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# PROPERTY TRANSACTIONS THAT MAY JEOPARDIZE THE PATRIMONIAL CONDITION OF PUBLIC JURIDIC PERSONS IN THE CHURCH

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It has long been ecclesiastical law that certain public entities within the Catholic Church have had to procure hierarchical permission before they could transfer their ownership of, or, "alienate," property of substantial value to other parties. This was reflected, for example, in Canons 1530 through 1533 of the 1917 Code of Canon Law. This continues to be so under the current system of Canon law applicable to the Latin Church contained in Book V of the 1983 Code of Canon Law.<sup>1</sup>

The ecclesiastical law has recently gained publicity in this country with St. Louis University's sale of its teaching hospital to Tenet Health-Care Corp. for three hundred million dollars.<sup>2</sup>

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<sup>1</sup> See CORPUS IURIS CANONICI-1983 CODE [hereinafter "CIC-1983"]. Pope John Paul II has also promulgated the 1990 Eastern Code of Canon Law, applicable to the Eastern Churches. The 1990 Eastern code tracks the 1983 Code of Canon Law (CIC-1983) closely in its treatment of temporal goods. Accordingly, this paper will confine its references to the 1983 code.

<sup>2</sup> See Patricia Rice, *Tenet Seals SLU Hospital Deal; Vatican Blessed Sale of*

Archbishop Justin Rigali of St. Louis had publicly objected to the sale of the hospital to a for-profit health chain because, among other reasons, hierarchical approval had not been sought.<sup>3</sup> The matter was indeed called to the attention of Rome, and the Vatican approved the sale under certain conditions, emphasizing that the properties of the university were “ecclesiastical goods” subject to the provisions of Canon law.<sup>4</sup> In other words, St. Louis University was not to disregard the alienation requirements of Canon law in this or other major property transactions.

While the alienation Canons of the 1983 code contain a number of provisions pertaining to outright transfers of ownership,<sup>5</sup> the code contains an additional provision, Canon 1295, which states: “the requirements mentioned in [Canons] 1291—1294 [the code’s requirements applicable to alienations], with which the statutes of juridic persons are to be in conformity, must be observed not only in an alienation but also in any transaction through which the patrimonial condition of a juridic person can be worsened.”<sup>6</sup>

Canon 1295 makes the Canonical requirements for alienation applicable to transactions which, although not alienations, may nonetheless worsen the patrimonial condition of a public juridic person. The Canon is intentionally general and open-ended. It purports to cover a large class of transactions which are not alienations as such, but which can generate effects (sometimes inadvertently) similar to alienations, or which can otherwise expose a public juridic person to the risk of economic harm. The most obvious examples of such transactions include mortgaging or pledging property, granting easements, and corporate restructuring.

This paper focuses the scope of Canon 1295 and the types of transactions affected by it. Canonists and civil attorneys who counsel hierarchical authorities in property matters should have some understanding of the impact of Canon 1295. To gain a full appreciation of its breadth of application, however, it is necessary to grasp the interplay between Canon 1295 and American civil

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*Catholic Facility for \$300 Million; Jesuits Must Tighten Oversight of SLU*, ST. LOUIS POST-DISPATCH, Feb. 25, 1998, at A1.

<sup>3</sup> *See id.*

<sup>4</sup> CIC-1983 c.1257, § 1.

<sup>5</sup> *See id.* at cc.1291–1294.

<sup>6</sup> *Id.* at c.1295.

law, because one typically turns to civil law in order to enforce the terms of a commercial transaction beneficial or detrimental to the public juridic person which owns the property in question.

### I. CANON 1295 APPLIES TO “PUBLIC JURIDIC PERSONS”

Canon 113 of the 1983 code describes those entities within the Church which have legal personality in summary fashion: (i) the Catholic Church and Apostolic See as “moral persons by divine law itself”; (ii) physical persons (the faithful of the Church); and (iii) “juridic persons.” Canon 1295 makes explicit reference to “juridic persons” as the entities to which it applies.

A juridic person is an artificial person with rights and duties distinct from those of any individuals (or things) which may pertain to it, analogous to a corporation in common law. As with a corporation, a juridic person is generally perpetual.<sup>7</sup>

Juridic persons may be constituted by prescription of law or by special concession from the relevant ecclesiastical authority.<sup>8</sup> Examples of the former are dioceses, parishes, and religious orders; once they come into existence they always have juridic personality. As a general example of the latter, individuals within the Church may take the initiative of forming an association with pious or charitable motives and then seek recognition as a juridic person. Unless they gain such recognition, the association as such enjoys no rights and carries no responsibilities; however, the members in their individual capacities do. Indeed, the members may prefer not to seek juridic personality, in order to avoid subjecting the statutes of the association to any changes demanded by the relevant ecclesiastical authority, as well as to the oversight of such authority.

Further, juridic persons are also discussed, as in Canon 116, in terms of whether they are “public” or “private.” A public juridic person is said to act *in nomine Ecclesiae* (in the name of the Church) and is subject to relatively close supervision by the ecclesiastical authority responsible for its establishment.<sup>9</sup>

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<sup>7</sup> See *id.* at c.120, § 1; see also MODEL BUS. CORP. ACT § 3.02 (1999).

<sup>8</sup> CIC-1983 c.114, § 1.

<sup>9</sup> See THE CANON LAW SOCIETY OF AMERICA, NEW COMMENTARY ON THE CODE OF CANON LAW 161 (John P. Beal et al. eds., Paulist Press 2000) [hereinafter “CANON LAW SOCIETY”].

Although a private juridic person is subject to ecclesiastical oversight to a degree not found with respect to associations without juridic personality, private juridic persons have greater autonomy than public juridic persons. This is consistent with the right of the faithful to associate freely in the Church.<sup>10</sup> At the same time, private associations enjoy a measure of identification with the Catholic Church not present in associations without juridic personality.

Although Canon 1295 uses the term "juridic persons" without qualification, it is limited in scope to transactions involving public juridic persons. This follows from the fact that Book V of the 1983 code, pertaining to temporal goods, states in a preliminary Canon that the temporal goods of private juridic persons are to be governed by their own statutes "unless express provision is made to the contrary."<sup>11</sup> In addition, Canon 1295 incorporates by reference the requirements contained in Canons 1291 through 1294, which deal with alienations (direct transfers of ownership, as by sale or exchange), and Canon 1291 explicitly states that the alienation requirements apply only to public juridic persons.<sup>12</sup>

In light of this, one might envision instances where seeking status as a private juridic person would be preferable to that of a public juridic person, as in some cases of schools and hospitals established by the lay faithful.<sup>13</sup> The private juridic person is afforded greater latitude in financial and property management. At the same time, the civil documents that govern an organization, which is a private juridic person in the Canonical realm, may ensure that its teaching and practice conform to the Church's moral and dogmatic principles as taught by its Magisterium.

