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# RESTATING THE CIVIL LAW OF QUASI-CONTRACT: *NEGOTIORUM GESTIO* AND UNJUST ENRICHMENT

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ABSTRACT

*This Article restates the Louisiana civil law of* negotiorum gestio *and unjust enrichment, one decade after the common-law Third Restatement of Restitution and Unjust Enrichment. The Article first redefines and re-designates the term "quasi-contract" from a false source of obligations to a valid practical term describing the two separate institutions of* negotiorum gestio *and unjust enrichment. Based on this renewed understanding of quasi-contract, the Article proceeds to a detailed commentary on the revised Louisiana law of* negotiorum gestio *and unjust enrichment (which includes the special action for payment of a thing not due and the general action for enrichment without cause).*

Keywords: quasi-contract, implied and constructive contracts, *negotiorum gestio*, management of affairs, unjust enrichment, payment of a thing not due, enrichment without cause, condictio indebiti, actio de in rem verso, remedies, obligations, comparative law

## I. INTRODUCTION

For centuries, legal systems have recognized two fundamental sources of obligations in private law—contract and tort—as well as a less defined "third pillar" that is based on the general principle of unjust enrichment and that lies somewhere in between.[1] This third source of obligations historically has gone by different obscure names. In civil-law systems and in mixed jurisdictions like Louisiana, it has been known as "quasi-contract," a misunderstood term that at times has been assigned a much broader meaning that it actually has.[2] This Article will show that the proper civil-law term "quasi-contract" is narrower, referring only to two distinct institutions—the management of affairs of another (*negotiorum gestio*)[3] and unjust enrichment.[4]

In common-law systems, terms such as "implied in law contracts" and "constructive trusts" have been used to describe a broader principle of unjust enrichment giving rise to a remedy of

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1. *See* Olivier Moréteau, *Revisiting the Grey Zone Between Contract and Tort: The Role of Estoppel and Reliance in Mapping Out the Law of Obligations*, *in* EUROPEAN TORT LAW 2004, at 60 (H. Koziol & B. Steinninger eds., 2005) (discussing various other legal sources of obligations, including reliance).

2. In civil-law systems, such as Louisiana, the area between contract and tort is vast, encompassing any legal obligation that is neither contractual nor delictual. The term "quasi-contract" has been misconstrued to include "innominate types" of quasi-contract outside the realm of *negotiorum gestio* and unjust enrichment. *See* ALAIN A. LEVASSEUR, LOUISIANA LAW OF UNJUST ENRICHMENT IN QUASI-CONTRACTS 9–15 and 36–52 (1991) [hereinafter LEVASSEUR, UNJUST ENRICHMENT] (criticizing the broad definition of quasi-contract in the Louisiana jurisprudence and correctly confining quasi-contract to cases of *negotiorum gestio* and unjust enrichment). *See infra* notes 54, 100 and 110.

3. *See* LA. CIV. CODE art. 2292 (2023).

4. This Article uses the term "unjust enrichment" in the Louisiana Civil Code context as a general category that includes two actions: (a) the special action for "payment for a thing not due" (*condictio indebiti*). LA. CIV. CODE arts. 2299–2305 (2023); and (b) the general action for "enrichment without cause" (*actio de in rem verso*). LA. CIV. CODE art. 2298 (2023). In the revised Louisiana Civil Code, the term "enrichment without cause" is used to identify both the general category as well as the specific *actio de in rem verso*. *See* LA. CIV. CODE bk. III, tit. V, ch.2 (2023); *id.* art. 2298. Use of the term "unjust enrichment" in this Article is thus intended to avoid confusion between the general category (hereinafter "unjust enrichment") and the *actio de in rem verso* (hereinafter "enrichment without cause").

restitution.[5] In both systems, this third source of obligations rests on the principle that a person who receives a benefit at the expense of another without legal justification may be obligated to restore that benefit or pay compensation.

Unlike obligations based on contracts or torts, this third source focuses on gain-based recovery rather than damages for loss sustained or profit deprived.[6] Despite its apparent simplicity, this third area of private law has been plagued by obscure terminology, historical misunderstandings, and the lack of a comprehensive legal doctrine, making it unappealing to law students and legal practitioners.[7]

Recent law reform in both systems has brought much needed clarity to this area of the law. A major development in the common law was the Third Restatement of Restitution and Unjust Enrichment of 2011.[8] The Third Restatement eliminated the older obscure terminology and clarified that unjust enrichment itself is the third source of obligations.[9]

Civil-law systems based on the Code Napoléon[10] have also revised their laws of quasi-contract. The French Civil Code[11] provisions on quasi-contract were revised in 2016.[12] The Quebec Civil

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5. *See* Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297 (2005) (hereinafter Kull, *Early Modern History*).

6. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION §§ 4.1–4.2 (3d ed. 2018); PETER BIRKS, UNJUST ENRICHMENT 267–74, 301–07 (2d ed. 2005).

7. *See* BIRKS, *supra* note 6, at xi (observing the lack of enthusiasm among lawyers and scholars regarding the law and doctrine of unjust enrichment); Note, *The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2092 (2020) (identifying "the increased focus on public law in American law schools" as another reason for the lack of interest in unjust enrichment law).

8. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. L. INST. 2011).

9. *See id.* § 1 cmt. b.

10. CODE CIVIL [C. CIV.] [CIVIL CODE] (1804) (Fr.) [hereinafter CODE NAPOLÉON].

11. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] (2023) (Fr.) [hereinafter FRENCH CIVIL CODE].

12. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1300 to 1303-4.

Code[13] was revised in 1991.[14] Both systems introduced a separate section with special rules on restitution.[15]

The Louisiana Civil Code provisions on *negotiorum gestio* and unjust enrichment were revised in 1995.[16] The confusing term "quasi-contract," which was defined too broadly in the pre-revision law, was mostly removed from the civil code.[17] Under the pre-revision law, a quasi-contractual obligation was understood as an obligation arising directly from the law without any agreement of the parties. This rather broad definition of quasi-contract would include *negotiorum gestio*, unjust enrichment, as well as several other "innominate" types of quasi-contract. The revised law abandoned this broad notion of quasi-contract, and instead focused on delineating two distinct institutions: *negotiorum gestio*[18] and unjust enrichment, which, in turn, comprises two separate actions—payment of a thing not due (*condictio indebiti*)[19] and enrichment without cause

13. Civil Code of Québec, S.Q. 1991, c. 64 (2023) (Can.) [hereinafter QUEBEC CIVIL CODE].

14. *See* QUEBEC CIVIL CODE, *supra* note 13, arts. 1482–1496.

15. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707. These provisions, however, do not govern restitution for enrichment without cause, for which there are more specific provisions. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

16. *See* LA. CIV. CODE arts. 2292–2305 (rev. 1995). 1995 La. Acts, No. 1041 (eff. Jan. 1, 1996). *See* Cheryl Martin, *Louisiana State Law Institute Proposed Revision of Negotiorum Gestio and Codification of Unjust Enrichment*, 69 TUL. L. REV. 181 (1994); Jeffrey Oakes, *Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum meruit as a Basis for Recovery in Louisiana*, 56 LA. L. REV. 873 (1995); Bruce V. Schewe & Vanessa Richelle, *The "New and Improved" Claim for Unjust Enrichment—Codified*, 56 LA. L. REV. 663 (1996).

17. Under article 2294 of the Louisiana Civil Code of 1870, quasi-contractual obligations were understood very broadly to include "[a]ll [lawful and purely voluntary] acts, from which there results an obligation without any agreement." LA. CIV. CODE art. 2294 (1870). According to this broad definition, quasi-contractual obligations potentially include most, if not all, obligations that are not contractual or delictual. Article 2294 has no counterpart in the Code Napoléon. This provision was clearly false and was repealed in 1995. The term "quasi-contract," however, still appears sporadically in the Louisiana Civil Code and in numerous revision comments. *See, e.g.*, LA. CIV. CODE arts. 2018, 2324.1, 3541 (2023). *See infra* notes 150–56 and accompanying text.

18. LA. CIV. CODE art. 2292 (2023).

19. *Id.* arts. 2299–2305.

(*actio de in rem verso*).[20] Nevertheless, this "third pillar" remains undertheorized in American private law doctrine—which includes the civil law of Louisiana.[21] Notably, although the pre-revision law has been thoroughly discussed,[22] little has been written on the revised post-1995 Louisiana law of *negotiorum gestio* and unjust enrichment. This is unfortunate for Louisiana judges, lawyers, and law students, who continue using the term "quasi-contract" and remain confused by the pre-revision doctrine and the overly broad understanding of quasi-contract under the pre-revision law.[23]

This Article restates the Louisiana civil law of *negotiorum gestio* and unjust enrichment, one decade after the common-law Third Restatement of Restitution and Unjust Enrichment.[24] Part I focuses on the culprit—the false term "quasi-contract" and its ensuing doctrine, which were both products of a gross misunderstanding of the early Roman-law sources. The mistranslation of the Roman term "*quasi ex contractu*"—which merely described a miscellany of unrelated obligations—into a single and independent source of obligations called "quasi-contract" by Medieval civil-law scholars has been documented as one of the most egregious misunderstandings in legal

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20. *Id.* art. 2298.

21. *See* Note, *Developments in the Law. Unjust Enrichment*. *Introduction*, 133 HARV. L. REV. 2062, 2062 (2020) (observing that "unjust enrichment has struggled to establish a consistent place for itself within American legal thought").

22. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2.

23. *See, e.g.*, Symeon C. Symeonides & Nicole Duarte Martin, *New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 116 (1993) ("[I]t could be argued that there is no longer a need for the doctrine of *negotiorum gestio* in Louisiana's law of co-ownership. This is probably not a great loss, as the doctrine is generally not well understood"); Katherine Shaw Spaht, *Matrimonial Regimes, Developments in the Law*, 48 LA. L. REV. 371, 386 (1987) ("The profession in Louisiana, however, unfortunately is informed insufficiently on the role of this ancient primary institution of the civil law [*negotiorum gestio*] and has not made much use of it"). *See also* Martin, *supra* note 16, at 183–85 (discussing the continued use of the term "quasi-contract" by Louisiana lawyers and the confusion this term has caused).

24. *Cf.* ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT p. x (2012) ("The word 'Restatement' might suggest that one is purely concerned to state the present law. That would be marginally misleading. What is being aimed for is the best interpretation of the present law."); Kit Barker, *Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales,* 34 OXFORD J. LEGAL STUD. 155 (2013).

history.[25] This misleading terminology confused the courts and hampered the development of a robust doctrine in this area of the law.[26] Most scholars agree that the confusing term "quasi-contract" serves no practical purpose. Although the term "quasi-contract" no longer appears in most modern civil codes, judges and lawyers are accustomed to using this term. However, they oftentimes misunderstand a "quasi-contractual obligation" to mean any legal obligation that is not contractual nor delictual. They have also at times confused *negotiorum gestio* with unjust enrichment. As this Article will show, the true meaning of a "quasi-contractual" obligation is an obligation stemming from *negotiorum gestio* or unjust enrichment, and nothing more. Lacking a more suitable term, this Article proposes two corrections to the term "quasi-contract" that would allow its continued and proper use. First, "quasi-contract" should be redefined according to contemporary civil-law doctrine as a group of two distinct "licit juridical facts" whose underlying feature is the lack of cause for receiving a service or a benefit. These two distinct licit juridical facts are *negotiorum gestio* and unjust enrichment. Second, the original Roman descriptive function of "quasi-contract" should be restored. Because the only two quasi-contracts are *negotiorum gestio* and unjust enrichment, the category of "quasi-contract" has no other practical utility than to describe these two related yet distinct legal obligations. The Article thus re-designates quasi-contract from a false source of obligations to a valid practical term that merely describes the two separate legal institutions of *negotiorum gestio* and unjust enrichment.

Based on a renewed understanding of quasi-contract, the Article proceeds to a detailed commentary on the revised Louisiana law. Due to the lack of Louisiana doctrine on the post-revision law, this commentary will necessarily be more descriptive and intended to

25. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 1–51; 2 AMBROISE COLIN & HENRI CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS No. 6 (8th ed. 1935) [hereinafter COLIN & CAPITANT II].

26. *See* BIRKS, *supra* note 6, at 267–74.

clarify concepts that have bedeviled courts and scholars. The examination will also focus on a comparative analysis within civil-law systems—France and Germany—and with reference to common law, most notably the Third Restatement of Restitution and Unjust Enrichment. Part II of this Article is devoted to the management of affairs of another (*negotiorum gestio*), which developed as a separate institution in civil law that must not be confused with unjust enrichment.27 Indeed, in the case of *negotiorum gestio*, the manager intervenes without authority to protect the owner's interests. The law of *negotiorum gestio* gives rise to reciprocal obligations between the parties—the manager must act prudently, and the owner must reimburse the manager.[28] Importantly, the obligations of the parties exist regardless of any enrichment.[29] Therefore*, negotiorum gestio* in the civil law is not merely a remedy of restitution for unjust enrichment. It is an expression of the principle of good faith and a code of behavior holding the manager to a heightened standard of care.[30] The Louisiana law of *negotiorum gestio* might be used as a reference to disentangle the confusion that persists at common law concerning the legal treatment of restitution for unrequested interventions.[31] Part III focuses on the Louisiana law of unjust enrichment and restitution, which is based on the French legal tradition. In

27. *See* LA. CIV. CODE art. 2292 cmt. e (2023) (observing that the Louisiana courts have confused *negotiorum gestio* with unjust enrichment); ROGER BOUT, LA GESTION D'AFFAIRES EN DROIT FRANÇAIS CONTEMPORAIN Nos 247–56 (1972) (discussing the confusion of *negotiorum gestio* and unjust enrichment in the French legal doctrine).

28. *See* LA. CIV. CODE arts. 2295, 2297 (2023).

29. *See id.* art. 2292 cmt. e.

30. *See* 2 BORIS STARCK, DROIT CIVIL. OBLIGATIONS. CONTRAT ET QUASI CONTRAT, RÉGIME GÉNÉRAL No. 1779 (Henri Roland & Laurent Boyer eds., 2d ed. 1986); PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE STOFFEL-MUNCK, DROIT DES OBLIGATIONS No. 1025 (10th ed. 2018) (all referring to *negotiorum gestio* as an expression of social solidarity, which must be encouraged and rewarded, but also held to higher standard to discourage officious intermeddlers).

31. *Cf.* Kull, *Early Modern History*, *supra* note 5, at 313–15 (discussing the role of Louisiana law in the accessibility of the idea of unjust enrichment in the nineteenth-century American law); James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1869–75 (2000) (arguing in favor of adopting civil-law solutions to common-law problems in the law of restitution).

Louisiana and France, unjust enrichment is not a unitary concept. Two separate actions now appear in the revised Louisiana Civil Code. First, the special action for payment of a thing not due (*condictio indebiti*) is available for restoration of money or other things that were given in payment without cause or for a cause that later failed.[32] This action occupies most of the space of the Louisiana law of unjust enrichment. Second, the general and subsidiary action for enrichment without cause (*actio de in rem verso*) is allowed only when no other remedy is available for the recovery of a benefit conferred on the defendant at the plaintiff's expense without lawful cause.[33] Restitution in Louisiana law is governed primarily by the theory of cause in contract and tort law and only exceptionally by a theory of unjust enrichment. According to the theory of cause, ownership of property that was transferred under a failed contract or was converted by tort automatically reverts to the original party who can recover it directly, without needing to resort to a theory of unjust enrichment. In short, most of Louisiana's law of restitution is already built into its laws of contract and tort, while restitution for unjust enrichment is generally restricted to cases falling outside the theory of cause.[34] On the other hand, the common-law version of unjust enrichment in the Third Restatement of Restitution and Unjust Enrichment is a unitary and more comprehensive concept. Restitution at common law cuts across several areas of the law, but its substantive basis is the theory of unjust enrichment. Therefore, instances of unjust enrichment under the Third Restatement—such as recovery of performances rendered under failed contracts[35]—may fall under the Louisiana theory of cause, the action for payment of a thing not due, or the subsidiary action for enrichment without cause. With these particularities in mind, the Third Restatement could serve as a helpful reference to Louisiana lawyers.

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32. *See* LA. CIV. CODE arts. 2299–2305 (2023).
33. *See id.* art. 2298.
34. *See id.* arts. 526, 1966, 1967, 2018, 2033, 2298, 2299 cmt. c.
35. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 4, topic 2, intro notes & §§ 37–39 (AM. L. INST. 2011).

Finally, Part IV clarifies some confusion in the Louisiana jurisprudence concerning *negotiorum gestio*, unjust enrichment, and the theory of cause, through a schematic depiction of the entire Louisiana law of quasi-contract. As mentioned, *negotiorum gestio* is an institution that is entirely separate from unjust enrichment. On the other hand, restitution in Louisiana law is mostly governed by the laws of contract and tort, pursuant to the broader theory of cause. Thus, recovery of performances rendered under a failed contract is achieved primarily through an action on the contract or by a real action for revendication.[36] Alternatively, the plaintiff may institute a quasi-contractual action for payment of a thing not due (*condictio indebiti*).[37] Conversely, the action for enrichment without cause (*actio de in rem verso*) is general and subsidiary, meaning that it can be brought only if no other remedy is available.[38]

## II. REDEFINING QUASI-CONTRACT

In civil law systems such as Louisiana, France, and Quebec, quasi-contract historically has been understood too broadly as an independent source of obligations that is based neither on contract nor on tort.[39] At common law, the term "quasi-contract" never acquired any reliable and generally accepted meaning.[40] Instead, terms such

36. *See, e.g.*, LA. CIV. CODE arts. 526, 2018, 2033 (2023).
37. *See id.* art. 2299 cmt. c.
38. *See id.* art. 2298.
39. *See* Valerio Forti, Quasi-contrats, No. 1, *in* JurisClasseur Civil, Art. 1300, Fascicule unique, Jan. 25, 2018 (Fr.) [hereinafter Forti, Quasi-contrats].
40. This is true especially in the United States, where the term first appeared in Keener's influential treatise on the law of quasi-contract in 1893. *See* WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS, intro. note (1893) (where the author explains that he adopted the term in place of "contract implied in law" in deference to the nineteenth-century English scholars Pollock and Anson). *See also* FREDERIC C. WOODWARD, THE LAW OF QUASI CONTRACTS 1–10 (1913) (discussing the origin, nature, and essential elements of "quasi contracts," as a term referring to "obligations arising from unjust enrichment"). Before 1893, "quasi-contract" was virtually unknown in the United States—except in Louisiana. *See* Kull, *Early Modern History*, *supra* note 5, at 313–15; BIRKS, *supra* note 6, at 267–68. "Quasi-contract" also appeared as a subtitle to the First Restatement, but was dropped in the Third Restatement. *Compare* RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (AM. L. INST.

as "implied in law contracts" or "constructive contracts" (and "constructive trusts" in equity) referred to a remedy for restitution on the basis of unjust enrichment.[41] These common-law terms, however, trace their history back to the civil-law misunderstanding of the Roman "*quasi ex contractu*."[42] Scholars from both systems agree that use of these obscure terms has sown confusion in the doctrine and the courts.[43]

The reason for this adverse effect is historical. The modern understanding of quasi-contract as a prescriptive concept referring to a single and independent source of obligations is grounded on a historical misunderstanding of the Roman law from which the concept originated. In fact, quasi-contract was never meant to serve as a legal term of art, much less an independent source of obligations in Roman law. Rather, it was merely a descriptive concept that grouped an amorphous variety of causative events—licit juridical facts—that lie between contract and tort. Based on this misconception, Medieval civil law scholars formulated a false doctrine that united the dissimilar institutions of *negotiorum gestio* and unjust enrichment under one heading of quasi-contract.[44]

As a result of this false doctrine, judges and lawyers understand quasi-contractual obligations very broadly to include any obligation that was created "without agreement" and that is not a delict. Within this broad definition, they also confuse *negotiorum gestio* with unjust enrichment. Naturally, such a broad and confusing category of quasi-contractual obligations is not also doctrinally false, but it also has no practical utility.

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1937) *with* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. L. INST. 2011).

41. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2.

42. *See* BIRKS, *supra* note 6, at 268; Peter Birks & Grant McLeod, *The Implied Contract Theory of Quasi-Contract: Civilian Opinion in the Century before Blackstone*, 6 OXFORD J. LEGAL STUD. 46, 54 (1986).

43. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 1–51.

44. *See* HENRY VIZIOZ, LA NOTION DE QUASI-CONTRAT. ÉTUDE HISTORIQUE ET CRITIQUE Nos 75–79 (1912).

The true meaning of quasi-contract is much narrower in scope. A quasi-contractual obligation is a legal obligation to restore a benefit that was received without cause. According to this true meaning, the two genuine types of quasi-contract are *negotiorum gestio* and unjust enrichment. All other legal obligations—including obligations that have been characterized by some scholars as "innominate" types of "quasi-contract"—are not actual quasi-contracts; they are other types of legal obligations. Contemporary civil law doctrine places *negotiorum gestio* and unjust enrichment under a more accurate category of "licit juridical facts" whose underlying feature is the lack of cause for receiving a service or a benefit.[45] This modern doctrine better explains the function of these two separate institutions. As a result of this modern approach, the confusing term "quasi-contract" has been eliminated in most modern civil codes, with the notable exception of the revised French Civil Code, which still regularly uses the term,[46] and the Louisiana Civil Code, in which the term still appears sporadically.[47]

Importantly, Louisiana judges and lawyers frequently use this term today, and their confusion surrounding this area of law persists. Introducing the term "licit juridical fact" as an everyday term of art in the courtroom hardly seems realistic. Instead, it is recommended to retain the commonly used term "quasi-contract," but redefine it as a descriptive term that encompasses two distinct institutions, namely, *negotiorum gestio* and unjust enrichment. These separate institutions exist between contract and tort and provide a means for compensation or restitution in cases of a beneficial intervention or receipt of an unmerited benefit. In short, quasi-contract basically means *negotiorum gestio* or unjust enrichment, and nothing more.

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45. *See* 2 JEAN CARBONNIER, DROIT CIVIL. LES BIENS. LES OBLIGATIONS No. 1213 (2d ed. 2017) [hereinafter CARBONNIER II]; 2 JACQUES FLOUR, JEAN-LUC AUBERT & ERIC SAVAUX, DROIT CIVIL. LES OBLIGATIONS. LE FAIT JURIDIQUE Nos 1–2 (14th ed. 2011) [hereinafter FLOUR ET AL., FAIT JURIDIQUE]; JEAN-LOUIS BAUDOUIN & PIERRE-GABRIEL JOBIN, LES OBLIGATIONS No. 538 (6th ed. 2005).

46. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1300.

47. *See, e.g.*, LA. CIV. CODE arts. 2018, 2324.1, 3541 (2023). *See infra* notes 150–56 and accompanying text.

This redefinition of quasi-contract restores the original and true function of the term, as the Romans initially intended. In this light, the continued use of a redefined term "quasi-contract" that refers to the modern doctrine is perfectly appropriate. A historical and comparative examination of quasi-contract should establish this conclusion.

### *A. Comparative Law*

The classical Roman law, influenced by Greek law and philosophy,[48] recognized two main sources of obligations—contract and delict (tort).[49] In his influential writings, the Roman jurisconsult Gaius acknowledges this classical dichotomy of sources,[50] but he also identified a third broad category of sources of obligations—"legal obligations stemming from various other events."[51]

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48. *See* ARISTOTLE, NICOMACHEAN ETHICS V, 1131a (c. 384 B.C.E.); PLATO, REPUBLIC VIII, 556a (c. 375 B.C.E.); 1 GEORGIOS PETROPOULOS, HISTORIA KAI EISIGISEIS TOU ROMAIKOU DIKAIOU [HISTORY AND INSTITUTES OF ROMAN LAW] 858 (2d ed. 1963, reprinted 2008) (Greece) [hereinafter: PETROPOULOS I]; JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 31 (1991) [hereinafter GORDLEY, PHILOSOPHICAL ORIGINS]; 1 MAX KASER, DAS RÖMISCHE PRIVATRECHT 522 (2d ed. 1971).

49. Contracts are a licit source of obligations whereas delict arises from an illicit act. *See* Jean Honorat, *Rôle effectif et rôle concevable des quasi-contrats en droit actuel*, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV.] 1969, p. 653; Forti, Quasi-contrats, *supra* note 39, No. 2.

50. G. INST. 3.88 ("for every obligation arises either *ex contractu* [from a contract] or *ex delicto* [from an offense]". *But see also* G. INST. 3.91 (admitting that payment of a thing not due falls between contract and delict). *See* Forti, Quasi-contrats, *supra* note 39, No. 2.

51. DIG. 44.7.1 (Gaius, Aureorum 2) ("Obligations arise either from contract or from wrongdoing or *by some special law from various types of causes*") (emphasis added). Scholars routinely refer to the abbreviated version of "various types of causes" (*ex variis causarum figuris*) to identify this third group of sources of obligations. However, this abbreviated reference could be misleading. Indeed, reference to the entire passage of "some special law from various types of sources" (*aut proprio quodam iure ex variis causarum figuris*) reminds the reader that the actual source of these obligations is the law. The "various events" (causes) trigger the application of "special laws" that give rise to legal obligations. See PETROPOULOS I, *supra* note 48, at 860, 1035; Forti, Quasi-contrats, *supra* note 39, No. 2; VIZIOZ, *supra* note 44, Nos 23–25; MELINA DOUCHY, LA NOTION DE QUASI-CONTRAT EN DROIT POSITIF FRANÇAIS No. 2 (1997).

In later writings, presumably by Gaius,[52] the jurisconsult elaborates further on this third amorphous category, by explaining that some of these miscellaneous obligations have effects "*quasi ex contractu*" (as though from a contract), while others have effects "*quasi ex delicto*" (as though from a tort).[53] The management of affairs of another (*negotiorum gestio*) and various types of unjust enrichment (*condictio sine causa*), which included payment of a thing not due (*condictio indebiti*), were examples of miscellaneous obligations that had effects *quasi ex contractu*.[54] Gaius's updated categorization found its way into the Institutes of Justinian and the

52. Gaius's later writings appear in Justinian's Digest of the *Corpus Iuris Civilis*. Whether the passages were subject to interpolations during the compilation remains questionable. See PETROPOULOS I, *supra* note 48, at 860; BIRKS, *supra* note 6, at 268–70.

53. DIG. 44.7.5.4 (Gaius, Aureorum 3) (referring to negligence as an event giving rise to an obligation *quasi ex delicto*); DIG. 44.7.5.5 (Gaius, Aureorum 3) (referring to damage occurring from ruin of a building as an event generating obligations *quasi ex delicto*); and DIG. 44.7.5.6 (Gaius, Aureorum 3) (identifying delictual liability through acts of others as an event producing obligations *quasi ex delicto*). Today, quasi-delict falls under tort law and gives rise to delictual obligations. *Cf.* LA. CIV. CODE bk. III, tit. V, ch. 3 (2023) (titled "Of offenses and quasi offenses"). *See also* ERIC DESCHEEMAEKER, THE DIVISION OF WRONGS. A HISTORICAL COMPARATIVE STUDY 57–67, 139–85 (2009) (discussing the Roman law of quasi-delict and the modern French law of "civil liability" (*responsabilité civile*)).

54. It should be noted that obligations *quasi ex contractu* originally included a variety of legal obligations beyond *negotiorum gestio* and unjust enrichment. These legal obligations included co-ownership, tutorship, and legacies, among others. Gradually, these additional types of obligations *quasi ex contractu* were separated from *negotiorum gestio* and unjust enrichment and they now constitute distinct types of legal obligations that exist between contract and tort (but outside "quasi-contract"). This separation was noted in the Code Napoléon and the early Louisiana civil codes as well as in the jurisprudence. *See* CODE NAPOLÉON, *supra* note 10, art. 1370; LA. CIV. CODE art. 2292 (1870); Dean v. Hercules, Inc., 328 So.2d 69, 71–73 (La. 1976) (distinguishing the legal obligation of vicinage from quasi-contractual obligations and identifying the following types of obligations in Louisiana law: (1) contractual; (2) quasi-contractual; (3) delictual; (4) quasi-delictual; and (5) legal). *See also* DIG. 44.7.5.pr. (Gaius, Aureorum 3) (identifying *negotiorum gestio* as an event giving rise to obligations *quasi ex contractu*); DIG. 44.7.5.1 (Gaius, Aureorum 3) (referring to tutorship and curatorship as events generating obligations *quasi ex contractu*); DIG. 44.7.5.2 (Gaius, Aureorum 3) (recognizing testamentary legacies as events producing obligations *quasi ex contractu*); and DIG. 44.7.5.3 (Gaius, Aureorum 3) (identifying payment of a thing not due as an event giving rise to an obligation *quasi ex contractu*). *See infra* notes 100 and 110.

*Corpus Iuris Civilis*.[55]

Under Gaius and Justinian, there was no "quasi-contract" as an independent source of obligations.[56] Instead, there were miscellaneous events that gave rise to legal obligations having effects *quasi ex contractu* (as though from a contract).[57] In short, *quasi ex contractu* referred to the effects of various legal obligations, not to the source of the obligation itself.[58]

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55. J. INST. 3.13.2 ("[Obligations] arise from a contract or as though from a contract or from a delict or as though from a delict"). BIRKS, *supra* note 6, at 269; 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 443 (Richard Burn ed., 9th ed. 1783) [hereinafter BLACKSTONE II]. *See also* J. INST. 3.27 (identifying several events giving rise to obligations *quasi ex contractu*, including *negotiorum gestio*, tutelage, co-ownership, testamentary legacies, and payment of a thing not due). *See* PETROPOULOS I, *supra* note 48, at 861, 1035.

56. Admittedly, Gaius—or his later interpolators—could have expressed his ideas regarding quasi-contract more accurately. Certain parts of Gaius's texts correctly speak of the obligor being bound as if by contract (*tenetur quasi ex contractu*). *See, e.g.*, DIG. 44.7.5.1 (Gaius, Aureorum 3) (referring to the tutor as a debtor who is bound as if by contract); DIG. 44.7.5.3 (Gaius, Aureorum 3) (discussing the obligor of a payment not due being bound as if by a contract of loan). Other parts, however, refer to the obligation being born (*nascitur) quasi ex contractu*. *See, e.g.*, DIG. 44.7.5.pr. (Gaius, Aureorum 3) (identifying *negotiorum gestio* as an event giving birth to obligations *quasi ex contractu*); *cf.* J. INST. 3.13.2 ("[Obligations] arise from a contract or as though from a contract or from a delict or as though from a delict"). Several scholars thus note that the confusion as to quasi-contract already existed in the Roman texts. *See* PAUL FRÉDÉRIC GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 418 n.3 (8th ed. by Félix Senn, 1929); Emilio Betti, *Sul significato di "contrahere" in Gaio e sulla non-classicità della denominazione "quasi ex contractu obligatio"*, 25 BULLETTINO DELL'ISTITUTO DI DIRITTO ROMANO 65–88 (1912).

57. *See* PETROPOULOS I, *supra* note 48, at 860–61, 1035; FRANÇOIS TERRÉ, PHILIPPE SIMPLER, YVES LEQUETTE & FRANÇOIS CHENEDE, DROIT CIVIL. LES OBLIGATIONS No. 1262 (12th ed. 2019). *See also* Forti, Quasi-contrats, *supra* note 39, No. 2 (arguing that the various quasi-contracts have no common denominator other than their placement in this amorphous category of *quasi ex contractu*).

58. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 7–8; 4 CHARLES AUBRY & CHARLES RAU, DROIT CIVIL FRANÇAIS. OBLIGATIONS § 305, at 93, *in* 1 CIVIL LAW TRANSLATIONS (La. State L. Inst. trans., 1965) (Etienne Bartin ed., 6th ed., 1942) [hereinafter AUBRY & RAU IV]; Forti, Quasi-contrats, *supra* note 39, No. 3; VIZIOZ, *supra* note 44, Nos 23–25; Michel Boudot, *La classification des sources des obligations au tournant du 20e siècle*, *in* L'ENRICHISSEMENT SANS CAUSE. LA CLASSIFICATION DES SOURCES DES OBLIGATIONS 131 (V. Mannino & C. Ophèle eds., 2007).

*1. Historical Misunderstandings—Quasi-Contract as a Prescriptive Concept*

When the Roman and Byzantine sources were rediscovered by Medieval scholars, the term *quasi ex contractu* was misunderstood to mean a single and independent source that generated obligations as if there were a contract between the parties.[59] In other words, the term "as though from contract" was not attached to the effects of the various obligation created, but rather to the source itself.[60] Quasi-contract thus emerged as an independent source of obligations. Suddenly, *negotiorum gestio* and unjust enrichment were not separate "miscellaneous events giving rise to legal obligations, the effects of which were as though from contract"—they were "quasi-contracts" themselves. The need quickly arose to identify a unifying legal theme for this independent source of obligations—what do *negotiorum gestio* and unjust enrichment have in common? What sets them apart as "quasi-contracts" from other categories of obligations?

To answer these questions, Medieval scholars advanced two distinct legal theories for quasi-contract.[61] First, the glossator Bartolus and his followers identified a fictitious contract as the basis for quasi-contract.[62] Under this "fictitious contract theory of quasi-contract," the parties to a quasi-contract actually do not have a contract;

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59. Some scholars argue that the misunderstanding had already started in Justinian's time. *See* BIRKS, *supra* note 6, at 268–71; Birks & McLeod, *supra* note 42, at 54 n.36; BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 224 n.2 (1962).

60. *See* PETROPOULOS I, *supra* note 48, at 861, 1035; Forti, Quasi-contrats, *supra* note 39, No. 3. Levasseur aptly observes that "*quasi ex contractu*" became *"ex quasi contractu."* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 5–7. As Birks notes, "it was only one short step from 'as though upon a contract' to 'upon a sort of contract', from *quasi ex contractu* to *quasi contract*." BIRKS, *supra* note 6, at 269.

61. *See* Forti, Quasi-contrats, *supra* note 39, No. 3; Emmanuel Terrier, *La fiction au secours des quasi-contrats ou l'achèvement d'un débat juridique*, RECUEIL DALLOZ [D.] 2004, p. 1179.

62. Justification for this theory may also be found in the—likely interpolated—texts of Gaius that refer to quasi-mandate and quasi-loan. *See* Forti, Quasi-

rather, the judge imposes the quasi-contractual obligation as if there were a contract between the parties.[63] Thus, *negotiorum gestio* is understood as an obligation between the manager and the owner as if there were a mandate (quasi-mandate). The special action for unjust enrichment from payment of a thing not due (*condictio indebiti*) is interpreted as an obligation between the payor and the payee as if there were a contract of loan (quasi-loan). This theory also appears in the writings of the French jurist Pothier,[64] whose work heavily influenced the redactors of the Code Napoléon.[65] Scholars argue that this theory also influenced early common law courts that developed the doctrine of "implied-in-law contracts," pursuant to which the court ordered the defendant to make restitution as if she had promised to do so.[66] Likewise, Chancery courts enunciated the equitable "constructive trust," which was the defendant's legal obligation to return certain identifiable assets as if she were a trustee.[67]

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contrats, *supra* note 39, No. 3; VIZIOZ, *supra* note 44, No. 38; Birks & McLeod, *supra* note 42, at 68–77.

63. *See* 31 CHARLES DEMOLOMBE, COURS DE CODE NAPOLÉON No. 53 (1882) [hereinafter DEMOLOMBE XXXI] ("A quasi-contract however is quasi a contract!").

64. *See* ROBERT JOSEPH POTHIER, TRAITÉ DU CONTRAT DE MANDAT No. 167 *in* 9 ŒUVRES COMPLÈTES DE POTHIER (nouvelle édition 1821) [hereinafter POTHIER, MANDATE]; ROBERT JOSEPH POTHIER, TRAITÉ DU CONTRAT DE PRÊT DE CONSOMPTION No. 132 *in* 5 ŒUVRES COMPLÈTES DE POTHIER (nouvelle édition 1821) [hereinafter POTHIER, LOAN]. *But see* Forti, Quasi-contrats, *supra* note 39, No. 3 (arguing that Pothier was influenced primarily by the "theory of equity").

65. *See* CODE NAPOLÉON, *supra* note 10, art. 1371 ("Quasi contracts are the purely voluntary acts of the party, from which results any obligation whatsoever to a third person, and sometimes a reciprocal obligation between the two parties"). *Cf.* LA. CIV. CODE art. 2293 (1870). *See* Forti, Quasi-contrats, *supra* note 39, No.4; Terrier, *supra* note 61, at No. 33 (explaining that article 1371 of the Code Napoléon had a didactic rather than a normative function).

66. Courts and scholars developed three elements for quasi-contract: (1) the plaintiff conferred a measurable benefit on the defendant; (2) the plaintiff conferred the benefit with the reasonable expectation of being compensated for its value; and (3) the defendant would be unjustly enriched if she were allowed to retain the benefit without compensating the plaintiff. *But see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. L. INST. 2011) ("Formulas of this kind are not helpful, and they can lead to serious errors").

67. *See* BIRKS, *supra* note 6, at 267–274, 301–307 (arguing that the common-law misunderstandings of quasi-contract are traced back to early civil-law sources); Kull, *Early Modern History*, *supra* note 5, at 313–16 (discussing the

The second legal basis is the "equity theory of quasi-contract," advanced by the glossator Azo[68] and by later civilian writers, especially scholars of the School of Natural Law.[69] Under this theory, equity underlies the concept of quasi-contract. The source of a quasi-contractual obligation is the law and the justification for imposing such an obligation is equity. The civil-law term "equity" refers to the Roman law *aequitas*—fairness, justice[70]—which finds its roots in the Aristotelian tradition.[71] The equitable principle forbidding unjust enrichment—known since Greek and Roman times[72]—appears in all types of quasi-contract.[73] Thus, the owner whose affair has been well-managed must give compensation to the manager as a matter of equity.[74] Likewise, the recipient of a payment that was

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Roman sources of the American doctrine of unjust enrichment). *See also* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 15–26; DOBBS & ROBERTS, *supra* note 6, §§ 4.2–4.3.

68. *See* Forti, Quasi-contrats, *supra* note 39, No. 3; VIZIOZ, *supra* note 44, Nos 34–35.

69. *See* VIZIOZ, *supra* note 44, Nos 39–48.

70. In civil-law systems, including Louisiana law, there is no separation between strict law and equity. Civilian equity is a set of general principles—based on justice, reason, and fairness—that is built into the law. *Cf.* LA. CIV. CODE art. 4 (2023) ("When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."); LA. CIV. CODE art. 2055 (2023) ("Equity. . .is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another"). *See* A.N. YIANNOPOULOS, CIVIL LAW SYSTEM. LOUISIANA AND COMPARATIVE LAW 180–182 (2d ed. 1999) [hereinafter YIANNOPOULOS, CIVIL LAW SYSTEM] (discussing the functions of equity in Louisiana law).

71. *See* GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 48, at 33–40 (discussing Aristotle's influence on the medieval study of Roman law).

72. DIG. 12.6.14 (Pomponius, Ad Sabinum 21) ("For it is by nature equitable that nobody should enrich himself at the expense of another."); DIG. 50.17.206 (Pomponius, Ex Variis Lectionibus 9) ("By the law of nature it is equitable that no one become richer by the loss and injury of another."). *See also* GEORGES RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 249 (4th ed. 1949); JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 419 (2006) [hereinafter GORDLEY, FOUNDATIONS].

