LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

October 14, 2022

Friday, October 14, 2022

Persons Present:

Adams, Marguerite (Peggy) L.
Babington, J. Bert
Baker, Pamela J.
Breard, L. Kent
Crigler, John D.
Cromwell, L. David
Davidson, James J., III
Davrados, Nikolaos A.
DiLeo, Tony
Doguet, Andre'
Forrester, William R., Jr.
Gregorie, Isaac M. "Mack"
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Heinen, Lauren C.
Holdridge, Guy
Knighten, Arlene D.
Kunkel, Nick
Kutcher, Robert A.
Lonegrass, Melissa T.
Lovett, John A.
Manning, C. Wendell
Miller, Gregory A.
Norman, Rick J.
Philips, Harry "Skip", Jr.
Price, Donald W.
Puder, Markus G.
Ramsey, Regina
Riviere, Christopher H.
Scalise, Ronald J., Jr.
Stuckey, James A.
Taranto, Todd Charles
Thibeaux, Robert P.
Title, Peter S.
Tucker, Zelda W.
Ventulan, Josef
Vidal, Cory
Waller, Mallory C.
Walters, Ed
Weems, Charles S., III
Woodruff-White, Lisa

President Thomas M. Hayes, III called the October Council meeting to order at 10:00 a.m. on Friday, October 14, 2022 at the Louisiana Supreme Court in New Orleans. After asking the Council members to briefly introduce themselves and making a few administrative announcements, the President called on Mr. L. David Cromwell, Reporter of the Possessory Actions Committee, to begin his presentation of materials.

Possessory Actions Committee

Mr. Cromwell began by reminding the Council that at its March meeting, it had almost completed its review of the revisions to the articles of the Code of Civil Procedure on petitory and possessory actions but that one issue remained outstanding – the existing rule of non-cumulation of actions. The Reporter also reminded the Council that during this meeting, the Council had taken a policy vote in favor of retaining the rule of non-cumulation generally but eliminating some of the draconian consequences that apply when petitory and possessory actions are improperly cumulated. Mr. Cromwell then provided background information concerning the rule of non-cumulation under French law and the jactitory action under Spanish law, as well as Louisiana's previous rule that when the plaintiff in a possessory action improperly cumulated that action with a petitory action, he not only judicially confessed that he is not in possession as under existing law, but he also judicially confessed that the defendant is in possession.

With this introduction, the Reporter asked the Council to turn to Article 3657, on page 10 of the materials. Mr. Cromwell explained that Paragraph A retains the existing rule of non-cumulation but, when the plaintiff improperly cumulates the possessory action with a petitory or declaratory judgment action, which are now treated the same, the possessory action will no longer abate unless the plaintiff asserts claims of ownership in a separate suit. Rather, the defendant is permitted to object to the improper cumulation, and the court will proceed under Articles 464 and 465. If the defendant incorrectly asserts title in himself, Paragraph B provides that those assertions will be limited to proving possession or the extent or length of time thereof, and the defendant is no longer required

to judicially confess the plaintiff's possession. If, on the other hand, the defendant files a separate suit against the plaintiff asserting claims of ownership, Paragraph C provides that the defendant will judicially confess the possession of the plaintiff in the possessory action. Paragraph C also prohibits the defendant from filing a reconventional demand asserting claims of ownership unless the plaintiff seeks adjudication of such claims.

A motion was then made and seconded to adopt Article 3657 on page 10 of the materials, after which one Council member questioned the use of "he files" on line 26. The Council engaged in a great deal of discussion as to whether this should be changed to "the defendant files" or "filed" or simply deleted entirely, and the Reporter explained that this language was intentionally chosen to ensure that the provision would not apply if the defendant were to reconvene in a separate ownership suit filed by the plaintiff, an example that is provided in Comment (e) on page 12. Mr. Cromwell then requested that "action" be changed to "suit" in three places in this Comment, on lines 23, 26, and 27 of page 12, and the Council agreed. The Council also agreed to change "he" to "the defendant" on line 22 of the same page before returning to page 10 to consider whether "executory judgment" on line 12 should be changed to "final and definitive judgment." The Reporter noted that this language appears in existing law on line 24 and means a final judgment to which suspensive appeal delays have run, and after additional discussion, the Council agreed to retain this language as drafted. A vote was then taken to adopt Article 3657 as presented and the Comments as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 3657. Same; cumulation with petitory action ~~prohibited~~ or declaratory judgment action; ~~conversion into or separate petitory action by defendant~~ reconventional demand or separate suit asserting ownership or title

A. The plaintiff ~~may~~ shall not cumulate the possessory action with either the petitory ~~and the possessory actions in the same suit or plead them in the alternative, and when he does so he waives the possessory~~ action or a declaratory judgment action to determine ownership. ~~If the plaintiff brings the possessory action, and without dismissing it and prior to judgment therein institutes the petitory action, the possessory action is abated.~~ If he does so, the possessory action does not abate, but the defendant may object to the cumulation by asserting a dilatory exception. If, before executory judgment in the possessory action, the plaintiff institutes the petitory action or a declaratory judgment action in a separate suit, the possessory action abates.

B. When~~, except as provided in Article 3661(1)-(3),~~ the defendant in a possessory action asserts title in himself, in the alternative or otherwise, he does not thereby ~~converts the suit~~ convert the possessory action into a petitory action~~, and judicially confesses~~ or judicially confess the possession of the plaintiff in the possessory action, but the defendant's assertions of title shall be considered in defense of the possessory action only for the purposes stated in Article 3661(B)(1) through (3).

C. Unless the plaintiff in the possessory action seeks an adjudication of his ownership, the defendant shall not file a reconventional demand asserting a petitory action or declaratory judgment action to determine ownership. If, before executory judgment in a possessory action, the defendant therein institutes a petitory action or declaratory judgment action to determine ownership in a separate suit he files against the plaintiff in the possessory action, the ~~plaintiff in the petitory action~~ defendant in the possessory action judicially confesses the possession of the ~~defendant therein~~ plaintiff in the possessory action.

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(a) The 2023 amendment of this Article preserves the rule of non-cumulation of the possessory and petitory actions and expands the rule to

prohibit cumulation of the possessory action with a declaratory judgment action to determine ownership. At the same time, the amendment lessens the consequences for the plaintiff of an improper cumulation and eliminates the judicial confession of the plaintiff's possession that previously arose from the defendant's assertions of title in a possessory action.

(b) Prior to the 2023 amendment of this Article, if the plaintiff cumulated the possessory action with the petitory action, the possessory action simply abated. Under the revised Article, when the plaintiff cumulates the possessory action with a petitory action or with a declaratory judgment action to determine ownership, the possessory action does not abate, but the defendant has the right to object to the improper cumulation by filing a dilatory exception. See Article 926(A)(7). Upon sustaining the exception, the court may order separate trials or may order the plaintiff to elect which action he desires to pursue, as provided in Articles 464 and 465. If not raised through a timely dilatory exception, the objection of improper cumulation is waived. See Article 926(B).

(c) If, rather than cumulating the possessory action with a petitory or declaratory judgment action, the plaintiff in the possessory action files a separate action to determine ownership while the possessory action is pending, the possessory action abates, but the plaintiff by doing so makes no confession of the defendant's possession.

(d) Prior to the 2023 revision, the consequences for a defendant who asserted title in himself in response to a possessory action were grave. Not only did his assertions of title convert the possessory action into a petitory action in which he became the plaintiff, but they also constituted a judicial confession of the other party's possession, thus triggering the onerous burden under Article 3653 of proving title good against the world. This harsh penalty has been removed. The defendant's assertions of title in a possessory action no longer convert the action into a petitory action or constitute a judicial confession of the plaintiff's possession; however, the defendant's assertions of title are considered in defense of the possessory action only for the limited purposes specified in Article 3661(B)(1) through (3). Thus, the defendant cannot divert the focus of a possessory action from the issue of possession to the often more complicated issue of ownership through the simple expedient of injecting issues of ownership in his pleadings.

(e) Unless the plaintiff in a possessory action has sought an adjudication of his ownership, the defendant is not permitted to assert a claim of ownership by reconvention. If the defendant asserts ownership by instituting a separate suit before judgment in the possessory action becomes executory, he judicially confesses the possession of the plaintiff in the possessory action. This judicial confession does not arise, however, if it is the plaintiff in the possessory action who institutes the separate suit to determine ownership while the possessory action is pending and the defendant reconvenes in that separate suit to assert his own claim of ownership.

Next, the Reporter directed the Council's attention to Article 1061, on page 28 of the materials, and explained that a cross-reference to Article 3657 had been added concerning the inability of the defendant in a possessory action to assert a reconventional demand claiming ownership. A motion was made and seconded to adopt the proposed changes to Article 1061 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1061. Actions pleaded in reconventional demand; compulsory

A. The defendant in the principal action may assert in a reconventional demand any causes of action which he may have against

the plaintiff in the principal action, even if these two parties are domiciled in the same parish and regardless of connexity between the principal and reconventional demands.