## II. CANON 1295 PERTAINS TO THE "STABLE PATRIMONY" OF PUBLIC JURIDIC PERSONS

Canon 1295 refers to transactions which may endanger the

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<sup>10</sup> See CIC-1983 cc.215-216.

<sup>11</sup> *Id.* at c.1257, § 2.

<sup>12</sup> See *id.* at c.1291.

<sup>13</sup> Of course, this is irrelevant to those entities which automatically have juridic personality from inception, such as parishes; they are necessarily public juridic persons.

*patrimonial* condition of a public juridic person. This is universally understood as restricting the Canon's applicability to transactions which may have an effect on "stable patrimony." However, "stable patrimony," is a term coined by Canonists which appears neither in the 1983 code nor the 1917 code.

Stable patrimony refers to durable real and personal property (in Canonical terms, immovable ecclesiastical property, and movable ecclesiastical property not consumed in its use) held by a church entity for an indefinite period.<sup>14</sup> It may also include intangible property such as investment securities. It may by exception encompass fungible property, particularly cash.

When property is acquired, it may presumptively be deemed as stable patrimony. The most obvious example is real estate. This presumption may be rebutted by showing that such property was acquired with a view toward imminent resale or other alienation. If it is not stable patrimony, neither Canon 1295 nor the Canons governing alienation apply.<sup>15</sup> On the other hand, cash is not generally considered as stable patrimony, because it is customarily held short-term as a medium of exchange used for acquiring goods and services of all types. If, however, it can be shown that the cash was dedicated to the acquisition of other property to be held in a stable manner, such as creating a fund in order to finance a purchase of land, the cash is stable patrimony which may not be diverted for other use. This constitutes an explicit designation of an ecclesiastical good (cash) to stable patrimony.

### III. CANONS 1291 THROUGH 1294

With respect to those transactions which fall within the ambit of Canon 1295, compliance with Canons 1291 through 1294 is required as if such transactions were alienations of property. Canon 1295 contains a clause to the effect that the statutes of the public juridic person are to conform to the content of Canons 1291 through 1294.<sup>16</sup> Canon 1291 enunciates the general requirement that a public juridic person must secure

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<sup>14</sup> See CANON LAW SOCIETY, *supra* note 9, at 1501-05 (discussing what is meant by "stable patrimony").

<sup>15</sup> See CIC-1983 cc.1291-1294.

<sup>16</sup> See *id.* at c.1295.

permission from the "competent authority"<sup>17</sup> in order to alienate stable patrimony with a value exceeding the sum determined by law.<sup>18</sup>

Canon 1292 begins by providing that special rules under Canon 638, section 3, apply to alienations of property held by religious institutes, although the alienation requirements of Canons 1291 to 1294 apply as well, to the extent that they are not preempted by Canon 638, section 3. Canon 1292 then stipulates the level of authority necessary for approving an alienation according to the value or type of property involved. Two threshold values are involved. If the value of a proposed alienation does not exceed a "minimum . . . amount" established by the relevant Episcopal conference, the alienation requirements do not apply.<sup>19</sup> Above that value, the administrator of a public juridic person which is not subject to the diocesan bishop must obtain permission from the authority which is determined in its own statutes. If the public juridic person is subject to the diocesan bishop (as in the case of a parish), the bishop is the competent authority with the consent of his finance council, his college of consulters (consisting of six to twelve priests selected by the bishop under Canon 502), and any other interested parties (such as those who donated the property to the juridic person to be used for specified purposes).<sup>20</sup> These individuals must be given economic information concerning the juridic person which will enable them to make informed decisions.<sup>21</sup> If the value of the property exceeds a specified higher value also established by the Episcopal conference, the so-called "maximum amount," permission from the Holy See (in particular, the Congregation of the Clergy) is required. In the United States, the minimum amount is now \$500,000 and the maximum is \$3,000,000.<sup>22</sup> If the property consists of goods donated through

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<sup>17</sup> See *id.* at c.1292.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at c.1292, § 1.

<sup>20</sup> If the bishop is himself administrator, he needs the consent of his finance council, the college of consulters, and any interested parties. See *id.*

<sup>21</sup> See *id.* at c.1292, § 4.

<sup>22</sup> An Episcopal conference does not have *carte blanche* in determining the minimum and maximum amounts; its determination must be recognized by the Congregation for the Clergy, and then the Episcopal conference must adopt the figures so recognized. The United States Conference of Bishops made a number of determinations which were rejected by the Congregation for the Clergy. The NCCB adopted the \$3,000,000 maximum amount but, in fact, has not issued a

a vow, or that are of special artistic or historical value, the permission of the Holy See is required irrespective of the monetary value.

Canon 1292 also foresees the tactic of dividing property and then alienating it piecemeal in order to fall below the minimum threshold value, and therefore avoid complying with the Canons on alienation. The Canon frustrates this plan by requiring that these alienations be aggregated.<sup>23</sup> All the requirements contained in Canon 1292 pertain to the validity of the alienation under Canon law.

In addition to these requirements for the validity of the transaction, Canon 1293 issues a number of requirements going to the liceity of an alienation:<sup>24</sup> there must be a just cause such as that of “urgent necessity, evident usefulness, piety, charity or some other serious pastoral reason[s],” written professional appraisals, and other safeguards by the competent authority to prevent harm to the Church. Finally, Canon 1294 states that an alienation should ordinarily be made for a price at least equal to the asset’s fair market value, and that the proceeds from the alienation should be invested carefully, or spent in accordance with the purposes of the alienation.<sup>25</sup>

#### IV. APPLICATION OF CANON 1295

##### *A. The Public Juridic Person as Debtor: Mortgages, Secured and Unsecured Loans*

###### 1. Mortgages

The classic and most obvious example of the application of Canon 1295, and that of its predecessor,<sup>26</sup> involves a public

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decree of promulgation for the \$500,000 minimum amount. The \$500,000 figure, then, is not official. See CANON LAW SOCIETY, *supra* note 9, at 1497–98.

<sup>23</sup> See CIC-1983 c.1292, §§ 3–4.

<sup>24</sup> The invalidity of a transaction opens up the possibility of reversing its apparent effect, at least if the recipient of the property is amenable to Canonical procedure or if means are available to do so under civil law. On the other hand, a transaction may be valid but illicit if the administrator fails to comply with Canon 1293. The administrator or other responsible party may be “punished with a just penalty” according to Canon 1377.

