



LOUISIANA STATE LAW INSTITUTE

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February 19, 2013

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: SR NO. 157 of 2012

Dear Mr. President:

The Louisiana State Law Institute respectfully submits herewith its interim report to the legislature in response to 2012 Senate Resolution No. 157, relative to the Louisiana Binding Arbitration Act.

Sincerely,

A handwritten signature in black ink, appearing to read "William E. Crawford".

William E. Crawford
Director

WEC/puc

cc: Senator Conrad Appel

e-mail cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us

LOUISIANA STATE LAW INSTITUTE

INTERIM REPORT TO THE LOUISIANA LEGISLATURE:

Study of the Louisiana Binding Arbitration Act

RESPONSE TO SENATE RESOLUTION NO. 157 OF 2012

February 19, 2013

LOUISIANA STATE LAW INSTITUTE
ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

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SENATE RESOLUTION NO. 157

BY SENATOR APPEL

A RESOLUTION

To urge and request the Louisiana State Law Institute to study the Louisiana Binding Arbitration Act.

WHEREAS, arbitration is a process by which parties to a dispute may submit their differences to the judgment of an impartial person or persons appointed by mutual consent or statutory provision; and

WHEREAS, arbitration has been increasingly favored by both Louisiana and federal courts as an efficient manner in which to resolve legal disputes; and

WHEREAS, legal disputes should be resolved in a just, speedy and economically efficient manner; and

WHEREAS, the arbitration process has become increasingly time-consuming and in some cases prohibitively expensive for both individuals and businesses in the state of Louisiana; and

WHEREAS, the Louisiana Binding Arbitration Act is found in R.S. 9:4201 *et seq.*; and

WHEREAS, the Louisiana Binding Arbitration Act should provide for an arbitration process that is efficient, economical and just in its outcome.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study the Louisiana Binding Arbitration Act to determine what recommendations may improve arbitration contracts in Louisiana so that arbitration proceedings take less time and are not prohibitively expensive, including whether "loser-pay" provisions may assist in decreasing time and expense of the arbitration process, whether reasonable limits may be imposed on what constitutes "pertinent evidence" under R.S. 9:4210 for an arbitrator to consider, and whether other recommended changes to Louisiana's arbitration laws may help to make arbitration a more efficient and cost-effective process for participants in Louisiana.

SR NO. 157

ENROLLED

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall report its findings and recommendations to the Louisiana Legislature on or before February 1, 2013.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

InterIm Report: SR 157 of 2012
Binding Arbitration Study

Louisiana Senate Resolution No. 157 (Regular Session 2012) by Senator Appel, provided that the Legislature “does hereby urge and request the Louisiana State Law Institute to study the Louisiana Binding Arbitration Act to determine what recommendations may improve arbitration contracts in Louisiana so that arbitration proceedings take less time and are not prohibitively expensive including whether ‘loser-pay’ provisions may assist in decreasing time and expense of the arbitration process, whether reasonable limits may be imposed on what constitutes ‘pertinent evidence’ under R.S. 9:4210 for an arbitrator to consider, and whether other recommended changes to Louisiana’s arbitration laws may help to make arbitration a more efficient and cost-effective process of participants in Louisiana.”

The study was assigned to the Alternative Dispute Resolution Committee of the Law Institute, under the guidance of the newly appointed Reporter, Professor Edward Sherman, former Dean, Tulane Law School, with Emmett C. Sole as Chair. The committee, at its next meeting on March 22, 2013, will consider whether provisions for greater efficiency and fairness might be made in the Louisiana Arbitration Act. The Senate Resolution focuses on arbitration, but many of the developments in recent years concerning attorney fee shifting/sanctions to encourage reasonable offers and settlement (including offers of judgment and loser-pay proposals) are not strictly applicable to arbitration. In fact, these mechanisms operate in the general litigation context rather than arbitration and are in some cases applicable more to mediation than arbitration.