73. *See* Minyard v. Curtis Products, Inc., 205 So 2d 422, 432 (La. 1967). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 note c (AM. L. INST. 2011) ("A statement to the effect that 'restitution is equitable' is a harmless platitude so long as 'equity' means only 'fairness'").

74. *See* CODE NAPOLÉON, *supra* note 10, art. 1375; LA CIV. CODE art. 2299 (1870); POTHIER, MANDATE, *supra* note 64, No. 167; YIANNOPOULOS, CIVIL LAW

not due must give restitution to the payor to avoid any unjust enrichment.[75] This theory made its way into the Code Napoléon[76] through the writings of the French jurists Domat[77] and Pothier.[78] Similarly at common law, implied-in-law contracts and constructive trusts also substantively refer to the doctrine of unjust enrichment.[79]

While the two theories are not mutually exclusive, much scholarship has been devoted to delineating the importance of each theory to the development of the doctrine of quasi-contract.[80] On the other hand, many scholars from both civil and common-law systems challenged the validity of these theories and questioned the usefulness of the false, misleading, and inaccurate term "quasi-contract." The crux of this fierce criticism is the simple fallacy that invalidates both theories—there never was a unique source of obligations under the name "quasi-contract." Critics argued quite convincingly that neither theory was able to establish a common denominator to the various quasi-contracts.[81] For instance, the "fictitious contract theory" classifies payment of a thing not due as a quasi-loan, but fails to

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SYSTEM, *supra* note 70, at 181 (referring to the law of *negotiorum gestio* as an example of a legislative precept that is based on equity).

75. *See* CODE NAPOLÉON, *supra* note 10, art. 1376; LA. CIV. CODE art. 2301 (1870). Justification for this theory can be found in Gaius (or his interpolators) who refers to equity as the reason for the quasi-contractual obligations. *See* DIG. 44.7.5 (Gaius, Aureorum 3).

76. *See* CODE NAPOLÉON, *supra* note 10, art. 1371; LA. CIV. CODE art. 2293 (1870). *See* Forti, Quasi-contrats, *supra* note 39, No. 4 (explaining that the "theory of equity" has the merit of simplicity—since quasi-contracts are based on the law and equity, no further legal justification was necessary for their inclusion in the Code Napoléon).

77. *See* VIZIOZ, *supra* note 44, No. 48 (discussing the doctrine of quasi-contract in Domat's scholarship).

78. *See* 1 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 69 (William D. Evans transl. 1806) (1761) [hereinafter POTHIER, OBLIGATIONS] ("The law alone, or natural equity, produces the [quasi-contractual] obligation, by rendering obligatory the fact from which it results").

79. *See* BIRKS, *supra* note 6, at 38–46 (arguing that unjust enrichment is a substantive source of the obligation to make restitution); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1196 (1995) (arguing that the remedy of restitution corresponds to the substantive law of unjust enrichment).

80. *See* Forti, Quasi-contrats, *supra* note 39, Nos 1–9.

81. *See id.* No. 2.

explain why unjust enrichment in general is a type of "fictitious contract." On the other hand, the "equity theory" explains why unjust enrichment is a quasi-contract, but fails to account for the fact that unjust enrichment principles do not apply in their entirety in the case of *negotiorum gestio*.[82] In fact, *negotiorum gestio* and unjust enrichment have always been distinct legal institutions in the civil law. Doctrinal attempts to merge the two together under a broader principle of unjust enrichment only managed to confuse courts and scholars.

This confused state of the doctrine, coupled with the use of the obscure term "quasi-contract"—and the term "implied contract" at common law—by scholars and courts impeded the development of a robust doctrine of restitution and unjust enrichment in both systems.[83] Comparativists and legal historians have cautioned courts and legislators to avoid using the misleading term "quasi-contract."[84] Some scholars were even more critical, calling for immediate abolishment of this "monster" from the legal vocabulary.[85]

What makes the comparative law of quasi-contract even more complicated is its different taxonomy among the two most prevalent civil-law systems of Germany and France, as well as across civil and common-law systems.

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82. *See* LA. CIV. CODE art. 2292 cmt. e (2023) (explaining that a manager of the affairs of another "may be entitled to reimbursement of expenses even if the owner has not been enriched at his expense").

83. For instance, the common-law term "implied contract" could mean "implied in law contract" or "implied in fact contract." The two meanings must not be confused. "Implied in law contracts" are not contracts—they are quasi-contracts. "Implied in fact contracts" are veritable contracts that are made by conduct rather than by express words. *See* Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 546–47 (1912); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 23–26. *See also* BIRKS, *supra* note 6, at 267–74.

84. *See* MAURICE TANCELIN, DES OBLIGATIONS. ACTES ET RESPONSABILITÉ No. 25 (6th ed. 1997) ; Forti, Quasi-contrats, *supra* note 39, No. 6.

85. *See* 2 LOUIS JOSSERAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS No. 10 (3d ed. 1939) [hereinafter JOSSERAND II]; 2 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL, VOL. 1, OBLIGATIONS, THÉORIE GÉNÉRALE No. 649 (François Chabas ed., 8th ed. 1991); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 9–15; TERRÉ ET AL., *supra* note 57, Nos 1261–65.

German legal doctrine of the nineteenth century developed a robust theory of sources of obligations, rendering useless the adoption of the unscientific term "quasi-contract"[86] in the German Civil Code of 1900,[87] as well as in other civil codes based on the German model, such as the Greek Civil Code of 1945.[88] Instead, the term "other obligations arising by law" is used to describe a miscellany of obligations arising without agreement, other than torts. The two most significant such obligations are unjustified enrichment and "agency without authorization" (*negotiorum gestio*). German scholars originally identified a unitary and broad concept of unjustified enrichment (*condictio generalis*) that was intended to govern all restitutions of benefits obtained without legal justification (*condictio sine causa*), which included the actions for payment of a thing not due (*condictio indebiti*). The general action for unjustified enrichment was included in the German Civil Code.[89] This broad concept of unjust enrichment was developed by jurists who also expounded a very narrow German notion of cause in their contract theory. Thus, unjustified enrichment was the main remedy for restitution of performance under failed contracts.[90] However, the inability to apply one set of factors to all cases of unjustified enrichment under one general action forced later scholars to apply different factors to various types of unjustified enrichments, including mistaken payments (*condictio indebiti*), transfers without legal cause (*condictio sine causa*), and

86. *See, e.g.*, GERHARD DANNEMANN, THE GERMAN LAW OF UNJUSTIFIED ENRICHMENT 210–12 (2009) (comparing the "absence of cause" approach in German law of unjust enrichment with the "quasi-contract" approach in English law, which never appeared in the German Civil Code).

87. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] (2023) (Ger.) [hereinafter GERMAN CIVIL CODE].

88. ASTIKOS KODIKAS [A.K.] [CIVIL CODE] (2023) (Greece) [hereinafter GREEK CIVIL CODE].

89. *See* GERMAN CIVIL CODE, *supra* note 87, § 812; GREEK CIVIL CODE, *supra* note 88, art. 904.

90. *See* 2 FRIEDRICH CARL VON SAVIGNY, DAS OBLIGATIONENRECHT ALS TEIL DES HEUTIGEN RÖMISCHEN RECHTS 249, 253-54 (1853) [hereinafter SAVIGNY, OBLIGATIONS]; CHRISTOS FILIOS, E AITIA STIS ENOCHIKES SYMVASEIS [THE CAUSA CONTRAHENDI] 80–86 (2007).

others.[91] *Negotiorum gestio*, on the other hand, was left outside the law of unjust enrichment. It was renamed "agency without authorization" and was placed right after the provisions on mandate in the German Civil Code.[92] These advanced German ideas arrived in France after the promulgation of the Code Napoléon in 1804.[93] Meanwhile, the Medieval civil-law term "quasi-contract" had crept into the code and the writings of the early French commentators.[94]

In the French legal tradition—which includes Louisiana, Quebec, and several other jurisdictions—the confusing term "quasi-contract" has been used to group sources of obligations that are neither contractual not delictual. The Code Napoléon recognized two nominate types of quasi-contract—*negotiorum gestio*[95] and payment of a thing not due (*condictio indebiti*).[96] The French courts later devised a restricted and subsidiary action for enrichment without cause (*actio de in rem verso*).[97] The latter two actions make up the French law of unjust enrichment. Historically, French unjust enrichment law has been fragmented and restricted because restitution is governed primarily by contract law through the application of the

91. *See* DANNEMANN, *supra* note 86, at 3–20.

92. *Geschäftsführung ohne Auftrag*. *See* GERMAN CIVIL CODE, *supra* note 87, § 677; 2 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS §§ 430–431 (Theodor Kipp ed., 8th ed., 1900); 1 LUDWIG ENNECCERUS & HEINRICH LEHMANN, DAS BÜRGERLICHE RECHT §§ 298–301 (2d ed. 1901). The literal translation of the German term would be "management without mandate." *See* LA. CIV. CODE art. 2292 cmt. a (2023). However, the term "agency without specific authorization" appears in the official English translation of the German Civil Code. *See* https://perma.cc/6QKM-QBXR (Nov. 1, 2022).

93. *See* HENRI CAPITANT, INTRODUCTION À L'ÉTUDE DU DROIT CIVIL Nos 230–321 (5th ed. 1927) (importing the German theory of juridical acts and facts into French legal doctrine).

94. *See* CODE NAPOLÉON, *supra* note 10, art. 1371; DEMOLOMBE XXXI, *supra* note 63, Nos 33–42; 20 FRANÇOIS LAURENT, PRINCIPES DE DROIT CIVIL Nos 308–09 (1876) [hereinafter LAURENT XX].

95. *See* CODE NAPOLÉON, *supra* note 10, arts. 1372–1375. *Cf.* LA. CIV. CODE arts. 2295–2300 (1870).

96. *See* CODE NAPOLÉON, *supra* note 10, arts. 1376–1381. *Cf.* LA. CIV. CODE arts. 2301–2314 (1870). *See* TERRÉ ET AL., *supra* note 57, No. 1263.

97. *See* AUBRY & RAU IV, *supra* note 58, § 305, at 93; VIZIOZ, *supra* note 44, Nos 54–71; Forti, Quasi-contrats, *supra* note 39, No. 5; TERRÉ ET AL., *supra* note 57, Nos 1261, 1263.

broader French theory of cause.[98] Unjust enrichment is confined to the tight space of quasi-contract.[99] Although *negotiorum gestio* and unjust enrichment are both classified as quasi-contracts, they are distinct institutions in theory. Nevertheless, courts and scholars have frequently confused the two concepts and have come up with false types of "innominate quasi-contracts" based on an overly broad understanding of quasi-contract. For example, according to some scholars, when a contractual relationship is imposed by operation of law rather than by consent of the parties, the obligations stemming from such a "forced contract" are quasi-contractual. This assertion is false for two reasons. First, not all legal obligations falling between contract and tort are "quasi-contractual." If that were the case, then a myriad of other "forced relationships," such as co-ownership, community property, and parental authority would fall under quasi-contract. Such an overly broad category of quasi-contract would serve no practical purpose, as there is no unifying factor that would group together these radically different legal obligations. Second, these "forced contracts" do not involve a transfer of wealth or benefit without legal cause. In short, they do not give rise to a true quasi-contractual claim for restoration or restitution. Therefore, most, if not all, cases of "innominate quasi-contracts" are not quasi-contracts at all—they simply are separate legal obligations.[100]

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98. *See* JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 161 (William Strahan trans., Luther Cushing ed., 1853); FILIOS, *supra* note 90, at 69–71; 2 GABRIEL MARTY & PIERRE RAYNAUD, DROIT CIVIL. LES OBLIGATIONS, VOL. 1 No. 347 (1962) [hereinafter MARTY & RAYNAUD II].

99. *See* Paul Roubier, *La position française en matière d'enrichissement sans cause*, *in* 4 TRAVAUX DE L'ASSOCIATION CAPITANT 38, 42 (Association H. Capitant ed., 1948); JEAN-PIERRE BEGUET, L'ENRICHISSEMENT SANS CAUSE No. 26 (1945); *See* MICHAEL P. STATHOPOULOS, AXIOSIS ADIKAIOLOGITOU PLOUTISMOU [CLAIM OF UNJUSTIFIED ENRICHMENT] 18–19 (1972) (Greece) [hereinafter STATHOPOULOS, UNJUST ENRICHMENT].

100. *See infra* note 110 (discussing the French category of "innominate quasi-contracts'). *See also* TERRÉ ET AL., *supra* note 57, Nos 1325, 1329–30 (criticizing the characterization of "forced contracts" and various other innominate legal obligations as "innominate quasi-contracts"). The confusion surrounding the existence of "innominate quasi-contracts" might also be attributed to the fact that the special action for enrichment without cause (*actio de in rem verso*) was not included in the Code Napoléon, but was first recognized by the French courts as an

Common-law courts in the seventeenth and eighteenth centuries were also misled by the civil-law misconceptions mentioned above when they enunciated an expanded writ of assumpsit which came to be known as "implied in law contract" for restitution at common law. Along the same lines, equity courts also created the "constructive trust" for specific restitutions and tracing of assets.[101] Although it was generally understood that the liability for such restitution was a general principle forbidding unjust enrichment, nineteenth and twentieth-century scholars in the United States developed the doctrine of unjust enrichment as the substantive counterpart to the remedy of restitution.[102] Unjust enrichment is a unitary concept at common law. English scholars have attempted to postulate a set of "unjust factors" and a categorization for unjust enrichment.[103] Other scholars, which included the drafters of the Third Restatement of Restitution and Unjust Enrichment, resisted calls for a strict categorization of the types of unjust enrichment.[104] Meanwhile, confusion persisted with regard to very definitions of restitution and of unjust

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additional ("innominate") quasi-contract. Under modern law, however, it is clear that all quasi-contractual obligations express the broader principle of unjust enrichment. In other words, all types of so-called innominate quasi-contracts are special types of unjust enrichment or *negotiorum gestio*. *See* 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW, PT. 1, No. 813 (La. State L. Inst. trans., 12th ed. 1959, reprinted 2005) [hereinafter PLANIOL II.1]; Minyard v. Curtis Products, Inc., 205 So 2d 422, 432 (La. 1967). *See also supra* note 54 (discussing the historical separation of various legal obligations from *negotiorum gestio* and unjust enrichment). The same confusion seems to persist in Louisiana. *See*, *e.g.*, Martin, *supra* note 16, at 184 (observing the Louisiana false understanding of "quasi-contract" as "simply a shorthand method for distinguishing this particular type of obligation from a contract, which is an obligation created by agreement"). *See also* LA. CIV. CODE art. 2292 cmt. e ("Dicta in certain Louisiana decisions have confused the institution of *negotiorum gestio* with that of enrichment without cause").

101. *See* DOBBS & ROBERTS, *supra* note 6, §§ 4.1–4.2; BIRKS, *supra* note 6, at 267–74, 301–07.

102. *See* Kull, *Early Modern History*, *supra* note 5, at 313–16.

103. *See* ANDREW BURROWS, THE LAW OF RESTITUTION 86–117 (3d ed. 2011); BIRKS, *supra* note 6, at 38–46 (comparing the common-law approach of "unjust factors" with the civil-law method of "absence of basis").

104. *Compare* BIRKS, *supra* note 6, at 38–46 (enunciating a theory of a unitary concept of unjust enrichment) *with* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) (acknowledging the existence of a unitary concept of unjust enrichment, but resisting a strict classification of cases of unjust enrichment).

enrichment.[105] Common-law systems also seem to recognize situations analogous to the civil-law *negotiorum gestio*, which are named "unrequested interventions."[106]

Meanwhile, comparative law scholars from both systems became highly critical of the continued use of the misleading term "quasi-contract."[107] The term was mostly removed in later revisions of civil codes modelled after the French Civil Code, such as the Louisiana and Quebec civil codes.[108] The Third Restatement of Restitution and Unjust Enrichment also avoids using the term "implied contracts." Nevertheless, the term survived the 2016 revision of the French law of obligations and remains in the revised French Civil Code.[109] It is also used by scholars and courts in civil law systems—especially French systems.[110]

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105. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. b, c (AM. L. INST. 2011) (explaining that restitution and unjust enrichment as terms of art have frequently proved confusing).

106. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–30 (AM. L. INST. 2011).

107. *See, e.g.*, VIZIOZ, *supra* note 44, Nos 75–79; BIRKS, *supra* note 6, at 267–68.

108. *See infra* notes 150–56 and accompanying text.

109. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1300. French doctrine was split on the issue of retaining quasi-contract in the French Civil Code. Today, the revised French Civil Code is an isolated example of a modern civil code that still defines and makes use of the term quasi-contract. *See* Philippe Remy, *Des autres sources d'obligations*, *in* POUR UNE RÉFORME DU RÉGIME GÉNÉRAL DES OBLIGATIONS 32 (François Terré ed. 2013); Forti, Quasi-contrats, *supra* note 39, No. 9.

110. As discussed *supra* note 99, in French law, quasi-contract is a broader concept that includes nominate and innominate types. The nominate quasi-contracts listed in the French Civil Code (*negotiorum gestio*, payment of a thing not due, and unjustified enrichment) provide for restitution of wealth that changes hands without cause. French doctrine classifies these nominate types as "quasi-contracts of exchange" (*"quasi-contrats échange"*). Innominate quasi-contracts provide for the partition of wealth among parties in an involuntary or *de facto* co-ownership ("quasi-contracts of partition"–*"quasi-contrats partage"*). Examples of innominate quasi-contracts include legal co-ownership, *de facto* community property of unmarried couples, *de facto* partnerships, accession to movables, and obligations to restore performances from a dissolved or null contract. The French law of quasi-contract is still developing. Scholars and courts have identified additional innominate quasi-contractual obligations in cases where the conduct of a person could create the illusion or appearance of a binding contractual commitment. A celebrated example in the French jurisprudence is the announcement of winning a lottery. *See* CYRIL GRIMALDI, QUASI-ENGAGEMENT ET ENGAGEMENT EN DROIT PRIVÉ. RECHERCHE SUR LES SOURCES DE L'OBLIGATION Nos 150–351 (2007) (arguing that non-binding unilateral promises—commitments—can

This brief comparative excursus shows beyond question that the critics of quasi-contract have carried the day, at least formally. Indeed, quasi-contract as a source of obligations is an inaccurate and false legal term that has unnecessarily complicated the law. A term, however, that has been used consistently in civil-law systems for more than two centuries. It is submitted here that a proper redefinition and re-designation of quasi-contract may inform the appropriate use of this term by courts and scholars. The correction is simple—the original Roman descriptive use of the term "quasi-contract" must be revived. As long as it is understood that quasi-contract is not a prescriptive and dogmatic homogenous source of obligations, but rather an amorphous group of separate legal obligations that arise neither from contract nor from tort, this term remains useful in the legal lexicon to describe a variety of "licit juridical facts" that lie between contract and tort and that provide for the restitution of a benefit obtained without a lawful cause.[111]

become binding as quasi-commitments if the promisee reasonably relies on the promise to her detriment). *But see* Forti, Quasi-contrats, *supra* note 39, No. 42; Philippe le Tourneau, Quasi-contrat, *in* RÉPERTOIRE CIVIL DALLOZ No. 56 (5th ed. 2014) [hereinafter le Tourneau, Quasi-contrat] (arguing that liability for "detrimental reliance" sounds in tort, not quasi-contract). *See also* TERRÉ ET AL., *supra* note 56, Nos 1319–30 (identifying certain cases of "innominate quasi-contracts" and criticizing various false "innominate quasi-contracts," including "forced contracts" and "detrimental reliance"). In Louisiana, the revised law of co-ownership specifically governs the relations between co-owners, leaving virtually no room for "innominate" types of quasi-contract. Thus, in Louisiana law, these "innominate" types of obligations are not quasi-contractual in nature. Instead, they are legal obligations that are regulated primarily by specific rules and only by exception by the rules of the nominate quasi-contracts of *negotiorum gestio* and unjust enrichment. *See*, *e.g.*, LA. CIV. CODE arts. 507–516, 797–818, 1967, 2018, 2033, 2802, 2814. *See also* Symenonides & Martin, *supra* note 23, at 116 (explaining that co-ownership issues ought to be resolved on the basis of the special law of co-ownership rather than on quasi-contractual principles). Thus, there is no practical need for such an "innominate" category in Louisiana.

111. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 28–31; BAUDOUIN & JOBIN, *supra* note 45, No. 538.

*2. Modern Trends—Quasi-Contract as a Descriptive Concept*

Quasi-contract is better understood as a descriptive term that refers to a category of distinct "licit juridical facts" involving compensation or restitution of a service or benefit received without legal justification. This modern view is doctrinally sounder than the older and confusing theories of "fictitious contract" and "equity."

Traditional as well as contemporary legal theory identifies two sources of obligations—manifestations of consent and events which operate independently of consent.[112] Manifestations of consent—known as "juridical acts" in the civil law—include contracts, conveyances, and testaments (donations mortis causa).[113] Events which operate independently of consent—"juridical facts" in the civil law—include torts, unjust enrichment, *negotiorum gestio*, and miscellaneous others.[114] Juridical facts constitute a residual and vast source of obligations, encompassing any event that is not a juridical act.[115] Juridical facts might occur independently of any human act. For instance, natural events—e.g., earthquake or fire—can give rise to legal obligations or modify pre-existing obligations.[116] Juridical facts, however, usually involve a voluntary or involuntary human act. The act may be illicit, in which case the juridical fact is illicit and falls under the category of tort (in civil law terms, delict or quasi-delict).[117] Juridical facts, however, may also involve licit human conduct, in which case they are styled "licit juridical facts."

112. *See* BIRKS, *supra* note 6, at 21; YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 447–48; 4 ROSCOE POUND, JURISPRUDENCE § 128 (1959); ALAIN A. LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A COMPARATIVE CIVIL LAW PERSPECTIVE 9–11 (2020) [hereinafter LEVASSEUR, OBLIGATIONS].

113. *See* BIRKS, *supra* note 6, at 21; YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 447–48; *See* SAÚL LITVINOFF & W. THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 105–32 (1969); BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 33–38 (2d ed. 1992); POUND, *supra* note 112, § 128; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 9.

114. *See* BIRKS, *supra* note 6, at 21; YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, 447–48; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 9–10.

115. *See* 2 GABRIEL BAUDRY-LACANTINERIE & JULIEN BONNECASE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL : SUPPLÉMENT No 366 (1925).

116. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 447–48.

117. *See* POUND, *supra* note 112, § 129.

Licit juridical facts are not torts because the human act involved is not unlawful or *contra bonos mores*. Licit juridical facts, however, are not juridical acts because the maker's intention, or lack thereof, is irrelevant; the legal obligation is created by operation of law regardless of such intent. In a licit juridical fact, the actor's capacity is also irrelevant, because her intent to acquire a right or to incur an obligation is simply inoperative.[118] It is thus clear that licit juridical facts fall between contract (juridical acts) and tort (illicit juridical fact).[119]

Quasi-contracts fall within the category of "licit juridical facts."[120] This categorization is evident from the older language in the French and Louisiana civil codes, describing quasi-contracts as "lawful and voluntary acts."[121] In essence, the term "quasi-contract," as redefined here, may be used to describe a variety of licit juridical facts that give rise to legal obligations. Thus, a manager of another's affairs (*negotiorum gestor*) is held to the obligations of a mandatary regardless of whether she intended to be a mandatary.

Likewise, the owner of the affair is bound as a principal even if she had no such intent. The payee of money not due must make restitution even though she had no intent to "borrow" the money from the payor and made no promise to repay. An enriched party at another's expense had no intent to make restitution for the enrichment, but is liable nevertheless. These "quasi-contractual obligations," as they came to be known, derive from licit juridical facts, that is, licit acts—sometimes voluntary, other times involuntary—giving rise to legal obligations regardless of the intention or capacity of the actor.

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118. *See* GRIMALDI, *supra* note 110, Nos 62–68; BAUDRY-LACANTINERIE & BONNECASE, *supra* note 115, No. 366.

119. *See* BAUDRY-LACANTINERIE & BONNECASE, *supra* note 115, No 366; CARBONNIER II, *supra* note 45, No. 1213.

120. *See* CARBONNIER II, *supra* note 45, No. 1213; Forti, Quasi-contrats, *supra* note 39, Nos 15–16 (explaining that quasi-contracts are juridical facts, not juridical acts).

121. *See* CODE NAPOLÉON, *supra* note 10, art. 1371; LA. CIV. CODE art. 2293 (1870); Forti, Quasi-contrats, *supra* note 39, No. 17.

The term "quasi-contract" in this descriptive context is perhaps accurate, because it merely describes licit acts that resemble contracts, but are clearly not contracts.

The category of juridical facts is vast. There are numerous licit juridical facts that give rise to legal obligations, but are not quasi-contracts.[122] What sets apart quasi-contracts—as a group of licit juridical facts—from other licit juridical facts is the existence of an unjustified benefit, that is, an intervention in another's affairs or a disposition of wealth without a legal cause.[123] Indeed, *negotiorum gestio* entails the unauthorized, albeit useful, management of another's affairs without legal cause—without mandate. Enrichment without cause, as the name suggests, involves a patrimonial shift that has no legal cause in a juridical act or the law. This common theme of a lack of legal cause is noticeably broader than the traditional "equity theory of quasi-contract," as it also encompasses *negotiorum gestio*.[124]

Quasi-contract is thus properly redefined, pursuant to contemporary civil-law doctrine, as a variety of licit juridical facts giving rise to legal obligations. The voluntary and licit character of these juridical facts resembles contracts, which are veritable juridical acts. However, these juridical facts are not contracts because the obligations of the parties are created independently of

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122. *See* Forti, Quasi-contrats, *supra* note 39, No. 16; le Tourneau, Quasi-contrat, *supra* note 110, No. 12.

123. *See* CARBONNIER II, *supra* note 45, No. 1213; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, Nos 1–2. *See also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) (explaining that the concern of restitution is with unjustified enrichment, that is, an enrichment without legal justification).

124. *See* Forti, Quasi-contrats, *supra* note 39, No. 20. Some French scholars, however, have challenged the idea that *negotiorum gestio* is included in this common theme of an unauthorized benefit. These scholars argue that the law of *negotiorum gestio* might also impose additional obligations on the manager of the affair—e.g., the obligation to provide an account or the obligation to continue the management—that do not necessarily find justification in an unauthorized benefit received by the owner. *See* Forti, Quasi-contrats *supra* note 39, No. 21; REMY CABRILLAC, DROIT DES OBLIGATIONS No. 186 (12th ed. 2016); LIONEL ANDREU & NICOLAS THOMASSIN, COURS DE DROIT DES OBLIGATIONS No. 1724 (2016).

their consent.[125] Redefining quasi-contracts as types of licit juridical facts better explains their characteristic features and is doctrinally sounder that the "fictitious—or implied—contract" theory.

Another common characteristic feature that is present in all quasi-contracts is a benefit without cause. That benefit may take the form of an enrichment or of a useful intervention in one's affairs.[126] Quasi-contract is thus distinguished from contract, because "while contracts organize, in a prospective manner, the justified transfer of wealth between the parties, quasi-contracts correct, in a retrospective manner, an unjustified transfer of wealth among the parties."[127]

On the other hand, quasi-contract is separated from tort, because the source of delictual liability is damage unfairly caused to others, whereas the source of quasi-contractual liability is the benefit unduly received from others.[128] Thus, lack of cause seems to be a

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125. A similar understanding of "implied in law contracts" exists at common law. *See* ALFRED WILLIAN BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT. THE RISE OF THE ACTION OF ASSUMPSIT 491, 504–505 (1975) (explaining that implied in law contracts are not promises and that they lack the element of mutual assent).

126. The French jurist Toullier first expressed the idea that the common feature found in all quasi-contracts is an undue benefit that must be restored. *See* 11 CHARLES-BONAVENTURE-MARIE TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE No. 19 (4th ed., 1824).

127. TERRÉ ET AL., *supra* note 57, No. 1263, at 1332 (emphasis removed).

128. *See* CARBONNIER II, *supra* note 45, No.1213. *See also* YVAINE BUFFELAN-LANORE & VIRGINIE LARRIBAU-TERNEYRE, DROIT CIVIL. LES OBLIGATIONS No. 2011 (16th ed. 2018) ("the quasi-contracts inscribed in the Civil Code proceed from the same idea: to compensate for the advantage received from someone without sufficient justification"); EUGÈNE GAUDEMET, THÉORIE GÉNÉRALE DES OBLIGATIONS 295 (1937); RIPERT, *supra* note 72, No. 111; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, Nos 1–2; Forti, Quasi-contrats, *supra* note 39, Nos 6, 19. *See also* TERRÉ ET AL., *supra* note 57, No. 1263, at 1332 (criticizing the position argued by some French scholars that quasi-contractual liability is based on delict); Forti, Quasi-contrats, *supra* note 39, No. 21, explaining that:

> quasi-contractual obligations are viewed from the side of the debtor—the owner in negotiorum gestio, the recipient of an undue payment, the enriched party in enrichment without cause, whereas delictual obligations are viewed from the side of the creditor—the victim. . .The real difference between quasi-contract and delict or quasi-delict would then be the origin of the impoverishment: spontaneous in one case, imposed in the other.

preferable substitute to the "equity theory of quasi-contract."[129] As a result, quasi-contract is appropriately re-designated from a prescriptive legal concept denoting an independent source of obligations to a descriptive concept connoting a group of various juridical facts, which themselves are sources of legal obligations.[130]

Under this modern understanding, one may distinguish the appropriate legal liability—among a variety of licit juridical facts for the restitution of a benefit that was obtained without a lawful cause—from the remedy of restitution in money or in kind as the case may be.[131] When viewed through this lens, legal systems seem to converge with regard to the law of quasi-contract. Civil-law systems, which originally defined quasi-contract as a substantive concept, are now developing a unified law of restitution. Interestingly, the French and Quebec civil codes have enacted a separate section devoted to "restitution."[132] German and Greek scholars also observe the functional and flexible application of their law of unjustified enrichment, thus placing more emphasis on the restitution itself rather than the enrichment.[133] Conversely, common-law doctrine initially focused on the law of restitution as a remedy. Following the First

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129. *See* Gérard Cornu, *Quasi-contrats (art. 1371 à 1339)*, *in* AVANT-PROJET DE RÉFORME DU DROIT DES OBLIGATIONS ET DU DROIT DE LA PRESCRIPTION 62, 64 (Pierre Catala ed., 2006) ("[I]t is the theory of cause which, in the final analysis, unites the trilogy [*negotiorum gestio*, payment of a thing not due, and enrichment without cause]. . .The presence of the cause in the contract corresponds to the absence of cause in the quasi-contract.").

130. *See* BAUDOUIN & JOBIN, *supra* note 45, No. 538; Forti, Quasi-contrats, *supra* note 39, No. 22 (affirming the usefulness of the idea that quasi-contractual obligations arise when a person benefits from the quasi-contractual fact without being entitled to such benefit).

131. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011) (explaining the different types of "restitution").

132. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352–1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707; Valerio Forti, Régime général des obligations - Restitutions, *in* JurisClasseur Civil, Art. 1352 à 1352-9, Fascicule unique, Jan. 25, 2018 (Fr.) [hereinafter Forti, Restitution]. These provisions, however, do not govern restitution for enrichment without cause, for which there are more specific provisions. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303–1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

133. *See* MICHAEL P. STATHOPOULOS, GENIKO ENOCHIKO DIKAIO [GENERAL LAW OF OBLIGATIONS] 1080 (5th ed. 2018) (Greece) [hereinafter STATHOPOULOS, OBLIGATIONS].

Restatement of Restitution, however, the common law is now forming a substantive law of unjust enrichment.[134] This comparative overview of the laws of quasi-contract and restitution is particularly useful when examining the doctrinal and jurisprudential development in mixed jurisdictions, such as Louisiana.

*B. Louisiana Law*

The Louisiana law of quasi-contract was revised in 1995.[135] Prior to this revision, this area of the law was influenced primarily by French law, although certain common-law concepts, such as the doctrine of quantum meruit, appeared in the Louisiana jurisprudence. Thus, Louisiana inherited the confusion and misunderstandings from both civil and common-law systems.[136]

Following the French model, the Louisiana Civil Code of 1870 identified quasi-contracts that lay between contract and tort.[137] A broad definition of quasi-contract in the Louisiana Civil Code of 1870 comes verbatim from the Code Napoléon. Quasi-contracts are "the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between two parties."[138] This definition con-

134. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b (AM. L. INST. 2011) (discussing the conceptual framework on the First Restatement of Restitution, 1937); BIRKS, *supra* note 6, at 307–08 (concluding his thesis for a substantive theory of unjust enrichment as the legal basis for the remedy of restitution); *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(2), at 392 (distinguishing between unjust enrichment as the basis for liability and restitution as the remedy); GOFF & JONES, THE LAW OF UNJUST ENRICHMENT Nos 8-01 to 26-06 (Charles Mitchell et al. eds., 9th ed. 2016) (analyzing several ground for restitution found in the law of unjust enrichment).

135. *See* LA. CIV. CODE arts. 2292–2305 (rev. 1995). 1995 La. Acts, No. 1041 (eff. Jan. 1, 1996).

136. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 15–16.

137. *See* LA. CIV. CODE art. 2292 (1870); LA. CIV. CODE art. 2271 (1825); LA. CIV. CODE p. 318, arts. 1, 3 (1808).

138. LA. CIV. CODE art. 2293 (1870). *Cf.* LA. CIV. CODE art. 2272 (1825); LA. CIV. CODE p. 318, art. 2 (1808). For a critical analysis *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 26–36. For a comparative analysis that emphasizes on codification techniques, *see* Gérard Trudel, *Usefulness of Codification: A*

fused some Louisiana courts, which turned to common-law elements of quasi-contract.[139] Other Louisiana courts developed a doctrine of quasi-contractual quantum meruit, that is, an action for compensation for services rendered in the absence of an enforceable contract.[140] This broad definition of quasi-contract meant that several nominate and perhaps innominate types of quasi-contract existed in Louisiana. Nevertheless, Louisiana jurisprudence steadily identified three principal types of quasi-contract—management of affairs of another (*negotiorum gestio*);[141] payment of a thing not due (*condictio indebiti*);[142] and enrichment without cause (*actio de in rem verso*) which was "inherent but not fully expressed in the Louisiana Civil Code 1870,"[143] and was developed by the jurisprudence of the Louisiana Supreme Court.[144]

The 1995 revision moves away from common-law approaches and realigns Louisiana law with modern civil-law systems. The French model is followed primarily. However, certain German and Greek influences are also noticeable. Importantly, the term "quasi-contract" is eliminated as it served no practical purpose according

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*Comparative Study of Quasi-Contract*, 29 TUL. L. REV. 311 (1955). Under article 2294 of the Louisiana Civil Code of 1870, quasi-contractual obligations were understood very broadly to include "[a]ll [lawful and purely voluntary] acts, from which there results an obligation without any agreement." LA. CIV. CODE art. 2294 (1870). According to this broad definition, quasi-contractual obligations potentially include all obligations that are not contractual or delictual. Article 2294 has no counterpart in the Code Napoléon. This provision was clearly false and was repealed in 1995.

139. *See, e.g.*, Teche Realty & Investment Co., Inc. v. A.M.F., Inc., 306 So. 2d 432, 436 (La. App. 3d Cir. 1975); Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3d Cir. 1980):

> The essential elements of quasi contracts are a benefit conferred on the defendant by the plaintiffs, an appreciation by defendant of such benefits, and acceptance and retention by the defendant of such benefits under circumstances such that it would be inequitable for him to retain the benefits without payment of the value therefor.

140. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 271–372 (discussing extensively the Louisiana jurisprudence on *quantum meruit* and the confusion caused by the use of this common-law concept).

141. *See* LA. CIV. CODE arts. 2294–2300 (1870).

142. *See id.* arts. 2294, 2301–2314.

143. *See* LA. CIV. CODE art. 2298 cmt. a (2023).

144. *See* Minyard v. Curtis Products, Inc., 205 So 2d 422 (La. 1967); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 351–56.

to the committee.[145] Title V of Book III of the Louisiana Civil Code is renamed "Obligations Arising Without Agreement," consisting of three chapters. Chapter 3 is devoted to torts (offenses and quasi-offenses).[146] The first two chapters occupy "quasi-contract." Chapter 1 is designated as "Management of Affairs (*Negotiorum Gestio*).[147] Chapter 2 is titled "Enrichment Without Cause," containing two sections—Section 1 is named "General Principles" and contains the general remedy for enrichment without cause, and Section 2 is titled "Payment of a Thing Not Owed" and contains provisions on payment of a thing not due (*condictio indebiti*), which is now expressly recognized as a special rule of unjust enrichment.[148]

Meanwhile, the revised Louisiana law of co-ownership specifically governs the relations between co-owners, leaving virtually no room for "innominate" types of quasi-contract in Louisiana. By eliminating the term "quasi-contract" and recognizing *negotiorum gestio* and unjust enrichment as the only available actions, the revised law effectively (and correctly) repealed the false concept of "innominate quasi-contracts." Thus, in modern Louisiana law, "quasi-contract" means *negotiorum gestio* or unjust enrichment (payment of a thing not due or enrichment without cause), and nothing more.[149] Despite the fact that the revised Louisiana Civil Code does not attach any general regime to the notion of quasi-contract, the term still appears sporadically in the civil code provisions. Thus, quasi-contract remains a term of art in Louisiana law. For instance, other sources outline certain common rules to quasi-contracts in matters of dissolution of contracts,[150] damages,[151]

145. *See* Martin, *supra* note 16, at 183–85.
146. *See* LA. CIV. CODE arts. 2315–2324.2 (2023).
147. *See id.* arts. 2292–2297.
148. *See id.* art. 2298; *id.* arts. 2299–2305.
149. *See supra* notes 54, 100, and 110.
150. *See* LA. CIV. CODE art. 2018 (2023) (explaining that recovery of a performance when a contract is dissolved may be made "in contract or *quasi-contract*") (emphasis added).
151. *See id.* art. 2324.1 ("In the assessment of damages in cases of. . .*quasi contracts*, much discretion must be left to the judge or jury") (emphasis added).

choice-of-law,[152] civil procedure,[153] evidence,[154] and liberative prescription.[155]

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152. *See id.* art. 3541 (applying by analogy the choice-of-law principles on conventional obligations to quasi-contractual obligations). *See id.* cmt. c:

> Other more complete conflicts codifications contain separate rules for. . .quasi-contractual obligations. In this state, the relative scarcity of conflicts cases involving such issues militates against the drafting of such special rules. Nevertheless, a general 'catch-all' article is needed to govern these classes of cases. This Article is intended to meet this need.

*Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 221 (AM. L. INST. 1977); *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 1185–95 (6th ed. 2018). *Cf. also* European Parliament and Council Regulation 864/2007, arts. 10–11, 2007 O.J. (199) 40–49 (containing separate special choice-of-law rules for *negotiorum gestio* and unjust enrichment, which includes payment of a thing not due). *See* Peter Mankowski, *Article 10: Unjust Enrichment* 363–389, *in* 3 EUROPEAN COMMENTARIES OF PRIVATE INTERNATIONAL LAW. ROME II REGULATION (Ulrich Magnus & Peter Mankowski eds., 2019); Lubos Tichy, *Article 11: Negotiorum Gestio* 389–408, *in id.*; Forti, Quasi-contrats, *supra* note 39, No. 25. *See also generally* RESTITUTION AND THE CONFLICT OF LAWS (Francis Rose ed., 1995); HÉLÈNE CHANTELOUP, LES QUASI-CONTRATS EN DROIT INTERNATIONAL PRIVÉ (1998); GEORGE PANAGOPOULOS, RESTITUTION IN PRIVATE INTERNATIONAL LAW (2000); CHRYSSAFO TSOUCA, TO EFARMOSTEO DIKAIO STON ADIKAIOLOGITO PLOUTISMO [THE LAW APPLICABLE TO UNJUSTIFIED ENRICHMENT] (Greece).

153. Courts have held, for instance, that the alternate venue for actions on contract is also proper for actions based on quasi-contract. *See, e.g.*, Tyler v. Haynes, 760 So. 2d 559 (La Ct. App. 3d Cir 2000) (*negotiorum gestio*); Bloomer v. Louisiana Workers' Compensation Copr., 767 So. 2d 712 (La. Ct. App. 1st Cir. 2000) (*negotiorum gestio*); Arc Industries L.L.C. v. Nungesser, 970 So. 2d 690 (La. Ct. App. 3d Cir. 2007) (enrichment without cause). *See* LA. CODE CIV. PROC. art. 76.1 (2023). *Cf.* 42 C.J.S *Implied and Constructive Contracts* § 15 (Oct. 2022 update).

154. Quasi-contract is a juridical fact that can be proven by any means of evidence, including parol evidence. See Forti, Quasi-contrats, *supra* note 39, No. 29.

155. Actions on quasi-contract are personal actions that are subject to the general liberative prescription of ten years. *See* LA. CIV. CODE art. 3499 (2023); Roussel v. Railways Realty Co., 115 So. 742 (La. 1928); Minyard v. Curtis Products, 205 So. 2d 422, 433 (La. 1967); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); Burns v. Sabine River Authority, 736 So. 2d 977, 980 (La. Ct. App. 3d Cir 1999); Kilpatrick v. Kilpatrick, 660 So. 2d 182, 186 (La. Ct. App. 2d Cir. 1995); Smith v. Phillips 143 So. 47 (La. 1932); Lagarde v. Dabon, 98 So. 744, 746 (La. 1923); Julien v. Wayne, 415 So. 2d 540, 542 (La. Ct. App. 1st Cir. 1982); State v. Pineville, 403 So. 2d 49, 55 (La. 1981); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 207–09. *Cf.* Forti, Quasi-contrats, *supra* note 39, Nos 30–32. *See infra* notes 488, 796, 920, and accompanying text. Some of these cases refer to "quasi-contract" without clarifying whether they apply to *negotiorum gestio*, unjust enrichment, or to the older (and false) "innominate" type of quasi-contract. *See supra* notes 100 and 110 (discussing the French category of "innominate quasi-contracts"). Be that as it may, true quasi-contractual actions (*neogotiorum gestio* and unjust enrichment) as well as other legal actions (the former "innominate quasi-contractual actions") would still fall under the general liberative prescription of ten years, because of the residual nature of the general rule, unless these legal

As mentioned, judges and lawyers are also accustomed to using term "quasi-contract," perhaps for lack of a better term.[156] To facilitate continued use of this term, Part I of this Article proposed a redefinition of the term "quasi-contract" as a descriptive term referring to two distinct "licit juridical facts"—*negotiorum gestio* and unjust enrichment.

As the revised rules are now in their third decade of existence, there has been little doctrinal attention to their proper interpretation and application. Meanwhile, Louisiana courts have often confused *negotiorum gestio* with unjust enrichment or have not distinguished the type of unjust enrichment (*condictio indebiti* or *actio de in rem verso*). Based on a redefined concept of quasi-contract under modern civil-law doctrine, Parts II and III of this Article offer a first comprehensive commentary on the revised Louisiana law of quasi-contract—*negotiorum gestio* and unjust enrichment. Because the revision comments to the new provisions often cite to foreign—especially French—doctrine, the discussion will refer to foreign sources when necessary to fill gaps in the Louisiana doctrine and jurisprudence.

## III. MANAGEMENT OF AFFAIRS (*NEGOTIORUM GESTIO*)

The management of affairs (*negotiorum gestio*) is the unrequested intervention of a person, the "manager" (*negotiorum gestor*), who acts usefully and appropriately to protect the interests of another person, the "owner" of the affair (*dominus negotiorum*),

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actions are considered delictual in nature. *See* Dean v. Hercules, Inc., 328 So.2d 69, 71–73 (La. 1976) (holding that actions under article 667 of the Louisiana Civil Code are delictual in nature and prescribe in once year).

156. *See* Martin, *supra* note 16, at 184 ("If used uniformly to denote [a description of obligations that arise without agreement and are not contractual], quasi contract presents no doctrinal problem"). *Cf.* Corbin, *supra* note 83, at 544–46; SAMUEL J. STOLJAR, THE LAW OF QUASI-CONTRACT 1–2 (2d ed. 1989); RICHARD M. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW 130 (1936); Dan Priel, *In Defence of Quasi-Contract*. Research Paper No. 22/2011, *in* COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY (2011) (all preferring the term "quasi-contract" for lack of a better term).

usually in situations of necessity. Under certain conditions, the manager is entitled to compensation from the owner and also incurs certain obligations toward the owner. These conditions are laid out in the law of *negotiorum gestio*.[157] The classic examples dating back to Roman law are urgent repairs to an absent neighbor's home and the provision of medical care to an unresponsive patient.[158]

*Negotiorum gestio* is perhaps the most misunderstood part of the already confused law of quasi-contract.[159] Comparativists often argue that *negotiorum gestio* is a purely civilian institution with no common-law counterpart. A manager of affairs would thus be

157. *See* LA. CIV. CODE art. 2292 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1301; QUEBEC CIVIL CODE, *supra* note 13, art. 1482; GERMAN CIVIL CODE, *supra* note 87, art. 677; GREEK CIVIL CODE, *supra* note 88, art. 730. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–22 (AM. L. INST. 2011). *See* 7 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS No. 721 (Paul Esmein ed., 2d ed. 1954) [hereinafter PLANIOL & RIPERT VII]; 6 CHARLES AUBRY & CHARLES RAU, DROIT CIVIL FRANÇAIS. CONTRATS CIVILS DIVERS, QUASI-CONTRATS, RESPONSABILITÉ CIVILE No. 295 (André Ponsard & Noël Dejean de la Bâtie, 7th ed. 1975) [hereinafter AUBRY & RAU VI]; 15 GABRIEL BAUDRY-LACANTINERIE & LOUIS-JOSEPH BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES OBLIGATIONS, TOME QUATRIÈME No. 2790 (3d ed. 1908) [hereinafter BAUDRY-LACANTINERIE & BARDE XV]; XENOPHON LIVIERATOS, PERI DIOIKISEOS ALLOTRION [ON MANAGEMENT OF AFFAIRS OF ANOTHER] 34–36 (1968) (Greece).

158. These examples date back to Justinian's Digest. Other examples from the Digest include providing necessaries for the support of a family, paying the debt of another to avoid seizure or receiving payment on behalf of another. *See* DIG. 3.5.9, § 1 (Ulpian, Ad Edictum 10). No doubt, these examples were in the minds of the redactors of the Code Napoléon when drafting the provisions on *negotiorum gestio*. *See* 8 PIERRE-ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 453, 466 (1836). Nevertheless, French courts and scholars have developed a doctrine of *negotiorum gestio* that well exceeds these examples. *See* Roger Bout, Quasi-Contrats, Gestion d'affaires, Conditions d'existence, *in* JURISCLASSEUR CIVIL, ART. 1372 À 1375. FASCICULE B-1 (Aug. 1986); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2790; MARTY & RAYNAUD II, *supra* note 98, No. 337; LIVIERATOS, *supra* note 157, at 12–20, 68–69. Some examples from the French jurisprudence include juridical acts (such as making or receiving payments, taking out insurance, hiring a contractor to make urgent repairs, providing suretyship for a debt past due to avoid executory process, chartering an aircraft to repatriate a person in distress, hiring a physician to provide urgent care) as well as material acts (such as making urgent repairs, capturing and returning a runaway animal or providing care to a lost animal, putting out a fire, rescuing persons in danger). *See* STARCK, *supra* note 30, Nos 1769–70.

159. *See, e.g.*, JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 55 (1951) (warning his common-law audience that the topic of *negotiorum gestio* "will seem completely strange").

repudiated by a common-law court as an "officious intermeddler" or "volunteer." This assertion is a generalization and, as such, it is far from accurate.[160] Such sweeping statements fail to consider the legal nature and scope of application of *negotiorum gestio* across legal systems. In fact, the starting point of analysis in both civil and common-law systems is the Roman maxim forbidding intervention in another's affairs.[161] Both systems developed exceptions to this rule. Civil-law systems received the Roman concept of *negotiorum gestio*, but its reception was far from uniform in the major civil-law systems of France and Germany.[162]

Although there is no institution of *negotiorum gestio* at common law, similar concepts are found scattered in several areas of the law, some of which have been recently grouped under the heading of the law of restitution.[163] The following brief comparative discussion illustrates the convergences and divergences of *negotiorum gestio* among legal systems. The comparative conclusions also inform the proper analysis of the revised Louisiana law on this topic.

### *A. Comparative Law*

*Negotiorum gestio* has direct Roman roots.[164] Although little is known about the early history of this institution, sources indicate

160. *See* Samuel J. Stoljar, *Negotiorum Gestio* Nos 3, 24–25, *in* 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Ernst von Caemmerer & Peter Schlechtriem eds., 2007).

161. *See* DIG. 50.17.1.36 (Ulpian, Ad Sabinum 27) ("It is culpable to involve oneself in an affair with which one has no concern").

162. *See* LIVIERATOS, *supra* note 157, at 9–11.

163. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (AM. L. INST. 2011) (unrequested emergency intervention to protect another's life or health); *id.* § 21 (unrequested emergency intervention to protect another's property); *id.* § 22 (unrequested emergency intervention to perform another's duty). *But see* BIRKS, *supra* note 6, at 22–24 (arguing that *negotiorum gestio* does not fall within the scope of the law of unjust enrichment and restitution).

164. For a detailed account of the history of *negotiorum gestio*, See LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 58–60; Stoljar, *supra* note 160, Nos 26–27; DAWSON, *supra* note 159, at 55–61; John P. Dawson, Negotiorum Gestio: *The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 819–23 (1961); Ernest G. Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law,* 13 CORNELL L.Q. 190 (1928) [hereinafter Lorenzen, Negotiorum Gestio]; J. Menalco

that it developed in the courtrooms, when absentee litigants, who often were drafted as soldiers, were represented by a manager (*gestor*) of their affairs.[165] This institution later developed and broadened significantly in the post-classical Roman era as an action to protect the manager's altruistic intervention in the owner's affairs outside the courtroom.[166]

Importantly, the Roman law granted two actions—the direct legal action (*actio negotiorum gestorum directa*) that the owner had against the manager compelling the manager to execute the management prudently and to account to the owner; and the equitable contrary action (*actio negotiorum gestorum contraria*) that the Praetor gave to the manager for compensation for services rendered.[167] The direct action was later based on a "fictitious theory of quasi-contract," whereas the contrary action lay on the basis of the "equity theory of quasi-contract."[168]

This broadened notion of *negotiorum gestio* found its way into the French Civil Code through the writings of Domat and Pothier in the form of a "quasi-mandate."[169] Conversely, the German Pandectists imported a more restricted "agency without authorization" that appeared in the German Civil Code.[170]

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Solid, Comment, *Management of the Affairs of Another*, 36 TUL. L. REV. 108 (1961); LIVIERATOS, *supra* note 157, at 9–33; JEROEN KORTMANN, ALTRUISM IN PRIVATE LAW: LIABILITY FOR NONFEASANCE AND NEGOTIORUM GESTIO 99–103 (2005); PETROPOULOS I, *supra* note 48, at 1035–41.

165. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 58; Dawson, *supra* note 164, at 819.

166. *See* PETROPOULOS I, *supra* note 48, at 1036–37 (arguing that the institution of *negotiorum gestio* is a product primarily of interpolations to Ulpian's texts that were made at the time of Justinian's compilation).

167. *See* LIVIERATOS, *supra* note 157, at 13–14.

168. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 58-59; KORTMANN, *supra* note 164, at 99–100.

169. *Gestion d'affaires*. *See* CODE NAPOLÉON, *supra* note 10, art. 1372; DOMAT, *supra* note 98, at 573–80; POTHIER, MANDATE *supra* note 64, No. 167; 2 GEORGES RIPERT & JEAN BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL No. 1217 (1957) [hereinafter RIPERT & BOULANGER II].

170. *Geschäftsführung ohne Auftrag*. *See* GERMAN CIVIL CODE, *supra* note 87, § 677. *See supra* note 92.

*1. Civil Law*

In the French legal tradition, *negotiorum gestio* is the most representative application of the "fictitious contract theory of quasi-contract."[171] French doctrine and jurisprudence steadily characterize this institution as a "quasi-mandate," that is, a legal source of obligations that binds the parties as if there were a mandate.[172] Under the Code Napoléon and the revised French Civil Code, *negotiorum gestio* is subject to the rules of mandate that apply by analogy.[173] French doctrine is careful to note, however, that *negotiorum gestio* remains an autonomous juridical fact, although it does resemble the juridical act of mandate. Thus, the source of the obligations of the parties is the law and not the unilateral will of the manger or the owner.[174] Nevertheless, French doctrine and jurisprudence still require contractual capacity of the manager, even though the source of the obligation is not contractual.[175] One significant consequence of the "quasi-mandate" characterization is that the manager has the power to bind the owner to contracts with third persons.[176] This is a

171. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 53–54. For a detailed discussion of the legal foundation of *negotiorum gestio*, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 66–69.

172. *See* DEMOLOMBE XXXI, *supra* note 63, No. 53; TERRÉ ET AL. *supra* note 57, No. 1279.

173. *See* CODE NAPOLÉON, *supra* note 10, art. 1372; FRENCH CIVIL CODE, *supra* note 11, art. 1301. *Cf.* LA. CIV. CODE art. 2293 (2023).

174. *See* François Goré, *Le fondement de la gestion d'affaires source autonome et générale d'obligations*, RECUEIL DALLOZ [D.] 1953, p. 40; PLANIOL & RIPERT VII, *supra* note 157, No. 725; LIVIERATOS, *supra* note 157, at 12–33; Stoljar, *supra* note 160, Nos 31–36. Some French scholars have characterized *negotiorum gestio* as a unilateral juridical act. *See, e.g.*, JOSSERAND II, *supra* note 85, No. 1448; 1 RENE DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL No. 17, at 46–47 (1923).

175. If the manager lacks capacity, compensation is only available under a theory of unjust enrichment. On the other hand, capacity of the owner is not a requirement for *negotiorum gestio*. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2799–2800; PLANIOL & RIPERT VII, *supra* note 157, No. 729; DEMOLOMBE XXXI, *supra* note 63, No. 94. *But see* AUBRY & RAU VI, *supra* note 157, No. 295, at 440 n.3 (questioning the requirement of capacity for all cases of *negotiorum gestio*).

176. *See* CODE NAPOLÉON, *supra* note 10, art. 1375; FRENCH CIVIL CODE, *supra* note 11, art. 1301-2; QUEBEC CIVIL CODE, *supra* note 13, art. 1486; LA. CIV. CODE art. 2297 (2023).

salient feature of the French model of *negotiorum gestio* that is not found in the German civil-law system.[177]

As a result, *negotiorum gestio* in French law captures a wide variety of unsolicited altruistic acts, potentially including interventions by intermeddlers and other volunteers with "predatory" intentions.[178] French doctrine is aware of this criticism and has attempted to restrict the scope of application to acts that are "useful" and "appropriate," having the express or implied intent of the owner in mind.[179] Furthermore, contemporary French scholars concede that pure altruism cannot be the legal foundation for *negotiorum gestio*.[180] The precise intent of the manager, who might have a personal interest in the affair managed, must be scrutinized carefully.[181] On the contrary, if the manager had a purely gratuitous intent, she should not be able to recover any compensation from the owner.[182]

Other French scholars have posited that *negotiorum gestio* is a subset of the more general doctrine of unjust enrichment.[183] Indeed, it is true that the Roman contrary action enforcing *negotiorum gestio* (*actio negotiorum gestorum contraria*) was a praetorian action to prevent the owner's unjust enrichment.

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177. *See* LA. CIV. CODE art. 2297 cmt. b (2023); AUBRY & RAU VI, *supra* note 157, No. 300.

178. *See* DAWSON, *supra* note 159, at 61–62.

179. *See* AUBRY & RAU VI, *supra* note 157, No. 295; KORTMANN, *supra* note 164, at 103–05.

180. *See* Stoljar, *supra* note 160, No. 19. *See also* MALAURIE ET AL., *supra* note 30, No. 1025 (observing that "encouraging altruism risks encouraging indiscretion, a great social plague; many people have a natural, even unhealthy inclination to take care of others. . .Because philanthropy is often a beautify mask under which selfish interests hide").

181. *See* AUBRY & RAU VI, *supra* note 157, No. 295; PLANIOL & RIPERT VII, *supra* note 157, No. 726.

182. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2798.

183. *See, e.g.*, Maurice Picard, *La gestion d'affaires dans la jurisprudence contemporaine*, *in* RTDCIV 1922, p. 33. Indirect support for this position can also be found in the text of the revised French Civil Code. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303 ("En dehors des cas de gestion d'affaires. . .celui qui bénéficie d'un enrichissement injustifié au détriment d'autrui. . .") ("Except in cases of management of affairs. . .he who benefits from an unjustified enrichment at the expense of another. . .").

Pothier himself stated that the foundation for this quasi-contract was "natural equity."[184] Nevertheless, *negotiorum gestio* should be kept separate from the actions for unjust enrichment (payment of a thing not due and enrichment without cause).[185] First, *negotiorum gestio* presupposes a voluntary act of the manager and it imposes reciprocal obligations to both parties. Unjust enrichment, however, does not necessarily require any voluntary act of the parties and it gives rise only to one obligation for restitution. Thus, *negotiorum gestio* comes much closer to a quasi-contract (or implied contract at common law) than unjust enrichment. Second, the contrary action brought by the manager against the owner is for compensation for the useful management, with reference to the time the act of management was performed and regardless of whether any benefit from the management was later maintained.[186] Thus, compensation is due to a neighbor who repairs a house even if the house later burns down. Likewise, a physician is entitled to compensation for spontaneous medical aid to a patient who does not survive.[187] Conversely, compensation for enrichment without cause is due only to the extent of the enrichment that subsists when the action is brought.[188] Finally,

184. *See* POTHIER, MANDATE, *supra* note 64, No. 167.

185. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 723; DEMOLOMBE XXXI, *supra* note 63, No. 48; BOUT, *supra* note 27, Nos 247–56.

186. *See* LA. CIV. CODE art. 2292 cmt. e (1995); PLANIOL & RIPERT VII, *supra* note 157, No. 723. In fact, there was no express requirement of the defendant's enrichment in the Roman categories of quasi-contract and in early French civil law. *See, e.g.*, DOMAT, *supra* note 98, at 541 (tutor recovers expenses regardless of minor's enrichment); *id.* at 601 (restoration of a thing not due depends on the nature of the thing as consumable or nonconsumable and resembles the obligations of a borrower from a loan); *id.* at 579 (*negotiorum gestor* recovers regardless of owner's enrichment). *But see* Valerio Forti, Gestion d'affaires. Généralités. Conditions Nos 45–46, *in* JurisClasseur Civil, Art. 1301 à 1301-5. Fascicule 10, Jul. 27, 2020 (Fr.) [hereinafter Forti, Requirements for Negotiorum Gestio] (explaining that under French jurisprudence, when the management is conducted in the common interest of the manager and the owner, reimbursement of the manager depends on whether the owner actually received a benefit at the end of the management).

187. *See* DIG. 3.5.9, § 1 (Ulpian, Ad Edictum 10). *Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1486.

188. *See* LA. CIV. CODE art. 2298 (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 723.

*negotiorum gestio* holds the manager to a heightened standard of care and potentially imposes liability for breach of the manager's duties. Thus, *negotiorum gestio* is not merely a remedy in restitution. It is a code of behavior, an expression of the principle of good faith and altruism. The action for enrichment without cause (*actio de in rem verso*), on the other hand, is concerned with restitution and is a gap-filling subsidiary action that is brought when no other remedy—including a remedy for *negotiorum gestio*—is available.[189] Therefore, the two institutions are separate in the civil law. Doctrinal attempts to merge *negotiorum gestio* with the *actio de in rem verso* only created confusion in the courts and the doctrine.[190] Although *negotiorum gestio* is inspired by a principle of unjust enrichment in its broader sense, it is unrelated to the more specific actions of payment of a thing not due (*condictio indebiti*) and enrichment without cause (*actio de in rem verso*). Common law scholars have also encountered difficulty in accurately explaining liability in unjust enrichment for unrequested interventions.[191] Perhaps a civil-law approach of separating these two institutions would facilitate that discussion.

German legal doctrine in the nineteenth century had espoused the theory of juridical acts and had thus dispelled with the notion of quasi-contract. *Negotiorum gestio* was therefore at odds with the

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189. *See* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122–23 (La. 1974); Symeonides & Martin, *supra* note 23, at 100, 151.

190. Because the action for enrichment without cause (*actio de in rem verso*) was not expressly recognized in the Code Napoléon, early French scholars attempted to introduce the action either as an abnormal *negotiorum gestio* or an extension of the action for recovery of a payment of a thing not due. Naturally, this only confused the courts. *See* Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law: Part I*, 36 TUL. L. REV. 605, 618–21 (1962) [hereinafter Nicholas I] (discussing the development of a theory of abnormal *negotiorum gestio* (*negotiorum gestio utilis*) in the French jurisprudence); Barry Nicholas, *Unjustified Enrichment in Civil Law and Louisiana Law, Part II*, 37 TUL. L. REV. 49, 49–62 (1962) [hereinafter Nicholas II] (discussing the foundation of enrichment without cause on the basis of several quasi-contractual theories in the early Louisiana jurisprudence). *See infra* note 806.

191. *See* Priel, *supra* note 156 (arguing that in cases of unrequested interventions at times of emergency, the principles of restitution and unjust enrichment are not only unhelpful, but misleading).

German scientific classification of operative facts.[192] Being faithful Romanists, however, German scholars maintained the concept, which was named "agency without authorization" and appeared in the German Civil Code as an independent title next to mandate.[193] In its typical systematic fashion, German doctrine also carefully categorizes types of *negotiorum gestio*. Thus, a "genuine agency without authorization" exists when the manager conducts the affair of another knowing that the affair is foreign and intending to manage it as such.[194] Conversely, a "false agency without authorization" exists when the manager treats the affair as her own although she knows that she is not entitled to do so.[195] The latter category is a tort giving rise to claim for damages that includes disgorgement of profits.[196]

At first blush, the German version of *negotiorum gestio* seems markedly narrower than its French counterpart. Management is authorized only for emergencies, and it must conform with the owner's actual or presumed will.[197] The manager has a duty to notify the owner and to wait for the owner's directions when possible.[198] Importantly, the manager has no power to bind the owner toward third

192. *See* KORTMANN, *supra* note 164, at 106. For a detailed comparative examination of the German law of *negotiorum gestio*, *see* Dawson, *supra* note 164, at 824–43.

193. *See* GERMAN CIVIL CODE, *supra* note 87, § 677; KORTMANN, *supra* note 164, at 106; Stoljar, *supra* note 160, Nos 31, 42.

194. An example is when a person sells a perishable item belonging to her friend for her friend's account. *See* ENNECCERUS & LEHMANN, *supra* note 92, § 298. If the genuine management conforms with the owner's actual or intended wishes and was for the owner's benefit, the manager will be reimbursed for her expenses. Otherwise, the manager who failed to act prudently will be liable to the owner for damages. *See* GERMAN CIVIL CODE, *supra* note 87, §§ 677–686. *See also* Dawson, *supra* note 164, at 824 (preferring the term "pure *negotiorum gestio*").

195. *See* GERMAN CIVIL CODE, *supra* note 87, § 687 para. 2. For example, a person sells her friend's item wanting to keep the price for herself. *See* ENNECCERUS & LEHMANN, *supra* note 92, § 298. *See also* DANNEMANN, *supra* note 86, at 104–105 (preferring the term "unjustified *negotiorum gestio*"); Dawson, *supra* note 164, at 826 (using the term "impure *negotiorum gestio*").

196. *See* DANNEMANN, *supra* note 86, at 104–105.

197. *See* Stoljar, *supra* note 160, No. 43; KORTMANN, *supra* note 164, at 106.

198. *See* GERMAN CIVIL CODE, *supra* note 87, § 681. *Cf.* LA. CIV. CODE art. 2294 (2023).

persons.[199] A closer look, however, may reveal a broader scope of application in certain cases. For instance, incapacity of the manager does not exclude the application of the German provisions on *negotiorum gestio*.[200] Notably, the element of altruism is a salient feature of the German law of *negotiorum gestio*, which gave rise to a "theory of human help."[201]

While no objection can be raised against altruism on moral grounds, the use of pure altruism as a legal basis for compensation might generate questionable results.[202] A well-known and criticized example from the German courts involved a motorist who swerved to avoid a child and was severely injured as a result. The court held that the motorist managed the affair of the child and was awarded compensation for her "expenses" that included her loss.[203]

*Negotiorum gestio* is thus an independent legal source of obligations—a veritable licit juridical fact. If the conditions for its application are met, the owner has a direct action against the manager for prudent conclusion of the management, and the manager has a contrary action against the owner for compensation. If the conditions are not met, then the owner may have an action in tort against an officious intermeddler, if the manager did not manage the affair to protect the interests of the owner, or if the manager

199. *See* Stoljar, *supra* note 160, No. 43; KORTMANN, *supra* note 164, at 110.

200. *See* GERMAN CIVIL CODE, *supra* note 87, § 682 (providing that a manager with limited capacity may be held liable to the owner in tort and unjust enrichment; however, the manager maintains her action against the owner in *negotiorum gestio*).

201. *Theorie der Menschenhilfe*. Josef Kohler, *Die Menschenhülfe im Privatrecht*, 25 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1, 43 (1887); Stoljar, *supra* note 160, No. 18; KORTMANN, *supra* note 164, at 106.

202. *See* Stoljar, *supra* note 160, No. 19 (criticizing the use of pure altruism as the legal basis for a claim of *negotiorum gestio*).

203. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 27, 1962, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 390, 1963 (Ger.). *See* KORTMANN, *supra* note 164, at 110. *See also* Stoljar, *supra* note 160, No. 20 (criticizing this German decision as a dangerous overreach of *negotiorum gestio* into tort law and an imposition of a great financial burden on the recipient of unrequested interventions, and observing that recent German jurisprudence has moved away from a pure altruistic theory of *negotiorum gestio*).

intervened despite the owner's prohibition. Alternatively, the manager might be able to claim restitution for any unjust enrichment that the owner obtained by the manager's services.

*2. Common Law*

A popular opinion among scholars is that the altruistic institution of *negotiorum gestio* has no place in the individualistic common law.[204] A civil-law manager is thus branded as an "officious intermeddler," "interloper," "busybody," or "volunteer."[205] This is an oversimplified and inaccurate statement of comparative law. Perhaps a more accurate statement of the orthodox position at common law is that the intervenor in another's affairs generally has no action for compensation against the owner of the affair.[206] In other words, the Roman contrary action of the manager against the owner for compensation is not authorized at common law.[207] The validity of this more accurate statement, however, can also be challenged.

Although no special institution called *negotiorum gestio* officially exists at common law, various theories of recovery reach comparable results, especially when the intervention served a public-policy purpose.[208] The main example is the action for compensation

204. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS. ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 448 (1992). *See also* Dawson, *supra* note 164, at 817, 1073; Edward W. Hope, *Officiousness*, 15 CORNELL L.Q. 25 (1929); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Francis D. Rose, *Restitution for the Rescuer*, 9 OXFORD J. LEGAL STUD. 167 (1989); Robert A. Long, Jr., *A Theory of Hypothetical Contract*, 94 YALE L.J. 415 (1984).

205. *See* Stoljar, *supra* note 160, No. 54.

206. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(3) (AM. L. INST. 2011).

207. *See* Duncan Sheehan, *Negotiorum Gestio: A Civilian Concept in the Common Law?*, 55 INT'L & COMP. L. Q. 253, 260 (2006) (observing that the direct action of the owner against the manager is available in English law, and examining whether the contrary action is also available).

208. *See* DAWSON, *supra* note 159, at 140–41. *See also* KORTMANN, *supra* note 164, at 115–18 (discussing implied contract and agency by necessity as two

of a vessel for rescuing another vessel in distress, under the law of maritime salvage.[209] Another older and less known example concerned unattended burials, importing the Roman *actio funeraria* into the common law.[210] The doctrine of "agency by necessity" is also a candidate for a common-law analogue to *negotiorum gestio*.[211] Cases of agency by necessity originally involved the supply of necessaries and preservation of property in favor of certain persons unable to tend to their affairs.[212] Lastly, unjust enrichment seems to be gaining momentum as a suitable ground for the manager's recovery at common law.[213] This is particularly the case in the United States. The Third Restatement of Restitution and Unjust Enrichment devotes several sections to the restitution for "unrequested intervention," especially in emergency cases of protection of another's life or health, and property.[214] These provisions strongly resemble a civil-law *negotiorum gestio* approach, even though the relevant Restatement comments and notes make no such reference.[215] Interestingly, the manager's recovery under the Restatement—which is

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significant analogues to *negotiorum gestio*); GOFF & JONES, *supra* note 134, Nos 18-01 to 18-71; BURROWS, *supra* note 103, at 469–87.

209. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 21 cmt. e (AM. L. INST. 2011); Stoljar, *supra* note 160, No. 58; KORTMANN, *supra* note 164, at 129–34. *See also* DAWSON, *supra* note 159, at 141 ("Our law of maritime salvage not only permits but encourages intervention by giving it a generous reward. Our good neighbor policy applies on the sea but not on land").

210. *See* Stoljar, *supra* note 160, No. 58; KORTMANN, *supra* note 164, at 118–20.

211. Just like the "implied in law contract" referred to an implied promise in the absence of consent, "agency by necessity" implies authority of the intervenor in certain cases of necessity. *See* Stoljar, *supra* note 160, No. 58; Sheehan, *supra* note 207, at 267–71; KORTMANN, *supra* note 164, at 127–36.

212. The traditional cases involved married women, shipmasters, and holders of negotiable instruments. *See* Stoljar, *supra* note 160, No. 58; KORTMANN, *supra* note 164, at 127–36.

213. *See* Sheehan, *supra* note 207, at 263–67; KORTMANN, *supra* note 164, at 123–27. *But see* BIRKS, *supra* note 6, at 23–24 (endorsing the civil-law view that *negotiorum gestio* does not fall within the purview of unjust enrichment).

214. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (AM. L. INST. 2011); *id.* § 22 (performance of another's duty). *See also* 2 GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 10.1–10.11 (1978 & Suppl.) [hereinafter PALMER II].

215. *See* Stoljar, *supra* note 160, No. 60–65 (commenting on similar provisions in the First Restatement of Restitution).

"measured by the loss avoided or by a reasonable charge for services provided"—might be more generous than a claim for reimbursement that is allowed in most civil-law cases.[216] In any event, common-law lawyers and scholars might turn to Louisiana doctrine to better understand why an unrequested intervention is a distinct case that may not fit well in an unjust enrichment analysis. What is recoverable here is not the enrichment of the beneficiary—whose change of position is irrelevant—but the expense and resources of the intervenor who acted spontaneously and appropriately.

Finally, it should be noted that a civil-law manager is only granted compensation when she is not an "officious intermeddler."[217] On the other hand, a volunteer who is moved by a gratuitous intent to help her neighbor and who did not intend to claim reimbursement has no action for reimbursement against the owner.[218] Regardless of her gratuitous intent, however, a civil-law manager is liable to the owner for the prudent management of the affair either

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216. *Compare* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (AM. L. INST. 2011) *with* LA. CIV. CODE art. 2297 (2023).

217. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 93–109 (explaining that the requirement of "usefulness" coupled with the altruistic nature of *negotiorum gestio* would disqualify "officious interlopers" from any action for compensation).

218. *See* GERMAN CIVIL CODE, *supra* note 87, § 685. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 21 cmt. c (AM. L. INST. 2011). Gratuitous intent is not presumed. *See* KORTMANN, *supra* note 164, at 105–06. When discussing the topic of *negotiorum gestio*, scholars often refer to good (and bad) Samaritans. *See* Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152 (1999). This reference is certainly accurate with respect to the legal duty to rescue others ("Good Samaritan laws"), which exists in most civil-law jurisdictions (but not in Louisiana), as opposed to common-law jurisdictions. *See* Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 88–106 (2005). However, *negotiorum gestio* has no direct correlation with the legal duty to rescue. *See* KORTMANN, *supra* note 164, at 105, 108 (observing that a private rescuer's claim for reimbursement under *negotiorum gestio* is independent of the legal duty to rescue). *But see* MALAURIE ET AL., *supra* note 30, No. 1025 (arguing that rescuers should not qualify as *negotiorum gestores* for several reasons: first, because they have a preexisting legal (or moral) duty to rescue, thus their management is not "spontaneous"; second, because they are performing a public policy function of a gratuitous nature rather than a private management of the victim's affair; third, because in some cases rescuers might be mandataries when their intervention was made with the victim's valid consent).

under the law of *negotiorum gestio* or, if the conditions of *negotiorum gestio* are not met, under tort law.[219]

*B. Louisiana Law*

The revised Louisiana law of *negotiorum gestio* primarily follows the French approach.[220] Thus, the rules of mandate apply by analogy to *negotiorum gestio*.[221] The manager has a fiduciary duty toward the owner to manage the affair under a heightened standard of a prudent administrator.[222] The owner is bound by juridical acts made by the manager with third persons, as if the manager were given an express mandate.[223] Furthermore, the manager must have full legal capacity; otherwise, the rules of *negotiorum gestio* do not apply.[224] Nevertheless, the revised law has borrowed certain elements from German and Greek law. Most notably, the manager's act must conform with the owner's actual or presumed wishes.[225] The manager must give prompt notice to the owner and await instructions, unless there is immediate danger. In other words, the full extent of *negotiorum gestio* is limited to acts that protect the owner or her patrimony from immediate danger.[226]

The coexistence of French and German elements in the revised Louisiana law become apparent in the following overview of the requirements and effects of *negotiorum gestio*.

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219. *See* LA. CIV. CODE art. 2295 & cmt. c (2023).
220. *See* LA. CIV. CODE arts. 2292–2297 (rev. 1995). *Cf.* LA. CIV. CODE arts. 2295–2300 (1870); LA. CIV. CODE arts. 2274–2278 (1825); LA. CIV. CODE p. 318–20, arts. 5–9 (1808); DeBlanc v. Texas, 121 F.2d 774, 775–76 (5th Cir. 1941) (observing that the jurisprudence of the Louisiana Supreme Court on *negotiorum gestio* is in accord with French doctrine); Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana,* 56 LA. L. REV. 257, 277–80 (1995). For an excellent analysis of the pre-revision law, which is still a valuable resource today, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 53–141.
221. *See* LA. CIV. CODE art. 2293 (2023).
222. *See id.* art. 2295.
223. *See id.* art. 2297.
224. *See id.* art. 2296.
225. *See id.* art. 2292.
226. *See id.* art. 2294 & cmt.

*1. Requirements*

The relationship of the parties—manager and owner—is governed by the provisions on *negotiorum gestio* only when certain requirements are met. If the requirements for *negotiorum gestio* are not met, the rights and obligations of the parties are determined by other legal provisions, such as tort law or unjust enrichment law.[227] Civil-law doctrine enumerates several basic conditions for *negotiorum gestio*. In Louisiana law, the requirements for *negotiorum gestio* fall into two categories—the first set of requirements refers to the act of management of affairs of another; and the second set of requirements refers to the parties (manager and owner).

*a. The Act of Management of Affairs of Another*

*Negotiorum gestio* requires one act or several acts of management of the affairs of another person. Civil-law doctrine and jurisprudence construe these terms broadly.[228] "Management" entails voluntary acts of the manager. These acts can be simple material acts, as in the case of a repair of a dilapidated building or putting out a fire.[229]

The manager's acts can also be juridical acts, such as the sale of perishable goods,[230] the hiring of services of third parties to manage

227. *See id.* arts. 2292 cmt. d, 2295 cmt. c, 2296. *See also* Lee v. Lee, 868 So. 2d 316, 319–20 (La. Ct. App. 3d Cir. 2004).

228. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 728; AUBRY & RAU, *supra* note 157, No. 295; TERRÉ ET AL., *supra* note 57, No. 1271.

229. *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003) (rescuing a boat from sinking).

230. *See, e.g.*, Leon Godchaux Clothing Co. v. De Buys, 120 So. 539, 637–38 (La. Ct. App. Orl. 1929) (holding that a seller becomes a *negotiorum gestor* of a buyer who rejected the thing, and that seller has the duty to sell the thing if it is perishable); LA. CIV. CODE art. 2608 cmt. b (2023) ("A merchant buyer who proceeds to sell perishable things that he has rejected acts as the seller's negotiorum gestor"); DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES, §§12:10, *in* 24 LOUISIANA CIVIL LAW TREATISE (Oct. 2021 update). *Cf.* UCC § 2-603 (AM. L. INST. & UNIF. L. COMM'N 1977).

the affair,[231] or the payment of the owner's debt.[232] Naturally, when the manager makes juridical acts, she must have the requisite contractual capacity.[233] Frequently, the management will entail a mixture of juridical and material acts.[234] For instance, a neighbor wishing to repair the owner's house, may use her own personal labor and may also contract with third parties to purchase materials or hire workers for the project.[235] The management may consist of a single act or a series of related acts. When the acts are related, the management is deemed indivisible—the manager must complete the entire management as a prudent administrator, if directions from the owner have not been received.[236] If the several acts are separate, then each act constitutes its own management that is separate from the others.[237]

Acts of management routinely involve conservatory acts, that is, necessary acts tending to preserve a thing or prevent its damage or loss.[238] Acts of management are sometimes administrative acts,

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231. *See* LA. CIV. CODE art. 2292 cmt. b (2023); *cf. id.* 2989 cmt. e ("The contract of mandate may involve the performance of material acts as well as the making of juridical acts"). In Roman law, only juridical acts were contemplated as acts of management. By the time of Justinian, civil law jurisprudence and doctrine expanded the definition to also include material acts. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 59.

232. *See* Hebert v. Hollier, 976 So. 2d 1256, 1259 (La. 2007); Armstead v. Roche, 302 So. 3d 539, 542–43 (La. Ct. App. 4th Cir. 2020).