B. ~~The defendant in the principal action~~ Except as otherwise provided in Article 3657, and except in an action for divorce under Civil Code Article 102 or 103 or in an action under Civil Code Article 186, the defendant in the principal action shall assert in a reconventional demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action.

The Council then returned to the beginning of the materials to consider the proposed Comments concerning the revisions to the articles on petitory and possessory actions, beginning with Article 3651 on page 1. A motion was made and seconded to adopt these Comments as presented, and the motion passed with no objection. A motion was also made and seconded to adopt the proposed technical changes and Comments to Article 3653 on page 4 of the materials, and the motion passed with no objection. Article 3653 as adopted by the Council reads as follows:

Article 3653. Same; proof of title; immovable

A. To obtain a judgment recognizing his ownership of immovable property or real right therein, the plaintiff in a petitory action shall:

(1) Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant ~~is~~ has been in possession ~~thereof; or~~ for one year after having commenced possession in good faith and with just title or that the defendant has been in possession for ten years.

(2) Prove a better title thereto than the defendant, ~~if the court finds that the latter is not in possession thereof~~ in all other cases.

B. When the titles of the parties are traced to a common author, he is presumed to be the previous owner.

After a brief discussion concerning the fact that these Comments are not intended to supersede any existing Comments, which are still useful, a motion was made and seconded to adopt the technical changes and Comments to Article 3654 on page 6 of the materials. The motion passed without objection, and Article 3654 as adopted by the Council reads as follows:

Article 3654. Proof of title in action for declaratory judgment, concursus, expropriation, or similar proceeding

When the issue of ownership of immovable property or of a real right therein is presented in an action for a declaratory judgment~~,~~ or in a concursus, expropriation, or similar proceeding, or when the issue of the ownership of funds that are deposited in the registry of the court and ~~which~~ that belong to the owner of the immovable property or of the real right therein is so presented, the court shall render judgment ~~in favor of the party~~ as follows:

(1) ~~Who~~ If the party who would be entitled to the possession of the immovable property or real right therein in a possessory action has been in possession for one year after having commenced possession in good faith and with just title or has been in possession for ten years, the court shall render judgment in favor of that party, unless the adverse party proves that he ~~has acquired ownership from a previous owner or by acquisitive prescription; or~~ would be entitled to a judgment recognizing his ownership in a petitory action under Article 3653(1).

(2) ~~Who~~ In all other cases, the court shall render judgment in favor of the party who proves better title to the immovable property or real right therein~~, when neither party would be entitled to the possession of the immovable property or real right therein in a possessory action~~.

Motions were then made and seconded to adopt the proposed Comments to Articles 3655 and 3656, on pages 8 and 9 of the materials, as presented, and these motions passed without objection. Having already approved Article 3657 and its Comments, the Council turned to Article 3658, on page 13 of the materials, and a motion was made and seconded to adopt the proposed technical changes and Comments to this provision as presented. The motion passed without objection, and the text of Article 3658 as adopted by the Council reads as follows:

Article 3658. Same; requisites

To maintain the possessory action the ~~possessor must~~ plaintiff shall allege and prove ~~that~~ all of the following:

(1) He had possession or precarious possession of the immovable property or real right therein at the time the disturbance occurred~~;~~.

(2) He and his ancestors in title, or the person for whom he possesses precariously and that person's ancestors in title, had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud~~;~~.

(3) The disturbance was one in fact or in law, as defined in Article 3659~~; and~~.

(4) The possessory action was instituted within a year of the disturbance.

Motions were made and seconded to adopt the Comments to Article 3659, as well as the technical changes and Comments to Articles 3660 and 3661, on pages 14 through 17 of the materials, as presented, and those motions passed without objection. The text of Articles 3660 and 3661 as adopted by the Council reads as follows:

Article 3660. Same; possession

A. A person is in possession of immovable property or of a real right therein, within the intendment of the articles of this Chapter, when he has the corporeal possession thereof, or civil possession thereof preceded by corporeal possession by him or his ancestors in title, and possesses for himself or precariously for another, whether in good or bad faith, or even as a usurper.

B. Subject to the provisions of Articles 3656 and 3664, a person who claims the ownership of immovable property or of a real right therein possesses through his lessee, through another who occupies the property or enjoys the right under an agreement with him or his lessee, or through a person who has the use or usufruct thereof to which his right of ownership is subject.

Article 3661. Same; title not at issue; limited admissibility of evidence of title

A. In the possessory action, the ownership or title of the parties to the immovable property or real right therein is not at issue.

B. No evidence of ownership or title to the immovable property or real right therein shall be admitted except to prove any of the following:

(1) The possession thereof by a party as owner~~;~~.

(2) The extent of the possession thereof by a party and his ancestors in title~~; or~~.

(3) The length of time in which a party and his ancestors in title have had possession thereof.

Motions were also made and seconded to adopt the Comments to Articles 3662 and 3669, on pages 18 and 25 of the materials, as presented, and the motions passed with no objection. Mr. Cromwell then explained that no Comment was necessary with respect to Article 1061 on page 28 or Civil Code Article 3440 on page 30. After the Reporter asked the Council to turn to the Comments to Civil Code Article 531 on page 29, a motion was made and seconded to adopt these Comments as presented, and the motion passed with no objection. Finally, Mr. Cromwell asked the Council to consider the draft report to the legislature in response to Senate Concurrent Resolution No. 42 of the 2016 Regular Session, explaining that the report provides background information and discusses the project in its entirety. A motion was made and seconded to adopt the draft report as presented, and the motion passed with no objection.

At this time, Mr. Cromwell concluded his presentation, and after a brief break, the President called on Mr. Robert P. Thibeaux, Reporter of the Lease of Movables Act Committee, to begin his presentation of materials.

Lease of Movables Act Committee

Mr. Thibeaux began his presentation by thanking late Professors Saul Litvinoff and Thanassi Yiannopolos and noting that the Civil Code contained very few issues that were not comprehensively addressed by Professors Litvinoff or Yiannopoulos. Emphasizing his appreciation for their work, Mr. Thibeaux explained that the Lease of Movables Act Committee was presenting in the hopes of furthering Professor Yiannopoulos's work in one particular regard – revisiting the deletion of Civil Code Article 520. He reminded the Council that former Article 520, which had effectively served as Louisiana's version of *la possession vaut titre*, had been repealed at the behest of the equipment leasing industry, over fears that a lessor could lose ownership of a movable as a result of the actions of its lessee. Notably, the Article was repealed in its entirety without any corresponding legislative fix for the resulting gap in the law. The Reporter explained that the Committee proposed to revive Article 520 in such a form that would assuage the prior concerns of the leasing industry. He further explained that the Committee's future plans were for its revised Lease of Movables Act to follow the substance of UCC-2A, which he characterized as regulating the present legal gap in precise detail, adding that the Committee had concluded that the present adoption of Article 520 would do no harm to the related statutory provisions of the current Lease of Movables Act. Mr. Thibeaux then introduced Professor Melissa T. Lonegrass, a Committee member, and noted that she had spearheaded the Committee's drafting efforts and would be presenting the materials.

Professor Lonegrass thanked Mr. Thibeaux and noted that she had volunteered to take the lead with respect to the present segment of the Committee's project, which comprised a series of provisions all dealing in some way with the transfer of ownership. She explained that as the Committee had worked to integrate the substance and policy of UCC-2A into Louisiana law, it had concluded that present law's inclusion of certain concepts and omission of others resulted in a body of law that was difficult to align with UCC-2A. In particular, because Article 2A was built on the foundation of and worked together with Articles 2 and 9, Louisiana law's deviation from those bodies of law proved problematic insofar as it impacted the integration of Article 2A. Thus, the proposals that Professor Lonegrass planned to present represented necessary precursors to the Committee's ultimate legislative goal; therefore their adoption would not exceed the Committee's legislative directive.

Professor Lonegrass then began with the Committee's proposed new Article 520, briefly reiterating the legislative history to which Mr. Thibeaux had previously referred: When the law governing the ownership of movables was last comprehensively revised in

the 1970s, two accomplishments of the revision were the enactment of a general rule for the transfer of ownership of movables and the enactment of an exception to that general rule. The general rule, simply put, was that an individual could not transfer ownership of a movable he or she did not own. The exception was the bona fide purchaser doctrine, applicable when a movable was sold without authority, protecting the good faith purchaser of such a movable over the claim of the original owner. The good faith purchaser doctrine comprised the "bundle" of articles from 518 to 522 and was designed to balance the interests of the owner and the good faith purchaser. With justifications for protecting both parties, the policy underlying the doctrine's protection of the purchaser was to favor security of transaction and commerce. The revision enacted rules governing a number of different situations in which a good faith purchaser might wish to assert ownership against the "true" owner of the movable. One such rule was contained in former Article 520, which broadly codified the French approach to the situation—essentially providing that a transferee in good faith for fair value can acquire ownership from a seller who is not the owner when the seller is in possession with consent of the owner—but was repealed before it ever became effective. The leasing industry generally viewed former Article 520 as overly favorable to the good faith purchaser in light of UCC-2's analogue, which provided that an entrustee (loosely, a person with possession with consent of the owner) can transfer ownership, but only when dealing with a buyer in the ordinary course of business. This latter concept is defined under the UCC as requiring not only good faith and fair value but also that the transfer be from a merchant selling similar things in the ordinary course of its business. Thus, the circumstances in which UCC-2 protected the innocent buyer were narrower than those in Article 520.

