking a preliminary injunction from the court. This follows from the presumption in arbitration law that a valid contract exists between the parties.

In conclusion, as has been pointed out in the jurisprudence, Louisiana law does not specifically permit the filing of a suit to enjoin arbitration as an injunctive proceeding. However, there are cases on this issue that indicate that under exceptional circumstances a party can petition a court for an injunction to enjoin arbitration as a matter of equity.

The jurisprudence goes on to state that, "A *preliminary* injunction is a procedural device interlocutory in nature designed to preserve the existing status pending a trial of the issues on the merits of the case. The applicant for a preliminary injunction has the burden of making a prima facie showing that he will prevail on the merits of the case—i.e., that he will obtain a permanent injunction based upon proof of irreparable injury."[21] This statement makes it clear that an injunction is primarily a device that is used to maintain the status quo for litigation purposes. This purpose of facilitating litigation would seem to go directly against the stated policy of Louisiana which is to strongly favor arbitration and its use. As such, creating provisions within Louisiana arbitration law to enjoin arbitration would frustrate Louisiana's policy of encouraging.

3. When party is sued on a contract and responds that there is a valid arbitration clause, should it be raised by an exception (of prematurity?) and a rule to show cause?

Revised Statute 9:4202 directly addresses the issue of what a party should do if proceedings are brought in violation of an agreement to arbitrate. It mandates that:

> If any suit or proceedings be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved in the suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the

[18] *Abshire v. Belmont Homes, Inc.*, 896 So.2d 277.
[19] 106 So.3d 716
[20] 106 So.3d 716, 718
[21] *Equitable Petroleum Corp. v. Cent. Transmission, Inc.*, (431 So.2d 1084, 1087)

> terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

According to Article 926 of the Code of Civil Procedure, the exception of prematurity can be raised as a dilatory exception.[22] As a general rule the dilatory exception of prematurity must be pleaded prior to or in the answer.[23] This is because an exception is a defensive measure that a defendant uses to "retard, dismiss, or defeat the demand brought against him."[24] This is possible even though R.S. 9:4205 mandates that any application to the court under Louisiana Binding Arbitration Law be made and heard in the manner of motions because of Louisiana's liberal rules of procedure which create fuzzy perimeters for the concept of exceptions vis-à-vis motions.[25] As such, it is possible that a party can raise an exception of prematurity by motion thereby meeting the requirements of 9:4205.[26] Additionally, cases on this point have stated that an exception of prematurity can be brought when an adverse party fails to arbitrate or by a motion to stay the proceedings pending arbitration.[27]

A party may also file a rule to show cause. According to the Code of Civil Procedure, a rule to show cause must be applied for by written motion.[28] The rule can be ordered when the movant is clearly entitled without supporting proof or when the movant has supporting proof, is served on the adverse party and is tried contradictorily.[29] This follows because the rule to show cause is a contradictory motion.[30]

If there is a valid agreement to arbitrate between the parties, then the aggrieved party should file a dilatory exception of prematurity demanding dismissal of the suit or file a motion to stay the proceedings pending arbitration.[31] This method of halting litigation finds support in both cases on the issue and statutory law. A party in Louisiana could file a rule to show cause—based on Code of Civil Procedure Article 2593—which provides that a summary proceeding can be commenced by the filing of a rule to show cause—unless otherwise provided by law. Thus, if a party files the dilatory exception of prematurity demanding the dismissal of the suit the party could contemporaneously file a rule to show cause why the suit should not be dismissed. In this way, even though there currently is no basis in Louisiana law for contemporaneously filing a rule to show cause to dismiss a suit due to prematurity based on a lack of participation in binding arbitration the law does not prohibit this procedure. Based on the lack of law on this possible means of temporarily stopping litigation, it is possible that this contradictory motion could be used based on the rationale that doing so is not prohibited anywhere in the law—thereby implicitly condoning this procedure within the context of Louisiana arbitration law and forwarding the use of arbitration in Louisiana.

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[22] C.C.P. Art. 926(1)
[23] C.C.P. Art. 928
[24] C.C.P. Art. 921
[25] *Louisiana Civil Law Treatise – Civil Procedure*, § 6:8, Frank Maraist
[26] Ibid
[27] See *Wied v. TRCM, LLC* (698 So.2d 685), *Moore v. Automotive Protection Corp.*, (695 So.2d 550), etc.
[28] C.C.P. Art. 963
[29] Ibid
[30] Ibid
[31] Louisiana Practice – Personal Injury, Russ Herman, § 9:43