233. *See* LA. CIV. CODE arts. 27, 1918 (2023).

234. The party invoking *negotiorum gestio* carries the burden of proving the acts of management. Material acts can be proved by any means, including testimonial evidence, whereas special rules apply for the proof of juridical acts. *See* LA. CIV. CODE arts. 1831–1853 (2023); AUBRY & RAU VI, *supra* note 157, No. 298; PLANIOL & RIPERT VII, *supra* note 157, No. 734; MARTY & RAYNAUD II, *supra* note 98, No. 343; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 209–26; SAÚL LITVINOFF & RONALD J. SCALISE, JR., THE LAW OF OBLIGATIONS §§ 12.1–12.69, *in* 5 LOUISIANA CIVIL LAW TREATISE (2d ed., Nov. 2021 update) [hereinafter LITVINOFF & SCALISE, OBLIGATIONS].

235. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 728; AUBRY & RAU, *supra* note 157, No. 295.

236. *See* LA. CIV. CODE art. 2294 (2023).

237. *See* DEMOLOMBE XXXI, *supra* note 63, No. 107; LIVIERATOS, *supra* note 157, at 59, 71–72.

238. *See* AUBRY & RAU, *supra* note 157, No. 295; TERRÉ ET AL., *supra* note 57, No. 1271. Examples include rescuing, preserving, and safeguarding property, taking out insurance, and satisfying creditors to avoid seizure. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 444; A.N. YIANNOPOULOS & RONALD

which are acts of ordinary management of the property.[239] Because most cases of management involve necessary acts in emergency situations, the period of administration will usually be brief.[240] Acts of disposition of the property, on the other hand, are permitted only if they are necessary and useful.[241]

The "affair" of the owner is usually patrimonial in nature, involving an asset or a right of the owner.[242] The affair can also be extra-patrimonial, as in the case of rescuing a person from harm, or providing medical services to an unconscious patient.[243] When the

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J. SCALISE, JR., PERSONAL SERVITUDES § 3:2, *in* 3 LOUISIANA CIVIL LAW TREATISE (5th ed., Oct. 2022 update) [hereinafter YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES].

239. *See* TERRÉ ET AL., *supra* note 57, No. 1271. Administrative acts exceed conservatory acts, but they are less than an alienation of the property, unless the property is consumable or perishable. Examples include usual and foreseeable expenses, useful improvements, production of income without depletion of the property, collection of natural and civil fruits, insuring the property, and collecting payments. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 444; YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 3:2.

240. *See* AUBRY & RAU VI, *supra* note 157, No. 295; PLANIOL & RIPERT VII, *supra* note 157, No. 726; MARTY & RAYNAUD II, *supra* note 98, No. 340.

241. An oft-quoted example is the sale of a perishable thing. *See* LA. CIV. CODE art. 2292 cmt. b (2023). *See* AUBRY & RAU VI, *supra* note 157, No. 295; PLANIOL & RIPERT VII, *supra* note 157, No. 726; TERRÉ ET AL., *supra* note 57, No. 1271. A *negotiorum gestor* does not have the power to establish predial servitudes, but she may acquire servitudes for the benefit of the owner. *See* LA. CIV. CODE arts. 711 cmt. b, 735 cmt. c (2023). Courts have held that a unit operator may act as a *negotiorum gestor* when selling mineral interests of an unleased owner. *See* Taylor v. Woodpecker Corp., 633 So. 2d 1308, 1313 (La. Ct. App. 1st Cir. 1994); Taylor v. Smith, 619 So. 2d 881, 887–88 (La. Ct. App. 3d Cir. 1993); Johnson v. Chesapeake Louisiana, LP, 2022 WL 989341 (W.D. La. Mar. 31, 2022).

242. The term "affair" is also used in the revised law of mandate, and it connotes juridical as well as material acts. *See* LA. CIV. CODE art. 2989 cmt. d (2023); Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087, 1108–09 (1999). The original draft of the proposed revision of the law of *negotiorum gestio* substituted the word "interests," which potentially has a broader meaning. *See* Martin, *supra* note 16, at 190–91. Nevertheless, strictly personal obligations of the owner cannot be performed by another person—including a *negotiorum gestor*—unless the other party agrees to receive such performance. *See* LA. CIV. CODE art. 1766 (2023). *Cf.* MALAURIE ET AL., *supra* note 30, No. 1030.

243. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (AM. L. INST. 2011). In any event, however, manager's services and expenses must be susceptible of being measured in money. Strictly personal affairs, such as personal family relations, are not susceptible to management by another. *See* Bout, *supra* note 158, No. 116.

affair is patrimonial, the term "owner" must not be misconstrued to mean that only the property right of ownership is contemplated. An "owner" is any person, natural or juridical,[244] whose real or personal rights are involved in the management.[245] Thus, the term "owner" here is broader than the traditional term "owner" in property law.[246] Naturally, the owner of a dilapidated home that is repaired by the manager, or the owner of an animal that is rescued is an "owner."[247] Likewise, a lessee or a usufructuary of land that was urgently repaired are "owners" for the purposes of *negotiorum gestio* when their interests are protected by the management.[248]

Furthermore, an obligee or an obligor of an obligation may become "owners" for the same purposes. Thus, the voluntary payment of the debt of another may qualify as an act of *negotiorum gestio* on the obligor's behalf.[249] Likewise, protecting third parties from an animal may constitute a management of the affair of the owner of the animal who would otherwise be liable for the damage

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244. *See* LA. CIV. CODE art. 24 (2023).

245. *See* AUBRY & RAU VI, *supra* note 157, No. 295; Bout, *supra* note 158, Nos 114–15; LIVIERATOS, *supra* note 157, at 57–60.

246. It should also be clear that *negotiorum gestio* does not give the manager any ownership rights in the thing managed. *See* McGraw v. City of New Orleans, 215 So. 3d 319, 330 (La. Ct. App. 4th Cir. 2017). At best, the manager is a precarious possessor of the owner, who administers the thing on the owner's behalf and who may retain the thing until reimbursed. *See* LA. CIV. CODE art. 3004 (2023); Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016); Ligon v. Angus, 485 So. 2d 142, 145 (La. Ct. App. 2d Cir. 1986); A.N. YIANNOPOULOS & RONALD J. SCALISE, JR., PROPERTY § 12:20, *in* LOUISIANA CIVIL LAW TREATISE (5th ed. Sep. 2022 update) [hereinafter YIANNOPOULOS & SCALISE, PROPERTY]; 3 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 177 (Maurice Picard ed., 2d ed 1952) [hereinafter PLANIOL & RIPERT III].

247. *See* PLANIOL & RIPERT VII, *supra* note 157, at 11 n.6. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 (AM. L. INST. 2011).

248. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 728.

249. *See* Woodlief v. Moncure, 17 La. Ann. 241 (La. 1865); Standard Motor Car Co. v. State Farm Mut. Auto Ins., 97 So. 2d 435, 438–40 (La. Ct. App. 1st Cir. 1957). *Cf.* DIG. 3.5.42 (Labeo, Posteriorum Epitomatorum 6); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 22 (AM. L. INST. 2011); PLANIOL & RIPERT VII, *supra* note 157, at 12 n.1. For a detailed comparative analysis, *see* Stoljar, *supra* note 160, Nos 96–133. Conversely, the mistaken payment of the debt of another is recovered pursuant to an action for payment of a thing not due. *See* LA. CIV. CODE art. 2302 (2023). *See infra* notes 720, 838.

in tort.[250]

The affair must be "of another," that is, it must be foreign to the manager.[251] The usual case is when the manager has no real or personal right in the affair managed—e.g., the neighbor has no right in the house she is repairing.[252] Nevertheless, *negotiorum gestio* may also apply when the manager has some interest in the managed affair,[253] as long as the manager has the common interest in mind when managing the affair.[254] For example, the manager may co-own the home that she is repairing or may be a usufructuary.[255]

The rules of *negotiorum gestio* may apply in this case to the extent that other rules—e.g., co-ownership or usufruct—do not govern

250. *See* MARTY & RAYNAUD II, *supra* note 98, No. 339; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, at 10 n.6; Cour de cassation [Cass.] [supreme court for judicial matters] civ., Mar. 14, 1914, RGAT 1915, p. 464 (Fr.).

251. *See* Burns v. Sabine River Authority, 614 So. 2d 1337, 1340 (La. Ct. App. 3d Cir. 1993); Tate v. Dupuis, 195 So. 810, 813 (La. Ct. App. 1st Cir. 1940).

252. *See* LIVIERATOS, *supra* note 157, at 58.

253. *Cf.* LA. CIV. CODE art. 2991 (2023) (mandate may serve the interest of the principal, the mandatary, or both); Holmes & Symeonides, *supra* note 242, at 1119–21; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 73–74.

254. *See* Illinois Central Gulf Railroad Co. v. Deaton, Inc., 581 So. 2d 714 (La. Ct. App. 4th Cir. 1991); Oliver v. Central Bank, 658 So. 2d 1316, 1322 (La. Ct. App. 2d Cir. 1995); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008). The revised French Civil Code specifically regulates the management of a common affair. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-4 (providing that the personal interest of the manager in the affair managed does not exclude the application of the rules of *negotiorum gestio*, and that in such a case, the obligations of the parties are proportional to their interest in the affair managed).

255. *See* Taylor v. Taylor, 739 So. 2d 256, 261 (La. Ct. App. 1st Cir. 1999) (observing that the legal principles governing co-ownership are generally based on notions of quasi-contract, particularly *negotiorum gestio*); City of New Orleans v. City of Baltimore, 15 La. Ann. 625, 627 (1860) (residuary co-legatee acted as *negotiorum gestio* when incurring expenses in protecting the joint interest of both legatees); Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3 Cir. 1980) (co-owner of mineral interests acted as a *negotiorum gestor* when cleaning, plugging, and abandoning wells); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008) (co-owner acted as *negotiorum gestor* when purchasing insurance for the co-owned property). *See also* TERRÉ ET AL., *supra* note 57, No. 1276. The usufructuary has no authority to act in a representative capacity by virtue of her real right of enjoyment, but her contracts may bind the naked owner under the rules of *negotiorum gestio*. YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, §§ 2:3, 3:5, 3:6; *cf.* Kelley v. Kelley, 3 So. 2d 641 (La. 1941).

the management.[256] A management having the characteristics mentioned above will fall within the scope of *negotiorum gestio* only if the management is spontaneous, useful, and licit.

*i. Spontaneous*

The management is "spontaneous" when it is purely voluntary, that is, not authorized or imposed by a pre-existing juridical act—e.g., contract of mandate—or by law.[257]

Indeed, if the manager is already authorized or bound by contract or by law to perform the acts of management, then these acts are governed by the contractual or legal source, and not by the rules of *negotiorum gestio*.[258] Revised article 2292 of the Louisiana Civil

256. The relationship between co-owners is governed by the specific provisions of the Louisiana Civil Code on co-ownership as *lex specialis*. *See* McCurdy v. Bloom's Inc., 907 So. 2d 896, 900 (La. Ct. App. 2d Cir. 2005); LA. CIV. CODE art. 800 cmt. (2023). Nevertheless, it is generally accepted that a co-owner may become a *negotiorum gestor* when her acts exceed the authority granted by the provisions on co-ownership. *See* Symeonides & Martin, *supra* note 23, at 99–102, 108 n.197, 115–16, 150–52 (1993); Taylor v. Taylor, 739 So. 2d 256, 261–62 (La. Ct. App. 1st Cir. 1999); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008); LA. CIV. CODE art. 806 cmt. c (2023). Management of community property is also governed by special rules. *See* ANDREA CARROLL & RICHARD D. MORENO, MATRIMONIAL REGIMES § 7:17, *in* 16 LOUISIANA CIVIL LAW TREATISE (5th ed., Dec. 2021 update); LA. CIV. CODE arts. 2334–2369.8 (2023); Mendoza v. Mendoza, 249 So. 3d 67, 72–74 (La. Ct. App. 4th Cir. 2018); Lee v. Lee, 868 So. 2d 316, 318–19 (La. Ct. App. 3d Cir. 2004); Lemoine v. Downs, 125 So. 3d 1115, 1117–19 (La. Ct. App. 3d Cir. 2012).

257. *See* Tyler v. Haynes, 760 So. 2d 559, 536 (La. Ct. App. 3d Cir. 2000) (observing that in *negotiorum gestio* "[t]he management is purely voluntary"). This was the meaning of the terms "voluntary act" and "of his own accord" that appeared the pre-revision law. *See* LA. CIV. CODE arts. 2293, 2295 (1870); CODE NAPOLÉON, *supra* note 10, arts. 1371, 1372. *See* TERRÉ ET AL., *supra* note 57, No. 1274.

258. *See* Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 21 (La. Ct. App. 1st Cir. 2001); Darce v. One Ford Automobile, 2 La. App. 185, 186–87 (La. Ct. App. 1st Cir. 1925); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 92–93; PLANIOL & RIPERT VII, *supra* note 157, No. 727. Determining whether and to what extent a statute authorizes a person to act requires careful interpretation of the authorizing statute. For instance, it has been held that a special statute on "forced pooling" that derogates from the Louisiana Mineral Code authorizes the unit operator to sell mineral interests of all owners, including unleased owners. *See* LA. REV. STAT. § 30:10(A)(3) (2023); Taylor v. Woodpecker Corp., 562 So. 2d 888, 890–92 (La. 1990). Some courts have also held that in cases of "forced pooling" under the same special statute, the legal

Code, following the German approach, uses the term "without authority" to describe a spontaneous act.[259] The term "authority" does not only refer to authority by representation and mandate. Instead, spontaneity ought to be understood broadly to incorporate any act that is not already authorized or imposed by contract or by law.[260]

The act may be authorized or imposed by a pre-existing contract, usually between the owner and the manager.[261] For instance, if the

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relationship between the unit operator (who is authorized to sell mineral interests) and the unleased owners (who were placed in the forced pooling without their consent) is "quasi-contractual." *See* LA. REV. STAT. § 30:10(A)(3) (2023); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); King v. Strohe, 673 So. 2d 1329, 1339 (La. Ct. App. 3d Cir. 1996). Other courts have further held that the unit operator who sells mineral interests of unleased owners under that same special statute may be classified as a *negotiorum gestor* having a legal obligation to account that derives from the special statute and from the provisions on *negotiorum gestio*. *See* LA. REV. STAT. § 30:10(A)(3) (2023); Taylor v. Woodpecker Corp., 633 So. 2d 1308, 1313 (La. Ct. App. 1st Cir. 1994); Taylor v. Smith, 619 So. 2d 881, 887–88 (La. Ct. App. 3d Cir. 1993; Johnson v. Chesapeake Louisiana, LP, 2022 WL 989341 (W.D. La. Mar. 31, 2022). It should be clear that a "forced pooling" relationship is not quasi-contractual merely because the obligations are imposed by law. As discussed *supra* note 99, obligations arising from "forced contracts" do not constitute an innominate category of quasi-contractual obligations—they are separate legal obligations. It is less clear whether the unit operator who sells unleased mineral interests under the special statute does so exclusively as a legal representative who is authorized by the statute and whose rights and obligations are strictly confined within the statute (LA. CIV. CODE art. 2986), or exclusively as an unauthorized *negotiorum gestor* under the provisions of *negotiorum gestio* (LA. CIV. CODE art. 2292), or as a legal representative whose rights and obligations are governed primarily by the statute and also by the rules of co-ownership, mandate or *negotiorum gestio*, and enrichment without cause on all issues for which the statute is silent. *See supra* note 110. *Cf.* LA. CIV. CODE art. 806 cmt. c (2023). *Cf. also* LA. CODE CIV. PROC. art. 3422.1 para. E (2023) (referring to the "laws of negotiorum gestio and mandate applicable to co-owners" of immovables that are damaged by disaster and are subject to a small succession). Answering this question requires careful interpretation of the statute. The interpreter might be pleased to know, however, that the rules of mandate will generally apply to both authorized legal representatives and unauthorized *negotiorum gestors*, to the extent those rules are compatible. *See* LA. CIV. CODE art. 2293 (2023); Holmes & Symeonides, *supra* note 241, at 1101–03.

259. *See* LA. CIV. CODE art. 2292 (2023); Menard v. Hyatt, 773 So. 2d 908, 911 (La. Ct. App. 3d Cir. 2000); Martin, *supra* note 16, at 189–90.

260. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301; GAËL CHANTEPIE & MATHIAS LATINA, LE NOUVEAU DROIT DES OBLIGATIONS. COMMENTAIRE THÉORIQUE ET PRATIQUE DANS L'ORDRE DU CODE CIVIL No 709 (2d ed., 2018).

261. The act of management may also be imposed by a contract between the manager and a third party. Thus, if A hires B to manage C's affair, and if all other requirements for *negotiorum gestio* are met, then the manager of C's affair is A,

parties have agreed to a contract of mandate or other contract of services, then the obligations of the parties are clearly governed by contract law.[262] This does not mean, however, that any pre-existing contract between the parties will automatically exclude the possibility of *negotiorum gestio*.[263] If the management exceeds the duties imposed by a contract, then the requirement of spontaneity may be met.[264] For instance, a mandatary might perform acts of management that exceed her authority.[265] Furthermore, *negotiorum gestio* may apply in circumstances where the pre-existing contract is null

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who acted through her mandatary B. On the other hand, if this triangular relationship between A, B, and C is a third-party beneficiary arrangement (*stipulation pour autrui*), then *negotiorum gestio* ought to be excluded for two reasons. First, A's stipulation toward B in C's favor will only be effective toward C, if C manifests her intent to avail herself of the benefit. LA. CIV. CODE art. 1979 (2023). Thus, the purported "owner" has consented to the management. Second, a third-party beneficiary (C) is only an obligee, whereas an "owner" in a *negotiorum gestio* obligation is also an obligor. *See* J. Denson Smith, *Third Party Beneficiary in Louisiana: The* Stipulation Pour Autrui, 11 TUL. L. REV. 18 (1936). *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 724; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2791 (both discussing the distinction between management of affairs and third-party beneficiary contracts).

262. *See* MJH Operations, Inc. v. Manning, 63 So. 3d 296, 300–01 (La. Ct. App. 2d Cir. 2011); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 90 n.89. The act of the manager may also create a contractual or legal relationship that excludes *negotiorum gestio*. Thus, an act of accepting appointment as trustee must be made in writing and not by other acts of *negotiorum gestio*. Valid acceptance creates a legal relationship of trust. *See* Succession of McLean, 580 So. 2d 935, 941 (La. Ct. App. 2d Cir. 1991).

263. *See* AUBRY & RAU VI, *supra* note 157, No. 295.

264. *See* Eylers v. Roby Motors Co., Inc., 11 La. App. 442, 444 (La. Ct. App. 2d Cir. 1929); Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003). Certain additional duties, however, might be imposed by good faith or by suppletive rules. For instance, the seller may owe a duty in good faith to store the item sold for a brief time or to provide instructions or other services to the buyer. These duties arise from the contract and good faith; they do not constitute acts of *negotiorum gestio*. Conversely, certain additional "spontaneous" acts of one party might constitute breach of the contract and would thus be disallowed. *See* LA. CIV. CODE arts. 1759, 1983, 2054, 2055 (2023); Citizens Discount Co., Inc. v. Royal, 230 So. 2d 857, 859 (La. Ct. App. 4th Cir. 1970); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 92.

265. *See* LA. CIV. CODE art. 3019 (2023); Holmes & Symeonides, *supra* note 242, at 1145–50; TERRÉ ET AL., *supra* note 57, No. 1274; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2797; AUBRY & RAU VI, *supra* note 157, No. 295; DEMOLOMBE XXXI, *supra* note 63, No. 72; LAURENT XX, *supra* note 94, No. 319. If these acts are advantageous despite divergence from authority, they may still fall within the purview of the mandate contract. *See* LA. CIV. CODE art. 3011 (2023).

or if it has expired.[266] Thus, a "depositary" in a null deposit or a continuing depositary after termination of the deposit might qualify as a *negotiorum gestor*.[267]

The act may also be authorized or imposed directly by operation of law. Thus, a parent who has parental authority by law to administer the child's affairs is a legal representative, and not a *negotiorum gestor* of the child or of the other parent.[268] A government authority that is charged with paying child support,[269] performing a rescue operation, or clearing a public road[270] is acting

266. *See* TERRÉ ET AL., *supra* note 57, No. 1274; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2797; DEMOLOMBE XXXI, *supra* note 63, Nos 68–73. *Cf.* Hobbs et al. v. Central Equipment Rentals, Inc., 382 So. 2d 238 (La. Ct. App. 3d Cir. 1980) (granting recovery under a theory of *negotiorum gestio* to the plaintiff who undertook to clean-up and plug an abandoned mineral well, presumably upon termination of contract with defendant). For a critical review of this case, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 89–92.

267. *See* LIVIERATOS, *supra* note 157, at 92–93. Special rules apply for mandate. *See* LA. CIV. CODE arts. 3021, 3024–3032 (2023); Holmes & Symeonides, *supra* note 242, at 1113, 1150–57. Thus, termination of the mandate by the principal—when coupled with the principal's express or tacit opposition to any further intervention—excludes acts of *negotiorum gestio*. On the other hand, a person who acts in good faith under the erroneous belief that she is a mandatary may qualify as a *negotiorum gestor*, if all other requirements are met. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 68–73; 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW PT. 2, No. 2277 (La. State L. Inst. trans., 12th ed. 1959, reprinted 2005) [hereinafter PLANIOL II.2]; RIBERT & BOULANGER II, *supra* note 169, No. 1227; Lorenzen, Negotiorum Gestio, *supra* note 164, at 193; DIG. 3.5.5.pr (Ulpian, Ad Edictum 10). Conversely, fraud or duress against the manager exclude the spontaneous nature of the act. *Cf.* LA. CIV. CODE art. 1761 cmt. b (2023) (explaining that a person acting without outside compulsion by fraud or violence (but not error) is acting "freely").

268. *See* TERRÉ ET AL., *supra* note 57, No. 1274; AUBRY & RAU VI, *supra* note 157, No. 295.

269. *But see* City & County of San Francisco v. Juergens, 425 So. 2d 992, 993–94 (La. Ct. App. 5th Cir. 1983) (holding that the government authority that paid child support acted as a *negotiorum gestor* of the child's father, and not as a *gestor* of the child's affair which was not susceptible of management under *negotiorum gestio*). *See* Martin, *supra* note 16, at 191 (observing correctly that the plaintiff in the preceding case was not entitled to reimbursement as a *negotiorum gestor* because it had a legal obligation to manage the affair; the plaintiff could have recovered however under a special statutory provision or, alternatively, under a theory of enrichment without cause).

270. However, a private towing company who tows and stores a stalled vehicle upon instruction by the police was held to be a *negotiorum gestor. See* Tyler v. Haynes, 760 So. 2d 559 (La Ct. App. 3d Cir 2000) (holding that the state police who cleared the public road of a stalled vehicle had a legal duty to do so and were not a *negotiorum gestor*; however, the private tow company who was instructed

by operation of law, and not as a spontaneous gestor.[271] An executor of a will or an administrator of an estate fulfills her legal duty to defend the will or represent the estate as a court-appointed legal representative, not as a *negotiorum gestor*.[272] A solidary obligor who pays the entire amount of the debt to the obligee does so because she is bound by law or contract. Her right of recourse is found in the law of subrogation, and not *negotiorum gestio*.[273] Likewise, an obligee who has a legal duty to mitigate her damages from breach of contract is not managing the obligor's affairs when she performs such mitigating acts.[274] Finally, fulfillment of a natural

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by the police to tow and store the vehicle was entitled to reimbursement as a *negotiorum gestor* of the owner). Similar results are also reached by French and German courts in identical cases. *See* KORTMANN, *supra* note 164, at 104-05 ("Unless the instructions [by the police] amounted to a public command. . .the breakdown service should be regarded as merely having been informed of the opportunity for rescue, and therefore as having acted voluntarily [and spontaneously]"); *id.* at 109–10 (explaining that German courts have also held in a similar way).

271. Furthermore, persons acting in their official capacity or function, as well as private individuals who voluntarily assist them, do not qualify as *negotiorum gestores*. Thus, a private individual who assisted law enforcement in the pursuit and capture of a thief was deemed to be a mere volunteer assisting the authorities and a manager of the victim's affair. *See* AUBRY & RAU VI, *supra* note 157, No. 295, at 441 n.4; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, at 10 n.6. In another case, however, a customer of a department store who chased after a thief in response to the owner's plea for help was considered a *negotiorum gestor* and was entitled to compensation for his injury. *See* STARCK, *supra* note 30, No. 1779.

272. *See* Kilpatrick v. Kilpatrick, 660 So. 2d 182, 187 (La. Ct. App. 2d Cir. 1995); Gale v. O'Connor, 9 So. 557, 558–59 (La. 1891). Furthermore, other court-appointed administrators of property are not *negotiorum gestores*. *See* SMP Sales Management, Inc. v. Fleet Credit Corp., 960 F.2d 557, 561 (5th Cir. 1992).

273. *See* LA. CIV. CODE arts. 1804, 1829 (2023). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 85. *But see* Standard Motor Car Co. v. State Farm Mutual Automobile Ins. Co., 97 So. 2d 435 (La. Ct. App. 1st Cir. 1957) (holding that a garageman who voluntarily repaired a damaged vehicle—and was thus subrogated to the rights of the other of the vehicle against the tortfeasor—could recover against the tortfeasor under a theory of *negotiorum gestio*). For a critique of this holding, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 71–72, 86–88. For a comparative analysis of subrogation in the context of suretyship, *see* Johann A. Dieckmann, *The Normative Basis of Subrogation and Comparative Law: Select Explanations in the Common Law, Civil Law and in Mixed Legal Systems of the Guarantor's Right to Derivative Recourse,* 27 TUL. EUR. & CIV. L. F. 49 (2012).

274. Interestingly, there is Louisiana jurisprudence holding that a lessor who re-lets the leased property that has been abandoned by lessee is a *negotiorum gestor* of the first lessee for the purposes of mitigation of the damages and, as such,

obligation ought to exclude the application of the rules of *negotiorum gestio*.[275]

*ii. Useful*

The purpose of the law of *negotiorum gestio* is to balance two conflicting legal policies—the policy encouraging intervention by good neighbors (altruism) and the policy disfavoring interference in the affairs of others (individualism).[276] As a rule, interference is not allowed, unless the management is useful.[277] The utility of the act of management is, therefore, a salient feature of *negotiorum gestio*. The act must "protect the interests" of the owner,[278] that is, the act must be reasonable, appropriate, and beneficial to the owner at the

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lessor must credit any rents received by the second lessee. *See* Overmeyer Co., Inc. v. Blakeley Floor Co., Inc., 266 So. 2d 925, 926–27 (La. App. 4th Cir. 1972); Benton v. Jacobs, 3 La. App. 274, 277 (La. Ct. App. Orl. 1925); Bernstein v. Bauman, 127 So. 374, 377–78 (La. 1930). Although it is true that in the case of an abandoned lease, the lessor has no duty to mitigate, it is questionable whether the lessor who re-lets the abandoned leased property is managing an affair of the first lessee with the intent to benefit that lessee. Perhaps a more suitable legal basis under the revised civil code that would prevent the lessor from collecting rent twice would be enrichment without cause. *See* LA. CIV. CODE art. 2298 (2023); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 78, 104–06.

275. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 85–86. Thus, if the purported "manager" already had a natural obligation to act—e.g., an obligation that was extinguished by prescription or involved another moral duty rising to the level of a natural obligation—and the "manager" acted freely, then the rules of *negotiorum gestio* will not apply. *See* LA. CIV. CODE arts. 1761–1762 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 21–25; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 2.5, 2.22. *But see* Bout, *supra* note 158, No. 49 (arguing that the manager's preexisting natural obligation to act does not by itself exclude the application of the provisions on *negotiorum gestio*; however, the gratuitous nature of performing a natural obligation would preclude the manager's reimbursement).

276. *See* MARTY & RAYNAUD II, *supra* note 98, No. 337; TERRÉ ET AL., *supra* note 57, No. 1268; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 69–70.

277. *See* Tucker v. Carlin, 14 La. Ann. 734, 735 (1859). *Cf.* LA. CIV. CODE art. 2299 (1870) ("Equity obliges the owner *whose business has been well-managed* to [compensate the manager]") (emphasis added); CODE NAPOLÉON, *supra* note 10, art. 1375. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 93.

278. *See* LA. CIV. CODE art. 2292 cmt. c (2023) (the management is useful "when there is a necessity or when the owner derives some benefit from the acts of management"). *See* PLANIOL & RIPERT VII, *supra* note 157, No. 726; MAURICE MARUITTE, LA NOTION JURIDIQUE DE GESTION D'AFFAIRES 288 (1930).

time the management was undertaken.[279] Additionally, and importantly, the "interest" of the owner must be determined according to the actual or presumed wishes of the owner.[280] This requirement of utility distinguishes a true *negotiorum gestor* from an officious intermeddler, whose conduct is tortious in the civil law.[281] Indeed, if the intervener acts against the owner's interests, the provisions on *negotiorum gestio* do not apply; instead, the intervener may be liable in tort for any damage caused.[282]

Determining the usefulness of the act of management is therefore crucial. Civilian scholars have debated whether the usefulness is determined objectively, considering what the interests and wishes of a reasonable owner would be, or subjectively, based on the actual interests and wishes of the owner.[283] Early French doctrine tended to prefer the subjective approach,[284] but later scholars correctly adopted a mixed approach.[285] Louisiana law also follows a mixed

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279. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* 2, at 93; TERRÉ ET AL., *supra* note 57, No. 1277; STARCK, *supra* note 30, No. 1771. Usually, but not always, the acts will be urgent and necessary acts that are made by a manager who is unable to contact the owner. *See* MARTY & RAYNAUD II, *supra* note 98, No. 340; PLANIOL & RIPERT VII, *supra* note 157, No. 726.

280. This requirement applies especially in German and Greek civil law. For example, remodeling the owner's house is certainly "beneficial" to the owner and in her "interest;" however, the actual owner or a reasonable owner might have not wished to make such an expense, especially if the expense is luxurious or superfluous. *See* Ioannis Sakketas, Article 730, No. 44, *in* 3 ERMINEIA ASTIKOU KODIKOS. TMEMA 2, TEFCHOS 5 [COMMENTARY ON THE CIVIL CODE. PART 2, ISSUE 5] (Alexandros Litzeropoulos et al. eds., 1957) (Greece); LIVIERATOS, *supra* note 157, at 71.

281. *See* Webre v. Graudnard, 138 So. 433, 434 (La. 1931) ("An 'intermeddler' is one who takes possession 'of a vacant succession, or a part thereof, without being duly authorized to that effect, *with the intent of converting the same to his own use*.'") (emphasis in the original); LA. CIV. CODE art. 1100 (1870).

282. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931). In such a case, *negotiorum gestio* law does not apply. The rights and liabilities of the parties, including the prescriptive period for the action, fall under the law of delictual obligations. *See* LA. CIV. CODE art. 2292 cmt. d. (2023).

283. *See* LIVIERATOS, *supra* note 157, at 72.

284. *See, e.g.*, DEMOLOMBE XXXI, *supra* note 63, No. 185.

285. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 731, at 17:

> To say that the affair was well-managed, we must place ourselves at the moment of the management, and assess what a diligent administrator had to do then, taking into account, since it is the affair of another, the owner's habits and intentions that the manager could or should know.

approach—the interest and wishes of the owner are determined objectively,[286] unless the manager knows or should know what are the actual interests and wishes of the owner,[287] which would include the owner's opposition to any acts of management of her affairs.[288]

The obligations of the owner are also determined accordingly. Thus, the owner whose affair was managed appropriately is obligated to reimburse the manager only for necessary and useful expenses,[289] that is, for acts that were necessary or useful for the owner's affair.[290] Conversely, luxurious or exorbitant acts are not protected, unless of course the owner had made known her subjective interest for such acts to the manager.[291]

The determination of the usefulness is made with reference to the time the act is performed,[292] and not necessarily with reference to the result of such acts.[293] Preservation of the benefit is

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286. To make this objective determination, the manager must act as a prudent administrator, taking into account the circumstances of the situation, the nature and extent of the acts to be performed, the presumed wishes of the owner, and good faith. *See* City of New Orleans v. City of Baltimore, 15 La. Ann. 625, 627 (1860); Sakketas, *supra* note 280, Article 730, No. 4; TERRÉ ET AL., *supra* note 57, No. 1277.

287. *See* TERRÉ ET AL., *supra* note 57, No. 1277. *See* LA. CIV. CODE art. 2292 (2023) ("the manager. . .acts. . .to protect the interest of. . .the owner, *in the reasonable belief that the owner would approve of the action if made aware of the circumstances*") (emphasis added).

288. The owner's opposition excludes *negotiorum gestio*, unless the opposition is illicit. *See infra* note 334–43 and accompanying text.

289. The distinction between necessary, useful, and luxurious expenses is well-known in Louisiana law. *See* LA. CIV. CODE art. 1259 (2023). *See infra* note 424.

290. *See* LA. CIV. CODE art. 2297 (2023); Succession of Mulligan v. Kenny, 34 La. Ann. 50, 51 (1882) (holding that a temporary and ineffective repair of owner's roof was useless); LIVIERATOS, *supra* note 157, at 71–72. *Cf.* LA. CIV. CODE art. 2299 (1870); FRENCH CIVIL CODE, *supra* note 11, art. 1301-2.

291. *See* LIVIERATOS, *supra* note 157, at 71–72.

292. *See* Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. Ct. App. 3d Cir. 1980) (focusing on the acts of the manager at the time they were performed); AUBRY & RAU VI, *supra* note 157, No. 297; MARTY & RAYNAUD II, *supra* note 98, No. 340; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 94–97.

293. *See* City of New Orleans v. City of Baltimore, 15 La. Ann. 625, 627 (1860):

> It is very possible that, without [the manager's] services, the [affair managed] might have had the same result; but we think that, considering the magnitude of the interests at stake, the protracted nature of the [affair],

irrelevant.[294] Thus, as noted, the act of repairing a house may qualify as an act of *negotiorum gestio*, even if the house is later destroyed or the repair later becomes useless for the owner.[295] A useless management runs contrary to the owner's interest and does not qualify as *negotiorum gestio*—the owner is not bound to the acts of the manager, unless she ratifies these acts;[296] the putative manager is liable to the owner in tort, and may have a claim against the owner in unjust enrichment for any remaining benefit the owner received.[297]

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> the complicated matters under adjudication, and the manner in which the services were performed, the course pursued by the [manager] was deserving of commendation. . .It was the conduct of a prudent 'negotiorum gestor'.

294. This separates *negotiorum gestio* from enrichment without cause. *See* LA. CIV. CODE art. 2292 cmt. e (2023) ("A negotiorum gestor may be entitled to reimbursement of expenses even if the owner has not been enriched at his expense"). *See* TERRÉ ET AL., *supra* note 57, No. 1277; MAZEAUD ET AL., *supra* note 85, No. 683. *But see* Forti, Requirements for Negotiorum Gestio, *supra* note 186, Nos 45–46 (explaining that under French jurisprudence, when the management is conducted in the common interest of the manager and the owner, reimbursement of the manager depends on whether the owner actually received a benefit at the end of the management).

295. *Cf.* DIG. 3.5.9, § 1 (Ulpian, Ad Edictum 10). *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2818, at 465 ("To assess the utility or uselessness of the manager's acts we must put ourselves at the moment when the acts were made, without regard to posterior events that may have negated the acts' usefulness"). *Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1486.

296. *See* LA. CIV. CODE art. 1843 (2023). *See* AUBRY & RAU VI, *supra* note 157, No. 299; PLANIOL & RIPERT VII, *supra* note 157, No. 733; LIVIERATOS, *supra* note 157, at 73. For ratification in general *see further* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–222; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.58–12.60.

297. *See* TERRÉ ET AL., *supra* note 57, No. 1277; On the other hand, a useful management can be faulty, when it commences in the owner's interests, but the manager fails to carry out the management prudently. Such a management still qualifies as *negotiorum gestio*, having the effects discussed herein, including the owner's obligation to fulfill the obligations undertaken by the manager. LA. CIV. CODE art. 2297 (2023). The owner then has recourse against the manager for damages. LA. CIV. CODE art. 2295 (2023); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008) (manager acted usefully when purchasing insurance but later committed faulty management when she failed to distribute the insurance proceeds to the owners). Admittedly, the line separating useless and faulty management can become blurred because imprudent acts of the manager might also be useless acts. Be that as it may, French doctrine—and jurisprudence to an extent—observe this distinction. *See* Bout, *supra* note 158, No. 24; Valerio Forti,

*iii. Licit*

Finally, the act of the management must be licit, that is, not unlawful or *contra bonos mores*. Indeed, an unlawful or immoral act may never qualify as an act of *negotiorum gestio*, even if made to "protect the interest" of the owner.[298] Thus, tortious acts—including self-help—exercised on behalf of another does not constitute *negotiorum gestio*.[299]

As a logical extension of this rule, the owner can never be held vicariously liable for acts of the manager. Thus, if a manager commits a tort while managing the affairs of the owner, the owner is not liable toward the victim.[300]

*b. The Parties*

The second set of requirements of *negotiorum gestio* refers to the parties—the manager and the owner. The requirements concerning the manager are positive—she must intend to manage the owner's affair and she must have contractual capacity. Conversely, the requirements pertaining to the owner are negative—she must neither authorize nor oppose the management.

*i. The Manager (*Gestor*)*

The manager can be a natural or a juridical person. Usually, the manager is one single person; however, it is possible to have two

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Gestion d'affaires - Effets, No. 6, *in* JurisClasseur Civil, Art. 1301 à 1301-5, Fascicule 20, Jul. 27, 2020 (Fr.) [hereinafter, Forti, Negotiorum Gestio]. *See also infra* notes 360–63 and accompanying text.

298. *See* DEMOLOMBE XXXI, *supra* note 63, No. 123.

299. *See* Madden v. Madden, 353 So. 2d 1079, 1080–81 (La. Ct. App. 2d Cir. 1977); PLANIOL & RIPERT VII, *supra* note 157, No. 732; AUBRY & RAU VI, *supra* note 157, No. 300; TERRÉ ET AL., *supra* note 57, No. 1277; LIVIERATOS, *supra* note 157, at 61.

300. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 732; AUBRY & RAU VI, *supra* note 157, No. 300. Naturally, the answer would be different if the owner had appointed the manager as her employee. *See, e.g.*, LA. CIV. CODE art. 2320 (2023); Holmes & Symeonides, *supra* note 242, at 1114–15.

managers who jointly manage an affair of another. In such a case, the co-managers are joint obligors and joint obligees vis-à-vis the owner.[301]

The manager must have intent to manage the affair of the owner. This intent contains two elements. First, the manager must know that the affair managed is the affair of another, and not her own exclusive affair.[302] It suffices that the manager is aware that the affair is foreign.[303] Knowledge of the precise identity of the owner is not required.[304] Likewise, error on the part of the manager as to the identity of the owner is inoperative.[305] On the other hand, *negotiorum gestio* is excluded when the purported manager is managing a foreign affair believing that the affair is her own.[306] For example, a "manager" who performs acts of management on certain property in

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301. *See* LA. CIV. CODE art. 3009 (2023) (multiple mandataries are not solidarily liable unless the mandate provides otherwise). *See also* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2809. Likewise, a *negotiorum gestor* who manages the affair of more co-owners is not solidarily liable. *See* 13 GABRIEL BAUDRY-LACANTINERIE & LOUIS-JOSEPH BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES OBLIGATIONS, TOME DEUXIÈME No. 1192 (3d ed. 1907) [hereinafter BAUDRY-LACANTINERIE & BARDE XIII]. However, the rules on solidarity may apply in certain cases. *See, e.g.*, LA. CIV. CODE arts. 1789, 2324 (2023). *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15, 123–28; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.25, 7.66.