Professor Lonegrass noted that the repeal of Article 520 introduced a host of problems into Louisiana law, as no other rule or provision specified the outcome in the situation covered by former Article 520. An argument could be made for the application of the general rule, but not definitively. Similarly, an argument could be made for the application of equitable estoppel – a case-by-case approach applicable prior to Article 520's enactment – but this was similarly non-definitive. Strangely, Professor Lonegrass explained, Louisiana courts had generally opted for a third alternative – the erroneous application of the rules for the transfer of lost and stolen things – and she noted that this application extended even to recent decisions. Thus, she explained, the Committee had sought to rectify these problems and clearly delineate the effects of a party purporting to sell a movable under Article 520 circumstances while nevertheless remaining cognizant of the objections that had led to Article 520's initial repeal. She noted that the Committee had been careful to study the UCC approach and incorporate it into its proposed Article 520, while using civil law terminology rather than UCC terminology. This, she added, was why "buyer in the ordinary course" did not appear in the Committee's proposal; instead, the Committee had elected to reproduce the substance of the term without using the term itself. Professor Lonegrass also reminded the Council that the Committee's proposal applied to more than merely lessees selling without the consent of the owner; rather, it applied to any party in possession of a movable with consent of the owner who attempted to transfer ownership. Thus, it covered individuals such as depositaries, repairers, and the like. Finally, she noted that the Committee would be drafting further provisions dealing more specifically with leases of movables, so to the extent that the present fix did not represent a *perfect* fix, a more comprehensive solution would be forthcoming; in any event, she expressed hope that the present language would satisfy all parties and thus no further legislation would be necessary on this particular issue.

Professor Lonegrass then turned to the materials, reading for the Council the language of proposed Article 520. She noted that it was similar to the original article's construction but incorporated the new concepts she had just discussed, which the Committee hoped would help align Louisiana with the UCC approach. She then opened the floor for questions. A Council member asked whether the Committee had sought input from the architects of the prior opposition to Article 520. Professor Lonegrass clarified that she was unsure who, specifically, led the charge to repeal Article 520 but that Mr. Thibeaux practiced in the area of equipment leasing and thus was highly qualified to opine regarding the industry's likely reaction to the proposal. The Reporter acknowledged this as correct and added that he planned to address the proposal with senior policy groups such as ELFA and anticipated that the leasing industry would testify in support of the eventual bill seeking to enact this proposal. Another member inquired as to what the

"except as otherwise ..." language referenced. Professor Lonegrass noted that this language served to recognize the fact that Article 520 appears in the middle of a series of articles dealing with separate but related scenarios, so as to indicate that Article 520 was not intended to supersede any of these rules but rather work in conjunction with them; additionally, this language served to employ an abundance of caution with respect to the Committee's intention to preserve the concept of mandate – another area where a transfer of property belonging to someone else might occur. On a note related to this second justification, Professor Lonegrass further noted that the "by legislation" phrasing was selected in lieu of "by law" in a deliberate attempt to displace the equitable estoppel jurisprudence that had been haphazardly applied in the present context; the logic was that jurisprudence could fall under the umbrella of "law" but not "legislation".

Next, a Council member asked for a real-world example of when Article 520 might apply. Professor Lonegrass referenced a situation in which the lessee of equipment was also a dealer of the same type of equipment; if the merchant-lessee were to sell the leased equipment out from under the owner, the purchaser in good faith would acquire ownership in spite of the lack of authority to sell, after which the owner would have an action for damages against the lessee. She clarified that the point of the rule was that the purchaser should be able to rely on the appearance created by the merchant that the merchant was trustworthy. A second Council member inquired as to whether this would apply to movables such as cars, which were subject to certificates of registration and title. Professor Lonegrass emphasized that this question related to Article 525 and would be addressed with another of the Committee's proposals. She added that another common situation to which Article 520 would be applicable was an equipment repair shop that also sold equipment. This prompted a third Council member to inquire as to whether the article would apply to pawnbrokers. Professor Lonegrass noted that this very issue had been discussed by the Committee and that the Committee had made a conscious decision not to incorporate the UCC's exemption of sales by pawnbrokers from its definition of sales "in the ordinary course of business" to which its analogous doctrine was applicable. She explained that the Committee's reasoning was two-fold: First, the Committee had realized, when it was "in the weeds" of attempting to incorporate the concept of a buyer in the ordinary course of business into the Code, that this was quite difficult from a stylistic and drafting perspective. And second, the pawnbroker exception was one of three listed in the UCC – along with dation en paiement and transfer in bulk – and the Committee ultimately determined that the explicit inclusion of these other two categories as excepted from "the ordinary course" was unnecessary, as the concept itself excluded them anyway; thus, because the Committee decided to omit these other categories, it considered the issue of whether a good faith purchaser actually *should* be protected when buying from a pawnbroker, deciding in the affirmative. A member of the Council who also served on the Committee confirmed this explanation, adding that the Committee simply could not come up with a good policy justification for treating pawnbrokers differently than any other merchants. In response to a subsequent question, Professor Lonegrass clarified that the Committee's approach was more protective of purchasers than the UCC by way of its omission of pawnbrokers, and that the French rule was far more protective of purchasers than anything even contemplated by the Committee, further clarifying that most other civil law jurisdictions had opted for a more "balanced" approach akin to that being proposed by the Committee.

Next, a Council member inquired as to who would have the burden of proving that the merchant was customarily selling similar things. Professor Lonegrass answered that her understanding was that a purchaser would be required to prove all elements of the provision, given that it was an exception to the general rule; the Reporter agreed with her characterization. The member asked a follow-up question regarding the details of the "customarily" standard. Both Professor Lonegrass and Mr. Thibeaux answered that they had never encountered a case in which this term served as a turning point. The Council member posed a hypothetical, asking whether an art restorer who occasionally also sold art would suffice as "customarily" selling similar things and acknowledging that this was an example of a "hard case." Professor Lonegrass and Mr. Thibeaux both opined that such individual would meet the requirement of "customarily" selling similar things, and Professor Lonegrass noted that this phraseology was found in other places in Louisiana law, so while it was not necessarily precise, it was not problematic. Finally, a Council member asked about the stylistic approach, in particular with respect to the word

"legislation," and asked whether the Committee had considered any alternatives to this language. Professor Lonegrass noted that the Committee had originally started with "provided by law" but had revised this in light of the aforementioned issue with equitable estoppel. She further stated that this construction was not out of the ordinary and noted that the Reporter of the Law Institute's Coordinating Committee served on the Lease of Movables Act Committee and had assented to the inclusion of this language. A motion was then made and seconded to adopt the Committee's proposed Article 520, and the motion passed with no objection. The adopted proposal read as follows:

Article 520. Transfer of ownership by merchant

Except as otherwise provided by legislation, a transferee in good faith and for fair value acquires ownership of a corporeal movable from a transferor who is not the owner only if the transferor has possession of the thing with the consent of the owner, is a merchant customarily selling similar things, and transfers the thing in the regular course of the transferor's business.

After breaking for lunch, the Council continued its consideration of materials from the Lease of Movables Act Committee, with Professor Lonegrass turning the Council's attention to the proposed Comments to Article 520. After making a few minor typological corrections, she provided a brief explanation of each Comment, and there were no questions or objections. A motion was made and seconded to approve the Comments, which passed with no objection. The adopted Comments to Article 520 read as follows:

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(a) This provision is new. It sets forth a limited exception to the rule that the transfer of a thing of another does not convey ownership. See C.C. Art. 2452. It does so by formulating a rule that is consistent with the doctrine of entrustment found in the Uniform Commercial Code. See U.C.C. Sec. 2-403(2) and 2A-305(2). The rule formulated by this article is also consistent with the French doctrine of *la possession vaut titre*, but only as applied to certain transfers. See Fr. Civ. Code art. 2276. The purpose of this article is to protect a good faith purchaser for value who acquires a movable from a transferor who has possession of the thing with the owner's consent, but only when the transferor is a merchant customarily selling similar things and the transfer is in the regular course of the transferor's business.

(b) The requirements that the transferee acquire the movable in good faith, for fair value, and in the regular course of business from a merchant customarily selling similar things limit the protections of this article to a "buyer in the ordinary course of business" as that term is used in the Uniform Commercial Code. See La. R.S. 10:1-201(b)(9); U.C.C. Sec. 1-201(a)(9) and 2A-103(1)(a). Under that definition, neither a dation en paiement nor a transfer in bulk is a sale to a buyer in the ordinary course of business. Likewise, under this article, neither a dation en paiement nor a transfer in bulk is a sale in the regular course of the transferor's business.