The Reporter has proposed the following roadmap for future deliberations on ADR, with consideration of the specific issues of SR 157 in conjunction with a continuation of its review of the Model Act, Civil Code, and jurisprudence:

The committee will continue its review of the 2000 Revised Model Arbitration Act. It left off after Section 10 and will now complete its recommendations from Section 10 to the end. A review of the minutes of the last meetings indicates that the first ten sections of the model act were approved as written or with only slight stylistic changes. The only exception was that Section 5 was recommitted: "the staff was instructed to determine whether this Section prevented a party from obtaining a TRO. The committee did agree to return Paragraph B to uniform language so that lines 8-9 on page 14 would delete the reference to the Code of Civil Procedure as follows: ... manner provided by law [Take out: for the service of a summons in a civil action]." The committee was asked to review the Act before the March 22 meeting as to what issues arise in Section 10 to the end.

The committee minutes also indicated that certain issues were raised that do not seem to have been resolved: “The committee also discussed whether to maintain or repeal the existing Civil Code Articles on arbitration. Other issues discussed included, the role of courts in the arbitration process, including review of the right to arbitrate and the arbitration award. The committee also considered the issues of waiver of arbitration, non-custodial parent-signatory parties, impartiality of the arbitrator, how to streamline the process, rules of evidence and discovery, relating to federal law, and grounds for appeal. Each of these issues will be further discussed in the context of the Uniform Act.”

An earlier memorandum from John McCollam stated: “A relatively important question or issue is whether or not a party who has not signed the agreement providing for arbitration can join in or be compelled to arbitrate. For some time, the Federal Fifth Circuit has answered that question in the affirmative. See *Sherer v. Green Tree Servicing, L.L.C.* 548 F.3d 379 (5th Cir. 2008). But the recent U.S. Supreme Court case of *Arthur Anderson v. Carlisle*, No. 08-146 (U.S. May 4, 2009), apparently applied state law as opposed to federal law (an issue), finding that non-signing parties could be bound by an arbitration provision.”

Pursuant to SR 157, extensive research has been undertaken, and several articles have been posted on the LSLI dropbox [www.lsl.org/adr] concerning possible mechanisms for fee-shifting and encouragement of settlement:

*An ABA Task Force in 1996 proposed a modified offer of judgment rule with sanctions for failure to do substantially better than a previous offer of judgment. (See Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice," 76 Texas L. Rev.1863 (1998)).

*Texas has now adopted a modified and limited “loser pay rule.” (See “Closing the Lottery: Texas Loser Pays Rule,” The Economist, Dec. 10, 2011) Various other modifications of a loser pays rule have been proposed or passed in other states (e.g., Alaska and Florida). Manhattan Institute for Policy Research, "Greater Justice, Lower Cost: Loser Pays Rule," No. 11, Dec. 2008); Eisenberg, Fisher, & Rosen-Zvi, When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants.”

*Two states, Michigan and Minnesota have passed statutes that incorporate offer of judgment into mediation. (See Sherman & Fairman, Interplay Between Mediation and Offer of Judgment Rule Sanctions, 26 Ohio State J. on Dis. Resol. 327 (2011)).

*A June 23, 2009 Memorandum from John McCollam to the committee stated: House Bill No. 1350 (Rep. McMains) - Drafted by the ADR Committee of the New Orleans Bar Association, endorsed by the ADR Section of the Louisiana State Bar Association, and concurred in by Rep. Riddle as taking the place of his earlier-introduced bill (House Bill 660). This bill, like the original Riddle bill, is based on the Texas ADR statute, but contains a number of changes including provisions to reduce the coercive effect of authorizing courts to refer cases to arbitration (e.g., sec. 4102 requires a party moving for ADR to consult with opposing counsel and attach a statement as to whether opposing counsel agrees or opposes such referral; in

determining whether to refer a case to ADR a judge “shall give due weight to the opinion of any party who is opposed”; within 10 days after an order of referral, any party may file a written objection and the court “shall grant a hearing” on the objection; and the court “shall rescind its order of referral” if there is a reasonable basis for the objection).

Respectfully Submitted,

William E. Crawford, Director
Louisiana State Law Institute