302. *See* Tate v. Dupuis, 195 So. 810 (La. Ct. App. 1st Cir. 1940); Chance v. Stevens of Leesville, 491 So. 2d 116 (La. Ct. App. 3d Cir. 1986). As discussed *supra* notes 251–56 and accompanying text, an affair is "foreign" even if the manager has some interest in the affair, as in the example of the management by a usufructuary or the management of a co-owned thing by one of the co-owners.

303. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295.

304. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2793; PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295. Thus, the rescuer of a motorist who was involved in an accident might be managing the affairs of the injured motorist, the motorist at fault, or their insurers. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, at 13.

305. *See* Kirkpatrick v. Young, 456 So. 2d 622, 625 (La. 1984); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; PLANIOL & RIPERT VII, *supra* note 157, No. 727.

306. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295. Conversely, a person who in good faith intervenes in another's affair under the erroneous belief that she is a mandatary may qualify as a *negotiorum gestor*, if all other requirements are met. *See supra* note 267.

the mistaken belief that she inherited the property has no recourse against the true successor under the provisions on *negotiorum gestio*.[307] Likewise a garageman who repaired an automobile at the request of a thief had no intent to manage the affair of another, and therefore does not qualify as a *negotiorum gestor*.[308] The purported "manager" in such cases may seek compensation against the true owner based on the provisions on enrichment without cause, if the requirements for that action are met.[309] Likewise, a person who pays the debt of another in the mistaken belief that she is the debtor may have recourse against the payee and the true debtor pursuant to the provisions of payment of a thing not due and enrichment without cause.[310]

Second, the manager must intend to manage the affair for the owner's benefit. As explained in the Louisiana jurisprudence, a person does not qualify as a *negotiorum gestor* unless she undertakes the management "with the benefit of [the owner] in mind."[311] Contemporary doctrine and jurisprudence have correctly moved away from the requirement of a purely altruistic intent.[312] A manager will

307. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792.

308. *See* Darce v. One Ford Automobile, 2 La. App. 185, 186–87 (La. Ct. App. 1st Cir. 1925). Additionally, the acts of the garageman were not spontaneous, as they were imposed by the preexisting contract with the thief. *See supra* notes 261–67 and accompanying text.

309. *See* LA. CIV. CODE art. 2298 (2023); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; DEMOLOMBE XXXI, *supra* note 63, No. 82; LAURENT XX, *supra* note 94, No. 324.

310. *See* LA. CIV. CODE art. 2302 (2023). *See infra* notes 747–57 and accompanying text.

311. *See* LA. CIV. CODE art. 2292 cmt. c (2023); Woodlief v. Moncure, 17 La. Ann. 241 (La. 1865); Kirkpatrick v. Young, 456 So. 2d 622, 624–25 (La. 1984); MJH Operations, Inc. v. Manning, 63 So. 3d 296, 300–01 (La. Ct. App. 2d Cir. 2011); Johnco, Inc. v. Jameson Interests, 741 So. 2d 867, 869–70 (La. Ct. App. 3d Cir. 1999). *But see* Symeonides & Martin, *supra* note 23, at 100–101 n.156 (observing that when the manager is also a co-owner of the managed property, "the intent to 'benefit' the other co-owners is imputed by law to the acting co-owner, even when he subjectively harbors a contrary intent"); *cf.* Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008); Armstead v. Roche, 302 So. 3d. 539, 543 (La. Ct. App. 4th Cir. 2020); Succession of Walker v. Walker, 524 So. 2d 907, 910 (La. Ct. App. 5th Cir. 1988).

312. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 61, 108. A purely selfish intent, however, such as the management of a foreign affair as one's own, excludes the application of the rules of *negotiorum gestio*. *See* LA. CIV. CODE art.

recover her expenses—which may include compensation for her services—if she managed the affair for the interest and the benefit of the owner, with the expectation of reimbursement.[313] A purely gratuitous intent, on the other hand, would exclude any claim of the manager for compensation.[314] Also, interventions prompted by sheer curiosity or meddling do not qualify as acts of *negotiorum gestio*.[315]

Finally, according to long-standing French doctrine, the manager must have capacity to act. The prevailing view is that "capacity" means contractual capacity.[316] This view is also expressed in revised article 2296 of the Louisiana Civil Code, pursuant to which,

> [a]n incompetent person or a person of limited legal capacity may be the owner of the affair, but he may not be a manager. When such a person manages the affairs of another, the rights and duties of the parties are governed by the law of enrichment without cause or the law of delictual obligations.[317]

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2292 cmt. d (2023); Woodlief v. Moncure, 17 La. Ann. 241 (1865); Transport Insurance Co. v. Ford Motor Co., 259 So. 2d 606, 609 (La. Ct. App. 4th Cir. 1972); PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295.

313. *See* AUBRY & RAU VI, *supra* note 157, No. 297. *See also* Lorenzen, Negotiorum Gestio, *supra* note 164, at 193 (explaining that this requirement also applied in Roman law).

314. *See* Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016). Such gratuitous intent, however, is not presumed. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2798; AUBRY & RAU VI, *supra* note 157, No. 297; Bout, *supra* note 158, Nos 38–40. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 cmt. c (AM. L. INST. 2011). The manager, however, remains liable to the owner for the prudent management of the affair, even if the manager waived her right to receive reimbursement. The court may enforce the manager's duty less rigorously. *See* LA. CIV. CODE art. 2295 (2013). *See also* DEMOLOMBE XXXI, *supra* note 63, No. 87.

315. *See* American Mfrs. Mut. Ins. Co. v. United Gas Corp., 159 So. 2d 592, 596 (La. Ct. App. 3d Cir. 1964); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 70–71, 84–85.

316. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2799; MARTY & RAYNAUD II, *supra* note 98, No. 342; PLANIOL & RIPERT VII, *supra* note 157, No. 729.

317. LA. CIV. CODE art. 2296 (2023). The same rule applies in France, even though the revised French Civil Code contains no such specific provision. As a result of this rule, an incapable manager who performs acts of management will

Such a requirement does not exist in German and Greek law.[318]

The approach followed in France and Louisiana is problematic. Contractual capacity is required by necessity when the manager is making juridical acts, as when the manager must alienate perishable goods belonging to the owner.[319] Contractual capacity should not be required, however, when the manager is performing material acts, as when the manager herself performs physical acts to protect her neighbor's property. Therefore "capacity" ought to be interpreted more broadly to refer to the manager's general understanding of her actions. This approach actually protects the incapable manager, who thus maintains her action for reimbursement.[320]

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not be reimbursed if there is no subsisting enrichment at the end of the management. *Cf.* LA. CIV. CODE art. 2292 cmt. e (2023).

318. *See* LA. CIV. CODE art. 2296 cmt. b (2023). *Cf.* GERMAN CIVIL CODE, *supra* note 87, § 682; GREEK CIVIL CODE, *supra* note 88, art. 735 (both providing that a manager with limited capacity is responsible toward the owner in tort and unjust enrichment; however, the manager maintains her action against the owner in *negotiorum gestio*).

319. *See* MAZEAUD ET AL., *supra* note 85, No. 676. However, limited capacity is sometimes sufficient when performing certain juridical acts. *See, e.g.*, Hellwig v. West, 2 La. Ann. 1 (1847) (holding that the incapacity of a married woman did not extend to quasi contracts such as *negotiorum gestio*). Furthermore, a mandatary may have limited contractual capacity in some cases. It ought to follow that the manager of another's affairs can possess limited capacity by greater force. *Cf.* LA. CIV. CODE art. 2999 (2023); Holmes & Symeonides, *supra* note 242, at 1133–34.

320. *Cf.* LA. CIV. CODE art. 2300 (1870) (using the term "the use of reason" instead of capacity). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 99–102; MAZEAUD ET AL., *supra* note 85, No. 676; AUBRY & RAU VI, *supra* note 157, No. 295, at 440 n.3; 13 PHILIPPE-ANTOINE MERLIN, RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE 739 (5th ed. 1828); Leland H. Ayres & Robert E. Landry, Comment, *The Distinction Between Negotiorum Gestio and Mandate*, 49 LA. L. REV. 111, 118 (1988). A provision requiring the manager's capacity no longer appears in the revised Quebec Civil Code; however, it is argued that this requirement is implied by reference to the general rules on administration of the affairs of another. *See* BAUDOUIN & JOBIN, *supra* note 45, No. 543. *But see* Trudel, *supra* note 138, at 323 (characterizing the requirement of the manager's capacity "an unfortunate innovation which must be amended as soon as possible" and positing that:

> [t]he only capacity admissible in this matter is the one which characterizes the reasonable man, i.e., the power to distinguish between right and wrong. The same way that this power carries the legal obligation to rectify the consequences of a faulty act, it must also confer the right to demand compensation for certain services rendered without intention of gratuity.

*ii. The Owner (*Dominus*)*

The owner can be a natural or a juridical person. The owner can be one single person or multiple "co-owners"[321] who are joint obligors and obligees vis-à-vis the manager.[322] As noted, the owner need not have the right of ownership. It suffices that the owner has a real or personal right in the affair managed.[323] Substitution of the owner by way of a succession in universal or particular title does not affect the validity of *negotiorum gestio*.[324] A requirement for capacity does not exist for the owner—she can be capable or incapable of making juridical acts.[325]

The owner must be absent when the manager initiates the management of the owner's affair and throughout the management. Absence might be physical, as in the classic example of urgent repairs

321. A mandatary who was hired by one co-owner without authorization by the other co-owner is at the same time mandatary of the former and *negotiorum gestor* of the latter. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931).

322. Conversely, multiple principals are solidarily bound to their mandatary. *See* LA. CIV. CODE art. 3015 (2023). However, under prevailing French doctrine interpreting the similar provision of article 2002 of the Code Napoléon, this provision is not compatible with the noncontractual nature of *negotiorum gestio*. See BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2819; BAUDRY-LACANTINERIE & BARDE XIII, *supra* note 301, No. 1192; AUBRY & RAU VI, *supra* note 157, No. 297 at 447; DEMOLOMBE XXXI, *supra* note 63, No. 180; LAURENT XX, *supra* note 94, No. 315. Nevertheless, the rules on solidarity may apply in certain cases. *See, e.g.*, LA. CIV. CODE arts. 1789, 2324 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15, 123–28; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.25, 7.66. *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 731, at 18 (observing that each owner is liable to the manager for the full amount of the manager's expenses if it is not possible to divide the management).

323. *See supra* notes 244–56 and accompanying text.

324. Transfer of the owner's rights *inter vivos* or *mortis causa* does not affect an ongoing management of affairs. The transferee is the new owner. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2804; MARTY & RAYNAUD II, *supra* note 98, No. 344. The pre-revision law had a specific provision on this issue. *See* LA. CIV. CODE art. 2297 (1870); Martin, *supra* note 16, at 193–94. *See also* LA. CIV. CODE art. 3506(28) (2023) (defining universal and particular successors).

325. Management of affairs does not require the capacity of the owner. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2800; PLANIOL & RIPERT VII, *supra* note 157, No. 729; MARTY & RAYNAUD II, *supra* note 98, No. 342.

to a home while the owner was away and could not be reached.[326] Nevertheless, absence ought to be understood broadly to encompass the owner's actual or legal inability to care for her affairs. The classic example of the provision of medical aid to an unconscious person illustrates this type of absence.[327] Thus, absence basically means that the management occurs without the owner's authorization or opposition.[328]

If the owner—who has contractual capacity—expressly authorizes the manager to act—either before an event occurs or when the necessity for action arises—then the relationship between owner and manager is clearly a contract of mandate.[329] The owner in this case provides an express mandate. The mandate, however, can also be tacit, when the owner—who has contractual capacity—is aware of the acts of management and accepts such acts by not objecting, although she was able to object.[330] Some scholars have argued that the owner's actual knowledge of the management by itself amounts to

326. The owner is not "absent" if communication with the owner was feasible prior to any act of management. Thus, the provisions on *negotiorum gestio* do not apply if the "manager" who made the repairs could have made reasonable efforts to contact the owner beforehand for the owner's directions. *See* Woodlief v. Moncure, 17 La. Ann. 241 (1865); STARCK, *supra* note 30, No. 1778; BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 128, No. 2028. If the owner could not be reached and the management commenced, the manager—who is now a *negotiorum gestor*—remains bound to make reasonable efforts to give notice to the owner and seek instructions. *See* LA. CIV. CODE art. 2294 (2023). *See infra* notes 386–410 and accompanying text.

327. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (AM. L. INST. 2011).

328. *See* LIVIERATOS, *supra* note 157, at 96.

329. Permission granted by the owner after the management commenced is also a ratification of the acts of the manager. There is no formal requirement for such permission and ratification. *See* LA. CIV. CODE arts. 2989, 2993, 1843 (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 733; AUBRY & RAU VI, *supra* note 157, No. 299. However, if the management was made at the request of a third person who had no authority, then the manager is acting as a *negotiorum gestor*. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931).

330. *See* Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2795; TERRÉ ET AL., *supra* note 57, No. 1275. Thus, a passerby who lends a hand to motorist who has been in an accident—but whose capacity is not impaired—with the latter's express or tacit consent is not a *negotiorum gestor,* but a mandatary. *See* STARCK, *supra* note 30, No. 1772 (referring to such a mandate as an "innominate contract to provide assistance").

a tacit mandate that negates any claim based on *negotiorum gestio*.[331] This view is partly true. While in most cases knowledge without objection on the part of the owner may amount to a tacit mandate, it is possible that the owner knows of the acts of management, provides directions to the manager,[332] but is unwilling or legally incapable to engage the manager in a contract of mandate.[333]

On the other hand, the owner's opposition to the management usually excludes the manager's claim of *negotiorum gestio*.[334] Indeed, the rule remains that intervention in a foreign affair is disallowed, unless there is good reason to permit and reward such intervention on the basis of *negotiorum gestio*.

Thus, if the owner forbade any intervention, the purported manager cannot claim spontaneity or usefulness of the act of management.[335] Opposition can be expressed beforehand, in which case management is excluded altogether, or during the management, in which case the management terminates prospectively.[336] Usually, the owner will communicate her opposition to the manager directly.

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331. *See* Ayres & Landry, *supra* note 320, at 121–22; Martin, *supra* note 16, at 191.

332. *See, e.g.*, LA. CIV. CODE art. 2294 (2023) (imposing a duty on the manager to contact the owner and await owner's directions). This provision is based on the German and Greek Civil Codes. Pursuant to German and Greek doctrine, however, providing directions without the intent to engage in a mandate does not negate the *negotiorum gestio* relationship. *See infra* note 386–410 and accompanying text. *But see* Martin, *supra* note 16, at 195–96 (arguing that "Article 2294 obliges a potential manager to obtain an express or, at least, tacit mandate prior to undertaking the management without authority").

333. *See* PLANIOL II.2, *supra* note 267, No. 2273; TERRÉ ET AL., *supra* note 57, No. 1275. This was the rationale of the pre-revision law, which allowed *negotiorum gestio* "whether the owner be acquainted with the undertaking or ignorant of it." LA. CIV. CODE art. 2295 (1870); CODE NAPOLÉON, *supra* note 10, art. 1372. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2795.

334. *See* Tucker v. Carlin, 14 La. Ann. 734, 735 (1859) ("no man ought to be held responsible for the acts of another done to his prejudice *and against his will*") (emphasis added).

335. *See* Woodlief v. Moncure, 17 La. Ann. 241 (1865); Tucker v. Carlin, 14 La. Ann. 734, 735 (1859); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2796; PLANIOL & RIPERT VII, *supra* note 157, No. 726. *See also* FRENCH CIVIL CODE, *supra* note 11, art. 1301.

336. *See* Woodlief v. Moncure, 17 La. Ann. 241 (1865); Tucker v. Carlin, 14 La. Ann. 734, 735 (1859); Lee v. Lee, 868 So. 2d 316, 319 (La. Ct. App. 3d Cir.

Nevertheless, the owner's knowledge of the opposition will suffice.[337] For instance, the owner may have communicated her opposition publicly or to a third person who then relayed the communication to the manager.[338] Civilian scholars are in agreement as to this negative requirement. German and Greek laws, however, have carved out one crucial exception—if the owner's opposition is illicit or *contra bonos mores*, then it should be ignored.[339] In such a case, management of the owner's affairs over an illicit prohibition is protected under the rules of *negotiorum gestio*.[340]

Thus, a rescuer of a drowning victim will qualify as a *negotiorum gestor* despite the victim's vocal opposition to her rescue.[341] Likewise, the owner's legal capacity ought to be taken into account when assessing his opposition to the intervention. Thus, a hospital might seek recovery for treating a severely injured, delirious patient despite his refusal.[342] French doctrine is also in accord with these exceptions.[343] They ought to apply, therefore, in Louisiana as well.

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2004); LIVIERATOS, *supra* note 157, at 96. The manager may be entitled to reimbursement and compensation for useful acts of management made prior to the communication of the owner's opposition.

337. *See* Succession of Mulligan v. Kenny, 34 La. Ann. 50, 51 (1882); Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985); *See* Sakketas, *supra* note 280, Article 730, Nos 58–60.

338. *See* Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985); LIVIERATOS, *supra* note 157, at 100–101.

339. *See* GERMAN CIVIL CODE, *supra* note 87, § 679; GREEK CIVIL CODE, *supra* note 88, art. 730 para. 2.

340. *See* LIVIERATOS, *supra* note 157, at 102–105; Sakketas, *supra* note 280, Article 730, Nos 61–66; 2 APOSTOLOS GEORGIADES, ENOCHIKO DIKAIO. EIDIKO MEROS [LAW OF OBLIGATIONS. SPECIAL PART] 878–879 (2007) (Greece).

341. *See* WINDSCHEID, *supra* note 92, § 430, at 857; Sakketas, *supra* note 280, Article 730, No. 62.

342. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. d (AM. L. INST. 2011).

343. *See* Bout, *supra* note 158, No. 112; MARUITTE, *supra* note 278, at 285; MALAURIE ET AL., *supra* note 30, No. 1027; STARCK, *supra* note 30, No. 1775.

*2. Effects*

*Negotiorum gestio* gives rise to legal obligations[344] that present two characteristic features. First, both parties—manager and owner—incur obligations toward each other. This feature dates back to the distinction in Roman law between the owner's direct action against the manager (*actio negotiorum gestorum directa*) and the contrary action of the manager against the owner (*actio negotiorum gestorum contraria*).[345] The direct action was a legal action compelling the manager to execute the management prudently and to account to the owner. The contrary action lay in equity and authorized the manager's reimbursement and compensation.[346]

The coexistence of the two Roman actions, as further developed under the "equity theory of quasi-contract," continues to permeate the modern law of *negotiorum gestio*, which provides for legal obligations of the manager and the owner.[347] Importantly, these two actions remain distinct in the Louisiana jurisprudence. The owner's action derives from the manager's intervention in her affairs whereas the manager's action depends on the utility of the management.[348]

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344. The obligations arising from *negotiorum gestio* are legal because they stem from a juridical fact. The obligations from *negotiorum gestio* are not conventional obligations precisely because there is no juridical act (e.g., contract) between the parties. *See* LA. CIV. CODE art. 1757 (2023).

345. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 3; PETROPOULOS I, *supra* note 48, at 1038.

346. *See* PETROPOULOS I, *supra* note 48, at 1038.

347. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 3. *But see* Goré, *supra* note 174, at 39 (observing that the obligations of the owner truly derive from *negotiorum gestio* whereas the obligations of the manager result directly from the law).

348. *See* Standard Motor Car Co. v. State Farm Mut. Auto Ins., 97 So. 2d 435, 439 n.9 (La. Ct. App. 1st Cir. 1957); Kirkpatrick v. Young, 456 So. 2d 622 (La. 1984); Chance v. Stevens of Leesville, Inc., 491 So. 2d 116, 122–24 (La. Ct. App. 3d Cir. 1986). *See also* Bruce V. Schewe & Kent A. Lambert, *Obligations. Developments in the Law*, 54 LA. L. REV. 763, 766–67 (1994). Furthermore, the owner has no action to compel a person who has not intervened to act as *negotiorum gestor*. *Cf.* Hodges v. Southern Farm Bureau Casualty Ins. Co., 411 So. 2d 564, 567 (La. Ct. App. 1st Cir. 1982); LeBlanc v. Audubon Ins. Co., 357 So. 2d 29, 29–30 (La. Ct. App. 3d Cir. 1978).

The second characteristic feature of *negotiorum gestio*—peculiar only to the French civil-law systems, including Louisiana—is that the obligations of the manager and owner might also extend to third parties. This is so because in France and Louisiana *negotiorum gestio* is recognized as a "quasi-mandate," under the "fictitious contract theory of quasi-contract." Thus, under the French Civil Code, the manager is subject to "all the obligations of the mandatary."[349] French doctrine has observed that this statutory directive ought not be taken literally.[350] The Louisiana Civil Code adopted more accurate language when providing that *negotiorum gestio* "is subject to the rules of mandate to the extent those rules are compatible with management of affairs."[351] The civil codes of France and Louisiana do not specify which rules of mandate are indeed compatible with *negotiorum gestio*. Nevertheless, it is clear in both systems that the manager and the owner may incur obligations toward third parties.[352]

*a. Obligations of the Manager*

The laws of *negotiorum gestio* and, in the absence of a provision in those laws, the laws of mandate impose three obligations on the manager toward the owner[353]—the obligation of diligence, the obligation of perseverance, and the obligation to account.[354] These obligations are fiduciary in nature.[355] They derive from the Roman

349. FRENCH CIVIL CODE, *supra* note 11, art. 1301; *cf.* LA. CIV. CODE art. 2293 (2023).

350. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 4 ("[T]he comparison with the mandate can be interpreted as a simple directive given to the judge inviting him to draw inspiration from the system of this contract when the rules of *negotiorum gestio* themselves are insufficient").

351. *See* LA. CIV. CODE art. 2293 (2023).

352. *See, e.g.*, LA. CIV. CODE art. 2297 cmt. b (2023).

353. *See* TERRÉ ET AL., *supra* note 57, No. 1279.

354. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 5. Interestingly, under Quebec law, the administration of property of others is grouped into one set of provisions that also apply to *negotiorum gestio*. *See* QUEBEC CIVIL CODE, *supra* note 13, arts. 1484, 1299.

355. *Cf.* Holmes & Symeonides, *supra* note 242, 1135 n.264 (discussing the fiduciary nature of mandate and agency in civil and common law); Elizabeth

direct action of the owner against the manager (*actio negotiorum gestorum directa*),[356] which was later based on the legal fiction of a "quasi-mandate."[357]

Under article 2295 of the Louisiana Civil Code, the manager is bound to manage the affair of the owner with prudence and diligence[358] and is answerable for any loss that results from failure to do so.[359] Thus, the manager is liable for faulty management.

French doctrine carefully distinguishes "faulty management" from "useless management."[360] Liability for faulty management under *negotiorum gestio* presupposes that the requirements for *negotiorum gestio* have been met, including the requirement that the management be useful.[361]

If the management is useless, then there is no *negotiorum gestio*—the putative manager may be held liable in tort[362] or unjust

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Carter, *Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees*, 80 LA. L. REV. 661 (2020). A mandatary and, by extension, a *negotiorum gestor* of the owner's property is the owner's precarious possessor. *See* Ligon v. Angus, 485 So. 2d 142, 145 (La. Ct. App. 2d Cir. 1986); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 12:20; PLANIOL & RIPERT III, *supra* note 246, at 177.

356. *See* PETROPOULOS I, *supra* note 48, at 1038.

357. *See* LA. CIV. CODE art. 2295 (1870). *Cf.* CODE NAPOLÉON, *supra* note 10, art. 1372.

358. *See* LA. CIV. CODE art. 3001 (2023).

359. *See id.* art. 2295.

360. *See* Bout, *supra* note 158, Nos 21–24; Forti, Negotiorum Gestio, *supra* note 297, No. 6. *See supra* note 297.

361. The distinction between useless and faulty management is not always straightforward. Indeed, an imprudent act, especially at the commencement of the management, can equate to a useless management. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 6; Bout*, supra* note 158, No. 22; Marianne Lecene-Marénaud, *Le rôle de la faute dans les quasi-contrats*, RTDCIV 1994, p. 531. The party claiming *negotiorum gestio* must prove the element of usefulness. When the management is useful but faulty, the provisions on *negotiorum gestio* apply, but the owner can claim damages against the manager. The owner bears the burden of proving the manager's fault. *See* Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008) (finding that manager acted usefully when purchasing insurance but later committed faulty management when she failed to distribute the insurance proceeds to the owners); Bout, *supra* note 158, No. 24.

362. *See* LA. CIV. CODE art. 2295 cmt. c (2023) ("The manager may also be liable under the law governing delictual obligations for his fraud, fault, or neglect, but not for slight fault."). *See* LA. CIV. CODE art. 2315 (2023); LA. CIV. CODE art. 3506(13) (1870).

enrichment.[363]

The standard of care of the manager is that of a prudent administrator,[364] which is a fiduciary standard that is higher than the standard for liability in tort.[365] The manager's diligence is determined objectively, with reference to an attentive and careful person taking care of her own affairs.[366] This diligence may also require positive acts of the manager, who is also liable for neglect.[367] Thus, a co-

363. *Cf.* LA. CIV. CODE art. 2296 cmt. c (2023). The distinction between faulty management and useless management has evaded the French courts on certain occasions. *See, e.g.,* Cour de cassation, civ., Jun. 23, 1947, JCP 1948, II, 4325 (holding that the rules of *negotiorum gestio* were inapplicable to the case of a person managing his brother's business without due care and incurred liabilities).

364. *See, e.g.,* LA. CIV. CODE art. 576 cmt. b. (2023). The "prudent administrator" standard in the Louisiana Civil Code and the corresponding *bon père de famille* in the Code Napoléon reflect the Roman law notion of *homo diligens et studiosus paterfamilias*. DIG. 22.3.25.15 (Paul, Quaestionum 3). This standard generally applies in all situations of administration of the property of others. *See* LA. CIV. CODE art. 229 cmt. b (2023); *cf.* QUEBEC CIVIL CODE, *supra* note 13, arts. 1299, 1309, 1484. *See* YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 4:14; LA. CIV. CODE art. 2930 cmt. b (2023). *See also* JOEL EMANUEL GOUDSMIT, THE PANDECTS. A TREATISE ON ROMAN LAW, AND UPON ITS CONNECTION WITH MODERN LEGISLATION 213–16 (R. de Tracy Gould trans. 1873) (discussing the various degrees of fault in Roman law); TOOLEY-KNOBLETT & GRUNING, *supra* note 230, §§ 11:8 ("The reason for the higher duty of the true prudent administrator is that such a person holds and uses a thing that belongs to another.").

365. *See* Lococo v. Lococo, 462 So. 2d 893 (La. Ct. App. 4th Cir. 1984); Beavers v. Stephens, 341 So. 2d 1278, 1281 (La. Ct. App. 3d Cir. 1977); Carter, *supra* note 355, at 672–76; TERRÉ ET AL., *supra* note 57, No. 1280. The standard of care is the same in the law of mandate, which applies by analogy to *negotiorum gestio*. *See* LA. CIV. CODE arts. 3001, 2293 (2023); Bayon v. Prevot, 4 Mart. (o.s.) 58, 63, 65 (La. 1815); SAÚL LITVINOFF & RONALD J. SCALISE JR., THE LAW OF OBLIGATIONS. PUTTING IN DEFAULT AND DAMAGES §§ 15.12–15.13, *in* 6 LOUISIANA CIVIL LAW TREATISE (2d ed., Nov. 2021 update) [hereinafter LITVINOFF & SCALISE, DAMAGES]; Holmes & Symeonides, *supra* note 242, at 1136.

366. *See* Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3 Cir. 1980); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 116–18; YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 4:14; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 15:13. *See also* Forti, Negotiorum Gestio, *supra* note 297, No. 9 (explaining that the court is called upon to compare the behavior of the manager with the behavior of a reasonable and attentive person).

367. *See* LA. CIV. CODE art. 2295 & cmt. c (2023); Carbajal v. Bickmann, 187 So. 53 (La. 1939); Lococo v. Lococo, 462 So. 2d 893 (La. Ct. App. 4th Cir. 1984); Beavers v. Stephens, 341 So. 2d 1278, 1281 (La. Ct. App. 3d Cir. 1977); YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 4:14; Symeonides & Martin, *supra* note 23, at 107–08.

owner of mineral interests who located a contractor with necessary expertise to perform cleaning, plugging and abandoning of the wells at a minimal cost, used all the care of a prudent administrator.[368] A family friend who, upon request of one co-heir, sold bonds belonging to the estate at fair market value was a prudent *negotiorum gestor* of the other co-heirs.[369] Conversely, a co-owner commits faulty management when she fails to distribute insurance proceeds from a policy that she purchased for all co-owners as their *negotiorum gestor*.[370] A son commits faulty management of his ailing father's assets when he enters into speculative financial transactions rather than selecting a safer investment.[371] Likewise an employee of a store is an imprudent manager when she returns a lost bag to a third person claiming to be the owner without making a reasonable inquiry as to the validity of the third person's assertion of ownership.[372]

Nevertheless, revised article 2295 of the Louisiana Civil Code continues to say that, "The court, considering the circumstances, may reduce the amount due the owner on account of the manager's failure to act as a prudent administrator."[373] This special rule does not introduce a lesser standard of diligence for the manager.[374] Rather, it grants discretion to the court to enforce the liability of the manager "less rigorously," taking into account the gratuitous nature of *negotiorum gestio*, and the similar rule applicable to gratuitous mandate.[375] The court may exercise its discretion "considering the

368. *See* Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3 Cir. 1980).

369. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931).

370. *See* Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008).

371. *See* Cour de cassation, req., Apr. 13, 1899, D.P. I 1901, p. 233, note Boistel (Fr.).

372. *See* Cour de cassation, 1e civ., Jan. 3, 1985: Gaz. Pal. 1985, 1, p. 90, note Piedelièvre (Fr.); also published in RTDCIV 1985, p. 574, note Mestre.

373. LA. CIV. CODE art. 2295 (2023). A similar provision is found in the French Civil Code. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-1 para. 2 ("The judge may, depending on the circumstances, reduce the compensation owed to the owner of the affair due to the fault or negligence of the manager").

374. *See* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 15.13 (discussing the liability of the gratuitous mandatary and the manager of affairs).

375. *See* LA. CIV. CODE art. 2295 cmt. b (2023); LA. CIV. CODE art. 3003 (1870) (providing that the responsibility of a mandatary with respect to fault is

circumstances" of the case.[376] Article 2295 does not identify exactly what circumstances should be considered. An indication might be drawn from the provision's predecessor—article 2298 of the Louisiana Civil Code of 1870, upon which the current provision is based.[377] Old article 2298, in its second paragraph refers to "circumstances of friendship or of necessity [that] have induced [the manager] to undertake the management."[378] Based on this language, it would seem that the circumstances surrounding the manager's decision to perform the act of the management should weigh more heavily than the circumstances involving the actual fault of the manager.[379] Thus, the compensation due to the owner may be more easily reduced when the affair managed is solely in the owner's interest. Conversely, reducing the compensation due to the owner seems less appropriate when the manager also has an interest in the affair managed.[380]

Under the French Civil Code, the manager "must continue the management until the owner or his successor is able to provide for it."[381] The manager thus has an obligation of perseverance. She must

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"enforced less rigorously" when the mandate is gratuitous); Mechanics' Bank v. Gordon, 5 La. Ann. 604 (1850). *See* LA. CIV. CODE art. 3002 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1995; QUEBEC CIVIL CODE, *supra* note 13, art. 2148.

376. LA. CIV. CODE art. 2295 (2023).

377. *See id.* art. 2295 cmt. a.

378. LA. CIV. CODE art. 2298 (1870). A similar rule was found in the Code Napoléon. *See* CODE NAPOLÉON, *supra* note 10, art. 1374. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931); Woodlief v. Moncure, 17 La. Ann. 241 (La. 1865) (identifying the *negotiorum gestor* as a friend who took upon himself the management of the affair solely in the interest of the owner).

379. *See, e.g.*, Chance v. Stevens of Leesville, Inc., 491 So. 2d 116, 123 (La. Ct. App. 3d Cir. 1986) (reducing the damages owed by the *negotiorum gestor* who undertook the acts of management as a good-will measure); Ayres & Landry, *supra* note 320, at 113.

380. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 10; CHANTEPIE & LATINA, *supra* note 260, No 721. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-4 (providing that the personal interest of the manager in the affair managed does not exclude the application of the rules of *negotiorum gestio*, and that in such a case the obligations of the parties are proportional to their interest in the affair managed).

381. FRENCH CIVIL CODE, *supra* note 11, art. 1301-1; *cf.* CODE NAPOLÉON, *supra* note 10, arts. 1372–1373.

continue—or, if necessary, complete—the management of the affair in its entirety[382] until the owner or the owner's successor is able to take over.[383] The rationale for imposing this obligation of perseverance is to discourage thoughtless initiatives or superficial interference, and to encourage useful management.[384] The French approach was followed in the Louisiana Civil Code of 1870,[385] and it is still applied today in the revised provisions of the Louisiana Civil Code, with one important exception—revised article 2294. According to this provision, "The manager is bound, when the circumstances so warrant, to give notice to the owner that he has undertaken the management and to wait for the directions of the owner, unless there is immediate danger."[386] As the revision comment explains,[387] this rule is based on similar provisions in the Greek and German civil codes.[388]

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382. The manager must manage the entire affair with all its extensions. *See* CODE NAPOLÉON, *supra* note 10, art. 1372 ("[The manager] must himself be responsible in like manner of all the dependencies of the same affair"); Forti, Negotiorum Gestio, *supra* note 297, No. 13. Incomplete or partial management is faulty management. *See* TERRÉ ET. AL., *supra* note 57, No. 1280.

383. *See* Burns v. Sabine River Authority, 736 So. 2d 977, 979–80 (La. Ct. App. 3d Cir. 1999) (referring to the courts earlier opinion on the same case—614 So. 2d 1337); American Mfrs. Mut. Ins. Co. v. United Gas Corp., 159 So. 2d 592, 596 (La. Ct. App. 3d Cir. 1964). Thus, the manager has an affirmative duty to preserve and to manage the property. Usufructuaries also have a duty to preserve and prudently administer the property. In contrast, a co-owner has a right but not a duty to preserve the property. *See* LA. CIV. CODE arts. 576, 581, 800, 2295, 2369.3 cmt a (2023); Symeonides & Martin, *supra* note 23, at 138–48; Forti, Negotiorum Gestio, *supra* note 297, Nos 11–12.

384. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 11. *See also* MALAURIE ET AL., *supra* note 30, No. 1025 (observing that "it is better to do nothing than to begin [a management of an affair] without finishing it").

385. *See* LA. CIV. CODE arts. 2295–2297 (1870).

386. LA. CIV. CODE art. 2294 (2023). *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003).

387. *See* LA. CIV. CODE art. 2294 rev. cmt. (2023).

388. *See* GREEK CIVIL CODE, *supra* note 88, art. 733 ("The manager is bound to give notice, as soon as he can, to the owner that he has undertaken the management and to wait, if there is no immediate danger from the delay, for the directions from the owner"); GERMAN CIVIL CODE, *supra* note 87, § 681:

> The manager must notify the owner, as soon as feasible, of his undertaking of the management and, if postponement does not entail danger, wait for the decision of the principal. Apart from this, the provisions relating to a mandatary in sections 666 to 668 apply to the duties of the manager with the necessary modifications.

Revised article 2294 of the Louisiana Civil Code imposes two additional obligations on the manager. First, the manager has the duty to notify the owner of the commencement of the management, "when the circumstances so warrant."[389] Greek and German scholars explain that the rationale for this obligation is to secure the management of the affair according to the actual will of the owner, whenever possible.[390] The manager has the legal obligation to notify the owner as soon as possible—at the commencement of the management or, if notification at that time is impossible, at the earliest possible time during the management.[391] The notification must identify the affair managed, but it need not be detailed.[392] There is no formality requirement for the notification—it may be oral and it may be addressed to the owner's legal representative.[393] The manager is relieved of this obligation if, because of the circumstances, notification of the owner is unattainable.[394] This usually occurs when the

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*Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1483 ("Duty to inform – The manager shall as soon as possible inform the principal of the management he has undertaken").

389. LA. CIV. CODE art. 2294 (2023). *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003).

390. *See* LIVIERATOS, *supra* note 157, at 123; Sakketas, *supra* note 280, Article 733, No. 1; GEORGIADES, *supra* note 340, at 880; 2 PANAGIOTIS ZEPOS, ENOCHIKON DIKAION. EIDIKON MEROS [LAW OF OBLIGATIONS. SPECIAL PART] 643 (2d ed. 1965) (Greece); Panagiotis Papanikolaou, Article 733, No. 1, *in* 4 ASTIKOS KODIX. ERMINEIA KAT'ARTHRO [CIVIL CODE. ARTICLE-BY-ARTICLE COMMENTARY] (Apostolos Georgiades & Michael Stathopoulos eds. 1999) (Greece); JAN KROPHOLLER, STUDIENKOMMENTAR BGB, § 679–681, No. 1 (4th ed. 2000); Hans Hermann Seiler, BGB § 681, *in* 5 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Kurt Bermann et al. eds., 4th ed. 2005); Hans Carl Nipperdey, BGB § 681, No. 5, *in* 2 STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Franz Brändl et al. eds, 11th ed. 1955); 2 KARL LARENZ, LEHRBUCH DES SCHULDRECHTS. BESONDERER TEIL 354–55 (12 ed. 1981); Johannes Friesecke, BGB § 681, *in* PALANDT BÜRGERLICHES GESETZBUCH KURZKOMMENTAR (Peter Bassenge et al. eds, 37th ed. 1978). *See also* HANS JOACHIM MUSIELAK, GRUNDKURS BGB 326–29 (4th ed. 1994) (discussing the primacy of the owner's real will in comparison with the owner's presumed will).

391. *See* Sakketas, *supra* note 280, Article 733, No. 2.

392. The manager is essentially giving notice of the event that she has undertaken the management of the affair. *See* GEORGIADES, *supra* note 340, at 880.

393. *See* Apostolos Tasikas, Article 733, No. 4, *in* 1 SYNTOMI ERMINEIA TOU ASTIKOU KODIKA [SHORT COMMENTARY OF THE CIVIL CODE] (Apostolos Georgiades ed., 2010).