(c) Louisiana courts have in the past occasionally applied the doctrine of equitable estoppel to bar an owner's action for revendication against a good faith purchaser of a movable who purchased it from a person to whom the owner voluntarily delivered possession. According to that jurisprudence, the owner who clothes the possessor with every possible indicium of ownership must bear the loss when the possessor transfers the thing to a good faith purchaser. Theriac v. McKeever, 405 So. 2d 354 (La. App. 2 Cir. 1981); James v. Judice, 140 So. 2d 169 (La. App. 3 Cir. 1962); Flatte v. Nichols, 96 So. 2d 477 (La. 1957); William Frantz & Co. v. Fink, 52 So. 131 (La. 1909). While the courts' use of the doctrine of equitable estoppel is in line with the Uniform Commercial Code's entrustment doctrine and the French principle of *la possession vaut titre*, the approach formulated by this Article is more predictable than the prior jurisprudence. This article

displaces the doctrine of equitable estoppel in this context by declaring that, except as otherwise provided by legislation, one who has possession of a corporeal movable with the owner's consent may transfer its ownership to another only if the requirements of this article are met.

(d) The requirement that the transferor have possession with the owner's consent negates the application of this article to lost or stolen things. The owner's right to recover lost or stolen things from a possessor is governed by C.C. Arts. 521 and 524.

(e) In the absence of a rule like the one set forth in this article, Louisiana courts have erroneously applied Article 524, which by its very terms applies only to lost or stolen movables, to the transfer of a movable by a person who has possession of the thing with the owner's consent. See Livestock Producers, Inc. v. Littleton, 748 So. 2d 537 (La. App. 2 Cir. 1999); Louisiana Lift & Equip., Inc. v. Eizel, 770 So. 2d 859 (La. App. 2 Cir. 2000). Unless otherwise provided by legislation, if the requirements of this article are not satisfied, the transfer of a corporeal movable by a person who has possession of it with the owner's consent does not transfer ownership, and the owner may recover the movable from the transferee without reimbursing the purchase price, even if the transferee is in good faith.

(f) This article does not affect the law of mandate. Quite apart from this provision, a mandatary in possession of a corporeal movable belonging to the principal may have actual or apparent authority to transfer its ownership to another.

Professor Lonegrass then turned to Article 525 on page 3 of the materials, noting that the Committee proposed to repeal this provision. She reminded the Committee that the rules just discussed – Articles 518 through 524, including the newly adopted Article 520 – dealt with movables and explained that Article 525 rather cryptically provided that the provisions of the Chapter were inapplicable to movables required to be registered in public records. She then explained the issues at hand: Article 525 essentially referred to motor vehicles covered by the Vehicle Certificate of Title Law, which required registration of all manner of motor vehicles. Although other types of movables were similarly required to be registered – boats and bee colonies, for example – such registration was not what was being referenced by Article 525. Rather, Article 525, dealt with movables subject to a certificate of title. In response to a question as to why Article 525 would not apply to boats, Professor Lonegrass clarified that the applicable statutes were not technically certificate of title statutes; for boats, there was no requirement for documents to be executed at the time of transfer and the provisions merely provided for a numerical tracking system. She returned to her explanation, querying rhetorically what was meant when the provision said that the preceding rules regarding transfer of ownership did not apply. If read literally, this would mean that none of the rules of transfer of movables apply to motor vehicles in any way, which would mean that ownership does not transfer upon consent of the parties, for example. Professor Lonegrass recounted several other basic rules regarding ownership of movable property, emphasizing that a plain reading of Article 525 would make these wholly inapplicable to motor vehicles. The primary issue with such reading, according to Professor Lonegrass, was that it was historically incorrect; further, the certificate of title statutes set out no "replacement" rules for the other ostensibly displaced Civil Code provisions. Because it was not and never had been clear how Article 525 was intended to apply, the Committee therefore recommended its repeal.

Professor Lonegrass then provided further information regarding the legal backdrop: First, no rule had ever existed in Louisiana that one must comply with certificate of title statutes in order to transfer the ownership of a motor vehicle; both before and after the enactment of Article 525, courts had generally maintained that certificate of title and the corresponding rules had nothing whatsoever to do with transfer of ownership. In fact, courts explicitly hold that failure to comply with these statutes did not prevent transfer of ownership or title; rather, such failure merely prevented the title from being marketable. Further, the Comments to Article 525 seemingly endorsed the jurisprudence invalidating its own plain meaning. Professor Lonegrass explained that she had only come across

three Louisiana cases in which courts had held that a failure to comply with the Vehicle Certificate of Title statute precluded the transfer of ownership. She noted that the Committee had also researched other states and concluded that Article 525 was out of line with most other states' approaches as well. She proposed a hypothesis: In the 1970s and 1980s, the rest of the country was trying to determine the extent to which certificate of title laws dictated the transfer of ownership. The issue was somewhat uncertain, with some states leaning one way and other states leaning the other. However, since then, almost all states had come to settle on the view that certificate of title statutes were designed to help evidence ownership, not govern it, and most states had concluded that transfer of ownership for motor vehicles was governed by the UCC. Thus, Professor Lonegrass concluded, the repeal of Article 525 would bring Louisiana into accord with the rest of the country. She further emphasized that the only "change" would be the plain language of the rule because the actual application of the rule already generally accorded with other jurisdictions. A motion was then made and seconded to adopt the repeal of Article 525.

A Council member suggested that the Committee could instead change Article 525 to read in the affirmative, providing that the preceding rules *would* apply to movables subject to certificate of title laws. He reasoned that this would serve as a more effective signal to a practitioner who might be reading the cases where certificate of title statutes were held to be determinative of ownership, but Professor Lonegrass clarified that these cases were decided entirely on the basis of Article 525. Another member suggested adding a Comment to correspond with the repeal, but members of the Council noted that a Comment could not be added to a nonexistent article. Another suggestion was made to simply amend the certificate of title laws at issue rather than repeal Article 525. Professor Lonegrass explained that the reason vehicle certificate of title laws were held not to govern transfer of ownership was because such laws were not even worded in that way – these statutes merely stated "the seller must deliver the title to the buyer;" they did not state "the seller must deliver the title to the buyer or else ownership does not transfer." She opined that this was not a bad idea but would want such a revision to come subsequent to and separate from the present legislation so as to be clear that no change to the law was being effected.

A Council member then opined that many people believed that certificate of title statutes *did* govern ownership. Another member countered that anyone who actually read the law could not possibly reach such a misunderstanding. A third member expressed understanding as to Professor Lonegrass's opposition for revising the actual certificate of title statutes themselves but nevertheless urged that if and when the present legislation was brought, there would be people saying "what about cars?" Another member agreed, suggesting that the Committee should be prepared to offer some type of fix as a "just in case" if the Council opted against making an affirmative statement to the effect that certificate of title laws do not govern ownership.

A Council member then raised a wholly distinct issue: Noting that the Council had been focused on the ability of someone to transfer ownership when they were the true owner but had no certificate of title, he wondered about the reverse – whether an innocent transferee had any ability to rely upon the certificate of title being in some person's name other than the owner. Professor Lonegrass pointed out that such person would by definition either have to have possession with the consent of the owner or without, and there would be rules in effect for both scenarios. The member acknowledged his understanding of this fact, but queried as to what would happen in a "second sale" situation. Professor Lonegrass cautioned that if the Council wished to propose a policy for such scenario, it should do so very narrowly, as opposed to proposing a rule that served to negate a huge chunk of property law for cars. The Council member agreed, and clarified that he simply felt that some solution should be put forth, given that such a large majority of people believed that title was in fact determinative of ownership. Another Council member disagreed, reasoning that there was no reason to carve out cars in particular when Article 520 already set out the situations in which the innocent purchaser should win. Professor Lonegrass noted that at least one Louisiana case applied equitable estoppel under the logic that the owner was negligent in providing the middleman at issue with indicia of ownership. She added that other states had made this same policy decision: that unless the requirements of the entrustment doctrine are met, ownership

could not be transferred by a non-owner. In response, a Council member queried whether certificate of title law had any current relevance; Mr. Thibeaux answered that it was undoubtedly a lynchpin of good faith, and Professor Lonegrass agreed.

After additional discussion on the issue, a Council member suggested that the Committee review the issue and bring back a proposal alongside further research regarding the present effects of certificate of title laws and whether such laws provided any rights at all. He moved to recommit the proposal accordingly, and the motion was seconded. Another Council member argued that this would be inappropriate to assign to the Lease of Movables Act Committee, as the project would cut across all bodies of law, including, for example, successions and donations. An argument was made that the Council's own indecision was evidence that the repeal of Article 525 would be subject to significant scrutiny at the legislature, and the Committee should at least be prepared to offer a suggested fix. Returning to the issue of the significance of the present decision and the necessity to know more about certificate of title laws before making it, a Council member asked Professor Lonegrass when Louisiana's certificate of title statute was enacted, and she responded that this law was enacted in 1950. The Council member thus argued that in 70 years, it had not been an issue and Article 525 should accordingly be repealed. Professor Lonegrass expressed strong agreement, adding that Louisiana was about 40 years behind the rest of the country with respect to this issue. The Council member who had motioned for the proposal to be recommitted withdrew his motion, and a vote was then taken on the motion to adopt the proposed repeal of Civil Code Article 525. The motion passed with all but one vote in favor.