<sup>25</sup> See CIC-1983 c.1294.

<sup>26</sup> See CORPUS IURIS CANONICI-1917 CODE c.1533.



juridic person executing a mortgage in order to secure a loan. If the mortgage pertains to real estate with a fair market value in excess of one of the applicable thresholds, the loan and accompanying mortgage will have to be approved in accordance with the provisions of Canons 1291 through 1294 as if it were an alienation, in order for the transaction to be valid under Canon law. This applies as well, of course, to a deed of trust (wherein a third party receives the property as trustee or stakeholder pending the discharge of indebtedness by the debtor to the creditor).

The application of Canon 1295 to mortgages is subject to a common and important exception; namely, purchase money mortgages and installment sales contracts do not engage Canon 1295. In a purchase money mortgage, the mortgage is executed with respect to the land purchased. As such, it is substantially similar to an installment sales contract, in which the seller retains title until the purchase price is fully paid. Canon 1295 is inapplicable to these types of financial arrangements because the fair market value of the property acquired is presumably at least equal to the debt incurred (in fact, it should be greater because the purchaser typically makes some down payment for the acquisition), so that the net patrimonial condition of the public juridic person remains unchanged. If the juridic person subsequently defaults there may be a foreclosure, but without cutting into other assets of the juridic person.<sup>27</sup>

Even a purchase money mortgage or an installment purchase of property brings Canon 1295 into play if the down payment consists of money which is stable patrimony in an amount exceeding one of the thresholds under Canon 1292. This is because a default could force a foreclosure sale and a possible loss of the stable patrimony committed to the acquisition (*viz.*, the down payment) in order to satisfy the mortgagee's claim, unless the sale yielded a sum at least equal to the contract price of the original purchase by the juridic person.

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<sup>27</sup> The argument for excluding purchase money mortgages and installment sales from the ambit of Canon 1295 is even stronger if non-recourse debt is involved. With non-recourse debt, the seller or lender of funds used to purchase the asset may look only to the property acquired to satisfy outstanding indebtedness in case of default. If the property has depreciated in value below the outstanding indebtedness at the time of default, the creditor may not proceed against other assets of the debtor to recoup the shortfall.

## 2. Other Secured Indebtedness; Unsecured Debt

At other times, the public juridic person may incur indebtedness to secure a loan or to purchase personal property and place its existing assets constituting stable patrimony as collateral. The public juridic person may be called upon to grant a security interest in property to the seller or lender, and the latter will endeavor to obtain priority over other creditors of the public juridic person with respect to that property.<sup>28</sup> When a seller of property or a lender of proceeds contractually earmarked for the purchase of specific property takes a security interest in that same property and perfects it in a timely manner, it has a perfected “purchase money security interest,” which will take priority over all other creditors as far as that property is concerned.<sup>29</sup> The rationale for this priority is that the creditor (be it the seller or lender making the loan for a particular purchase) who enables the debtor to purchase specific property should be able to look to that same property to satisfy an unpaid debt before other creditors of the debtor have the opportunity to do so. The analysis is the same as that of mortgages. If the collateral consists of stable patrimony of a value exceeding one of the thresholds alluded to in Canon 1292 (which, it will be recalled, is \$500,000 and \$3,000,000 in the United States), prior approval from competent ecclesiastical authority will be required pursuant to Canon 1295. If the security interest is of the purchase money variety, however, or if the transaction is an installment purchase, there should be no application of Canon 1295, provided that the down payment made with money constituting stable capital does not exceed one of the thresholds.

One might take the position that where there is no security granted in specific assets of a public juridic person as debtor, there should be no application of Canon 1295. This is erroneous.

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<sup>28</sup> By way of general explanation, a creditor will attempt to gain prior rights over the property which serves as security by complying with Article Nine of the Uniform Commercial Code as it is enacted in the relevant State (with Article Eight being relevant as well when the collateral is investment securities), the provisions of which govern with respect to personal property (as opposed to real estate). Typically, this is done by taking control or physical possession of the property, as where investment securities are pledged, or by the timely filing of a financing statement with the State. This is referred to as “perfecting” the security interest. *See* U.C.C. § 9-301 (2002).

<sup>29</sup> *See generally* BARKLEY CLARK & BARBARA CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 1.02(3) (rev. ed. 2001).

If the public juridic person defaults on an unsecured loan, the general creditor will seek a personal judgment against juridic person and, upon obtaining it, will institute another action to levy against whatever assets are not subject to secured creditors. If the juridic person does indeed have assets available which constitute its stable patrimony, they may be seized. In effect, there is potential risk as soon as the debt is incurred, because the unsecured creditor may render itself as secured by obtaining a judicial lien on stable patrimony in the event of default.

### 3. Bonds

A nonprofit corporation erected under Canon law as a public juridic person and which qualifies as a 501(c)(3)<sup>30</sup> organization for federal income tax purposes may find the issuance of bonds as a particularly attractive way to raise capital. Sections 103 and 145 of the Internal Revenue Code provide that interest from so-called "qualified 501(c) bonds" is exempt from federal income tax.<sup>31</sup> This means that investors may be willing to purchase these bonds even though they may offer lower interest, because the after-tax yield is still competitive with the other investments that do not yield tax-exempt income. Under I.R.C. section 145, bonds with an aggregate face amount of up to \$150,000,000 can qualify (with no limit in the case of hospitals).<sup>32</sup> For qualified hospital bonds, at least 95% of the proceeds must be used for the hospital.<sup>33</sup> "Qualified 501(c) bonds" must be issued with the approval of the state or local municipality where the enterprise is to be located.

Whether they are secured or unsecured (debentures), and whether they enjoyed tax-favored status among the investors or not, bonds are conceptually no different than other forms of indebtedness with respect to Canon 1295. Only if the proceeds were earmarked for specific acquisitions (which themselves would constitute new stable patrimony) pursuant to the bond indenture could a substantial bond issue escape the net of Canon 1295.

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<sup>30</sup> I.R.C. § 501(c)(3) (1994) (referring to corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .").

<sup>31</sup> *Id.* at §§ 103(a), 145(a).

<sup>32</sup> *Id.* at § 145(b).

<sup>33</sup> *Id.* at § 145(b)(2).