394. *See* GEORGIADES, *supra* note 340, at 880.

owner or her legal representative cannot be found,[395] or the urgent nature of the affair, which would include an "immediate danger,"[396] does not allow time for notification.[397] Whether notification was possible is a matter of fact to be determined by the special circumstances of the case.[398] Although some scholars are not in agreement, it seems that the owner should not bear the burden the proving that notification was or became possible. Instead, the manager ought to bear the burden of proving that notification was not possible.[399]

If notification is possible, failure of the manager to notify the owner timely does not negate or terminate the *negotiorum gestio* relationship between manager and owner.[400] The manager, however, may be liable to the owner for damages sustained because of the manager's failure[401] to notify the owner timely.[402]

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395. The owner's identity or contact details might be unknown or she may not be reached. *See* Sakketas, *supra* note 280, Article 733, No. 2. The owner might be unconscious, and her family cannot be reached. *See* GEORGIADES, *supra* note 340, at 880.

396. LA. CIV. CODE art. 2294 (2023).

397. *See* GEORGIADES, *supra* note 340, at 880 (referring to the example of an unconscious owner who receives emergency medical treatment from the manager); KROPHOLLER, *supra* note 390, No. 4 (observing that the factors to be taken into consideration are the availability of the owner and the importance of the affair).

398. *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 400 (La. Ct. App. 4th Cir. 2003); GEORGIADES, *supra* note 340, at 880; Papanikolaou, *supra* note 390, No. 2.

399. The owner must prove that the manager failed to give timely notification. *See* GEORGIADES, *supra* note 340, at 880; Papanikolaou, *supra* note 390, No. 5. *But see* ZEPOS, *supra* note 390, at 643; Sakketas, *supra* note 280, Article 733, No. 10; Nipperdey, *supra* note 390, BGB § 681, No. 5 (all arguing that the owner must prove that the notification was or became possible, whereas the manager must prove that an immediate danger rendered notification impossible).

400. The manager maintains her claim of compensation against the owner, if the requirements of *negotiorum gestio* are met. *See* Nipperdey, *supra* note 390, BGB § 681, No. 13; ZEPOS, *supra* note 390, at 643; Sakketas, *supra* note 280, Article 733, No. 7; Tasikas, *supra* note 393, No. 7.

401. *See* LIVIERATOS, *supra* note 157, at 123; ZEPOS, *supra* note 390, at 643; Sakketas, *supra* note 280, Article 733, No. 7; Tasikas, *supra* note 393, No. 7. The standard of the manager's care is that of a prudent administrator. LA. CIV. CODE art. 2295, 576 cmt. b (2023). *Cf.* LIVIERATOS, *supra* note 157, at 123; Nipperdey, *supra* note 390, BGB § 681, No. 5; Sakketas, *supra* note 280, Article 733, No. 7.

402. The owner's damages may be any loss sustained or cost that the owner would have avoided had she been notified timely and was able to provide directions to the manager. *See* Tasikas, *supra* note 393, No. 7. An interesting example comes from the German jurisprudence. A power company continued to provide

When notification is possible, the manager must notify the owner timely and must await the owner's directions, unless there is immediate danger.[403] The obligation to wait for further directions is only applicable if the management is still ongoing.[404]

If the owner communicates directions to the manager, a careful legal assessment of the owner's communication is warranted. If the owner gave simple directions to the manager without expressing an intent to give a mandate to the manager, or if the owner was legally incapable of providing a mandate, then the parties still remain in a relationship of *negotiorum gestio*—the manager must follow the owner's directions precisely, unless these directions are illicit or impossible.[405] In the latter case, the manager is still charged with managing the affair according to "the reasonable belief that the owner would approve the action"[406] On the other hand, if the owner's directions rise to the level of a mandate, the parties are bound to a contract of mandate[407] that terminates the relationship of

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electricity to a retirement home after the retirement home's electricity provider—who purchased electricity from the power company and resold it to its customers—became insolvent. The power company delayed several weeks to notify the retirement home that it had taken over as the electricity provider. Meanwhile, the retirement home allegedly continued to pay the original provider. The court held that the power company acted as a *negotiorum gestor* for the retirement home and was entitled to compensation for the electricity it provided. The court, however, noted that the manager (power company) failed to notify the owner (retirement home) of the management in a timely fashion. Thus, the manager was liable for any damage that the owner sustained during this delay, which would include the payments made to the insolvent former provider that could not be recovered, if the owner could have proved this loss. Bundesgerichtshof, Jan. 26, 2005, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT [NJW-RR] 639, 2005. Later amendments to the German energy legislation have legislatively overruled the German jurisprudence that energy providers can act as *negotiorum gestor*. *See* BGH May 10, 2022, EnZR 54/21, https://perma.cc/RD3A-XZFN (Nov. 1, 2022).

403. *See* LA. CIV. CODE art. 2294 (2023).

404. *See* KROPHOLLER, *supra* note 390, No. 4 (observing that the obligation to wait for the owner's instructions is "without real practical significance. . .because in most cases the management is limited to individual measures taken before the owner can provide directions"); Seiler, *supra* note 390, No. 5.

405. *See* Tasikas, *supra* note 393, No. 5; Sakketas, *supra* note 280, Article 733, No. 9; Nipperdey, *supra* note 390, BGB § 681, No. 5.

406. LA. CIV. CODE art. 2292 (2023).

407. *See* LA. CIV. CODE art. 2989 (2023).

*negotiorum gestio*.[408] If the owner fails to provide directions, the manger must continue the prudent management of the affair in the interest of the owner, according to the presumed intention of the owner.[409] The manager is released from both obligations to notify the owner and to wait for directions when the delay poses an immediate danger.[410] Finally, the manager has the obligation to account to the owner for the management.[411] This obligation is not provided specifically in the civil code articles on *negotiorum gestio*; however, it derives from the provisions on mandate,[412] which apply

408. The owner's intent to provide a mandate must be determined by the circumstances surrounding the parties' communication. For instance, the owner may have provided a procuration to the manager. LA. CIV. CODE art. 2987 (2023). The owner may have given very detailed instructions that included the making of a juridical act with third persons or the payment of a substantial sum of money. *See* Sakketas, *supra* note 280, Article 733, No. 5; GEORGIADES, *supra* note 340, at 881; Tasikas, *supra* note 393, No. 6; LIVIERATOS, *supra* note 157, 124 n.2. A mandate between the parties may also act as a ratification of the manager's previous acts. Tasikas, *supra* note 393, No. 6; LA. CIV. CODE art. 1843 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 12.58.

409. This means that the manager must act as a prudent administrator, which also includes the obligation to wait for further instructions from the owner if there is no immediate danger and if the affair is not urgent. *See* Nipperdey, *supra* note 390, BGB § 681, No. 5; Sakketas, *supra* note 280, Article 733, Nos 4–5; GEORGIADES, *supra* note 340, at 880; Tasikas, *supra* note 393, No. 5.

410. The immediate danger must concern the person or patrimony of the owner and it may also affect the manager and third persons for whose damage the owner will be held liable *See* LIVIERATOS, *supra* note 157, at 123. For instance, the owner's building might be in danger of collapsing or might catch fire, threatening damage to the neighboring manager and third persons. *See* ZEPOS, *supra* note 390, at 643; GEORGIADES, *supra* note 340, at 881; Sakketas, *supra* note 280, Article 733, No. 6. The danger may be real or merely perceived as real by the manager, as long as the manger's perception is based on good faith. The manager is still entitled to compensation even if the danger was not eventually avoided by the management, if she acted as a prudent administrator. Sakketas, *supra* note 280, Article 732, Nos 2–6; Nipperdey, *supra* note 390, BGB § 680, Nos 1–8. However, if there is no immediate danger, and if the affair is not urgent, the manager must continue to wait for the owner's directions Sakketas, *supra* note 280, Article 733, No. 6 (noting that the manager may not engage in further management simply on the basis that the owner delayed in providing directions).

411. *See* Saint v. Martel, 53 So. 432 (La. 1910); Gaudé v. Gaudé, 28 La. Ann. 181 (1876).

412. *See* LA. CIV. CODE arts. 3003–3009 (2023); Holmes & Symeonides, *supra* note 242, at 1135–37. An obligation to account may also derive from other statutes. For instance, a special statute provides for accounting of a unit operator who sells mineral interests of unleased owners. LA. REV. STAT. § 30:10(A)(3) (2023); Dow Construction, LLC v. BPX Operating Co., 603 F.Supp.3d 442, 447–

by analogy.[413] The obligation to account flows from the fiduciary nature of the relationship between manager and owner.[414] Thus, the manager must provide information to the owner, which includes an account of the management.[415] The manager must turn over to the owner everything that she received by virtue of the management, which might include disgorgement of profits,[416] except sufficient property to pay her expenses.[417] The manager owes interest on the

48 (W.D. La. 2022); Self v. BPX Operating Co., 595 F.Supp.3d 528, 533–37 (W.D. La. 2022).

413. *See* LA. CIV. CODE art. 2293 (2023). A similar approach is followed in other civil-law jurisdictions. *See, e.g.*, FRENCH CIVIL CODE, *supra* note 11, arts. 1301, 1993; QUEBEC CIVIL CODE, *supra* note 13, arts. 1484, 1299, 1301; GERMAN CIVIL CODE, *supra* note 87, § 681 para. 2; GREEK CIVIL CODE, *supra* note 88, art. 734; Forti, Negotiorum Gestio, *supra* note 297, No. 14; Sakketas, *supra* note 280, Article 734, No. 5 (discussing similar rules found in several civil codes).

414. *Cf.* Holmes & Symeonides, *supra* note 242, 1135 n.264 (discussing the fiduciary nature of mandate and agency in civil and common law).

415. *See* LA. CIV. CODE art. 3003 (2023); Holmes & Symeonides, *supra* note 242, at 1136. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2; Forti, Negotiorum Gestio, *supra* note 297, No. 15.

416. *See* LA. CIV. CODE arts. 3004, 2293 (2002). In common-law systems, the plaintiff may sometimes pursue a restitution-based disgorgement remedy. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. L. INST. 2011) (opportunistic breach of contract); *id.* § 43 (breach of fiduciary duties); *id.* §§ 49(4) & 51(4)–(5) (conscious wrongdoing); Andrew Kull, *Disgorgement for Breach, the Restitution Interest, and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2001); DOBBS & ROBERTS, *supra* note 6, § 4.4(3) (discussing consequential benefits measures of restitution). In civil-law systems, disgorgement of profits is generally not possible under a theory of unjust enrichment, although such claims might be allowed for breach of a fiduciary duty (e.g., *negotiorum gestio* or mandate). *See generally* DISGORGEMENT OF PROFITS: GAIN-BASED REMEDIES THROUGHOUT THE WORLD (Ewoud Hondius & André Janssen eds., 2015). In Louisiana, a remedy of disgorgement of profits may be available in the law of mandate and, by extension, *negotiorum gestio*. *See* LA. CIV. CODE arts. 3004 and 2293 (2002); Carter, *supra* note 355, at 688–89. Disgorgement of profits may also be available in the case of restoration of a payment not due. *See infra* notes 774–76 and accompanying text. Disgorgement of profits, however, is not an available remedy in cases of enrichment without cause. *See infra* notes 908–09 and accompanying text. *But see infra* note 919 and accompanying text. Special statutes may also allow a disgorgement remedy. *See, e.g.*, LA. REV. STAT. §§ 9:2790.5 and 9:2790.6 (2023) (providing a civil remedy to the state to recover profits obtained through the commission of certain criminal offenses).

417. *See* LA. CIV. CODE art. 3004 (2023); Holmes & Symeonides, *supra* note 242, at 1136; Forti, Negotiorum Gestio, *supra* note 297, No. 15. Nevertheless, the manager need not turn over things she received beyond the scope of the management—e.g., gratuities received from third persons in the course of her proper management acts. *See* Sakketas, *supra* note 280, Article 734, No. 5. *Cf.* DIG. 3.5.2

owner's money diverted to the manager's own use.[418] The manager is personally bound for the management.[419] She may appoint her own mandataries, if necessary for the prudent management of the affair, but she is answerable to the owner for the acts of her mandataries.[420]

*b. Obligations of the Owner*

Under the laws of *negotiorum gestio* and mandate, the owner has two obligations toward the manager—to reimburse expenses and to compensate for damage.[421] These obligations date back to the Roman contrary action of the manager against the owner (*actio negotiorum gestio contraria*),[422] which was founded on equity.[423]

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(Gaius, Ad Edictum Provinciale 3) ("[I]t is proper that the manager give an account for his activity and be condemned for whatever he. . .keeps for himself *from these transactions*) (emphasis added).

418. *See* LA. CIV. CODE art. 3005 (2023); Holmes & Symeonides, *supra* note 242, at 1136; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 9.16. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2; Forti, Negotiorum Gestio, *supra* note 297, No. 15. *But see* Webre v. Graudnard, 138 So. 433, 434 (La. 1931) (finding that the *negotiorum gestor* does not owe interest if he had previously tendered payment to owners and the owners refused to accept). The manager is also liable for interest on the owner's money that she actually collected or could have collected as a prudent administrator, taking into consideration the actual or presumed wishes of the owner and the circumstances of the management. For example, the prudent manager will deposit the owner's money that she received during the management—e.g., by selling the owner's perishable goods—in an interest-bearing bank account, unless it was the owner's wishes to keep the money in her personal safe. *See* Sakketas, *supra* note 280, Article 734, No. 4. *Cf.* DIG. 3.5.18.4 (Paul, Ad Neratium 2) ("[the manager] shall hand over not only the principal amount but also the interest received on the owner's money or even interest that [the manager] could have collected"). Unauthorized use of the owner's property beyond the scope of the managed affair constitutes faulty management for which the manager is liable in *negotiorum gestio* and potentially in tort. *See* LA. CIV. CODE art. 2295 cmt. c (2023).

419. *Cf.* LA. CIV. CODE art. 3006 (2023).

420. *Cf. id.* art. 3007; Sakketas, *supra* note 280, Article 730, No. 6. It should be noted that the manager does not appoint "substitutes," as is the case in the law of mandate, because the manager was not chosen by the owner.

421. *See* LA. CIV. CODE arts. 2297, 3012, 3013 (2023); Burckett v. State, 704 So. 2d 1266, 1268 (La. Ct. App. 2d Cir. 1997); Forti, Negotiorum Gestio, *supra* note 297, No. 20.

422. *See* PETROPOULOS I, *supra* note 48, at 1038.

423. *See* LA. CIV. CODE art. 2299 (1870) ("Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by

The owner must reimburse the manager for all necessary and useful expenses424 that the manager incurred as a *negotiorum gestor*.[425] The manager is entitled to reimbursement for necessary expenses par excellence; it is the usual case that the manager intervened to preserve or protect the owner's affair.[426] The manager is also reimbursed for useful expenses incurred during the management of the affair.[427] Both necessary and useful expenses must be incurred within the framework of a "useful management," considering the necessity and reasonableness of the expense and the actual

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the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses"). *Cf.* CODE NAPOLÉON, *supra* note 10, art. 1375; DIG. 44.7.5 (Gaius Aureorum 3).

424. The distinction between necessary, useful, and luxurious expenses is well-known in Louisiana law. *See* LA. CIV. CODE art. 1259 (2023):

> Necessary expenses are those which are indispensable to the preservation of the thing. Useful expenses are those which increase the value of the [thing], but without which the [thing] can be preserved. Expenses for mere pleasure are those which are only made for the accommodation or convenience of the owner or possessor of the [thing], and which do not increase its value.

*id.* art. 527 (2023) (necessary expenses incurred by adverse possessor); *id.* art. 528 (useful expenses incurred by adverse possessor); *id.* art. 581 (necessary expenses incurred by usufructuary); *id.* art. 806 (expenses incurred by co-owner); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 11:21.

425. LA. CIV. CODE art. 2297 (2023); CODE NAPOLÉON, *supra* note 10, art. 1375. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2 (abandoning the terms "useful and necessary expenses" and instead providing that the owner must reimburse the manager for "expenses incurred in his interest"). French scholars observe, however, that the distinction between useful, necessary, and luxurious expenses still informs the application of the new rule. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 21.

426. *See* Succession of Erwin, 16 La. Ann. 132 (1861) (reimbursement of taxes paid by manager); Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985) (co-owner of property may take out insurance for other co-owners as their *negotiorum gestor*); Forti, Negotiorum Gestio, *supra* note 297, No. 21; Sakketas, *supra* note 280, Article 736, No. 7.

427. *See* LA. CIV. CODE art. 2297 (2002); Moody v. Arabie, 498 So. 2d 1081, 1084–85 (La. 1986); Symeonides & Martin, *supra* note 23, at 151–52. One court recently read article 2297 of the Louisiana Civil Code *in pari materia* with a special statute when allowing a unit operator who sold unleased mineral interests to deduct post production expenses (recoverable under Louisiana Civil Code article 2297) from the proceeds of the sale owed to the owner (owed under the special statute). *See* LA. REV. STAT. § 30:10(A)(3) (2023); Johnson v. Chesapeake Louisiana, LP, 2022 WL 989341 (W.D. La. Mar. 31, 2022); Dow Construction, LLC v. BPX Operating Co., 602 F.Supp.3d 928, 937–38 (W.D. La. 2022); Self v. BPX Operating Co., 595 F.Supp.3d 528, 536 (W.D. La. 2022).

or presumed wishes of the owner.[428] Recovery of these expenses is actionable even if the affair is not managed successfully, as long as no fault is attributed to the manager.[429] The owner owes interest on all these expenses from the date of the expenditure.[430] The manager has a right of retention for repayment of these expenses.[431]

Conversely, luxurious and unreasonable expenses, as well as expenses made in violation of the owner's directions, cannot be recovered under the law of *negotiorum gestio*.[432] Furthermore, the manager is only entitled to reimbursement for the necessary and useful expenses actually incurred; not for future expenses or for the increased value of the owner's property.[433]

The manager might maintain an action in unjust enrichment against the owner for expenses that the manager could not recover under the law of *negotiorum gestio*.[434] Finally, the manager is not

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428. These expenses include attorney fees incurred by the manager in the useful management of the affair. *See* Bank of the South v. Fort Lauderdale Technical College, Inc., 301 F.Supp. 260, 261 (E.D. La. 1969). *See also* Sakketas, *supra* note 280, Article 730, No. 52; *id.*, Article 736 Nos 7 and 9 (observing that a manager who intentionally hinders the gratuitous management of the owner's affair by another is acting against the owner's presumed wishes and is thus not entitled to reimbursement for any expenses).

429. *See* LA. CIV. CODE art. 3012 (2023); *Cf.* DIG. 3.5.21 (Gaius, Ad Edictum Provinciale 3). *But see* Forti, Requirements for Negotiorum Gestio, *supra* note 186, Nos 45–46 (explaining that under French jurisprudence, when the management is conducted in the common interest of the manager and the owner, reimbursement of the manager depends on whether the owner actually received a benefit at the end of the management).

430. *See* LA. CIV. CODE art. 3014 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 9.16; Forti, Negotiorum Gestio, *supra* note 297, No. 22 (explaining that the charging of interest as of the date of the expenditure encourages the altruistic management of another's affairs); Sakketas, *supra* note 280, Article 736, No. 11; Nipperdey, *supra* note 390, BGB § 683, No. 23. *Cf.* DIG. 3.5.18 § 4 (Paul, Ad Neratium 3) ("[The manager] is entitled to. . .interest [he has] paid out or interest [he] could have received on money of [his] own which [he] spent on the other person's business").

431. *See* LA. CIV. CODE art. 3004 (2023).

432. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 21; Sakketas, *supra* note 280, Article 736, No. 7.

433. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 21.

434. *See* LA. CIV. CODE art. 2298 (2023); Lee v. Lee, 868 So. 2d 316, 319 (La. Ct. App. 3d Cir. 2004); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2817; DEMOLOMBE XXXI, *supra* note 63, No. 190. *Cf.* OBLIGATIONENRECHT [OR], CODE DES OBLIGATIONS [CO], CODICE DELLE OBLIGATIONI [CO] [CODE OF OBLIGATIONS] art. 423 para. 3 (2023) (Switz.) ("Where the [manager's] expenses

entitled to reimbursement if she managed the affair with a gratuitous intent, that is, without an intent to recover expenses.[435]

An interesting question is whether the manager is also entitled to a salary or fee for her services. Traditional civil-law doctrine has answered this question in the negative, insisting on the gratuitous nature of *negotiorum gestio*.[436] As an eminent authority has aptly noted, a manager who volunteers her services must not be in a better position than a gratuitous mandatary who was appointed by the principal.[437]

Based on this reasoning, French[438] and Louisiana jurisprudence[439] has steadily refused to grant a remuneration to the manager, as a rule. An ostensible exception to the rule is whenever the manager is a professional acting within her trade and when from the circumstances it can be inferred that both manager and owner should expect that a fee be paid to the manager.[440]

The traditional example from French doctrine and jurisprudence is that of a physician or an attorney who provide emergency services

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are not reimbursed, he has the right of repossession in accordance with the provisions governing unjust enrichment"); Sakketas, *supra* note 280, Article 736, No. 8.

435. *See* Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016). Gratuitous intent is not presumed. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2798; AUBRY & RAU VI, *supra* note 157, No. 297; Bout, *supra* note 158, Nos 38–40; *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 cmt. c. (AM. L. INST. 2011).

436. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 125; AUBRY & RAU VI, *supra* note 157, at 447.

437. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 125.

438. *See*, Forti, Negotiorum Gestio, *supra* note 297, No. 24 (discussing French jurisprudence).

439. *See, e.g.*, Succession of Kernan, 30 So. 239 (La. 1901); Kirkpatrick v. Young, 456 So. 2d 622 (La. 1984); Baron v. Baron, 286 So. 2d 480 (La. Ct. App. 1st Cir. 1973). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 127 n.165.

440. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126; AUBRY & RAU VI, *supra* note 157, at 447 (citing French jurisprudence). As explained in the revision comments to the law of mandate, remuneration may be awarded "also in accordance with usages, customary law, or even under the law of enrichment without cause." LA. CIV. CODE art. 3012 cmt. b (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (AM. L. INST. 2011) (providing that restitution for emergency intervention may include payment of a fee).

with no gratuitous intent.[441] This exception also appears in the Louisiana jurisprudence, but under the heading of quantum meruit.[442] Scholars have offered two justifications for this narrow exception. First, a professional who is devoting her time to the management of an affair without a gratuitous intent is technically entitled to a fee as an "expense" she has incurred.[443] Second, and more convincing, the manager is entitled to a fee as a matter of equity. Indeed, if the professional manager is refused a fee, her only recourse would be to recover the lesser of the owner's enrichment or her own impoverishment;[444] such a result would be manifestly unfair and would discourage professionals from providing their emergency services.[445]

Based on the above observations, it seems reasonable to award a fee to the professional manager under certain limited circumstances. However, the onerous character of this management must

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441. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126–27. *See, e.g.*, LA. CODE CIV. PROC. arts. 3171–3174 (2023) (appointment of attorney for absent heirs and legatee). *Cf.* La. State Mineral Bd. v. Albarado, 180 So. 2d 700 (La. 1965) (awarding compensation to an attorney who provided legal services to heirs in the absence of a contract under a theory of quasi-contractual *quantum meruit*). *But see* Kirkpatrick v. Young, 456 So. 2d 622, 624–25 (La. 1984) (dismissing action in *negotiorum gestio* of attorney who provided legal services to additional heirs because attorney was already obligated to act by his contract with heirs who were his clients). Additionally, a person who finds lost property and takes care of it for the unknown owner (e.g., straying livestock or a drifting sailboat) may be entitled to recover the fee she would customarily charge for such services. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 (AM. L. INST. 2011).

442. *See* State Mineral Bd v. Albarado, 180 So. 2d 700 at 707 (La. 1965). For a critical review of this decision, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 127.

443. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126; AUBRY & RAU VI, *supra* note 157, at 447; Forti, Negotiorum Gestio, *supra* note 297, No. 24.

444. *See* LA. CIV. CODE art. 2298 (2023); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126.

445. LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 127 n.165. Levasseur noted that allowing a fee to professionals who act as managers within the scope of their trade of profession:

> would encourage professionals to act as gestors. . .However, there may exist a risk that such a rule would encourage interference by professionals at too high a cost to principals. Nevertheless, by applying the requirement of usefulness of the management, the courts ought to be able to avoid this consequence.

be considered by the court when enforcing the manager's obligation to act as a prudent administrator.[446] The owner is liable to compensate the manager for any loss she has sustained as a result of the management.[447] This obligation to indemnify is drawn from the law of mandate.[448] The manager is entitled to damages for loss involving her patrimony[449] and for injuries sustained in the course of the management.[450] However, the manager's compensation may be reduced or excluded if the manager's own fault contributed to her loss,[451] or if she failed to take reasonable steps to mitigate the loss.[452]

In all of the above obligations of the owner toward the manager, it should be noted that the manager bears the burden of proving the

446. *See* LA. CIV. CODE art. 2295 cmt. b (2023).

447. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 25. The owner's liability is strict—no fault of the owner is required; however, the owner is not liable for fortuitous events. *See* Sakketas, *supra* note 280, Article 736, No. 12.

448. *See* LA. CIV. CODE art. 3013 (2023); Holmes & Symeonides, *supra* note 242, at 1138. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2, para. 2 (providing that the owner "compensates [the manager] for damages he has suffered as a result of his management").

449. The owner is also bound toward the manager to perform the manager's personal obligations that the manager contracted as prudent administrator. Thus, the manager has a direct action against the owner for performance of these obligations or for damages. *See* LA. CIV. CODE art. 3010 (2023); Holmes & Symeonides, *supra* note 242, at 1137–38; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 129.

450. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* 2, at 128–29. In one case, the plaintiff witnessed an auto accident and rescued the driver of one of the vehicles. The driver, being in a temporarily deranged state, assaulted the plaintiff. The plaintiff brought a delictual action against both drivers and was awarded damages from the other driver who was at fault for the accident. *See* Lynch v. Fisher, 34 So. 2d 514 (La. Ct. App. 2d Cir. 1948), *modified*, 41 So. 2d 692 (La. Ct. App. 2d Cir. 1949). A more suitable and straightforward ground for recovery in this case would be the law of *negotiorum gestio*. *See* Edward A. Kaplan, Comment: *Recovery by the Rescuer*, 28 LA. L. REV. 609, 611, 624 (1968); *Cf.* Forti, Negotiorum Gestio, *supra* note 297, No. 25 (discussing the relevant French jurisprudence on this issue); KORTMANN, *supra* note 164, at 142–49 (surveying the common-law cases of recovery by rescuers under tort law doctrine). *See also* Martin, *supra* note 16, at 190 n.52 (observing that the Louisiana courts have resorted to tort theories when considering recovery by a rescuer of human life).

451. *See* LA. CIV. CODE arts. 3013 cmt. b, 2003 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 5.32–5.33. *Cf.* KORTMANN, *supra* note 164, at 144–46 (discussing the contributory negligence of the rescuer in common-law tort doctrine).

452. *See* LA. CIV. CODE art. 2002 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 10.1–10.22.

elements of *negotiorum gestio*, as well as the nature and extent of her expenses and damages. The owner can raise defenses involving the lack of the elements of *negotiorum gestio*—especially his contrary directions to the manager—or the manager's comparative fault.[453] If the affair managed is in the common interest of the manager and the owner, then the expenses or damages are allocated in proportion to the interests of the parties.[454]

*c. Obligations to Third Persons*

Perhaps the most salient effect of *negotiorum gestio* as a "quasi-mandate" in the French legal tradition is that it imposes obligations on the manager and the owner toward third persons with whom the manager contracted as a *negotiorum gestor*.[455] The Code Napoléon did not fully regulate the contours of the parties' relationship with third persons.[456] French doctrine and jurisprudence developed the

453. *See* Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985); Bryan Properties of Shreveport, LLC v. Keith D. Peterson & Co., Inc., 2011 WL 13243817, at *2 (W.D. La. Aug. 30, 2011); Forti, Negotiorum Gestio, *supra* note 297, No. 21; Sakketas, *supra* note 280, Article 736, Nos 17–19.

454. *Cf.* LA. CIV. CODE art. 806 (2023). The revised French Civil Code addresses this issue specifically. FRENCH CIVIL CODE, *supra* note 11, art. 1304-2 ("[T]he burden of commitments, expenses and damages is shared in proportion of the interests of each in the common affair"). *See* Forti, Negotiorum Gestio, *supra* note 297, Nos 23, 26.

455. *See* Succession of Kernan, 30 So. 239, 243–44 (La. 1901). As noted, under the German approach, *negotiorum gestio* and mandate are clearly distinguishable institutions, even though certain provisions governing mandate apply to *negotiorum gestio* by analogy. GERMAN CIVIL CODE, *supra* note 87, §§ 681, 683; GREEK CIVIL CODE, *supra* note 88, arts. 734, 736; *cf.* LA. CIV. CODE art. 2297 cmt. b (2023). Thus, the manager lacks the authority to bind the owner in juridical acts with third persons. The owner may only be bound if she ratifies the manager's act. GERMAN CIVIL CODE, *supra* note 87, §§ 177–185; GREEK CIVIL CODE, *supra* note 88, arts. 229–239. In Roman law, the third person who transacted with the manager had a direct action against the manager, but was also granted an *actio de in rem verso* against the owner. DIG. 15.3.3 § 2 (Ulpian, Ad Edictum 29). *See* Sakketas, *supra* note 280, Article 737, Nos 13–14.

456. The obligation of the owner toward third persons with whom the manager contracted appears in the Code Napoléon. *See* CODE NAPOLÉON, *supra* note 10, article 1375 ("The owner whose affair has been well-managed must fulfill the engagements that the manager has contracted in his name"); *cf.* LA. CIV. CODE art. 2299 (1870). On the other hand, the obligations of the manager toward third

classic distinction between "management with representation" and "management without representation."[457]

According to this distinction, if the manager transacted "with representation," that is, in the name and on behalf of the owner with third persons, then the manager is not bound to the obligations generated from this transaction.[458] Instead, the owner is liable to perform these obligations and is given a direct action against the third person for performance of their obligation.[459] If the manager made juridical acts with third persons "without representation," that is, in her own name but on behalf of the owner, then the owner is not directly liable to third persons and has no direct action against them, unless the owner ratifies the acts of the manager.[460] The manager is bound to perform these obligations, and has a claim against the owner for reimbursement and compensation.[461] Nevertheless, the owner is not liable for the manager's offenses or quasi-offenses against third persons.[462] In both cases, the manager's "authority" to bind the owner lies in the utility of the management. If the act of management is useless, the requirements of *negotiorum gestio* are not met and the owner is not bound.[463]

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persons were not codified. *See* Forti, Negotiorum Gestio, *supra* note 297, Nos 16, 27.

457. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 16.

458. French jurisprudence elaborated further on the details of management with representation. To establish such management, it is sufficient for the manager to reveal to her co-contracting party, even implicitly, that she is acting in the name of the owner. *See, e.g.*, Cour de cassation, req., Dec. 4, 1929, D.H. 1930, p. 3; 1e civ., Jan. 1959, Gaz. Pal. 1959, 1, p. 153; Cour d'appel [CA] [regional court of appeal] Poitiers, civ., May 28, 1996, JurisData No. 1996-056302.

459. *See* Bout, *supra* note 158, No. 92; Forti, Negotiorum Gestio, *supra* note 297, Nos 17, 28.

460. *See* TERRÉ ET AL., *supra* note 57, No. 1282. *Cf.* LA. CIV. CODE art. 1843 (2002); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 12.58.

461. The owner's voluntary performance of these obligations toward third parties was interpreted by French jurisprudence as a tacit ratification of the manager's acts. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 29.

462. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 732; Bout, *supra* note 158, No. 94; Forti, Negotiorum Gestio, *supra* note 297, No. 28.

463. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 732; TERRÉ ET AL., *supra* note 57, No. 1282. FRENCH CIVIL CODE, *supra* note 11, art. 1301-2. The act of management may be useful but faulty, when the manager acted in the owner's

The revised Louisiana law of *negotiorum gestio* departs noticeably from the traditional French approach. The new Louisiana provisions abandon the French distinctions of management with or without representation, at least with regard to the obligations of the owner.[464]

Additionally, the new law of mandate—revised two years after the revision of the law of *negotiorum gestio*[465]—imports several concepts from the common law of agency, including the distinction between "disclosed" and "undisclosed mandate."[466]

Under revised article 2297 of the Louisiana Civil Code, the owner is bound to fulfill the obligations undertaken by the manager who has acted as prudent administrator, regardless of whether the manager acted in her own name or in the name of the owner.[467]

The same provision remains silent as to the liability of the manager toward third parties. The revised law of mandate applies to this issue.[468] Thus, a manager who transacts with third persons in the name of the owner and as a prudent administrator is not bound for

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interest but may have transacted imprudently. In such a case, the owner might be held liable toward third persons if the management was "with representation," but maintains a claim against the manager for damages. The distinction between useless and faulty management is not always clear and it has often eluded the French jurisprudence. *See* Bout, *supra* note 158, Nos 21–24. *See also supra* notes 297, 360–63 and accompanying text.

464. *See* LA. CIV. CODE art. 2297 (2023).

465. The revised law governing *negotiorum gestio* went into effect on January 1, 1996. *See* 1995 La. Acts, No. 1041 § 1. The new law of mandate took effect on January 1, 1998. *See* 1997 La. Acts, No. 261 § 1. *See* Martin, *supra* note 16, at 181; Holmes & Symeonides, *supra* note 242, at 1089.

466. *See* LA. CIV. CODE arts. 3016–3023 (2023); Holmes & Symeonides, *supra* note 242, at 1138–58.

467. *See* LA. CIV. CODE art. 2297 cmt. c (2023). Interestingly, a similar provision was enacted in the revised French Civil Code, replacing article 1375 of the Code Napoléon. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2 ("Anyone whose business has been usefully managed must fulfill the commitments entered into in his interest by the manager"). French scholars question whether this expands the owner's liability toward third parties in cases of "management without representation," that is, when the manager transacts with third parties in her own name but on behalf of the owner. This question still remains open in French doctrine and jurisprudence. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 27; CHANTEPIE & LATINA, *supra* note 260, No. 722.

468. *See* LA. CIV. CODE art. 2297 cmt. b (2023). *See also id.* art. 3020; Holmes & Symeonides, *supra* note 242, at 1150–51.

the performance of the obligations generated from the transaction.[469] In this case, the owner is solely bound to third persons and is also given a direct action against third persons for their performance.[470] A manager who transacts prudently with third persons in her own name but on behalf of the owner whose identity is not disclosed is solidarily liable together with the owner[471] for the performance of the obligations created from the transaction.[472] The manager has a direct action against third persons for performance of their obligations. The owner is also given this action, unless the obligation of the third person was strictly personal.[473]

The manager's "authority" to bind the owner, under article 2297 of the Louisiana Civil Code, extends to the limits of the manager's prudent administration of the affair.[474] The term "prudent admin-

469. *See* LA. CIV. CODE art. 3016 (2023) (disclosed mandate). The manager can also be held liable if she promised the performance of the contract. *See id.* art. 3016 cmt. c. Under French doctrine and jurisprudence, a manager who acts "with representation" remains liable to a third person if the manager assumed personal liability for the performance or if the manager committed a fault against the third person. For example, the manager might have led the third person to believe that there was a mandate, or the manager might have misrepresented the owner's solvency. *See* AUBRY & RAU VI, *supra* note 157, No. 300; PLANIOL & RIPERT VII, *supra* note 157, No. 732; 31 DEMOLOMBE XXXI, *supra* note 63, No. 193; LAURENT XX, *supra* note 94, No. 332.

470. *See* LA. CIV. CODE arts. 3016, 3022 (2023); Holmes & Symeonides, *supra* note 242, at 1141–42, 1157–58.

471. The manager and owner are solidarily liable to the third person for the performance of the obligation. The same rule applies with regard to the principal and the undisclosed mandatary. *See* Travis v. Hudnall, 517 So. 2d 1085 (La. Ct. App. 3d Cir. 1987); Frank's Door & Bldg. Supply, Inc. v. Double H. Const. Co., Inc., 459 So. 2d 1273 (La. Ct. App. 1st Cir. 1984); GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 33:4 n.6, *in* 8 LOUISIANA CIVIL LAW TREATISE (Jul. 2022 update). The manager also has a direct action against the owner for performing the entire obligation that she can enforce either before or after being sued by the third person. *See* LA. CIV. CODE art. 3010, 1805 (2023); LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 7.82; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15.

472. *See* LA. CIV. CODE art. 3017 (2023); Holmes & Symeonides, *supra* note 242, at 1141–42.

473. *See* LA. CIV. CODE art. 3023 (2023); Holmes & Symeonides, *supra* note 242, at 1157–58.

474. *See* LA. CIV. CODE art. 2297 (2023) ("The owner whose affair has been managed is bound to fulfill the obligations that the manager has undertaken *as a prudent administrator*") (emphasis added). To be sure, the revision comment to

istration" in this context ought to be understood as "useful management," in accordance with the traditional rule.[475] As noted, the management is useful when the manager acts in the actual or presumed interests of the owner. Determination of the presumed interests of the owner is objective, under a standard of prudent administration.[476] Article 2297 should be interpreted in this light.[477] If the requirements of *negotiorum gestio* are met—especially the requirement of useful management—then the owner is bound to the juridical acts made by the manager with third persons in the context of the useful management.[478] If the management is useful but faulty,

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this provision explains that, "When the manager acts as a prudent administrator, whether in his own name or in the name of the owner, the owner is bound to fulfill the obligations undertaken by the manager." *Id.* art. 2297 cmt. c.

475. *See* AUBRY & RAU VI, *supra* note 157, No. 297; Bout, *supra* note 158, Nos 21–24; Forti, Negotiorum Gestio, *supra* note 297, No. 6. The old French and Louisiana laws clearly distinguished between a "good management," as a useful management, and a "prudent management," which was the standard of care of the manager. *Cf.* LA. CIV. CODE art. 2299 (1870) ("Equity obliges the owner, *whose business has been well managed*, to comply with the engagements contracted by the manager, in his name. . ."); CODE NAPOLÉON, *supra* note 10, art. 1375 (containing identical language); LA. CIV. CODE art. 2298 (1870) ("In managing the business, [the manager] is obliged to use all the care of a prudent administrator"); CODE NAPOLÉON, *supra* note 10, art. 1374 (containing identical language).

476. *See* TERRÉ ET AL., *supra* note 57, No. 1277. *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 731, at 17; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2818, at 465:

> The owner is only bound by the manager's acts when the affair has been well-managed. The affair is well-managed when the manager has done useful acts in the owner's interest. . .To assess the utility or uselessness of the manager's acts we must put ourselves at the moment when the acts were made, without regard to posterior events that may have negated the acts' usefulness.

477. *See* LA. CIV. CODE art. 2297 (2023); The law of mandate ought to apply here with necessary adaptations. *Cf.* LA. CIV. CODE arts. 3019, 3021 (2023); Holmes & Symeonides, *supra* note 242, at 1145–57. Here, the manager's "authority" is not express, implied, or apparent. Rather, it depends on whether the manager acted in the owner's actual or presumed interest, taking into consideration the circumstances of the management, any directions provided by the owner or the owner's presumed wishes, the nature, purpose, and reasonableness of the transaction, and good faith. *See* TERRÉ ET AL., *supra* note 57, Nos 1277, 1282; *cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2 (providing that an owner whose affair was usefully managed, "must fulfill the obligations contracted *in his interest*") (emphasis added).