Professor Lonegrass next asked that the Council turn its attention to the provisions on pages 4 and 5 of the materials, noting that she would begin by providing some substantive background. She explained that, in 2017, the Council had adopted a proposal for the eventual elimination of the concept of a "financed lease" from Louisiana law. The present proposal, she noted, was the Committee's attempt at taking a surgical approach to achieve that substantive goal. In particular, she explained that the Committee wished to do away with the notion that, in a financed lease, the "lessor" (actually the seller) could retain title to the movable until such time as the "lessee" (actually the buyer) completed his or her obligations under the contract. She stated that this approach was both out of line with the rest of the country and inconsistent with Louisiana jurisprudence regarding conditional sales. On this latter point, she reminded the Council that it had been a long-accepted principle of Louisiana law that where the parties to the sale of a movable purported to agree that ownership would not transfer until payment of the price, courts would ignore such proviso, and ownership would instead transfer immediately upon consent to the thing and the price and the buyer would simply owe the price to the seller; then, if the buyer failed to pay, the normal remedies would apply. She further explained that this principle had been applicable even where transactions were styled or disguised as leases. Over time, however, such transactions became more common, and in 1985 the Lease of Movables Act was enacted and provided that this category of transaction should be governed according to the terms of the contract – allowing for the retention of ownership. Professor Lonegrass explained that, in this way, the Lease of Movables Act partially overruled *Barber Asphalt*, though only for transactions styled as leases: financed leases.

Professor Lonegrass continued with her overview of background law: The enactment of UCC-9 represented a decision by common law jurisdictions that, in such instances, ownership would transfer immediately to the buyer but the seller would retain a security interest, which could be enforced upon nonpayment. Thus, when UCC-9 was enacted in Louisiana, Louisiana redefined "financed lease" in the same way. Louisiana further added a nonuniform provision in the Lease of Movables Act, R.S. 9:3310, that set out that although Louisiana's Article 9 provision provided for the retention of a security interest for the seller in such a transaction, the seller could in fact retain ownership so long as they properly perfected the security interest. The resulting rule was not only far more protective of sellers than uniform Article 9 but conflicted directly with Louisiana's own Article 9. In fact, "financed lease" was a term unique to Louisiana. Professor Lonegrass concluded that Louisiana already had provisions governing these transactions and thus had no need for the strange nonuniform rule contained in R.S. 9:3310. Accordingly, the Committee had proposed the repeal of R.S. 9:3310 and the

corresponding revisions to R.S. 9:3306. A motion was made and seconded to repeal R.S. 9:3310, and with no discussion, the motion passed with no objection.

Next, Professor Lonegrass asked the Council to return to page 4 of the materials, where the Committee had recommended a few changes to the Lease of Movables Act. She noted that the term "financed lease" was used throughout the Lease of Movables Act; while the term itself was defined in the Act, it was really a transaction styled as a lease that would nevertheless be characterized as a security interest under UCC-9. She noted that there were reasons why such transactions should be treated specifically in various contexts throughout the Lease of Movables Act, so the Committee was not proposing to eliminate the term in its entirety. Rather, the Committee simply wanted to do away with the retention of ownership principle, which had been accomplished via the repeal of R.S. 9:3310, and had also identified a number of semantic issues requiring clean-up. First, she pointed to (12)(a), which set out that a financed lease was in fact a lease. The problem, here, was that a financed lease was in reality a sale; accordingly, the Committee proposed the addition of the language "in the form of" so as to clarify this matter. Next, she pointed out that the cross-reference to the UCC-9 provision determining whether a transaction was a security interest was incorrect. Finally, Professor Lonegrass concluded that the Committee would, in the future, return with more comprehensive revisions to the Lease of Movables Act – likely doing away with the concept of a financed lease entirely – but that these would take the Committee a bit more time.

A motion was then made and seconded to adopt the aforementioned revisions. A Council member queried whether the change proposed on line 8 needed to be carried through to line 15. Professor Lonegrass answered in the affirmative, and the suggestion was accepted as a friendly amendment. Another member suggested that reference to "effective date" should be revised to simply say "that date," and this change was also accepted. A vote was then taken on the motion to adopt R.S. 9:3306 as amended, and the motion passed with no objection. The adopted proposal read as follows:

R.S. 9:3306. Definitions

* * *

(12)(a) "Financed lease" means a transaction in the form of a lease entered into prior to January 1, 1990 under which:

(i) The lessee is obligated to pay total compensation over the base lease term which is substantially equivalent to or which exceeds the initial value of the leased property; and

(ii) The lessee is obligated to become, or has the option of becoming, the owner of the leased property upon termination of the lease for no additional consideration or for nominal consideration.

(b) After January 1, 1990, a "financed lease" for the purposes of this Chapter means a transaction in the form of a lease entered into on or after that ~~effective~~ date that is classified as a security interest as provided under R.S. ~~10:1-201(35)~~ 10:1-203.

* * *

(26)(a) "True lease" means a lease entered into before January 1, 1990, under which:

(i) The lessee has no obligation to pay total compensation over the base lease term which is substantially equivalent to or in excess of the initial value of the leased property; or

(ii) The lessee does not have the option or obligation to become the owner of the leased property upon termination of the lease for no or nominal consideration.

(b) A true lease also means a lease entered into after January 1, 1990 that is not classified as a security interest as provided under R.S. ~~10:1-201(35)~~ 10:1-203.

* * *

At this time, Professor Lonegrass concluded her presentation, and the President called on Mr. Tony DiLeo, Co-Reporter of the Alternative Dispute Resolution Committee, to begin his presentation of materials.

Alternative Dispute Resolution Committee

Mr. Dileo began his presentation by explaining that that he was the Co-Reporter handling the arbitration portion of the Committee's work, and that Professor Bobby Harges of Loyola Law School would eventually be taking the lead with respect to mediation. He noted that he had previously presented to the Council on behalf of the ADR Committee two years prior but that this would be his first time seeking approval of actual draft proposals.

Before turning to the draft, the Co-Reporter highlighted that the present revisions were being proposed in response to Louisiana's largely archaic arbitration law. Explaining that nearly all states had adopted some version of the original Uniform Arbitration Act – which was first published in 1925 subsequently revised twice in 1955 and 2000 – Mr. DiLeo emphasized that the Uniform Act was never adopted in Louisiana, which had not undertaken significant revisions of its arbitration laws in nearly a century. He identified the present proposal as a modified version of the Revised Uniform Arbitration Act (RUAA) as adopted in 2000, noting that it was far more detailed than both Louisiana's current arbitration laws and the Federal Arbitration Act (FAA). He characterized the FAA as "bare bones" and reasoned that the impetus for adoption of the RUAA by 21 states was to provide more detail. Mr. DiLeo further noted that the FAA would "always be there", as it largely preempted state law. Pointing to his decades of experiences as an arbitrator, he emphasized that arbitrators frequently found themselves wishing that they had a body of law like the RUAA to fill the gaps in the FAA when disputes arose. Finally, the Co-Reporter highlighted one further item adding to the importance of the present revision: In the recent Supreme Court decision in *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), the Court had held that the FAA's "look through" rule for establishing federal court subject matter jurisdiction, whereby the court was permitted to "look through" to the underlying claims in the petition in order to make a jurisdictional determination, was inapplicable to motions for the confirmation or vacatur of an arbitration award. As a result, Mr. DiLeo predicted that nearly all parties seeking to confirm, enforce, or vacate arbitration awards would be forced to do so in state court. He reasoned that, given the occasional unpredictability of state court rulings regarding arbitration-related disputes, it would thus be beneficial to enact a strong foundation of gap-filling rules by which such disputes could be adjudicated. This, Mr. DiLeo concluded, was what the Committee had tried to provide.

The Co-Reporter then turned to the materials. He noted that the document that had been circulated was coded against the RUAA, stating that the Committee had reasoned that this was the most informational way of presenting the material. Mr. DiLeo then began at Section 1, the definitions Section, reading through the provisions generally and noting that the Committee in its prior iteration had deleted the language "estate, trust," at the behest of the Trust Code Committee. A motion was made and seconded to approve Section 1, and, pointing to the definition of "arbitration organization" – in particular, the inserted phrase "person or persons" immediately preceding "or other entity – a Council member questioned the wisdom of this addition in light of the fact that the subsequent definition of "person" already encompassed a wide range of "other entit[ies]." He further noted that the Committee, by its addition of the aforementioned language, had changed the meaning of the definition in one substantive manner: allowing for a one-person arbitration organization. On this latter point, Mr. DiLeo confirmed that this substantive modification was precisely the Committee's intent when it had added the language to which the Council member had referred. Returning to his first comment, the Council member proposed replacing "commission, person or persons, or other entity" with

"commission, or other person" so as to avoid the redundancy he had previously noted. The Reporter accepted this revision as a friendly amendment.