*B. The Public Juridic Person as Creditor, Guarantor or Surety*

In a reversal of roles, when a public juridic person functions as creditor, it may also place its stable patrimony at risk in such a way as to necessitate compliance with the alienation provisions via Canon 1295. So far as Canon 1295 is concerned, such a loan usually involves money.<sup>34</sup> One must distinguish, however, between a loan of money and an investment of money in securities. An investment in securities is generally governed by Canon 1284, section 2, and is not subject to Canon 1295.<sup>35</sup>

The most important safeguard to be implemented in a cash loan is that of obtaining a purchase money mortgage or security interest in the property purchased by the debtor with the cash, to be recorded immediately with the relevant county or State office. If a juridic person does not take this measure, there is the danger that other creditors may have priority in the event of the debtor's insolvency. This is particularly important because federal bankruptcy law affords a trustee in bankruptcy special powers to void security interests and other liens of creditors, but the trustee's powers do not extend to voiding perfected purchase money mortgages and security interests.<sup>36</sup>

However, even with a purchase money mortgage or security interest duly recorded in a timely manner, the loan in an amount subject to the minimum threshold might come within the application of Canon 1295. This will be so when the value of the security is subject to fluctuations in value, and the risk increases in proportion to the term of the loan.

Rather than acting as a creditor by lending stable capital directly to another entity, a public juridic person may act as a guarantor or surety with respect to a loan made to that other entity by a third party, such as a bank. This may be more feasible for the juridic person than a direct loan, but it may still be subject to Canon 1295.

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<sup>34</sup> With regard to non-cash property, Canon 1295 may also be involved; but with respect to "leases" of real property, Canon 1297 governs rather than Canon 1295.

<sup>35</sup> If an administrator makes a substantial change to an investment portfolio, it may also require compliance with the alienation provisions (not c. 1295). See CIC-1983 c.1284; see also CANON LAW SOCIETY, *supra* note 9, at 1484-87.

<sup>36</sup> See CLARK, *supra* note 29, ¶ 6.02 (1)(a).

### *C. Transfers Between Separate Civil Entities That are Part of the Same Public Juridic Person*

A public juridic person may operate through more than one civil law corporation. Transfers of assets from one corporation to another should not trigger the application of the alienation provisions directly, or by way of Canon 1295, because they are both part of the same juridic person. The same conclusion applies to loans between civil corporations which are part of the same juridic person, because the application of Canon 1295 presupposes that, Canonically speaking, the debtor is distinct from the creditor.

In rare circumstances, however, a loan or transfer of property between two civil corporations that are part of the same public juridic person may bring Canon 1295 into play. Suppose, for example, that X Corporation transfers to Y Corporation title to substantial stable patrimony, without having received money or money's worth of equal value. Both are not-for-profit entities of the same public juridic person, but Y is indebted to third party creditors. Should Y default on its indebtedness to those creditors, they will look to the patrimony transferred by X to Y to discharge their claims. The moral is that, while transferring assets from a debt-free corporation to one that is undergoing financial difficulty may immediately improve the position of the latter, it also places the transferred assets in jeopardy, thereby requiring compliance with Canon 1295. This is more likely to occur in outright transfers of property than in loans, because with a loan the lending corporation can perfect a purchase money security interest in the property and so maintain priority over other creditors, in the event that the transferee corporation defaults.

### *D. Easements*

While there are a number of ways in which easements may be classified in common law countries,<sup>37</sup> for purposes of this

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<sup>37</sup> Easements may be classified in several ways: (i) as active or passive; (ii) as appurtenant or in gross; and, (iii) according to the manner in which they are created, as express, implied (including by necessity) or by prescription. An active easement entitles the easement holder to perform acts which, were it not for the easement, would make him a trespasser; a passive easement gives the easement holder the right to prevent the owner of the land from doing certain acts he would be otherwise entitled to do. In an easement appurtenant, two

discussion, an easement is basically a non-possessory interest that one party has in land belonging to, or in the possession of another party, which entitles the owner of the easement to limited use of the land.<sup>38</sup> It should be clear that when a public juridic person grants an easement in real estate which is part of its stable patrimony, the real estate may suffer a loss in value because the public juridic person loses exclusive dominion and enjoyment of the property. The patrimonial condition may therefore be worsened, which makes Canon 1295 relevant.

Canon 1295 applies only if the patrimonial condition may be adversely affected beyond certain threshold values. Where an easement right is transferred, how should this adverse effect be measured? One might look to the compensation received in exchange for the transfer of the right as a starting point, but, ultimately, the proper measure is the diminution in value of the underlying property retained by the juridic person and to which the easement attaches. Inasmuch as Canon 1293, section 1, paragraph 2, calls for appraisals before stable patrimony of substantial value is alienated, the administrator should take appraisals of the property with and without the prospective burden of the easement. At least two sets of appraisals should be taken,<sup>39</sup> and, as a minimum, the smaller or smallest difference between the appraised values with and without the easement should logically measure the adverse effect on the patrimonial

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parcels of land are affected, with the one tract over which the easement runs negatively affected and the other tract benefiting from the easement; an easement in gross refers only to the property adversely affected by the easement right, as where a tract of land is subject to a utility company's right of access for lines and poles. An easement may also be by express grant or reservation; implied or by necessity if, in the event of litigation, a court determined that the parties to a transaction intended to create such right or would have had the matter been addressed, even though there may be no written instrument evidencing the same (e.g., dividing a tract of land and selling the section thereof which has no access to a public road except through the other section retained by the seller); or by prescription, and here Canons 1290, 197 and 1268 of the 1983 code defer to the civil law of adverse use where the property is located. See BLACK'S LAW DICTIONARY 509-10 (6th ed. 1990).

<sup>38</sup> See *id.*

<sup>39</sup> CIC-1983 c.1293, §1, ¶ 2, speaks of evaluation by "by experts" (*a peritis*). The language is similar to the antecedent provision of the 1917 Code of Canon Law, c.1530 §1, ¶ 1, which, as commentators on that code explained, meant at least two experts. See e.g., G. VROMANT, *DE BONIS ECCLESIAE TEMPORALIBUS* 252 n.298 (3d ed. rev., Brussels: L'Édition Universelle 1953). There is no reason to interpret the 1983 code differently.

condition.

*E. The Application of Canon 1295 to Patrimony Affected by a Transaction without Being an Object of the Transaction*

Canon 1295 is generally applied in the context of patrimony which is the immediate object of a prospective transaction, as in land owned by a public juridic person used to secure a loan. Sometimes, however, a transaction may have a collaterally negative impact on other patrimony. For example, a parish has two contiguous parcels of land, one of which has a church and a parking lot, and the other functions as a rarely utilized overflow parking lot. The parcel is in a residential area without significant zoning restrictions. With no foreseeable need for the overflow parking lot, the juridic person sells it to a commercial enterprise which will operate a nightclub on the land, thereby depressing the value of the land retained by the parish.