478. The wording in the Quebec Civil Code perhaps is more accurate. *See* QUEBEC CIVIL CODE, *supra* note 13, art. 1486:

the owner is still bound toward third parties, but has recourse against the manager for damages.[479] Because "faulty" and "useless" management more than often converge, third persons contracting with a manager would be well-advised to secure the manager's legal commitment to perform the act, preferably *in solido* with the owner.[480]

*3. Termination*

*Negotiorum gestio* terminates when the management of the affair is completed or if the owner or her representative take over the affair or communicate opposition to the management prior to the completion of the management.[481] *Negotiorum gestio* also terminates when the owner provides a mandate to the manager through contract or procuration. In such a case, the relationship becomes contractual and is governed by the law of mandate.[482] The owner may also ratify previous acts undertaken by the manager.[483]

Death of the manager also terminates the relationship of *negotiorum gestio*.[484] The manager's successors are not bound to continue

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> When the conditions of management of the business of another are fulfilled, even if the desired result has not been attained, the principal shall reimburse the manager for all the necessary and useful expenses he has incurred and indemnify him for any injury he has suffered by reason of his management and not through his own fault. The principal shall also fulfill any necessary and useful obligations that the manager has contracted with third persons in his name or for his benefit (emphasis added).

479. On the issue of "useful" and "faulty management," *see supra* notes 297, 360–63 and accompanying text.

480. *See* Bout, *supra* note 158, No. 92.

481. *See* LIVIERATOS, *supra* note 157, at 139.

482. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-3; TERRÉ ET AL., *supra* note 57, No. 1277, at 1346.

483. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 733; AUBRY & RAU VI, *supra* note 157, No. 299.

484. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2805; PLANIOL & RIPERT VII, *supra* note 157, No. 730; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 113–14. Likewise, a contract of mandate terminates upon the death of the mandatary. *See* LA. CIV. CODE art. 3024 (2023). On the other hand, death of the owner does not terminate *negotiorum gestio*, although death of the principal would terminate mandate. This is so because the *negotiorum gestor* has a legal obligation to continue the management until the owner or her successors are able to take control of the affair. *See* LA. CIV. CODE art. 2297 (1870); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 113. *See also supra* note 324.

the management, unless they elect to do so and the requirements for a new *negotiorum gestio* are met.[485] Nevertheless, the parties' existing obligations—which include the owner's obligation to reimburse the manager and the manager's obligation to account for the management—are heritable.[486] As a result of the legal requirement for the manager's capacity, interdiction of the manager also terminates *negotiorum gestio*.[487]

Actions in *negotiorum gestio* are personal actions that are subject to the general liberative prescription of ten years.[488]

## IV. UNJUST ENRICHMENT

In its broader sense, unjust (or unjustified[489]) enrichment is a general principle of law, the expression of which is found in several areas of the law, including the civil law of quasi-contract.[490] The

485. The manager's successors, however, may be obligated to notify the owner and perform conservatory acts for the preservation of the property until the owner assumes the affair. *See* LA. CIV. CODE art. 3030 (2023); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2804–05; PLANIOL & RIPERT VII, *supra* note 157, No. 730; DEMOLOMBE XXXI, *supra* note 63, Nos 140–141; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 113–14.

486. *See* Reed v. Taylor, 522 So. 2d 1262, 1265 (La. Ct. App. 4th Cir. 1988); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2805.

487. *See* LA. CIV. CODE art. 2296 (2023).

488. LA. CIV. CODE art. 3499 (2023); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); Gaudé v. Gaudé, 28 La. Ann. 181, 182 (1876); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 207–09.

489. The term "unjustified" enrichment is a faithful translation of the German term *ungerechtfertigte Bereicherung* and the French term *enrichissement injustifié*. The term "unjust" appears more frequently in the common-law systems. *See* BIRKS, *supra* note 6, at 274–75 (explaining that the term "unjust(ified)" is of limited normative value and "one might just as well speak of pink enrichment").

490. *See, e.g.,* LA. CIV. CODE art. 2055 (2023); COLIN & CAPITANT II, *supra* note 25, No. 232; Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 42–47 (1994) (referring to unjustified enrichment as an example of the application of the principle of equity by Louisiana courts); David W. Gruning, *Codifying Civil Law: Principle and Practice*, 51 LOY. L. REV. 57, 64 (2005) (using the principle of unjustified enrichment as an example of a principle of law interacting with practice); *see also* STARCK, *supra* note 30, No. 1797 (referring to accession improvements by possessors, community property, co-ownership, nullity especially for incapacity, payment of a thing not due, and improvements made by lessees as expressions of the general principle of unjustified enrichment).

idea of unjust enrichment as a general principle first appeared in Roman law at the time of Justinian.[491] It is in this broader sense that the common law has traditionally understood the term unjust enrichment.[492] In this Article, unjust enrichment is discussed in its more technical meaning of a specific source of legal obligations for the recovery of displaced wealth.[493] This has been the traditional civil-law understanding of the term, which the common law is now gradually embracing, although unjust enrichment is still construed rather broadly in the common-law tradition.[494]

Furthermore, according to some English writers, the method of determining an unjust enrichment differs among the two systems. These common-law scholars employ a list of "unjust factors"—which can be intent-based or policy-based—to determine whether the enrichment is unjust, whereas the civil-law approach inquires

491. *See* DIG. 12.6.14 (Pomponius, Ad Sabinum 21) ("For it is by nature fair that nobody should enrich himself at the expense of another"); DIG. 50.17.206 (Pomponius, Ex Variis Lectionibus 9) ("By the law of nature it is fair that no one become richer by the loss and injury of another"). *See also* RIPERT, *supra* note 72, at 249; BIRKS, *supra* note 6, at 268–70.

492. *See* DAWSON, *supra* note 159, at 3–5 (comparing Pomponius' statement in Justinian's Digest with Section 1 of the First Restatement of Restitution). Contemporary scholars continue to disagree on the definition of "unjust enrichment." *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2084–86 (2001); *Developments in the Law. Unjust Enrichment*. *Introduction*, *supra* note 21, at 2063–64.

493. *See* LA. CIV. CODE arts. 2298, 1757 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 7–11; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 1.6 (discussing the sources of obligations). *See also* Albert Tate, Jr., *Louisiana Action for Unjustified Enrichment: A Study in Judicial Process*, 51 TUL. L. REV. 446, 458–59 (1977) [hereinafter Tate II] (observing that the action for enrichment without cause finds its source in the law [see current article 1757 of the Louisiana Civil Code] and not in "equity"); Roberson Advertising Service, Inc. v. Winnfield Life Ins. Co., 453 So. 2d 662, 666–67 (La. Ct. App. 5th Cir. 1984).

494. *See Developments in the Law. Unjust Enrichment*. *Introduction*, *supra* note 21, at 2063 ("[W]e understand "unjust enrichment" as a *source of an obligation*. In other words, the term describes circumstances in which the private law finds that an individual owes something to another party") (emphasis in original, footnote omitted); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) ("The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what might more appropriately be called *unjustified enrichment"*) (emphasis in original).

into the existence of an explanatory basis (*iusta causa*) for retention of the enrichment.[495]

Several comparativists observe a convergence of methods toward a "no basis" approach. Under this view, the cases in which common-law unjust enrichment and the civilian version will actually yield different outcomes—disregarding terminology and classification, and setting aside the issue of disgorgement of profits[496]—is vanishingly small.[497]

The term "restitution" is also understood differently in civil and common law. To a civilian, restitution is a broader concept that originates from the Roman *restitutio in integrum* and refers to the restoration of the parties to their pre-existing situation.[498] Civil-law restitution entails restoring a thing that belongs to the plaintiff, such as

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495. *See, e.g.*, BURROWS, *supra* note 103, at 86–117, 201–522 (analyzing unjust factors); GOFF & JONES, *supra* note 134, Nos 2-01 to 3-59 (analyzing various "justifying grounds").

496. Disgorgement for wrongs is generally available at common law. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. L. INST. 2011). In the civil law, disgorgement of profits is available in *negotiorum gestio* (*see supra* note 416) and payment of a thing not due (*condictio indebiti*) (*see infra* notes 774–76 and accompanying text). It is generally not available in enrichment without cause (*actio de in rem verso*) (*see infra* notes 908–09 and accompanying text). *But see* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4 (allowing disgorgement of profits also in the case of the *actio de in rem verso* if the enriched defendant was in bad faith). *See infra* note 919 and accompanying text.

497. *See* BIRKS, *supra* note 6, at 40–43 (discussing the developments in English law and Canadian law). *See also* Andrew Kull, *Consideration Which Happens to Fail*, 51 OSGOODE HALL L.J. 783, 797–801 (2014) (framing the issue as the choice between "unjust enrichment" and "unjustified enrichment", and explaining that the two approaches are not incompatible). Interestingly, the Third Restatement of Restitution and Unjust Enrichment identifies unjustified enrichment as "enrichment that lacks an adequate legal basis," but it also loosely categorizes the types of liability for restitution in a way that resembles the English unjust factors (imperfect intent, qualified intent, fault-based, policy-based factors). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011).

498. *See* 14 GABRIEL BAUDRY-LACANTINERIE & LOUIS-JOSEPH BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES OBLIGATIONS, TOME TROISIÈME No. 1934 (3d ed. 1908) [hereinafter BAUDRY-LACANTINERIE & BARDE XIV]. "Restitution" in the context of the revised French and Quebec civil codes refers to restoration of specific property ("specific restitution" or "proprietary restitution") as well as restoration of payments not due. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. a, c, e (AM. L. INST. 2011) (discussing the potential misunderstanding of the term "restitution").

in the case of restoring performances from a failed contract or returning a thing that was wrongfully obtained by the defendant. This is the meaning of the term "restitution" in the French and Quebec civil codes.[499] Restitution in the civil law also entails surrendering a thing or money that has exited the plaintiff's patrimony and is being held by the defendant without cause. In France, Quebec, and Louisiana such restitution takes the form of a compensation awarded to the plaintiff.[500] In German law, the defendant must surrender whatever she holds without just cause.[501] Disgorgement of profits may occur occasionally, but it is not an element of the civil law of restitution.[502]

At common law, the meaning of "restitution" has proved confusing.[503] Generally, restitution is understood as gain-based recovery as opposed to loss-based recovery in the law of damages.[504] It includes giving back a thing or a money substitute of that thing to plaintiff (restoration); it can also include giving up a profit from a transaction (disgorgement).[505] It should be clear, therefore, that unjust enrichment and restitution present interesting differences across legal systems.

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499. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707.

500. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496; LA. CIV. CODE art. 2298 (2023).

501. *See* GERMAN CIVIL CODE, *supra* note 87, § 812. *See* Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1773 (2001) [hereinafter Birks, *Wrongful Enrichment*] (explaining that the German term *Herausgabe*—literally translated as "surrender"—"denotes a giving up and extends even to those givings up which are not givings back"). *See also* DANNEMANN, *supra* note 86, at 13 (explaining that the German law provides for the remedy of restitution in cases other than unjust enrichment).

502. *See supra* notes 416 and *infra* notes 774–76, 908–09, 919 and accompanying text.

503. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011).

504. *See* BIRKS, *supra* note 6, at 3–4; DOBBS & ROBERTS, *supra* note 6, § 4.1(1).

505. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011); Birks, *Wrongful Enrichment*, *supra* note 501, at 1773; DOBBS & ROBERTS, *supra* note 6, § 4.1(1).

*A. Comparative Law*

In the French legal tradition—which includes Louisiana and Quebec—unjust enrichment is not a unitary concept. Rather, it is divided into two specific quasi-contractual actions—payment of a thing not due (*condictio indebiti*)[506] and enrichment without cause (*actio de in rem verso*).[507]

These actions, however, are limited in scope because restitution is governed primarily by the doctrines of cause and nullity of juridical acts.[508] Notably, in France and Quebec there are now uniform rules of restitution for failed contracts and the payment of a thing not due.[509]

In the German legal tradition and at common law, unjust enrichment is in theory a unitary concept, encompassing cases of displaced wealth and providing the direct legal basis for restitution.[510] Nevertheless, cases of unjust enrichment cut across several areas of the law and defy systematic categorization.[511] This is why German doctrine has pulled away from the notion of a *condictio generalis* in favor of a taxonomy that entails several subcategories of enrichment.[512]

The Third Restatement of Restitution and Unjust Enrichment, which construes unjust enrichment more broadly than the German Civil Code, wisely avoided a tight categorization of cases of unjust

506. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1302 to 1302-3; QUEBEC CIVIL CODE, *supra* note 13, arts. 1491–1492; LA. CIV. CODE arts. 2299–2305 (2023).

507. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496; LA. CIV. CODE art. 2298 (2023).

508. *See* LA. CIV. CODE arts. 2018–2021, 2033–2035 (2023).

509. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707.

510. *See* Brice Dickson, *Unjust Enrichment Claims: A Comparative Overview*, 54 CAMBRIDGE L. J. 100, 119 (1995).

511. *See* DAWSON, *supra* note 159, at 111–27 (comparing the German and common-law concepts of unjust enrichment).

512. *See* DANNEMANN, *supra* note 86, at 11–12, 156–58 (presenting the German law of unjustified enrichment and the German taxonomy of enrichments in a nutshell).

enrichment.[513] This stark contrast in the comparative treatment of unjust enrichment is attributed to historical reasons, tracing back to the Roman actions of *condictio* and *actio de in rem verso*, as well as to the development of the Roman notion of *causa*.

*1. Roman Law*

The *condictio* was a nominate action of the classical Roman law that authorized recovery by the plaintiff of a certain object or money in the hands of the defendant.[514] By the time of the *Corpus Iuris Civilis*, several nominate types of *condictio* were developed as an expression of the general principle forbidding unjust enrichment. Thus, a *condictio* could be instituted when the plaintiff had given a thing or money to the defendant: (a) by mistake because payment was not actually due;[515] or (b) for a cause that failed,[516] or was illicit,[517] or was absent.[518]

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513. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011).

514. *See* ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC 10 (1965, reprinted 1984); LEOPOLD WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE 166 (Otis Harrison Fisk trans., rev. ed. 1986); GIRARD, *supra* note 56, at 649 n.1. The purpose of the *condictio* was restoration of the object held by the defendant to the plaintiff, who had never lost ownership of the object. *See* MAX KASER, DAS ALTRÖMISCHE JUS 286–88 (1949). The defendant in a *condictio* was considered a borrower who had a *propter rem* obligation to return the object. *See* KASER, at 287; SAÚL LITVINOFF, OBLIGATIONS. BOOK 1, § 199, at 360, *in* 6 LOUISIANA CIVIL LAW TREATISE (1969) [hereinafter LITVINOFF, OBLIGATIONS I]; GASTON MAY, ÉLÉMENTS DE DROIT ROMAIN 416 (18th ed. 1935). For a discussion of real obligations (*propter rem*), see generally YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 9:29; A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161 (1963); A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part II*, 23 LA. L. REV. 618 (1963); L. David Cromwell & Chloé Chetta, *Divining the Real Nature of Real Obligations*, 92 TUL L. REV. 127 (2017).

515. *See* DIG. 12.6 (*condictio indebiti*). This is the most ancient type of *condictio* in the Roman law. *See* PETROPOULOS I, *supra* note 48, at 1044–48.

516. *See* DIG. 12.4 (*condictio causa data causa non secuta*—otherwise known as *condictio ob causam datorum*). *See* PETROPOULOS I, *supra* note 48, at 1048–49.

517. *See* DIG. 12.5 (*condictio ob turpem vel iniustam causam*). *See* PETROPOULOS I, *supra* note 48, at 1048.

518. *See* DIG. 12.7 (*condictio sine causa*). *See* PETROPOULOS I, *supra* note 48, at 1049. This type of *condictio* was a residual category, encompassing situations in which the enrichment was attributed to a cause that had expired (*causa finita*)

The classical Roman *actio de in rem verso* lay for the restitution of the plaintiff's assets that were found in the defendant's patrimony through acts of the defendant's servant.[519] By Justinian's time, this action covered instances in which third parties were enriched at the expense of the impoverished plaintiff without a "just cause" (*iusta causa*).[520]

The term *causa*[521] was not ascribed any technical or significant meaning in the Roman law, because of the strict formalism in the creation of contracts.[522] *Causa* became relevant later, especially in the time of the glossators, when the old formalism was abandoned

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or where the enrichment itself was not a thing given by the plaintiff, but a promise made by the plaintiff, from which he is now seeking a release (*causa liberationis*). *See* STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 3–4.

519. *See* DIG. 15.1.41 (Ulpian, Ad Sabinum 43); GIRARD, *supra* note 56, at 710–22, 715–76; 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 245–46 (1902, reprinted 1975); WILLIAM W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 533-34, 536 (2d ed. 1932). Since its inception, this action directly entailed the element of restitution of assets that had exited the patrimony of the plaintiff and entered the defendant's patrimony through the acts of the defendant's servant. It is aptly said, therefore, that this action more closely resembles modern concepts of unjustified enrichment, especially in civilian systems modeled after the Code Napoléon. *See* ZIMMERMANN, *supra* note 204, at 878–84; STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 6–7; PAUL JÖRS & WOLFGANG KUNKEL, RÖMISCHES PRIVATRECHT 267 (3d ed. 1949).

520. Dig. 17.2.82 (Papinian, Responsorum 3); CODE JUST. 4.26.7 (Diocletian & Maximian 290/293) (*actio de in rem verso utilis*). *See* 2 GEORGE PETROPOULOS, HISTORIA KAI EISIGISEIS TOU ROMAIKOU DIKAIOU [HISTORY AND INSTITUTES OF ROMAN LAW] 1146–47 (2d ed. 1963, reprinted 2008) (Greece). *See* GORDLEY, FOUNDATIONS, *supra* note 72, at 419 (2006).

521. Cause of conventional obligations is a topic extensively discussed and debated elsewhere. *See, e.g.*, LITVINOFF, OBLIGATIONS I, *supra* note 514, §§ 196–242; John Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 4 (1951); Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919) [hereinafter Lorenzen, Cause]. For the purposes of this Article, the discussion adopts the prevailing theory of cause as accepted in Louisiana. *See* Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3 (1987) [hereinafter Litvinoff, Cause].

522. *See* FRITZ SCHULZ, CLASSICAL ROMAN LAW 471 (1951); LITVINOFF, OBLIGATIONS I, *supra* note 514, § 202; Smith, *supra* note 514, at 4. In classical Roman law, the term *causa*, when used to describe the *condictio*, was not a technical term of art. Depending on the context, *causa* referred to the Latin word for "reason," "situation," or specific objects—*res*. *See* MAX RADIN, HANDBOOK OF ROMAN LAW 297–300 (1927).

and was gradually replaced with the civilian theory of cause.[523] The glossators and post-glossators laid the foundation for a theory of cause with their commentaries of several—original or interpolated—excerpts from the *Corpus Iuris Civilis*.[524]

Perhaps the most notable and debated excerpt comes from Ulpian's "Commentary of the Edict."[525] In this text, the Roman jurisconsult Ulpian explains that only the nominate contracts are enforceable in Roman law.[526] Ulpian continues to explain that certain innominate contracts may by exception become enforceable if one of the parties has already performed.[527] In other words, Ulpian simply suggests that performance of an innominate contract by one party is the cause for demanding performance from the other party.[528] This passage was grossly misinterpreted by commentators to mean that every contract required a cause.[529]

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523. *See* ZIMMERMANN, *supra* note 204, at 553; SCHULZ, *supra* note 522, at 471; LITVINOFF, OBLIGATIONS I, *supra* note 514, § 208; Smith, *supra* note 514, at 4.

524. *See* FILIOS, *supra* note 90, at 17–35; *cf.* GORDLEY, FOUNDATIONS, *supra* note 72, at 292–93 (discussing Aristotle's influence on the postglossators' theories of cause).

525. DIG. 2.14.7 (Ulpian, Ad Edictum 4). *See* WILLIAM W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW § 119 (2d ed. 1953, reprinted 1981).

526. DIG. 2.14.7.1 (Ulpian, Ad Edictum 4) (explaining nominate contracts, such as sale, lease, partnership, loan, and deposit are actionable if formed properly). *See* PETROPOULOS I, *supra* note 48, at 873–1000 (providing a detailed discussion of all Roman nominate contracts); Ronald J. Scalise, Jr., *Classifying and Clarifying Contracts*, 76 LA. L. REV. 1063, 1068–72 (2016) (providing an overview of the Roman categories of contracts).

527. DIG. 2.14.7.2 (Ulpian, Ad Edictum) (referring to "synallagmatic contracts," that is, innominate contracts for the exchange of performances). Under this type of agreement, the parties exchanged promises to give, do, or not do something (*do ut des*, *facio ut facias*, *do ut facias*, and *facio ut des*). *See* BUCKLAND, *supra* note 525, § 119; LITVINOFF, OBLIGATIONS I, *supra* note 514, § 200. *Cf.* LA. CIV. CODE art. 1908 (2023) (bilateral or synallagmatic contracts); *id.* art. 1911 (commutative contracts).

528. DIG. 2.14.7.4 (Ulpian, Ad Edictum 4) ("when no cause exists, it is settled that no obligation arises from the [innominate] contract").

529. *See* WILLIAM W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 229–30 (Frederick H. Lawson, 2d rev. ed. 1952) (referring to Ulpian's excerpt as "the famous passage on which the whole theory of cause was based" and noting that "[it] was taken to mean that every contract must have a cause, [when] in reality [it] says nothing of the kind"); GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 48, at 49–50; LITVINOFF, OBLIGATIONS I, *supra* note 514, §

Two prominent jurists formulated their decisive theories relying on conflicting interpretations of this same passage—the French judge and jurist Domat and the German law professor Savigny. Domat interpreted Ulpian's text expansively and enunciated his theory of cause, which formed the basis of the French model of a restricted unjust enrichment, also applicable in Louisiana.[530] Savigny, on the other hand, construed Ulpian's text more narrowly and formulated his theories of abstraction and separation, from which the German model of a broader unjust enrichment emerged and was later expanded by German and Greek legal scholars.[531] As a result, the concept of unjust enrichment is historically and fundamentally different in the two major civil law systems of France and Germany.

*2. French Law*

In France, unjust enrichment is limited to cases not governed by the expanded doctrines of cause and nullity of juridical acts. Generally, the provisions on cause, nullity, and dissolution of contracts provide for restoration of contractual performances due to lack, failure, or illegality of cause.[532] Thus, if a contract that transfers ownership fails, ownership automatically reverts to the transferor who can revendicate the thing in the hands of the transferee.[533] This enlarged function of cause and nullity displaced the Roman *condictio*, with the exception of restoration of a payment not due (*condictio indebiti*), which is another available remedy for recovery of performances from failed contracts and mistaken payments outside the

205; Lorenzen, Cause, *supra* note 521, at 624-25; FILIOS, *supra* note 90, at 25–35.

530. *See* FILIOS, *supra* note 90, at 69–71.

531. *See id.* at 80–86.

532. *See* Roubier, *supra* note 99, at 42; BÉGUET, *supra* note 99, No. 26; STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 18–19. Occasionally, however, the provisions on dissolution and nullity may authorize recovery under a theory of unjust enrichment. *See infra* notes 539, 626–28, 824–25, 828, 932–36, and accompanying texts.

533. *See* Eric Descheemaeker, The New French Law of Unjustified Enrichment, 25 RESTITUTION L. REV. 77, 81–82 (2017).

realm of a contract under French law.[534] Delictual actions lie for the recovery of damages or the restoration of property as a result of an offense or quasi-offense. The remaining cases of restitution may fall within the purview of the restricted and subsidiary French action for enrichment without cause (*actio de in rem verso*).[535] This French model of a restricted enrichment without cause traces its roots to Domat's reading of Ulpian.

According to Domat, all contracts—nominate or innominate—must have a valid cause.[536] Cause is not the fact that one of the parties has already performed, as Ulpian had suggested—rather it is the obligation of the other party to perform.[537] If there is no valid cause or if cause fails, the contract is null and the parties ought to be restored to the situation that preexisted the dissolved contract (*restitutio in integrum*).[538]

Essentially, Domat's expanded theory of cause and nullity of juridical acts deals with most cases of restoration of a performance due to a lack or failure of cause or an undue payment, leaving little room for development of a separate doctrine of enrichment without

534. Domat cites the excerpts from Justinian's Digest on *condictio sine causa* alongside Ulpian's passage to support his theory of cause. *See* DOMAT, *supra* note 98, at 162; HENRI CAPITANT, DE LA CAUSE DES OBLIGATIONS 166–67 n.1 (3d ed. 1927) [hereinafter CAPITANT, CAUSE]; DIG. 12.7 (*condictio sine causa*). This reference has been interpreted to mean that the Roman *condictiones* are instances of a nonexistent or faulty *causa* and, therefore, ought to be governed by the provisions on nullity. *See* MARTY & RAYNAUD II, *supra* note 98, No. 347. This observation admits at least one exception—the payment of a thing not due, which is treated separately under the heading of quasi-contract. *See* DOMAT, *supra* note 98, at 595–603; DIG. 12.6 (*condictio indebiti*).

535. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 370–427 (discussing the several requirements for the *actio de in rem verso*).

536. *See* DOMAT, *supra* note 98, at 161 (dispensing with the Roman categorization of contracts and identifying four types of contracts based exclusively on the former innominate category of the Roman law). *See also* PLANIOL II.1, *supra* note 11, Nos 1029–32; LITVINOFF, OBLIGATIONS I, *supra* note 514, § 209.

537. *See* CAPITANT, CAUSE, *supra* note 534, at 166–67 n.1.

538. *See* DOMAT, *supra* note 98, at 161–62 (citing Ulpian in DIG. 2.14.7.4); *id.* at 191 (discussing the restoration of performances under an annulled contract); *id.* at 195 (examining the restoration of performances as a result of dissolution of a contract). *See also* BAUDRY-LACANTINERIE & BARDE XIV, *supra* note 498, No. 1934 (explaining that the French actions for nullity and dissolution find their origin in the praetorian *restitutio in integrum* of the Roman law).

cause.[539] Through the writings of Pothier, Domat's expanded theory of cause found its way into the Code Napoléon.[540] The notion of enrichment without cause remained forgotten and uncodified,[541] only to be introduced by the jurisprudence of the Cour de Cassation in the late nineteenth century as a limited *actio de in rem verso*.[542] This jurisprudence was very recently codified in France.[543]

Thus, under modern French law, restoration of performances due to absence or failure of cause is achieved pursuant to the contractual actions for nullity and/or dissolution of the contract.[544]

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539. The provisions on dissolution and nullity of contracts may authorize, directly or indirectly, a recovery under a theory of enrichment without cause. *See* AUBRY & RAU VI, *supra* note 157, No. 320; PLANIOL & RIPERT VII, *supra* note 157, No. 764. *Cf.* LA. CIV. CODE arts. 2018 and 2033 (2023). *See supra* note 532. *See also infra* notes 626–28, 824–25, 828, 932–36, and accompanying texts.

540. *See* CODE NAPOLÉON, *supra* note 10, arts. 1108, 1131–1133. *See* POTHIER, OBLIGATIONS, *supra* note 78, at 28–33, 72–73; DAWSON, *supra* note 159, at 95–98; LITVINOFF, OBLIGATIONS I, *supra* note 514, §§ 210–211; ANDRÉ MOREL, L'ÉVOLUTION DE LA DOCTRINE DE L'ENRICHISSEMENT SANS CAUSE. ESSAI CRITIQUE 34-36 (1955); ZIMMERMANN, *supra* note 204, at 883.

541. As mentioned, the only exception was the payment of a thing not due (*condictio indebiti*), which appeared in the Code Napoléon. *See* CODE NAPOLÉON, *supra* note 10, arts. 1376–1381. *But see* BAUDRY-LACANTINERIE & BARDE XIV, *supra* note 498, No. 2849VI (observing that Domat was aware of a limited number of unjustified transfers of wealth that gave rise to a general remedy of restitution outside the doctrine of cause). *See* DOMAT, *supra* note 98, at 598 (discussing the restitution of a things received without just cause—*condictio sine causa*—such as a dowry received for a marriage that did not occur).

542. This action was discovered in the seminal decision of the French Cour de cassation in the case of *Boudier*. *See* Cour de cassation, req., June 15, 1892, D. 1892, 1, 596, S. 1893, 1, 281, note J.-E. Labbé (Fr.) (impoverished provider of fertilizer performed at the request of an agricultural lessee on the land of the enriched lessor and subsequently claimed compensation from the lessor after the lessee became insolvent). For a detailed discussion of this case, *see* Nicholas I, *supra* note 190, at 622–24.

543. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4 (rev. 2016) (*enrichissement injustifié*). *See* Valerio Forti, Enrichissement injustifié, Généralités, Conditions matérielles No. 1, JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 10, Jun. 2, 2016 (Fr.) [hereinafter Forti, Unjust Enrichment – Material Conditions].

544. *See* CODE NAPOLÉON, *supra* note 10, arts. 1108, 1131–1133, 1304–1314; FRENCH CIVIL CODE, *supra* note 11, arts. 1128, 1162–1171, 1178–1187, 1224–1240, 1352 to 1352-9. *Cf.* LA. CIV. CODE arts. 1966–1970, 2018–2021, 2023–2023 (2023); QUEBEC CIVIL CODE, *supra* note 13, arts. 1385, 1410–1411, 1416–1424, 1604–1625, 1699–1707. It is noteworthy that the requirement of cause has been removed from the French Civil Code in the latest 2016 revision. Though many commentators describe this revision as a "revolution," the concept of cause as a mandatory requirement still appears in the revised provisions. *See, e.g.*,

Restoration of a payment not due can be made by a separate quasi-contractual action for payment of a thing not due (*condictio indebiti*).[545] Interestingly, the revised French law of obligations introduced common rules on "restitution" of performances in cases of nullity, dissolution, payment of a thing not due and various other situations.[546] The term "restitution" that appears in the revised French Civil Code originates from the Roman *restitutio in integrum* and refers to the restoration of the parties to their pre-existing situation.[547]

Indeed, as a result of nullity and dissolution of the contract, ownership of any property that had been transferred under the contract is restored to the transferor, who can reclaim it by a personal action for nullity and dissolution, or a quasi-contractual action for payment of a thing not due, or a real action to revendicate the property.[548] In all these cases of restoration, the element of the defendant's enrichment is irrelevant. The action for enrichment without cause is limited to those cases that fall outside the scope of cause and nullity.

By means of this action, the impoverished plaintiff is seeking restitution in its narrower sense—compensation from the defendant

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FRENCH CIVIL CODE, *supra* note 11, arts. 1162, 1169; see also Solène Rowan, *The New French Law of Contract*, 66 INT'L & COMP. L. Q. 805 (2018); TERRÉ ET AL., *supra* note 57, No. 403.

545. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1302 to 1302-3; QUEBEC CIVIL CODE, *supra* note 13, arts. 1491–1492. *Cf.* LA. CIV. CODE art. 2299–2305 (2023).

546. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707; Forti, Restitution, *supra* note 132, No. 1. These provisions, however, do not govern restitution for enrichment without cause, for which there are more specific provisions. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

547. *See* BAUDRY-LACANTINERIE & BARDE XIV, *supra* note 498, No. 1934. "Restitution" in the context of the revised French Civil Code refers to restoration of specific property ("specific restitution" or "proprietary restitution") as well as restoration of payments not due. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. a, c, e (AM. L. INST. 2011) (discussing the potential misunderstanding of the term "restitution").

548. *Cf.* LA. CIV. CODE art. 2299 cmt. c (2023). *See infra* notes 624, 663, 687, 701–06, 932–36, and accompanying texts.

for the enrichment that she now owns or its traceable product.[549]

*3. German Law*

In Germany, unjust enrichment is a broader concept, encompassing the restitution or restoration of property as a result of failed juridical acts, interference with the plaintiff's property, expenses otherwise avoided, and mistaken payments.[550] This expanded German understanding of unjust enrichment encompasses most cases of restitution.

The provisions on nullity and dissolution of contracts either directly cite to the provisions on enrichment without cause or provide for analogous solutions.[551] The broad German understanding of unjust enrichment dates back to Savigny's interpretation of Ulpian.[552]

Savigny read Ulpian's passage very narrowly to mean that some juridical acts are causal, but not all. Certain juridical acts, such as acts for the conveyance of movables, are abstract juridical acts, which are valid without reference to the validity of its cause.[553] This proposition formed the basis for Savigny's famous principle of

549. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4. *Cf.* LA. CIV. CODE art. 2298 (2023); QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496. *See also* PLANIOL II.1, *supra* note 100, No. 938A.

550. *See* KASER, *supra* note 48, § 139.3.

551. German scholars observe that restitution is a broader concept than unjust enrichment. For instance, certain provisions in the German Civil Code that are technically outside the realm of unjust enrichment provide for restitution—and in some cases disgorgement of profits. *See, e.g.*, GERMAN CIVIL CODE, *supra* note 87, § 346 (dissolution of contracts); *id.* § 687 (unjustified *negotiorum gestio*—disgorgement of profits available); *id.* § 985 (revendication of property by means of a real action); *id.* § 285 (substitution of the object of contract in cases of impossibility with or without the fault of the obligor—disgorgement of profits available); *id.* §§ 268, 426, 774, 1607 (legal subrogation). Likewise, the German Copyright Act provides for restitution for infringement of copyright that may also include disgorgement of profits. As to all of the above, *see* DANNEMANN, *supra* note 86, at 13–18. Nevertheless, even these "other" events of restitution are either based on the broader notion of unjust enrichment or they cite or apply the provisions on unjust enrichment by analogy.

552. *See supra* notes 525–31 and accompanying text.

553. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 450.

abstraction.[554] Based on his principle of abstraction, Savigny further posited that the act of conveyance must be distinguished from the promise of such conveyance, even if promise and conveyance occurred in one transaction.

This second proposition formed Savigny's famous "principle of separation."[555] Finally, Savigny recognized the importance of unjust enrichment as an essential remedy in the case of a failed abstract juridical act. In essence, even if the cause of an abstract juridical act involving transfer of property fails upon performance, the transferee will maintain ownership of the thing. The transferor can only recover the property under a theory of unjust enrichment.[556] Savigny postulated that the several Roman abstract *condictiones*, if read together, stand for the proposition of a general action of unjustified enrichment as a *condictio generalis*, which ought to be available if the actual cause of an abstract juridical act is nonexistent or invalid.[557]

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554. "*Abstraktionsprinzip.*" *See* SAVIGNY, OBLIGATIONS, *supra* note 90, at 249, 253–54; ARCHIBALD BROWN, AN EPITOME AND ANALYSIS OF SAVIGNY'S TREATISE ON OBLIGATIONS IN ROMAN LAW 122-24 (1872); FILIOS, *supra* note 90, at 80–86; BASIL MARKESINIS ET AL., THE GERMAN LAW OF CONTRACT, A COMPARATIVE TREATISE 27–37 (2d ed. 2006); ZIMMERMANN, *supra* note 204, at 866–68.

555. "*Trennungsprinzip.*" *See* 3 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 312–13 (1840); *see also* JOHN B. MOYLE, THE CONTRACT OF SALE IN THE CIVIL LAW 3, 110, 135 (1892, reprinted 1994) (discussing the difference between the Roman promissory concept of sale with the English sale as an "ipso facto transfer of property"); ZIMMERMANN, *supra* note 204, at 271–72; MARKESINIS ET AL., *supra* note 554, at 27–37 (explaining that the promissory act usually serves as the principal and objective cause of the dispositive act, while, through the dispositive act, the obligation incurred in the promissory act is discharged).

556. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 450. Several exceptions apply in cases of failed abstract juridical acts. For instance, if the act of conveyance is absolutely null or voidable on grounds of fraud or duress, then ownership of the property reverts to the transferor, who can bring a real action to revendicate the property. The transferee may have an action in unjustified enrichment for restitution of the price for the transfer. *See* GEORGIOS BALIS, GENIKAI ARCHAI TOU ASTIKOU DIKAIOU [GENERAL PRINCIPLES OF CIVIL LAW] § 75 (8th ed. 1961) (Greece); STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1083–85.

557. *See* 5 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 503, 522-23, 526–27, 567 (1841); Nicholas I, *supra* note 190, at 611.

Conversely, in the French legal tradition, the promise is not separated from the conveyance, as a rule.[558] If a contract of sale of a movable fails, ownership automatically reverts back to seller who can recover the movable by means of a real action, an action for dissolution or nullity of the contract as the case may be, or an action for payment of a thing not due.[559]

German legal doctrine bases its theory of unjust enrichment on the Roman *condictiones* from which a general action of unjustified enrichment appeared in the German Civil Code.[560] Thus, payment of thing not due (*condictio indebiti*), absence or failure of cause (*condictio sine causa*) and illicit cause (*condictio ob turpem causam*) fall within the purview of a unitary *condictio generalis* in German law.

Although this approach is doctrinally sound, setting the contours of such a unitary remedy that would govern a multitude of different cases has not been an easy task for German scholars and courts.[561] Contemporary scholars now distinguish between several types of enrichment.[562] German, Austrian, and Greek legal doctrines, for example, follow a more flexible approach, recognizing four broad categories of enrichment: (a) performance or other benefit conferred on the enriched obligor at the expense of the impoverished obligee; (b) enriched obligor's interference with the impoverished obligee's patrimony; (c) expenses incurred by the impoverished obligee on the property of the enriched obligor; and (d) obligee's performance of

558. *See* Descheemaeker, *supra* note 533, at 81–82 (explaining the difference between the French transfer of ownership *solo consensu* and the German principles of abstraction and separation of promise and conveyance).

559. *Cf.* LA. CIV. CODE art. 2299 cmt. c (2023).

560. *See* GERMAN CIVIL CODE, *supra* note 87, § 812; Martin Schwab, *in* 5 MÜNCHENER KOMMENTAR ZUM BÜRGELICHEN GESETZBUCH § 812 (Franz Jürgen Säcker et al. eds., 6th ed. 2013); DANNEMANN, *supra* note 86, at 3-20; ZIMMERMANN, *supra* note 204, at 887–91 (1990, reprinted 1992).

561. *See* GORDLEY, FOUNDATIONS, *supra* note 72, at 419–21, 426–32; STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 22–27; Nicholas I, *supra* note 190, at 614–17.

562. *See* DANNEMANN, *supra* note 86, at 21–44; BIRKE HÄCKER, CONSEQUENCES OF IMPAIRED CONSENT TRANSFERS 25–35 (2009).

obligor's obligations to third persons.[563]

Civil-law scholars also observe the functional and flexible application of the remedy for unjustified enrichment. Indeed, the requirement of "lack of cause" should not be confined to the cause of the juridical act or the separation between promise and conveyance. Instead, the cause should refer to the substantive and practical reason for retaining the enrichment or giving restitution. Thus, more emphasis is now placed on the restitution itself rather than the enrichment.[564] As noted, the French Civil Code now includes a separate section devoted to "restitution" for failed juridical acts. The civil law is therefore moving closer to incorporating a "law of restitution" into its notion of unjust enrichment.