Another Council member then pointed to the language "any legal or commercial entity" and queried whether there existed any commercial entity that was not also a legal entity. Mr. DiLeo noted that the Committee had simply used this construction because it was the uniform language – he explained that the Committee had not had any "deeper thought" behind the relationship between legal and commercial entities. He added that, if the Council member thought it best that the language be condensed, he would have no objection to such revision. Another member pointed out that the present language represented the national uniform manner of defining "person," adding that, while there existed legal entities that were not commercial entities, the converse was not necessarily true. In any event, he argued that no benefit would accrue from the amendment of this uniform language, as such language was already present in the Louisiana UCC. In response, the Council member who had initially raised the issue questioned what meaning the apparent distinction even carried, expressing doubt that there was any substantive difference in Louisiana between a legal and a commercial entity. The other member noted that the Port of New Orleans might be an example of an entity that would be "legal" but not "commercial" and maintained that it was beneficial to retain uniformity in such matters.

This prompted a larger discussion as to the relative merits of maintaining uniform language versus abandoning it in favor of a preferred alternative, even if the alternative was not necessarily substantively different. Several Council members expressed preference for the maintenance of uniform language unless a strong justification existed for its modification. In reference to the present provision, another Council member opined that the "good reason" in this instance was that the uniform language did not make sense. Mr. DiLeo made two points on the issue: First, he emphasized that the RUAA was adopted in less than half of all states, and frequently with non-uniformities. Second, he noted that it was his personal preference and that of the Committee to eschew uniformity "for uniformity's sake" in favor of undertaking to draft the best statute possible. A Council member expressed agreement with the Co-Reporter on his stance, emphasizing that the general lack of adoption of the RUAA compared to a uniform act such as the UCC dictated that the maintenance of uniformity was less valuable as a distinct end unto itself. Other members voiced agreement with this sentiment. Although some members nevertheless maintained their preference for adherence to uniform language, the Council ultimately accepted Mr. DiLeo's chosen course of action on the issue. Prior to moving on, the Reporter accepted as a friendly amendment the deletion of "or commercial" on line 10.

A final point was raised on the definitions Section – namely, that the deletion of "estate" and "trust" from the definition of "person" was ultimately substantively ineffective because these would nevertheless be incorporated by virtue of their inclusion within "any legal entity." The Co-Reporter acknowledged this as a good point, in response to which the member clarified that he had no suggested revision but merely wanted to ensure that Mr. DiLeo was aware of this quirk. A vote was then taken on the motion to adopt Section 1 as presented, and the motion passed with no objection. The adopted proposal read as follows:

§1. Definitions

In this Chapter:

(1) "Arbitration organization" means an association, agency, board, commission, or <u>other person</u> ~~other entity~~ that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means a court of competent jurisdiction in this State.

(4) "Knowledge" means actual knowledge.

(5) "Person" means an individual, or any legal entity, including a corporation, business trust, ~~estate, trust,~~ partnership, limited liability company, association, joint venture, government~~;~~ , governmental subdivision, agency, ~~or~~ instrumentality~~;~~, or public corporation~~; or any other legal or commercial entity~~.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Mr. DiLeo turned next to Section 2, noting that it contained no non-uniform language. He added that this provision followed the approach of Section 1-202 of the UCC on the issue of notice. A motion was made and seconded to adopt Section 2, and a Council member inquired as to whether parties were permitted to agree by contract for different rules regarding notice; Mr. DiLeo answered in the affirmative, noting that notice was not listed as a non-waivable provision pursuant to Section 4 and emphasizing that the bulk of the RUAA was similarly susceptible to contractual modification. The motion to adopt Section 2 passed with no objection, and the adopted proposal read as follows:

§2. Notice

A. Except as otherwise provided in this Chapter, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

B. A person has notice if the person has knowledge of the notice or has received notice.

C. A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

The Co-Reporter then moved to Section 3, highlighting that Subsection C's reference to "enactment date" should in fact reference a delayed date. On the issue of selecting a date subsequent to the enactment of the revision for its blanket applicability, a Council member posited that it might be best to refrain from trying to select a date now without a clearer picture as to the timeline for the revision. Mr. DiLeo stated that his plan was to seek approval without a specific date for now and to return to this provision near the end of the project. The Revisor of Statutes, Ms. Mallory Waller, noted that insofar as Subsections A and B referred to "enactment date," this language should be replaced with "the effective date of this Act." The Co-Reporter accepted this as a friendly amendment, also agreeing to table discussion of Subsection C and to revisit this provision at a later time. A vote was then taken on the motion to adopt Subsections A and B as amended and to recommit Subsection C, and the motion passed with no objection. Section 3(A) and (B) as adopted by the Council read as follows:

§3. When Chapter applies

A. This Chapter governs an agreement to arbitrate made on or after ~~[enactment date]~~ the effective date of this Act.

B. This Chapter governs an agreement to arbitrate made before ~~[enactment date]~~ the effective date of this Act if all the parties to the agreement or to the arbitration proceeding so agree in a record.

* * *

Mr. DiLeo then agreed to resume his presentation in the morning, and the Friday session of the October 2022 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

October 15, 2022

Saturday, October 15, 2022

Persons Present:

Babington, J. Bert
Baker, Pamela J.
Blunt, Shelton D.
Borel, Danielle L.
Breard, L. Kent
Crigler, John D.
David, Robert J., Jr.
DiLeo, Tony
Gregorie, Isaac M. "Mack"
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Heinen, Lauren C.
Holdridge, Guy
Knighten, Arlene D.
Kunkel, Nick
Miller, Gregory A.
Norman, Rick J.
Philips, Harry "Skip", Jr.
Price, Donald W.
Ramsey, Regina
Riviere, Christopher H.
Tucker, Zelda W.
Waller, Mallory C.
Weems, Charles S., III

President Thomas M. Hayes, III called the Saturday session of the October Council meeting to order at 9:00 a.m. on Saturday, October 15, 2022 at the Louisiana Supreme Court in New Orleans. The President then called on Mr. Anthony M. Di Leo, Co-Reporter of the Alternative Dispute Resolution Committee, to continue his presentation of materials.

Alternative Dispute Resolution Committee

Mr. DiLeo began by reminding the Council of its discussions regarding uniformity and, after acknowledging the value thereof, he noted that the Committee's general philosophy dictated that it would deviate from uniform language where it felt improvements could be made. In support, he emphasized that the nature of the subject matter – bearing on the most difficult questions that arose in the arbitration context, a highly volatile and heavily litigated arena at present – dictated that precision in drafting and accuracy in application were paramount concerns. Mr. DiLeo further opined that the federal backdrop of the FAA provided little help in this regard, reminding the Council that it was generally a bare-bones body of law, largely jurisdictional in nature. He counted these all as points underscoring the importance of crafting the most precise statute possible.

Moving next to the materials, the Co-Reporter began by clearing up some perceived confusion from the Friday session. Pointing to Section 3 of the draft, he explained the specific thrust of each Subsection – Subsection A setting out the Act's effective date and mandating the Act's applicability to all arbitration agreements entered into on or after that date; Subsection B allowing for the Act's applicability to prior arbitration agreements upon agreement of the parties; and Subsection C providing a subsequent date after which the Act would govern *all* arbitration agreements, even if entered into prior to the effective date – and noted that the RUAA's suggested "delayed date" was two years after the effective date. Nevertheless, he acknowledged that the Council had voted to wait on approval of Subsection C for the time being. Mr. Dileo also instructed the Council that he would be skipping over Section 4 regarding the Act's non-waivable provisions, reasoning that it would be meaningless for the Council to adopt a provision governing which rules could and could not be contractually modified or waived without first considering those rules themselves – and predicting that review of all such rules could itself take an entire session.

The Co-Reporter then proceeded to Section 5 of the Committee's draft. The staff attorney, Mr. Nick Kunkel, pointed out that this Section contained a number of instances of the verb "must" and noted that, although not indicated in the coding, all such instances both here and in subsequent sections would be replaced with "shall" to comport with Louisiana drafting convention. Mr. DiLeo then turned to the substance of Section 5, stating that the only change to the RUAA proposed by the Committee was the insertion of proper terminology regarding Louisiana procedure. A motion was made and seconded for the adoption of Section 5, at which time a Council member reasoned that if Subsection A was to provide for summary proceedings, then Subsection B should be revised accordingly. The member noted that the Code of Civil Procedure made specific provision for service in summary proceedings and thus proposed the deletion of the language "for the service of a summons in a civil action" in Subsection B. Mr. Kunkel asked whether the Council member wished to replace this language with a cross-reference to the pertinent Code of Civil Procedure article, and the member answered in the negative. Another Council member suggested the possible addition of language referencing the Code of Civil Procedure generally, reasoning that "in the manner provided by law" could be read to reference federal law. Acknowledging this point, a third Council member contended that this actually weighed in favor of maintaining the unamended language, as it provided more specifically than "the manner provided by law" and thus would preclude the inadvertent incorporation of provisions not intended to apply here. A member acknowledged the general principle underlying this theory as correct – the language initially proposed to be deleted narrowed the body of law from which the appropriate procedure could be sourced and was thus important – but noted that "the manner provided by law for the service of summons in a civil action" was different than that for summary proceedings, as the former required the citation. Mr. Kunkel proposed using the language "in the manner provided by law for summary proceedings." The Council generally felt that this proposal was premature, with one member urging that first a determination needed to be made as to whether the provision was intended to "pick up" service under federal law.