The proper procedure is to obtain appraisals of the real estate to be retained, both as to its current value and the projected value in the event that the other tract is alienated. If the sum of the value of the property to be alienated and any projected reduction in value, resulting from such alienation, of the remaining property exceeds the threshold established by the Episcopal conference, approval on the basis of both the alienation and the worsening of the patrimonial condition with respect to land retained, according to Canon 1295, is required.

*F. Options to Purchase and Canon 1295*

The administrator of a public juridic person may wish to sell stable patrimony by first issuing an option to the prospective purchaser rather than immediately entering into a sales contract. This may, for example, be motivated by a desire to retain the optionee's consideration if the latter fails to exercise it, or when the exercise is subject to a contingency. A prospective buyer may prefer an option for the same reason. Options are often used in land development. The developer is granted options on adjacent parcels, which can be exercised on successive dates. In this way, the developer-optionee reserves sufficient land for expansion if the project succeeds, but does not commit itself to purchase unless and until each tract is needed.

In general, granting an option to purchase stable patrimony would be subject to Canon 1295 because the danger of losing the

patrimony clearly exists. This would not be so, however, if the option were to contain a condition that any sale would be subject to permission from the competent ecclesiastical authority in conformance with Canon law (and without penalty to the juridic person should such permission be denied).

It should be noted that some transactions may involve both Canons 1295 and 1297; leases frequently include options to purchase. A short-term lease with an option to purchase is often used by a potential buyer who cannot immediately or conveniently arrange conventional financing. The term of the option is used to acquire the necessary financing, or it is agreed that the lease payments will go towards the eventual purchase price.

### *G. Corporate Structuring*

Every public juridic person is to have an administrator,<sup>40</sup> who one might characterize as the “steward” of property pertaining to the public juridic person. In the case of the most common public juridic persons—dioceses, parishes, and religious institutes—their stewards are diocesan bishops, pastors, and religious superiors (who direct their finance officers in carrying out the administration of goods), respectively.<sup>41</sup> These are the proper individuals to act for the entities which they represent in matters of finance and administration.

The financial and administrative powers of the administrators are not unbounded, however, as is clear from the discussion above of the provisions in Canons 1291 through 1295 regarding alienation and transactions that jeopardize stable patrimony (and, it may be noted, leasing under Canon 1297). Indeed, one may also regard as stewards superiors who must decide whether or not to approve transactions proposed by administrators.

In order to discharge their functions according to Book V of the 1983 code, these Canonical stewards must be in a position where they can exercise ultimate control over the use and disposition of Church property entrusted to them.<sup>42</sup> This requires that the status of the apostolates of public juridic persons under

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<sup>40</sup> See CIC-1983 c.1279, §2.

<sup>41</sup> See *id.* at cc.393, 532, 636.

<sup>42</sup> See *id.* at cc.1254–1257.



Canon law be compatible with the status of these same entities under civil law, and that the role of the Canonical stewards be compatible with that of the individuals who civil law regards as having authority over the administrative and financial affairs of such entities. If, for instance, civil law assigns to the board of trustees of a non-profit corporation, under which patrimony of a public juridic person is held, the legal authority to administer and convey the assets thereof, without regard to the authority of the appropriate Canonical stewards in the matter, there will be little that can be done, as a practical matter, to ensure compliance with the requirements of Book V, notwithstanding the fact that under Canon law, it is the Canonical stewards and not the board of trustees, as such, who are invested with such authority.

The application of Canon 1295 seems clear. At issue are the actions of the administrator who allows such state of affairs to develop in the first place by permitting stable patrimony to be held and administered in a civil-law structure which does not allow for the exercise of appropriate control by the Canonical administrator. When an administrator loses control over decisions relevant to alienation and other matters which could worsen the patrimonial condition of the juridic person, the stable patrimony is, in effect, placed at risk and, hence, the requirement of Canon 1295 must be fulfilled.

This devolution of control can take place in a variety of ways, depending upon the particular form of civil-law structure chosen for a particular apostolate. Consider, for example, the charitable trust, a frequently used civil-law structure in the United States. Depending on who the trustee is, the terms of the trust with respect to trustee powers, and the conditions under which the trustee may be replaced, the Canonical stewards may lose control of stable patrimony in such a way as to violate Canon 1295.<sup>43</sup>

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<sup>43</sup> See ADAM J. MAIDA & NICHOLAS P. CAFARDI, CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS 130-31 (The Catholic Health Ass'n of the U.S. 1984) (noting that a significant number of dioceses in the United States are unincorporated, along with their parishes). The properties of such a dioceses are usually held in a charitable trust or in an aggregation of charitable trusts (each parish corresponding to a separate trust). The bishop is the trustee for diocesan assets, and also for each set of assets held under a parish trust. The pastor of a parish serves as administrator for the parish assets in accordance with Canon 532. See CIC-1983 c.532. The beneficiaries of each parish trust are the parishioners, and the beneficiaries of a diocesan trust

Fee simple ownership by the diocesan bishop, alluded to in the preceding paragraph, is still employed in some dioceses, such as the diocese of Rockford, Illinois,<sup>44</sup> even though the Congregation of the Council in 1911 issued a directive which called for the abandonment of this practice.<sup>45</sup>

In the United States, Church property is generally held in some form of corporate structure. The topic of corporate structuring and restructuring as it relates to Canon 1295 differs from other areas of the Canon's application which have already been treated in this article. When incurring indebtedness, granting easement rights, and so forth, there are often compelling reasons for proceeding with a transaction that jeopardizes stable patrimony, and therefore, for seeking to comply with the alienation requirements that Canon 1295 mandates. In the matter of corporate structuring and restructuring, however, the Canonical "stewards" of a public juridic person must retain the authority to decide whether a future alienation, mortgage, or other action affecting stable

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are the faithful of the diocese. See MAIDA & CAFARDI, *supra* at 130–131. Also, Marilyn E. Phelan notes that a deed from a bishop as trustee passes good title to the property. See MARILYN E. PHELAN, *NONPROFIT ENTERPRISES, LAW AND TAXATION* 2: 44, § 14.12. (Clark, Boardman, Callaghan 1993). Phelan points out that, absent the express establishment of a trust, a conveyance of property to a church is deemed to be held in an implied trust for the benefit of the members or for the general church, depending upon the church structure. See *id*; see also THOMAS F. DONOVAN, *THE STATUS OF THE CHURCH IN AMERICAN CIVIL LAW AND CANON LAW* 84 (The Catholic University of America Press 1966). Donovan notes that if a bishop holds ecclesiastical property in fee simple, courts today will generally declare an implied trust to prevent the property from passing to his heirs. Phelan categorizes a church government as either the congregational form or the hierarchical form, stating that, with respect to the latter category, "Local hierarchical churches are but an integral and subordinate part of a larger church and are under the authority of the general church; consequently, civil courts generally give effect to the duly made decisions of the highest body within the hierarchy that has considered the dispute." 2 PHELAN, *supra* §§ 14.04, 14.12, at 15, 44. See also, *Mills v. Baldwin*, 362 So. 2d 2, 7 (Fla. 1978) (holding that when a local church withdrew from a national religious organization, ownership of the local church's property remained with the minority of the congregation that continued to be loyal to the national organization).

<sup>44</sup> See Robert L. Kealy, *Methods of Diocesan Incorporation* in CANON LAW SOCIETY OF AMERICA, *PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL CONVENTION* 163, 167 (1986).

<sup>45</sup> See S. Congregatio Concilii, *De Methodis Possidendi et Administrandi Bona Ecclesiastica in Stat. Americae Foed.*, 45 AM. ECCLESIASTICAL REV. 585, 586 (1911).

patrimony is advisable. If they believe an alienation or related action is advisable, they must then proceed to seek permission from the competent ecclesiastical authority. If they do not think the action is advisable, they must be able to prevent those who administer the affairs of the corporation from executing the transaction. The corporate structure must be designed so as not only to facilitate efficiency by granting adequate management authority to those with the requisite expertise, but also to preserve the authority that the Canonical stewards must have with respect to basic decisions relating to stable patrimony. To be designed otherwise is to cause the corporate structuring and restructuring itself to require ecclesiastical approval pursuant to Canon 1295, because of the risk of harm to the patrimonial condition of the juridic person.

Those individuals who, in accordance with Book V of the 1983 code, are charged with the responsibility of administration or of giving or seeking approval for certain acts of administration, alienation, and Canon 1295 transactions, may ensure that they are in a position to do so within a corporation in one of two general ways: (i) by acting as trustees in numbers sufficient to control the board of trustees (i.e., by having at least 51% of the voting power of the board) and so manage the affairs of the corporation in a substantially direct way, or (ii) by having a two-tiered corporate structure composed of both trustees and members, designating the Canonical stewards as members *ex officio*, and, in the articles of incorporation, reserving to the members powers of approval with respect to major corporate undertakings, such as disposition of property, encumbering property, engaging in major borrowing, making investments, mergers, dissolutions, disposition of property upon dissolution, corporate reorganizations, and amendment of the articles of incorporation.<sup>46</sup> So far as preventing the exposure of stable patrimony to loss is concerned, the second alternative, based upon the corporation having two levels of authority, is preferable to the first alternative.

This preference becomes clear upon examining the ramifications of forming a corporation that fails to provide for a membership layer. To begin with, relying on strict control over

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<sup>46</sup> This is the recommendation of MAIDA & CAFARDI, *supra* note 40, at 123, 156, 246.

the board of trustees may open the public juridic person to an unnecessary risk of incurring civil liability for corporate acts. If those individuals who are charged with the responsibility of approving alienations and Canon 1295 transactions in accordance with Book V of the 1983 code also control the board of trustees, they assume some exposure to personal liability for the untoward consequences of the corporation's activities.<sup>47</sup> More importantly, the fact that those individuals who dominate the board of trustees have hierarchical authority in the public juridic person may be construed to mean that the corporation is but an instrument of the public juridic person, with negligent or otherwise culpable decisions attributable to the public juridic person as a whole, exposing not only corporate assets to claims arising from torts or breach of contract but the other patrimony of the public juridic person as well.<sup>48</sup> A court will examine these

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<sup>47</sup> See *e.g.*, *Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses and Missionaries*, 381 F. Supp. 1003, 1015-16 (D.D.C. 1974), wherein the directors of a nonprofit hospital were liable for negligence in their delegation of duties to officers, employees, and outside contractors.

<sup>48</sup> When the board of directors of a for-profit corporation consists substantially of officers or directors of a corporation which owns most of the former corporation's outstanding shares (the former corporation being a "subsidiary" of the other, which is known as the "parent" corporation), this may be indicative of the subsidiary essentially being a mere instrument of the parent. This so-called "alter ego" theory has found recognition in nonprofit corporation litigation. See *e.g.*, *Roman Catholic Archbishop of San Francisco v. Superior Court of Alameda*, 93 Cal. Rptr. 338, 411 (Ct. App. 1971) (stating that the Archbishop, as a corporation under the California Corporations Code, has the same rights and duties as other corporations).

There are a number of other factors, however, that a civil court would scrutinize in deciding whether the liability of one corporation should be imputed to other corporations or apostolates of the public juridic person. Examples of such factors include whether the corporation failed to maintain its own separate books and records in a complete and timely manner, including minutes of board meetings; whether the funds and assets of the corporation were commingled with those of other entities and activities of the public juridic person, or were siphoned off or used indiscriminately for those other entities and activities; whether the corporation was consistently represented as being part of the public juridic person, analogous to a subsidiary corporation being held out as a "division" of the parent corporation rather than as a separate corporation; and whether the personnel of the public juridic person who were not in positions of authority within the corporation itself nonetheless directed the officers and employees of the corporation, which in effect would blur the distinction between the public juridic person and the incorporated enterprise. See MAIDA & CAFARDI, *supra* note 40, at 203; see also ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS IN A NUTSHELL* 91-93 (3d ed. West Publishing Co. 1991). (noting the lack of consistent clear delineation between the parent's affairs and the subsidiary's

and other factors, with no single factor being determinative of the ultimate issue, which is whether the corporation's separate identity was substantially disregarded in order to further the ends of the parent company or, in the context of Canonical relationships, the public juridic person. The dominant presence of Canonical stewards on the board of the corporation would carry significant weight, should any of the other factors cited above also point to the corporation being a mere "alter ego" of the public juridic person.

A similar problem may arise when, in addition to the public juridic person, other parties have contributed money or property to the corporation and later allege that decisions made by the board of trustees led to the actual or attempted enrichment of the public juridic person to the detriment of the corporation. When the trustees exercise control over corporate activities and assets in such a way that the putative purposes of the corporation (articulated in the articles of incorporation) are subordinated to those of the public juridic person and are thereby compromised or ignored altogether, the minority trustees, contributors or other interested parties may attempt to impute liability to the sponsoring public juridic person for ensuing corporate losses. While the purposes and ends of the corporation should certainly fit within the larger framework of the public juridic person's mission, the corporation's civil legal existence must be respected and the assets and resources of the corporation must be totally dedicated to serving the ends and purposes expressed in corporate documents.