Continuing this discussion, one Council member asked whether Section 5 generally included the right to bring suit in federal court. After Mr. DiLeo answered in the affirmative, the member wondered how then to address the fact that the draft provided for summary proceedings, a procedure specific to Louisiana. Mr. DiLeo clarified that the present provision would only apply to a Louisiana state court proceeding, as the FAA would govern the present issue in federal court. In light of this clarification, a Council member proposed returning to the language "in the manner provided by law for summary proceedings." Some members voiced support for this language; others maintained uncertainty as to its merit. A Council member again questioned how reference to Louisiana summary proceedings would be treated in federal court, further querying whether it was clear that the present provision would only be applicable in state courts. Without a definitive answer, another member suggested returning to the initial proposal to simply delete the language at issue. He reasoned that this rendered the provision as broad as possible and thus sidestepped the questions currently troubling the Council. After further discussion, the Council eventually concluded that the best alternative was the proposed language "the manner provided by law for summary proceedings." Mr. DiLeo accepted this as a friendly amendment, expressing agreement that it was an improvement upon the prior language. Another suggestion was made that "notice of an initial motion" should be replaced with "the initial motion" to reflect the fact that the object of the service was the motion rather than the notice. A Council member reasoned that the overall process for service might include more than mere service of the motion and thus proposed replacing "notice of an initial motion . . . shall be served" with "service of the initial motion . . . shall be made." The Council expressed support for these suggestions, and the Co-Reporter accepted them as friendly amendments. A vote was then taken on the motion to adopt Section 5 as amended, and the motion passed with no objection. The adopted proposal read as follows:

§5. Application for judicial relief

A. Except as otherwise provided in Section 28, an application for judicial relief under this Chapter ~~must~~ shall be made by motion to the court and heard in the manner provided by law ~~or rule of court for making~~

~~and hearing [motions]~~ for summary proceedings.

B. Unless a civil action involving the agreement to arbitrate is pending, ~~notice of an~~ service of the initial motion to the court under this Chapter ~~must~~ shall be ~~served~~ made in the manner provided by law for summary proceedings ~~the service of a summons in a civil action~~. Otherwise, notice of the motion ~~must~~ shall be given in the manner provided by law or rule of court for serving motions in pending cases.

Next, Mr. DiLeo moved to Section 6 concerning the validity of arbitration agreements. Regarding Subsection A, he noted that "record" was a defined term and that this Section accordingly precluded the validity of an oral agreement to arbitrate; he added, however, that there was authority suggesting that an agreement to arbitrate could be amended orally and pointed out that amendments were quite common. The Co-Reporter further commented that the text of Subsection A reproduced the language of the FAA on the same topic. He then emphasized Subsections B and C as highly important for their recognition of separability doctrine, the judicial treatment of an arbitration clause as separable from the contract in which it was embedded. Mr. DiLeo clarified that under separability doctrine, questions as to the validity of the arbitration clause were treated by courts as separate and distinct from questions as to the validity of the contract in which the clause was embedded. In other words, an arbitration clause could be enforced without regard for whether the underlying contract was enforceable. The Co-Reporter explained that this was important because it meant that challenges to the underlying contract, for example for fraud or duress, were properly decided in arbitration. He added that although questions of this sort were subject to arbitration, Subsection B provided that questions as to the validity or scope of the arbitration clause – that is, questions of arbitrability – were to be answered by courts. Mr. DiLeo then highlighted the prefatory clause of Subsection B, noting that this language clarified that Subsection B was subject to contractual modification and that parties could delegate questions of arbitrability to an arbitrator. He explained that this language, while non-uniform, did not represent a substantive change to the RUAA but rather a clarificatory signpost that the provision was indeed waivable under Section 4. He emphasized Subsection B and the prefatory language as highly important, noting that arbitrability was perhaps the single most litigated issue related to arbitration. Finally, the Co-Reporter noted that Subsection D simply provided a procedural rule regarding the sequencing of parallel arbitration and litigation. A motion was made and seconded to adopt Section 6.

At this time, one Council member commented that the language "or in equity" in Subsection A was not typically used in Louisiana and should thus be deleted. Similarly, another member pointed to the term "revocation" and suggested that it be replaced with "rescission." On the former issue, Mr. DiLeo noted that the "at law or in equity" language was actually sourced directly and intentionally from the FAA and even existed already in Louisiana's current Binding Arbitration Law. He voiced uncertainty as to whether there was any real justification for its removal, and the Council member who had initially proposed deletion of this language acknowledged that circumstances could arise in which Louisiana's arbitration act was applicable alongside another state's substantive law; given that such other body of substantive law could potentially set out "a ground ... in equity", the Council member withdrew his suggestion. Another member then pointed to the opening phrase of Subsection A, expressing distaste for its awkward formulation and suggesting instead use of the phrase "A written agreement to submit to arbitration." Mr. DiLeo pointed out that "record" was a defined term and was actually slightly broader than writing; thus, a "written agreement" was a smaller subset of "record." The Council member then withdrew the proposal.

On this same topic, another Council member noted that Civil Code Article 3100 set out that a "submission" must be in writing, a principle inconsistent with the aforementioned language referencing a "record." The Co-Reporter noted that the Committee would be repealing the present provisions dealing with arbitration. The Council member explained his intent to highlight the fact that the Committee's proposal would be slightly expanding the manner in which an arbitration agreement could be made in order to ensure that this change was not unintentional or problematic. Mr. DiLeo stated that he was aware of the slight expansion and emphasized the incredibly minor difference between the two

concepts. He added that he had not seen a single dispute related to the gap in these terms. Another instance of non-Louisiana terminology was noted – this time, "condition precedent" in Subsection C. A Council member proposed replacing this with "suspensive condition," and the staff attorney noted that he had conducted a quick search and determined that "condition precedent" was actually used several dozen times throughout the Revised Statutes, nevertheless acknowledging that this was not proper terminology. Ultimately, the Council decided to simply delete the word "precedent," and the Co-Reporter accepted this as a friendly amendment.

A Council member then asked to return briefly to the use of the term "revocation" in Subsection A. He noted that "rescission" was the proper Louisiana terminology but voiced uncertainty as to whether the replacement of "revocation" with "rescission" was appropriate in light of the fact that the Council had decided to retain the language "in equity." Another Council member proposed that the issue could be avoided by simply using the phrase "rescission or revocation". The Council generally expressed assent to this proposal, but the staff attorney questioned whether this would necessitate similar action with respect to each instance of common law terminology throughout the entire draft, which might prove to be a significant undertaking and create a negative implication of intent to exclude a particular body of law if one or more instances of such terminology were inadvertently left unmodified. Several Council members expressed agreement with this counterargument, advocating in favor of using one term or the other. After a brief debate, it was ultimately determined that the Council was sufficiently divided on the issue that it would be inappropriate for Mr. DiLeo to adopt the suggestion as a friendly amendment. Accordingly, a motion was made and seconded to adopt the addition of the language "rescission or" immediately preceding "revocation." The motion passed over several votes in opposition, and a motion was then made and seconded to adopt Section 6 as amended. This motion passed with no objection, and the adopted proposal read as follows:

§6. Validity of agreement to arbitrate

A. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the rescission or revocation of a contract.

B. ~~The~~ Except as otherwise agreed by the parties or provided in the arbitration rules selected by the parties, the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

C. An arbitrator shall decide whether a condition ~~precedent~~ to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

D. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

The Co-Reporter then asked the Council to turn its attention to Section 7 of the draft. He noted at the outset that the language "to arbitrate" should be inserted immediately after "agreement" in Subsection C. Mr. Kunkel additionally noted that the inadvertent use of "proceedings" on line 15 would be replaced with "proceeding." Returning to the substance of the provision, Mr. DiLeo stated that Section 7 dictated the protocol for determining whether there would be arbitration, including the proper party to make such determination. After reading through the text of the statute, the Co-Reporter highlighted Subsection D as particularly important, explaining that it prevented courts from usurping arbitral jurisdiction by refusing to order arbitration on the ground that the underlying claim lacked merit. In response to a question from the Council, Mr. DiLeo noted that Subsection E simply instructed the parties to already-pending litigation to make a motion for arbitration in the pending action rather than doing so separately. A motion was

made and seconded to adopt Section 7, at which time one Council member expressed distaste for the language "showing" on line 10, characterizing it as vague and without understood meaning and suggesting the use of "alleging" in its place. The Co-Reporter agreed with this assessment and accepted the revision as a friendly amendment. Another Council member pointed to the language "on just terms" appearing on lines 6 and 9 of page 5, in Subsections F and G, questioning whether this phrase had any meaning and proposing its deletion. This was also accepted as a friendly amendment.