If, on the other hand, the Canonical stewards relinquish control of the board of trustees so that individuals without knowledge of or commitment to the requirements of Canon law gain the majority voice on the board, competent ecclesiastical authorities may find themselves in the position of being unable to prevent transactions which violate Canonical requisites. Even before such a board of trustees entertains a proposal to alienate stable patrimony, the loss of control by the Canonical stewards will already have placed the patrimony at risk; and that is what would make such a corporate structure itself subject to Canon 1295.

Providing in the articles of incorporation that the corporation

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affairs is often determinative of liability).

shall have members, naming the Canonical stewards as such members, and reserving only limited powers to the members, affords the public juridic person greater protection from vicarious liability for corporate acts. The use of a two-tiered corporate authority liberates Canonical stewards from the responsibilities that they would otherwise bear as trustees under civil law. Moreover, the two-tiered corporate structure, with reserved powers in the members, can prevent a loss of control over major decisions concerning stable patrimony (as well as basic policy matters), while allowing other individuals to manage the day-to-day operational aspects of corporate activity. This also has the advantage of allowing laypersons with valuable technical expertise to act as a majority on the board of trustees.<sup>49</sup> In addition to the applicability of Canon 1295 to any civil-law structuring or restructuring of a corporate apostolate that would entail loss of control over stable patrimony by appropriate Canonical stewards, three other Canons should be mentioned as relevant to corporate restructuring. They are Canons 121, 122 and 123. These Canons pertain to juridic persons that are "joined" (*coniungantur*, the equivalent of merger or consolidation), divided, or dissolved. Canon 121 provides that in a merger the new public juridic person assumes the assets and liabilities of the public juridic persons that have merged to form it, taking into account the intentions of the founders and the donors of property, as well as any other acquired rights. Canon 122 states that when a public juridic person is divided, patrimony in general is to be divided in due proportion among the resulting juridic persons, excluding that particular property which is to be distributed in accordance with (i) the intention of the donors, (ii) any rights specifically acquired thereto, and (iii) the approved statutes of the juridic person or persons. Canon 123 governs the dissolution of a juridic person, stating that the property of a public juridic person will be distributed to the next highest juridic person, subject to any prevailing law or statutes.

#### *H. Settlement of Litigation*

##### 1. In the Ecclesiastical Forum

With regard to ecclesiastical disputes, the 1983 code suggests

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<sup>49</sup> See MAIDA & CAFARDI, *supra* note 43, at 245–46.

settlement, reconciliation, and arbitration as alternatives to ecclesiastical trials.<sup>50</sup> The provision which explicitly establishes the connection between the norms pertaining to the avoidance of trial and the norms which deal with alienation in Book V is Canon 1715, section 2, which states as follows: "If it is a question of temporal ecclesiastical goods, whenever the matter requires this, the formalities specified by law for the alienation of ecclesiastical goods are to be observed."

Canon 1715, section 2, makes clear that both settlement (*transactio*) and arbitration (*compromissum*) must conform to the formalities required by the alienation provisions of Book V if the dispute concerns temporal goods. In the case of arbitration, the point at which the administrator of a public juridic person should petition ecclesiastical authority in accord with the laws governing alienation is when he or she has determined that submission of the controversy to arbitrators would be in the best interest of the juridic person, not at the subsequent point when the duly appointed arbitrators have come to a decision which automatically binds the parties.

Canon 1715, section 2, states that a settlement or compromise must conform to the formalities required for alienation "whenever the matter requires this." The matter requires the formalities of alienation whenever transfer of ownership is, or could be involved, and whenever, even if no alienation is involved, there is the potential for a worsening of the patrimonial condition of a public juridic person. A settlement or arbitration, therefore, may require compliance with the alienation formalities either because the agreement calls for, or the decision in arbitration may call for, the alienation of stable patrimony by a public juridic person, or entails or may entail placing the stable patrimony of the public juridic person at risk (as, for example, in requiring the public juridic person to guarantee a loan made to another public juridic person). The latter would bring Canon 1295 into play, which, in turn, would make applicable the alienation formalities.

Unlike a settlement, which depending on its terms may or may not be subject to Canon 1295, submitting to binding arbitration to determine the ownership or conveyance of, or other transfer of interest in, stable patrimony *always* pertains to

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<sup>50</sup> See CIC-1983 c.1713.

Canon 1295, provided the monetary value of the patrimony is large enough to reach one of the Canon 1292 thresholds. Canon 1295 is implicated because the point at which the competent ecclesiastical authority must be petitioned is prior to the decision in arbitration itself. Submission to the arbitrators is the act which in itself places the patrimony at risk.

## 2. In the Civil Forum

The application of Canon 1295 can carry over to amicable agreements to change the terms of valid and binding contracts affecting property rights, such agreements often called substituted agreements and novations.<sup>51</sup> An agreement, however, might arise in order to terminate civil litigation. In this situation, the parties may essentially enter into a contract that affects stable patrimony, either by providing for its alienation (which entails compliance with the formalities of alienation if the value of the property is sufficiently high), or by placing the stable patrimony at risk (again, requiring fulfillment of the alienation formalities if the patrimony is sufficiently valuable).

## 3. The Implication of Rejecting a Settlement Offer with Respect to Canon 1295

Although a settlement agreement which calls for the transfer of stable patrimony or the placing of an encumbrance thereon may need to conform with the alienation formalities (either as a direct alienation, or as a transaction to which Canon 1295 applies), it should be kept in mind that a party which refuses a settlement offer may be rejecting a means of reducing the risk of losing stable patrimony. In either an ecclesiastical or civil forum, a party which declines an offer may eventually lose on the merits of the case, or may obtain a judgment in which such party receives less than it would if it had accepted the settlement offer. An additional risk factor to consider arises in the civil forum, as

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<sup>51</sup> In a "substituted agreement," the subject matter of the original contract is changed. For example, a buyer agrees to purchase condominium X from a builder for \$100,000. However, condominium X is unavailable on time, and for the same amount the buyer agrees to accept condominium Y, all other terms remaining the same. The term "novation" is often used interchangeably with "substituted agreement," but is technically distinct. In a novation, it is the identity of one of the contracting parties that changes. In either case, at least one of the parties may forego a right in property which, at least arguably, it possessed. The relevance of Canon 1295 is readily apparent.



illustrated by Rule 68 of the Federal Rules of Civil Procedure, which govern civil disputes<sup>52</sup> in the federal court system of the United States. Rule 68 provides that the defendant in a federal civil suit may make a written offer to settle up to ten days before trial begins.<sup>53</sup> If the plaintiff rejects the offer but subsequently fails to obtain a judgment in an amount greater than that which the defendant offered, the plaintiff cannot recover its own costs and must also pay the costs of the defendant from the date of the offer.<sup>54</sup> Moreover, in such a situation, if attorney fees were otherwise recoverable as costs by the plaintiff under a substantive statute, the plaintiff cannot recover post-offer attorney fees.<sup>55</sup> Attorney fees and other court costs can be substantial. There are state statutes that go further, in that they also allow the plaintiff to make settlement offers.<sup>56</sup> In addition, a standard settlement conference before trial is usually compulsory, the parties having no choice but to attend, even though the settlement judge has no power to determine the outcome.<sup>57</sup>

It may be stated that in federal civil courts (and in state courts with procedural rules similar to Rule 68), the rejection of a settlement offer constitutes a "transaction" because the rejection is an affirmative act. In the case of an administrator of a public juridic person who rejects such a settlement offer, additional stable patrimony may be placed at risk as a result of the rejection, namely, the extra legal costs which the juridic person may incur by reason of Rule 68 (or a similar state procedural rule if the dispute takes place in state court) should the trial not yield a successful outcome. This may entail the application of Canon

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<sup>52</sup> The term "civil" may be understood as pertaining to the laws and courts of secular states, as distinct from "ecclesiastical" laws and courts. In the context of this illustration of federal procedural rules, however, the term "civil" refers to non-criminal legal actions.

<sup>53</sup> See FED. R. CIV. P. 68.

<sup>54</sup> See *Id.*

<sup>55</sup> See *Marek v. Chesny*, 473 U.S. 1, 9 (1985) (holding that civil rights plaintiffs who would otherwise be eligible to recover attorney fees are barred from such recovery under Rule 68 after a settlement offer from defendants has been rejected).

<sup>56</sup> See, e.g., CAL. CIV. PROC. CODE § 998 (Deering 1996) (stating that if settlement offer is made by the plaintiff and not accepted by the defendant, the defendant may have to pay costs).

<sup>57</sup> EUGENE F. LYNCH ET AL., NEGOTIATION AND SETTLEMENT § 7:28 (Lawyers Cooperative Publishing, 1992)

1295, depending on the amount of increased exposure. The only feasible way to measure the exposure is to obtain an estimate after the settlement offer has been made, probably from the juridic person's legal counsel. If the estimate, less the amount of free capital that the juridic person would have available to defray such expense, exceeds one of the thresholds established by the Episcopal conference, then Canon 1295 applies.

On the other hand, although rejecting a settlement offer in an ecclesiastical forum is a "transaction" in that the administrator makes an affirmative act with financial consequences, the public juridic person does not stand to lose more stable patrimony than it did *before* the offer was made. Therefore, even though settlement offers should not be dismissed lightly, Canon 1295 does not apply to the rejection of such offers in an ecclesiastical forum.

#### 4. Arbitration and Mediation

As has been stated, binding arbitration requires compliance with the laws governing alienation because of the application of Canon 1295, assuming the value of stable patrimony in dispute is sufficiently high or the dispute may otherwise entail the liquidation or loss of substantial stable patrimony if the public juridic person does not prevail in the process.

Binding arbitration is similar to litigation in that it aims at a decision rather than an agreement between the parties. However, it has several potential advantages over litigation, as pointed out by Eugene F. Lynch:<sup>58</sup>

- (i) It is private, meaning that the parties can avoid publicity or at least minimize it;
- (ii) It is generally more rapid than waiting for a trial to commence and terminate, and may therefore be less expensive;
- (iii) It is not necessary to gamble on the emotions of a jury;<sup>59</sup>
- (iv) The parties can agree to modify the procedural and evidentiary rules.<sup>60</sup>

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<sup>58</sup> *Id.* at § 7:30.

<sup>59</sup> This is a point which is relevant to a civil forum, not an ecclesiastical forum.

<sup>60</sup> These are *potential* advantages. It may happen that one party may desire that the matter proceed to trial for a number of reasons, such as a desire to gain

There are, however, some alternative approaches to dispute resolution which are not binding, and not even all arbitration is binding on the parties. If the arbitration or other type of dispute resolution contemplated is not binding, then Canon 1295 does not apply before the parties themselves agree to adopt the solution proffered by the third party.

A non-binding method of dispute resolution may be useful as a preliminary measure of the strength of one's case, and it may also be a valuable settlement tool where one party believes that the other has a rather inflated opinion of the value of its case.<sup>61</sup> In such an instance, non-binding arbitration may be justified if the public juridic person has substantial stable patrimony at stake.

One such alternative to binding arbitration is mediation, whereby the parties bring into the dispute a mutually acceptable third party with the attributes of neutrality and expertise in evaluating the issues. Unlike litigation and arbitration, mediation focuses on encouraging an agreement rather than merely arriving at a decision.<sup>62</sup> The mediator cannot force a binding decision on the parties; the objective is for them to come to a consensual solution with the mediator's help. Hence, the act of agreeing to the introduction of a mediator does not cause Canon 1295 to apply.

There are variations to the foregoing illustrations of neutral parties who are employed to help resolve disputes. For purposes of applying Canon 1295, however, the principle which emerges is that any agreement to the appointment of such a third party must be preceded by the approval of the competent ecclesiastical authority only if the third party has authority to bind the public juridic person to a resolution which could cause it to relinquish control of stable patrimony of value in excess of one of the thresholds established by the Episcopal conference pursuant to Canon 1292, or which otherwise could expose the public juridic person to a worsening of its patrimonial condition.

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notoriety, to establish precedent, because it believes that a jury would be more favorably disposed to its position than an arbitrator, or because it believes that it has sufficient economic resources to conduct protracted litigation while its adversary does not.

<sup>61</sup> See LYNCH ET AL., *supra* note 57, § 7:30.

<sup>62</sup> *Id.* at § 7:29.

## CONCLUSION

As has been illustrated, a public juridic person of the Catholic Church may engage in any number of transactions which, while short of being outright transfers of ownership of "stable patrimony," can place its ownership or enjoyment of such property at serious risk. The application of Canon 1295 of the 1983 Code of Canon Law is more subtle and, at the same time, farther reaching, than that of a direct alienation. Canon lawyers should be acquainted with the various ways in which Canon 1295 may come into play. So, also, civil attorneys who counsel dioceses and other public juridic persons of the Catholic Church should at least be mindful of the relevance of Canon 1295, along with the Canons which apply to alienation, Canons 1291 through 1294, when they advise their clients about commercial transactions, corporate planning, and settlements of litigation.