Moving to a more substantive issue, one Council member sought clarification as to how Section 7 was intended to operate, posing the following hypothetical and related questions: Party A files a motion in Union Parish (the Council member opined, here, that the venue provision was fairly broad) to compel arbitration with Party B; in response, Party B goes to Orleans Parish and files a lawsuit against Party A with respect to the same substantive dispute forming the basis for the requested arbitration; as a result, there is a claim currently pending in Orleans Parish that one party alleges should be referred to arbitration. (1) Which judge should be the one to decide whether the matter should be subject to arbitration? (2) Can that judge somehow stay the litigation pending in the other parish? Mr. DiLeo answered that the present construction of Section 7 dictated that the Union Parish judge would make the determination, as that was the first filing that occurred in the hypothetical. The Council member asked a follow-up question of whether the party who filed suit in Orleans Parish would have the ability to have the overall matter moved to Orleans by virtue of his pending action. The Co-Reporter clarified that just the opposite was true, for the same reason as just stated. The Council member wondered whether it was practical to expect that timing would not prove problematic in this context, suggesting that the potential for parallel tracks in geographically distant venues presaged confusion. Another Council member disagreed with this notion, pointing out that background law from the Code of Civil Procedure already addressed and prevented the types of problems envisioned; such parties could make use of lis pendens provisions and file exceptions. Mr. DiLeo agreed, further noting that the venue provision, which had not yet been approved, actually provided relative to arbitration rather than litigation.

Next, a Council member proposed the general restructuring of Subsection C for stylistic purposes, suggesting that "pursuant to Subsection A or B of this Section" fit more cleanly at the end of the sentence than in the middle. This proposal received unanimous support and was accepted as a friendly amendment. Another member queried whether a court could make a determination as to whether there was an enforceable agreement merely on the pleadings. Mr. DiLeo answered in the affirmative. A member then asked, in relation to the opening clause of Subsection C, whether there was any possible way that the court could order arbitration if it were to find no enforceable agreement. When Mr. DiLeo answered in the negative, the member followed up by inquiring why, then, Subsection C specified the court was barred from ordering arbitration "*pursuant to Subsections A or B*" in such case. He reasoned that the language could simply be deleted with no effect on the substance of the provision, opining that such deletion would help eliminate ambiguity. A Council member who also served as a member of the Committee posited that perhaps the intent behind this phrase was to ensure adherence to the procedure set out in Subsections A and B. Another Council member suggested that the inclusion of this specifying language might owe to the fact that Subsections A and B were applicable to specific contexts, for example the Paragraph (A)(1) scenario where one party had shown an agreement to arbitrate and the other party did not oppose the motion to compel arbitration. He reasoned that perhaps the language at issue in Subsection C was intended to clarify that the fact that the motion to compel arbitration was uncontested, for example, did not relieve the court of its duty to determine whether there was an enforceable arbitration agreement. Another member disagreed, noting that Subsections A and B both required the court to rule on the motion in any event. He reasoned that such ruling would in all cases require a determination as to the enforceability of the arbitration agreement, concluding that this rendered the language at issue superfluous insofar as it was intended to ensure that the court did not neglect to make such a determination.

The Council did not find any of the proffered explanations for the inclusion of the language "pursuant to Subsection A or B" persuasive. The staff attorney highlighted the fact that Subsection C – prior to the Co-Reporter's insertion of the phrase "to arbitrate" on line 21 – was the only place in both Section 7 and the draft as a whole where reference was made simply to an "agreement" rather than an "agreement to arbitrate." Mr. Kunkel suggested that perhaps this discrepancy should be viewed as deliberate and posited that Subsection C might be referencing the contract in which the arbitration agreement was embedded rather than the arbitration agreement itself. Acknowledging his own uncertainty as to this explanation, he hypothesized that Subsection C could be intended to provide that a finding that the underlying contract was unenforceable prevented the court from ordering arbitration, even where there was an agreement to arbitrate. A Council member contended that such reading made no sense, as the unenforceability of the underlying contract would necessarily imply the unenforceability of the embedded arbitration clause. Mr. Kunkel maintained that this was not the case, as separability doctrine explicitly allowed for the enforceability of an arbitration clause without regard to the validity of the underlying contract. He acknowledged, however, that the effect of his hypothesized reading seemed to run contrary to the other provisions of Section 6 even if the necessary precepts were consistent with separability doctrine. The staff attorney nevertheless urged the Council not to take for granted the notion that the omission of "to arbitrate" at Subsection C was a mere drafting error. The Council largely disagreed with the staff attorney on these points, generally holding that the lack of an enforceable contract unequivocally precluded the existence of a valid agreement to arbitrate.

Although these discussions did not present an answer as to why the language "pursuant to Subsection A or B" had been included at Subsection C, they did, however, reveal another issue: If the Council was correct in its assumption that the court was required to make a determination as to the enforceability of the arbitration agreement in all cases, then this meant that Paragraph (A)(1) conflicted directly with Subsection C. One Council member stated that his understanding was that Section 7 dictated that if Paragraph (A)(1) was applicable, analysis never actually reached Subsection C. After further consideration, another Council member suggested that the Council had actually created the conflict itself when it had replaced "showing" with "alleging." In particular, he posited that Subsection A's reference to "showing" might have been intended to impose some evidentiary burden on the movant at the outset, reasoning that Paragraph (A)(1) did not conflict with Subsection C if its applicability presupposed a finding that there was in fact an agreement to arbitrate. This prompted consideration as to whether "showing" should be reinserted, with some members opining that it should and others arguing that "showing" was a term without any designated meaning. One Council member proposed requiring a prima facie case, but the Council ultimately found this to be too low a bar. Another member disputed that this revision was the source of the conflict between Paragraph (A)(1) and Subsection C and opined that "showing" was not in fact intended to impose an evidentiary requirement. In support of this argument, he noted that Paragraph (A)(2) included language directing the court's actions in such case as "it finds that there is no enforceable agreement to arbitrate." He reasoned that it made no sense for Paragraph (A)(2) to address a scenario where the court found no agreement to arbitrate if the introductory paragraph was intended to limit the applicability of the Subsection to scenarios in which the movant had already established the existence of such agreement. Other Council members acknowledged this as a salient point, and the staff attorney then noted another discrepancy in the language used in Section 7 – namely, that Subsection A referenced "an agreement to arbitrate" whereas Subsection C included the modifier "enforceable" prior to "agreement." He expressed doubt that this revealed any key information relative to the overarching issues being discussed but nevertheless highlighted it as another in a growing list of uncertainties. The staff attorney suggested that it might make more sense for the Council to recommit the provision to allow the Committee to provide satisfactory explanations with respect to these issues. The Council voiced support for this course of action, and a motion to recommit Section 7 passed with no objection.

Mr. DiLeo then took up one final section of the draft – Section 8, regarding provisional remedies – opining that the substance of the section was fairly straightforward, setting out generally that courts could order provisional remedies while the parties were still seeking to appoint an arbitrator. He noted that the Committee had made one change to the uniform language, adding a provision allowing for the dissolution, supplementation, or modification of those provisional remedies by the arbitrator. A motion was then made and seconded for the adoption of Section 8.

A Council member asked why the Committee had decided to use the term "application" in lieu of the uniform "motion" and why it had later reverted to "motion" in the latter portions of the Section. Another Council member clarified that "application" was often appropriate in this context, to which Mr. DiLeo added that a request for a temporary restraining order under federal law, for example, was styled an "application." A Council member suggested that perhaps the language "upon ex parte motion" could be substituted into the draft here. Another member dissented, noting that such motion would not necessarily be ex parte in this context. The Council member who had made the suggestion proposed, then, that this should be expanded upon in Subsection A, as he was unsure under the current language of the provision whether the grant of such remedies would require a hearing or notice to other parties. On this point, it was noted that Subsection A's use of the phrase "to the same extent and under the same conditions as . . . a civil action" would presumably "plug into" the Code of Civil Procedure; thus, the proposed addition was likely not necessary. The member who made the proposal acknowledged this as a strong point, adding that his preference would likely be for the present rules to mirror those for injunctions. To this, another Council member replied that a party seeking an injunction was called an applicant.

Digging further into this issue, a Council member expressed that she would not even know what an application was if someone made such a filing in her courtroom. Another member reminded her that the present rule would plug into the Code of Civil Procedure, so there would be no reason for her to expect filings of a different nature than was typical. This in turn prompted a suggestion that perhaps this provision should contain a more specific cross-reference so as to clarify exactly which rules and procedures would be applicable here. Other members voiced support for such a course of action. Ultimately, it was suggested that Section 8 be recommitted so that the Committee could investigate further into the use of the term "application" and the specific procedures that might be applicable in this context. The Co-Reporter agreed with this course of action, and the motion to recommit Section 8 passed with no objection.

At this time, Mr. Di Leo concluded his presentation, and the October 2022 Council meeting was adjourned.

Nick Kunkel

Mallory C. Waller