*4. Common Law*

In a somewhat similar fashion with the German approach, a unitary concept of unjust enrichment also appears at common law. Comparativists attribute this similarity to the restricted application of the doctrine of cause. Indeed, in both systems, the delivery of goods transfers ownership even if the contract is for some reason invalid.[565] However, the similarity ends there. In contrast to the civil law, the common-law tradition—especially in the United States—identifies a broader notion of unjust enrichment.[566] Based on this

563. This broad categorization of enrichments is known as the "Wilburg/von Caemmerer taxonomy." *See* WALTER WILBURG, DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT--KRITIK UND AUFBAU (1934); Ernst von Caemmerer, Grundprobleme des Bereicherungsrechts, *in* ERNST VON CAEMMERER: GESAMMELTE SCHRIFTEN 370 (H.G. Leser ed., 1968); Ernst von Caemmerer, *Problèmes fondamentaux de l'enrichissement sans cause*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ 573 (1966); STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 37–39; STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1058–59; ZEPOS, *supra* note 390, at 686, 690–91. For a comparative analysis of this taxonomy, *see* James Gordley, *Unjust Enrichment: A Comparative Perspective and a Critique*, 41, 54–60, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020); Descheemaeker, *supra* note 533, at 96–98.

564. *See* STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1080.

565. *See* Dickson, *supra* note 510, at 119.

566. *See* DANNEMANN, *supra* note 86, at 156–57 ("[T]he German law of unjustified enrichment and the English law of unjust enrichment show an overlap

broader understanding, restitution is a remedy for cases of unjust enrichment that can appear in several areas of the law, including contract, tort, and property.[567]

This core idea of unjust enrichment, as an "enrichment that lacks an adequate legal basis"[568] permeates the Third Restatement of Restitution and Unjust Enrichment. The premise of this idea can certainly be challenged doctrinally. Indeed, if unjust enrichment is construed more narrowly to mean a specific cause of action within certain strict parameters, then restitution certainly becomes a broader concept, unless one then decides to restrict restitution and tailor it to fit this unjust enrichment paradigm.[569] As the German experience has shown, however, unjust enrichment and restitution can be elusive legal concepts that defy strict categorizations and tailor-made straightjackets.[570]

The common-law tradition historically approached unjust enrichment from the viewpoint of the law of remedies.[571] The First Restatement of Restitution was the first step converging toward a substantive theory of unjust enrichment.[572] Just like the history of the civil law of unjust enrichment, the development of the law of

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which is substantial, but far from complete. . .the German law of unjustified enrichment is substantially smaller in scope than would be what many still call the law of restitution in English law").

567. *See* Kull, *Rationalizing Restitution*, *supra* note 79, at 1191, 1196.

568. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) (defining unjust[ified] enrichment as "enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights").

569. *See* Birks, *Wrongful Enrichment*, *supra* note 501, at 1776–78.

570. *Cf.* Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT'L & COM. REG. 273 (1995) (discussing legislative techniques and judicial flexibility in civil-law and common-law systems).

571. *See* SIMPSON, *supra* note 125, at 491.

572. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b & § 1 cmt. e (AM. L. INST. 2011). Interestingly, the name "restitution" for the First Restatement was chosen virtually by accident. In fact, what was being "restated" was the law of unjust enrichment. However, the name "restitution" caught on with judges and scholars in the common law world. *See* Andrew Kull, *Restitution and Unjust Enrichment* 62, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020).

restitution in the common law is fraught with historical misunderstandings, obscure terminology, and unnecessary complication in the law.[573]

Historically, restitution was available at common law and in equity.[574] When the plaintiff had legal title to assets withheld by the defendant, restoration at common law was achieved primarily by means of the ejectment and replevin actions.[575] No action existed in the early common law for restitution of assets in which the plaintiff had no legal title.[576] Especially for the case of money withheld by the defendant, however, a plaintiff with no legal title was entitled to restitution under a sub-form of the writ of assumpsit.[577] This law was shaped decisively in the eighteenth century case of Moses v. Macferlan,[578] in which Lord Mansfield enunciated the action for "money which ought not be kept," which largely corresponds to the modern notion of unjust enrichment.[579] English case-law in the seventeenth and eighteenth centuries solidified this connection of the

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573. *See* BIRKS, *supra* note 6, at 267–308 (discussing "competing generics" and "persistent fragments" which hinder the proper evolution of the doctrine of unjust enrichment).

574. For an excellent exposition of the legal history of restitution, *see* RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS, pt. 1, intro. note (AM. L. INST. 1937).

575. In Louisiana, a dispossessed plaintiff may institute several real actions, such as the possessory action or the petitory action for recovery of an immovable and the revendicatory action for the recovery of movables. *See* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:6–11:25, 12:32–12:44, 13:1–13:16.

576. *See* BIRKS, *supra* note 6, at 284–85.

577. *See* Slade v. Morley (Slade's Case), 76 Eng. Rep. 1074 (K.B. 1602) (establishing an action in assumpsit without need for a contractual promise). *See* BIRKS, *supra* note 6, at 270 and 286–90; DOBBS & ROBERTS, *supra* note 6, § 4.2(1).

578. 97 Eng. Rep. 676, 679 (K.B. 1760). Per Lord Mansfield:

> This kind of equitable action, to recover back money. . .lies for money paid by mistake or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word. . .the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

579. *See* BIRKS, *supra* note 6, at 270 (explaining that Lord Mansfield's opinion was based on the convoluted civil-law doctrine of "quasi-contract"). *See also* BLACKSTONE II, *supra* note 55, at 443 (referring to the civil-law category of obligations *quasi ex contractu* in his discussion of implied in law contracts).

unjust enrichment action to assumpsit—which was traditionally a writ specifically designed to enforce contracts—through the fiction of "implied contract."[580] In short, to fit the action under a writ of assumpsit, courts implied a fictitious contract between the parties that compelled restitution of the moneys withheld by defendant.[581] Under another seminal English case, the plaintiff whose money is wrongfully withheld may, in certain cases, waive the action of tort and bring suit for an "implied contract" instead.[582] This fictitious concept of "implied contract"[583] only managed to confuse courts and scholars.[584] To add to this confusion, courts also devised other subcategories of assumpsit for very specific restitution claims. These subordinate categories came to be known as the "common counts."[585]

Restitution of things other than money in which the plaintiff had no title was achieved by the Chancery courts in equity. Rather than

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580. To avoid confusion with "implied in fact contracts," which are actual contracts that are not expressed in words, courts and scholars oftentimes use the term "implied in law contracts" instead. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 391; 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.2 (1978 & Suppl.) [hereinafter PALMER I]. The confusion, however, persisted. *See supra* note 83 and *infra* notes 583–85, 590 and accompanying texts.

581. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 391 (giving the example of payment of money by mistake, which could not be recovered by replevin; in such cases, the court would imply a contractual obligation of defendant to make restitution to plaintiff).

582. *See* Lamine v. Dorrell, 92 Eng. Rep. 303 (K.B. 1706). *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 395–97; PALMER I, *supra* note 580, §§ 2.2–2.4.

583. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161–64 (Richard Burn ed., 9th ed. 1783) [hereinafter BLACKSTONE III] (using the terms "implied contract" and "implied assumpsit"). *See also* BIRKS, *supra* note 6, at 272–73 (explaining that Blackstone's use of the terms "implied contract" and "implied assumpsit" contributed to the confusion).

584. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 391–92; BIRKS, *supra* note 6, at 270–74 (discussing the civil-law origin of this confusing terminology).

585. Examples include "money paid to defendant's use" when plaintiff by mistake or otherwise pays defendant's debt; "money had and received" when defendant received money that belonged in good conscience to plaintiff; "*quantum meruit*" when plaintiff has performed services to the defendant either at defendant's request (implied in fact contract) or without defendant's request but to defendant's benefit (implied in law contract); and "*quantum valebant*" for the value of goods transferred. *See* in more detail BLACKSTONE III, *supra* note 583, at 161–64; SIMPSON, *supra* note 125, at 493–94; BIRKS, *supra* note 6, at 285–90; DOBBS & ROBERTS, *supra* note 6, § 4.2(2), at 392–94.

adjudicating title, equity courts gave the plaintiff an action *in personam* against the defendant to make restitution of property that in good conscience belonged to the plaintiff.[586] To achieve this result, equity courts developed their own fiction—the "constructive trust."[587]

Generally, if the defendant has secured legal title to a particular asset by unconscionable acts, the court will declare defendant to be a "constructive trustee" for the benefit of the plaintiff of the asset in question and its traceable product. In short, the defendant is ordered to restore the thing and/or its traceable product to plaintiff, as if defendant were a trustee and plaintiff were a beneficiary.[588] This fictional connection to the trust in the law of equity contributed even further to the existing confusion surrounding "implied contracts" at common law.[589]

Although the "forms of action" have been abolished long ago, the contemporary law of restitution is still haunted by the continued use of obscure terminology and the bifurcation of remedies at law and in equity.[590] Contemporary scholars have shifted their attention from remedies to substance, identifying unjust enrichment as the unifying concept of most of the law of restitution.[591]

The Third Restatement of Restitution and Unjust Enrichment has brought much needed order to the chaos. The Restatement's

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586. *See* DOBBS & ROBERTS, *supra* note 6, § 4.3(1). *But see also* BIRKS, *supra* note 6, at 292–907 (distinguishing between equitable actions *in personam* and *in rem*).

587. *See* DOBBS & ROBERTS, *supra* note 6, § 4.3(2); BIRKS, *supra* note 6, at 301–07; PALMER I, *supra* note 580, § 1.4 (discussing constructive and resulting trusts).

588. *See* DOBBS & ROBERTS, *supra* note 6, § 4.3(2); BIRKS, *supra* note 6, at 302–04. Equity courts had also developed similar remedies, such as the equitable lien, subrogation, and the accounting for profits. *See* BIRKS, *supra* note 6, at 292–307; PALMER I, *supra* note 580, § 1.5.

589. *See* BIRKS, *supra* note 6, at 301–07.

590. *See* BIRKS, *supra* note 6, at 282 (referring to this problem as a "persistent fragment"). *See also The Intellectual History of Unjust Enrichment*, *supra* note 7, at 2089 (arguing that "the fusion of law and equity in the United States plays an explanatory role in unjust enrichment's relative lack of popularity.").

591. *See* BIRKS, *supra* note 6, at 38–46 (enunciating his theory of a unitary concept of unjust enrichment).

approach is very balanced and linear, connecting liability (unjust enrichment) with the remedy (restitution). In its introductory Part I, the Restatement identifies unjust enrichment as the basis for liability for restitution.[592] Restitution is not unlimited,[593] and can be legal and/or equitable.[594] Part II focuses on the substantive aspect of the liability in restitution. Here, the drafters very wisely resisted calls for a taxonomy of a unitary concept of unjust enrichment.[595] Instead they identified four broad categories of unjust enrichment—transfers subject to avoidance due to a vice of consent;[596] unrequested intervention;[597] restitution for failed contracts;[598] restitution for wrongs;[599] and special cases of benefits conferred by a third person.[600] Part III divides the remedies in restitution via money judgment (restitution)[601] and restitution via rights in identifiable property (restoration).[602] Finally, Part IV lists the available defenses to restitution.[603]

More importantly, the Restatement is written in clear language, and it outlines the law in a comprehensive manner. Some of the ideas and concepts in the Restatement might also be useful to Louisiana courts, with the necessary civil-law adaptations.

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592. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011). *See* Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929 (2012).
593. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 2–3 (AM. L. INST. 2011).
594. *Id.* § 4.
595. *See* Birks, *Wrongful Enrichment*, *supra* note 501, at 1777–82 (attempting a legal taxonomy of unjust enrichment as to other causative events).
596. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5–19 (AM. L. INST. 2011).
597. *Id.* §§ 20–30.
598. *Id.* §§ 31–39.
599. *Id.* §§ 40–46.
600. *Id.* §§ 47–48.
601. *Id.* §§ 49–53.
602. *Id.* §§ 54–61.
603. *Id.* §§ 62–70.

*B. Louisiana Law*

The Louisiana law of unjust enrichment follows the French civil-law tradition.[604] As a result, the distinction between strict law and equity is unknown in Louisiana law.[605] Thus, there is no separate equity-based restitution, such as the constructive trust and the equitable lien.[606] Instead, Louisiana law provides for the recovery of displaced wealth primarily by application of the doctrines of cause and nullity, and in more limited circumstances under a theory of unjust enrichment.[607]

The doctrines of cause and nullity of contracts, as they appear in the Louisiana Civil Code, occupy most of the law of restitution.[608]

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604. *See* LA. CIV. CODE art. 2298 cmt. a (2023) (explaining that "the principle [of enrichment without cause] accords with civilian doctrine and jurisprudence"). *See also* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 5–15, 146–52, 333–60 (detailing the history of Louisiana law of quasi-contract, payment of a thing not due, and enrichment without cause with reference to French law); Oakes, *supra* note 16, at 878–79; Martin, *supra* note 16, at 200–04 (explaining the historical connection between French and Louisiana law of unjust enrichment).

605. The term "equity" in the Louisiana Civil Code refers to civilian principles of fairness, justice, reason, and the general principle forbidding unjust enrichment. *See* LA. CIV. CODE arts. 4, 2055 (2023). Use of this term in Louisiana law does not imply incorporation of the rules developed in Chancery courts in England and in the United States. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 182–84; LeBlanc v. New Orleans, 70 So. 212 (La. 1915). *See supra* note 70.

606. *See, e.g.*, Succession of Gaston v. Koontz, 49 So. 3d 1054, 1058 (La. Ct. App. 3d Cir. 2010); Matter of Oxford Management, Inc., 4 F.3d 1329, 1336 (5th Cir. 1993); EDWARD E. CHASE, JR., TRUSTS § 1:10, *in* LOUISIANA CIVIL LAW TREATISE (3d ed. Dec. 2021 update). *See* also LA. CIV. CODE art. 3185 (2023) (privileges are only granted by statute); In re Liquidation of Canal Bank & Trust Co., 160 So. 609 (La. 1935); In re Hagin, 21 F.2d 434, 437–38 (E.D. La. 1927) (equitable liens are unknown to the law of Louisiana). Subrogation, on the other hand, is regulated in the Louisiana Civil Code. *See* LA. CIV. CODE arts. 1825–1830 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 180–208; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 11.1–11.71.

607. *See, e.g.*, Trust for Schwegmann v. The Schwegmann Family Trust, 905 So. 2d 1143, 1147–49 (La. Ct. App. 5th Cir. 2005) (observing that a recovery in a case resembling a "constructive trust" may be authorized under a theory of unjust enrichment in Louisiana law).

608. For a fuller discussion of these doctrines in Louisiana law, *see* ALAIN A. LEVASSEUR, LOUISIANA LAW OF CONVENTIONAL OBLIGATIONS, A PRÉCIS 102–12 (2d ed. 2015) [hereinafter LEVASSEUR, CONVENTIONAL OBLIGATIONS]; LITVINOFF, OBLIGATIONS I, *supra* note 514, §§ 196–399; Litvinoff, Cause, *supra* note 521, at 3; Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663 (2014) [hereinafter Scalise, Nullity]. For discussion of the various

Under these doctrines, dissolution of a contract[609] may occur in several situations, such as breach of contract,[610] impossibility of performance,[611] notice of termination,[612] expiration,[613] fulfillment of a resolutory condition,[614] and certain other special cases for dissolution of donations.[615]

A contract is absolutely null (void) when it violates a rule of public order, such as when the contract is illegal[616] or when mandatory form is not observed.[617] A contract is relatively null (voidable) when it violates a rule for the protection of private parties,

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events that extinguish obligations, *see* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 227–334; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.1.

609. In Louisiana law, donations *inter vivos* are also enforceable contracts, if the requirements for donations are met. *See* LA. CIV. CODE art. 1468 (2023). Special rules apply for wills. *See id.* art. 1469. *See* ELIZABETH R. CARTER, LOUISIANA LAW OF SUCCESSIONS AND DONATIONS. A PRÉCIS 59–60, 68–82 (2021). Furthermore, the rules on contracts also apply to unilateral juridical acts that convey rights. *See* LA. CIV. CODE art. 1917 (2023).

610. *See, e.g.*, LA. CIV. CODE arts. 2013–2017, 2497, 2561–2564, 2615, 2719 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 36–38 (AM. L. INST. 2011); BURROWS, *supra* note 103, at 341–60; PALMER I, *supra* note 580, §§ 4.1–5.15; Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465 (1993).

611. *See* LA. CIV. CODE arts. 1873–1876 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 34 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 15-01 to 15-11; BURROWS, *supra* note 103, at 361–70; PALMER II, *supra* note 214, §§ 7.1–7.10.

612. *See, e.g.*, LA. CIV. CODE arts. 2024, 2718, 2727–2729, 2747, 3025, 3061 (2023). Here, termination usually does not have retroactive effect. Thus, restitution of performances is usually not contemplated. *See id.* art. 2019.

613. *See, e.g.*, LA. CIV. CODE arts. 1777, 2720 (2023). Restitution of performances is usually not contemplated in such cases, unless a performance was made after the termination of the contract.

614. *See, e.g.*, LA. CIV. CODE arts. 1767, 2572, 2588, 1532, 1533 (2023). Fulfillment of a resolutory condition will not always have retroactive effect. *See id.* arts. 1775–1776; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 83–87; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 5.12–5.13.

615. *See, e.g.*, LA. CIV. CODE arts. 1562–1564 (2023); CARTER, *supra* note 609, at 121–23.

616. *See* LA. CIV. CODE arts. 1968, 1971, 2030 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 32 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 25-01 to 25-18; BURROWS, *supra* note 103, at 488–97; PALMER II, *supra* note 214, §§ 8.1–8.9.

617. *See, e.g.*, LA. CIV. CODE arts. 1927, 1839, 1541, 2030 (2023). *But see id.* art. 1845 (allowing confirmation of a donation that is defective for want of form). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 (AM. L. INST. 2011); BURROWS, *supra* note 103, at 381–84.

as in the case of a vice of consent[618] or incapacity.[619]

Dissolution can be judicial or extrajudicial,[620] whereas nullity must be declared by a court.[621] When a contract that transfers ownership of a thing is dissolved or is declared null, the provisions on dissolution and nullity generally provide that the parties be restored to their preexisting situation.[622] Ownership of the contractual object reverts back to the transferor who may recover it by her original action for dissolution or nullity, or by a separate real

618. *See* LA. CIV. CODE arts. 1948–1965, 2031 (2023) (error, fraud, and duress). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5, 13, 14, 34, 35 (AM. L. INST. 2011). *See* Saúl Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1 (1989) [hereinafter Litvinoff, Vices of Consent].

619. *See* LA. CIV. CODE arts. 1919, 1921, 2031 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16, 33 (AM. L. INST. 2011). Contracts made by minors for necessaries or contracts made by minors who falsely misrepresent their majority are valid and enforceable contracts in Louisiana as a matter of law. *See* LA. CIV. CODE arts. 1923, 1924 (2023); LA. CIV. CODE art. 1785 (1870). *See* LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 19–21. Capacity to donate and vices of consent for donations (which include undue influence as an additional vice) are governed by more specific rules. *See* LA. CIV. CODE arts. 1470–1484 (2023); KATHRYN VENTURATOS LORIO & MONICA HOF WALLACE, SUCCESSIONS AND DONATIONS §§ 9:1–9:6, *in* 10 LOUISIANA CIVIL LAW TREATISE (2d ed. Jan. 2022 update); CARTER, *supra* note 609, at 85–99. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 11, 15, 46 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 9-01 to 11-58, 24-01 to 24-39; BURROWS, *supra* note 103, at 201–99, 311–17; PALMER I, *supra* note 580, §§ 3.1–3.20; PALMER II, *supra* note 214, §§ 9.1–9.19, 11.1–11.6.

620. *See* LA. CIV. CODE arts. 2013–2021 (2023); SAÚL LITVINOFF, OBLIGATIONS. BOOK 2 §§ 270, 272, 279–91, *in* 7 LOUISIANA CIVIL LAW TREATISE (1975) [hereinafter LITVINOFF, OBLIGATIONS II]; LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 101–102.

621. Actions to declare a contract absolutely null are imprescriptible whereas an action to rescind a relatively null contract is subject to liberative prescription. Absolute nullity is usually incurable, whereas a relatively null contract can be confirmed. *See* LA. CIV. CODE arts. 1842, 2029–2035 (2023); LITVINOFF & TÊTE, *supra* note 113, at 162–90; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.3; LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 104–112; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.52–12.57; Litvinoff, Vices of Consent *supra* note 618, at 35–49, 75–79, 101–05; Scalise, Nullity, *supra* note 608, at 689–700.

622. The provisions on dissolution and nullity regulate the method of restoration, its retroactivity, and its effect on third parties. *See* LA. CIV. CODE arts. 2018–2021 and 2033–2035 (2023). *See* LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 102–104 and 108–112; Scalise, Nullity, *supra* note 608, at 678–85.

action.[623]

Alternatively, the transferor can recover by means of the quasi-contractual action of payment of a thing not due.[624] If restoration in kind is impossible or impracticable, the court may award a monetary substitute in the form of damages.[625] In certain cases, the provisions on dissolution and nullity authorize recovery under a theory of unjust enrichment. Thus, if partial performance has been rendered under the failed contract, and that performance is of value to the recipient, recovery for that performance may be made in restitution for unjust enrichment.[626]

Likewise, when the performance consists of services or another similar benefit to the recipient, recovery of the value of such services or benefit is made in the form of compensation for enrichment without cause.[627] Finally, a mandatory law that nullifies a contract may authorize recovery under a theory of unjust enrichment.[628]

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623. For instance, the plaintiff may institute a possessory action or a petitory action for the recovery of immovables. *See* LA. CODE CIV. PROC. arts. 3651–3671 (2023). The plaintiff may bring the revendicatory action for the recovery of movables. *See* LA. CIV. CODE art. 3444 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:7–11:25, 12:33–12:44, 13:7–13:12.

624. *See* LA. CIV. CODE art. 2299 cmt. c (2023); Morgan's Louisiana & T.R. & S.S. Co. v. Stewart, 119 La. 392, 407–09 (1907); Kramer v. Freeman, 3 So. 2d 609 (La. 1941); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 13:13, 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20. *See supra* note 528 and *infra* notes 663, 687, 701–06, 932–36, and accompanying texts.

625. *See* LA. CIV. CODE arts. 2018, 1921, 2033 (2023).

626. *See* LA. CIV. CODE arts. 2018, 1878, 2033 cmt. b (2023); LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 102–03, 110–12; LITVINOFF, OBLIGATIONS II, *supra* note 620, § 271; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 16.63. *See also* Onstott v. Certified Capital Corp, 950 So. 2d 744, 749 (La. Ct. App. 1st Cir. 2006) (observing that "Articles 2033 and 2018 [of the Louisiana Civil Code are consistent with. . .[articles] 2298–2305, which establish a cause of action against one who has been enriched without cause at the expense of another").

627. *See* Sylvester v. Town of Ville Platte, 49 So. 2d 746, 750 (La. 1950); McCarthy Corp. v. Pullman-Kellogg, Div. of Pullmann, Inc., 751 F2d 750, 760 (5th Cir. 1985); AUBRY & RAU VI, *supra* note 157, No. 320; PLANIOL & RIPERT VII, *supra* note 157, No. 764. *Cf.* LA. CIV. CODE arts. 2018, 2033 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 9 (AM. L. INST. 2011). *See also supra* notes 532, 539; *see infra* notes 824–25, 828, 932–36, and accompanying texts.

628. For instance, contracts involving unlicensed contractors are absolutely null under the Contractors Licensing Law. LA. REV. STAT. § 37:2163 (2023). The

Restitution as an available remedy is provided in other areas of Louisiana law as well.

Examples include legal subrogation;[629] lack of authority of a mandatary;[630] revocatory action;[631] simulated contracts;[632] revocation of donations *inter vivos* for ingratitude of the donee;[633] declaration of unworthiness of a successor;[634] rescission of a sale of a corporeal immovable due to lesion beyond moiety;[635] improvements to land made by adverse possessors, lessees and other

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scope of this invalidating statute is to protect against incompetence, inexperience, or fraudulence. For cases not falling within this scope of a "substandard work exception" or "fraudulently obtained contract exception," courts have allowed recovery of the contractor's costs of materials, services, and labor, with no allowance for profit or overhead, under a theory of unjust enrichment. *See* Quaternary Resource Investigations, LLC v. Phillips, 316 So. 3d 448 (La. Ct. App. 1st Cir. 2020); Hagberg v. John Bailey Contractor, 435 So. 2d 580, 586–87 (La. Ct. App. 3d Cir. 1983); Dennis Talbot Const. Co. v. Private Gen. Contractors, Inc., 60 So. 3d 102, 104–05 (La. Ct. App. 3d Cir. 2011); Boxwell v. Dep't of Highways, 14 So. 2d 627, 631 (La. 1943); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 14.25. *But see also* Maroulis v. Entergy Louisiana, LLC, 317 So. 3d 316 (La. 2021) (holding that the clean hands doctrine may prevent the unlicensed contractor from invoking the nullity of the contract with the owner).

629. *See* LA. CIV. CODE art. 1829 (2023). Legal subrogation includes the action for contribution for payments made by solidary obligors, including sureties. *See id.* arts. 1804, 1805, 1829(3), 3047–3054 (2023). *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 188–95; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.78–7.84, 11.51–11.59. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 23–25 (AM. L. INST. 2011).

630. *See* LA. CIV. CODE arts. 3004, 3008, 3031, 3032 (2023); Holmes & Symeonides, *supra* note 242, at 1145–50. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 (AM. L. INST. 2011).

631. *See* LA. CIV. CODE arts. 2036–2043 (2023); LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 119–125. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 1 cmt. g & 48 (AM. L. INST. 2011).

632. *See* LA. CIV. CODE arts. 2025–2028 (2023); LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 81–84.

633. *See* LA. CIV. CODE arts. 1557–1560 (2023); LORIO & WALLACE, *supra* note 619, § 8:12. *See also* CARTER, *supra* note 609, at 118 (explaining that the term "revocation" is misleading and properly characterizing the action "as a type of rescission of contract that is permitted as a remedy for the donee's delictual actions").

634. *See* LA. CIV. CODE arts. 941–946 (2023); LORIO & WALLACE, *supra* note 619, § 5:3; CARTER, *supra* note 609, at 45–50. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 (AM. L. INST. 2011).

635. *See* LA. CIV. CODE arts. 1965, 2589–2600 (2023); TOOLEY-KNOBLETT & GRUNING, *supra* note 230, §§ 13:1–13:25.

precarious possessors;[636] expenses incurred by co-owners;[637] ex-spouse's claim for contribution to education and training of other ex-spouse;[638] and recovery of property of an absent person who reappeared.[639]

Restitution under a theory of unjust enrichment in Louisiana law is restricted to cases that fall outside the realm of cause, dissolution, nullity, and restitution by application of a specific legal rule. Louisiana law recognizes two actions for unjust enrichment—the action for a payment not due (*condictio indebiti*)[640] and the subsidiary action for enrichment without cause (*actio de in rem verso*).[641] These two actions are distinct.[642]

Payment of a thing not due is at the crux of Louisiana law of unjust enrichment.[643] Indeed, most cases of restitution under German law and common law—such as mistaken payments and performances under a failed contract—fall under this Louisiana action.[644] Under this action, recovery is authorized: (a) for payments of non-

636. *See* LA. CIV. CODE arts. 483–498, 2695 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:17–11:24. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (AM. L. INST. 2011).

637. *See* LA. CIV. CODE arts. 804, 806 (2023); Symeonides & Martin, *supra* note 23, at 99–101. For co-ownership of community property and former community property, *see* CARROLL & MORENO, *supra* note 256, §§ 7:16–7:20.

638. *See* LA. CIV. CODE art. 121 (2023).

639. *See id.* arts. 57–59 (2023); Monica Hof Wallace, *A Primer on Absent Persons in Louisiana*, 64 LOY. L. REV. 423, 436–39 (2018).

640. *See* LA. CIV. CODE arts. 2299–2305 (rev. 1995). *Cf.* LA. CIV. CODE arts. 2301–2314 (1870); LA. CIV. CODE arts. 2279–2293 (1825); LA. CIV. CODE p. 320, arts. 10–15 (1808). For an excellent analysis of the pre-revision law, which is still a valuable resource today, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 143–232.

641. LA. CIV. CODE art. 2298 (rev. 1995). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 233–327 (*quantum meruit*) & 329–437 (*actio de in rem verso*).

642. *See* Chrysler Credit Corp. v. Whitney Nat. Bank, 1993 WL 70050, at *4 (E.D. La. Mar. 4, 1993) (observing, however, that "the Louisiana jurisprudence is somewhat muddled on the question of whether these are, in fact, two distinct causes of action.").

643. *See* Descheemaeker, *supra* note 533, at 78–79.

644. *Cf., e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5–8, 11, 18, 19 (AM. L. INST. 2011). *See also* BIRKS, *supra* note 6, at 3 ("The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt").

existent debts (payment not due objectively);[645] and (b) for the mistaken payment of an existing debt of another (payment not due subjectively).[646] Finally, cases of restitution that do not fall under any of the above actions are relegated to the subsidiary action for enrichment without cause (*actio de in rem verso*). This subsidiary action was created by the jurisprudence of the Louisiana courts and was only recently enacted.[647]

*1. Payment of a Thing Not Due (*Condictio Indebiti*)*

In an action for payment of a thing not due, the court orders the defendant payee to restore a thing that belongs to the plaintiff payor, who gave the thing to the payee in payment of a non-existent debt or in mistaken payment of the debt of another.

The precise legal foundation for the action of a payment of a thing not due has not been settled in French doctrine.[648] Three theories have been supported.[649] The traditional theory characterizes payment of a thing not due as a quasi-contract in the form of a quasi-loan.[650] Under this theory, the recipient of a payment not due is liable for returning what was paid to the person who made the payment as if the recipient had borrowed the thing.[651] The redactors of the

645. *See* LA. CIV. CODE art. 2299 (2023). The action for payment of a thing not due is not subsidiary. Thus, the quasi-contractual action for recovery of payments not due objectively overlap with the broader theory of cause. *See id.* art. 2299 cmt c. *See also supra* notes 548, 624 and *infra* notes 663, 687, 701–06, 932–36, and accompanying text.

646. *See* LA. CIV. CODE art. 2302 (2023).

647. *See* LA. CIV. CODE art. 2298 (rev. 1995).

648. *See* 2 GABRIEL MARTY, PIERRE RAYNAUD & PHILIPPE JESTAZ, DROIT CIVIL. LES OBLIGATIONS No. 226 (2d ed. 1989); NICOLE CATALA, LA NATURE JURIDIQUE DU PAYEMENT No. 203 (1961); Yves Strickler, Paiement de l'indu, No. 4, *in* JurisClasseur Civil, Art. 1302 à 1302-3, Fascicule unique, Aug. 27, 2018 (Fr.).

649. *See* MALAURIE ET AL., *supra* note 30, No. 1041.

650. *See* POTHIER, LOAN, *supra* note 64, No. 132 (characterizing payment of a thing not due as a "promutuum").

651. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 203. Pothier obviously had in mind an obligation to repay money which would be likened to a loan of a consumable (*mutuum*). *Cf.* LA. CIV. CODE art. 2904 (2023). Nevertheless, the object of the payment can also be a non-consumable thing, in which case the obligation to repay, under Pothier's theory,

Code Napoléon were influenced by this theory when they included payment of a thing not due in the chapter on quasi-contracts.[652] Although this theory is the least popular among French scholars,[653] payment of a thing not due is still listed as a quasi-contract in the revised French Civil Code.[654] A second theory considers payment of a thing not due as a subset of the doctrines of cause and nullity.[655] This view focuses on the legal nature of payment as a juridical act.[656] When the obligation for which the payment is made does not exist, the juridical act of payment has no cause and is therefore null. Restoration is thus governed by the provisions on cause and nullity.[657]

Acceptance of this theory rests on the precise legal nature of payment as a juridical act or a juridical fact, an issue that has not been settled in French doctrine.[658] Finally, a third theory identifies payment of a thing not due as an expression of the principle of unjust enrichment. Most scholars support this theory,[659] but they are not in

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would resemble a loan of a nonconsumable (*commodatum*). *Cf.* LA. CIV. CODE art. 2891 (2023). This distinction becomes pertinent in the discussion of restoration of the thing owed. *Cf.* LA. CIV. CODE arts. 2304, 2305 (2023).

652. *See* CODE NAPOLÉON, *supra* note 10, art. 1376. *See* CATALA, *supra* note 648, No. 203.

653. *See* VIZIOZ, *supra* note 44, No. 53; RIPERT & BOULANGER II, *supra* note 169, Nos 1241–42; PLANIOL & RIPERT VII, *supra* note 157, No. 719; MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 203.

654. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1300.

655. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, Nos 205–208; RIPERT & BOULANGER II, *supra* note 169, Nos 1241–42.

656. *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 227–28 and 230; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.2 (characterizing payment as a juridical act).

657. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, Nos 205–208.

658. The legal nature of payment is controversial in France. The prevailing view considers payment a juridical act, especially when it comprises separate implementing acts, such as transfer of ownership or execution of documents. See 12 CHARLES AUBRY & CHARLES RAU, DROIT CIVIL FRANÇAIS § 762 (Paul Esmein ed., 6th ed. 1958); Benoît Moore, *De l'acte et du fait juridique ou d'un critère de distinction incertain*, 31 REVUE JURIDIQUE THÉMIS, 277, 307–12 (1997); CATALA, *supra* note 648, Nos 159–164.

659. *See* COLIN & CAPITANT II, *supra* note 25, No. 398; PLANIOL & RIPERT VII, *supra* note 157, No. 736; VIZIOZ, *supra* note 44, No. 70; MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 204.

agreement as to the precise delineation between payment of a thing not due and enrichment without cause.[660]

Each of these three theories contributed in part to the development of payment of a thing not due in French and Louisiana law and, it is submitted here, to the confusion surrounding this institution. First, under the theory supporting the application of the doctrines of cause and nullity, the payment of a thing not due has expanded its scope. Originally, payment of a thing not due was restricted to the restitution of a payment made in error because no debt was due. Gradually, this remedy has extended to cases of lack of cause or illicit cause. As a result, payment of a thing not due now encompasses three remedies—the action for restitution of a payment made for a nonexistent debt (*condictio indebiti*); the action for restoration or restitution of payments made in performance of a contract whose cause was absent or failed (*condictio sine causa*); and the action for restoration or restitution of payments made in performance of an illicit contract (*condictio ob turpem causam*).[661] The latter two actions overlap with the actions for dissolution and nullity of contracts, as well as with the delictual action in cases of illicit conduct.[662] Because the action for payment of a thing not due is not subsidiary, the plaintiff can choose the theory of recovery that best suits her interests.[663]

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660. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 204.

661. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 232–36 (distinguishing between the quasi-contractual remedy for restitution of payments of nonexistent debts (*condictio indebiti*) and the contractual remedies for restitution of payments made in performance of failed or illicit contracts (*condictio sine causa, condictio ob turpem causam*)); AUBRY & RAU VI, *supra* note 157, §§ 442, 442*bis* (distinguishing between "the action for restitution of the undue payment properly speaking" (*condictio indebiti*) and the "actions for restitution of payments made without cause, or for an illegal or illicit cause" (*condictio sine causa, condictio ob turpem causam*)).

662. *See* AUBRY & RAU VI, *supra* note 157, No. 313.

663. *See* LA. CIV. CODE art. 2299 cmt. c (2023); Morgan's Louisiana & T.R. & S.S. Co. v. Stewart, 119 La. 392, 407–09 (1907); Kramer v. Freeman, 3 So. 2d 609 (La. 1941). *But see* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20 (noting that Louisiana is a "fact pleading" system requiring no technical form of pleadings—

Second, the traditional theory of quasi-contract still informs the nature and function of the remedy for restitution. The recipient of a thing not due is liable to restore what she received as if she were a borrower in a contract of loan. Thus, the recipient must restore the thing itself if nonconsumable or its value if consumable or if the nonconsumable cannot be returned.[664] These rules of restoration are markedly different from the rules of restitution for enrichment without cause.[665]

Third, the modern theory of unjust enrichment correctly characterizes payment of a thing not due as a special remedy for enrichment without cause.[666] Acceptance of this theory would suggest that payment of a thing not due is simply a special case of unjust enrichment that is measured differently in different circumstances. This would align the French approach with what the German and common-law model of a broader unjust enrichment. However, the revised Louisiana law of quasi-contract remained faithful to the French legal tradition in this respect and has thus inherited the confusion surrounding the remedy for restitution of a payment not due. A brief overview of the requirements and the effects of this remedy under the revised law should prove this point.

*a. Types of Undue Payments*

There are two requirements for the action to recover a payment not due. The first requirement is a payment for which there is no

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the court knows the law (*jura novit curia*)). LA. CODE CIV. PROC. arts. 854, 862 (2023). *Cf.* PALMER I, *supra* note 580, §§ 2.2–2.4. *See supra* notes 548, 624 and accompanying text; *see also infra* notes 687, 701–06, 932–36 and accompanying text.

664. *See* LA. CIV. CODE art. 2304 (2023).

665. *See id.* art. 2298.

666. The 1995 revision of the former title on "quasi-contracts" of the Louisiana Civil Code correctly places payment of a thing not due in the chapter titled "Enrichment Without Cause." The *actio de in rem verso* occupies "Section 1. General Principles." LA. CIV. CODE art. 2298 (2023). Payment of a thing not due is found in "Section 2. Payment of a Thing Not Owed." LA. CIV. CODE arts. 2299–2305.

justification in law or contract.[667] The second requirement, which is not always necessary, is error on the part of the payor.[668]

The term "payment" is understood as performance of an obligation.[669] In this context, payment refers to the payment of money or the giving of an individualized thing that can be corporeal or incorporeal, consumable or nonconsumable, movable or immovable.[670] Conversely, performances of obligations to do, such as the rendition of services or obligations not to do, are generally not within the scope of the remedy for an undue payment. Restitution for such performances is available via the action for enrichment without cause.[671]

A payment can either be undue objectively or subjectively. Payment is not due objectively when no debt existed between payor and payee or when the debt was not enforceable when the payment was made. In either case, the payor is not an obligor, and the payee is not an obligee. Payment is not due subjectively when the debt exists and the payee is the true obligee, however the payor is not the true obligor. In essence, the payor is paying the debt of another

667. A provision of law or contract as well as a judgment can justify a payment. *See, e.g.*, McKinney Saw & Cycle v. Barris, 626 So. 2d 786, 790 (La. Ct. App. 2d Cir. 1993).

668. In civil-law terminology, the payor of a thing not due is referred to as the *solvens* and the payee is referred to as the *accipiens*. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 159. This Article will refer to the parties as "payor" and "payee" solely for purposes of simplicity and not in derogation of the civil-law traditional terminology.

669. *See* Descheemaeker, *supra* note 533, at 80 ("[Payment] is used to refer to the performance (execution, fulfillment, discharge, satisfaction) of any obligations, whether monetary or not").

670. *See* Strickler, *supra* note 648, No. 10; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 232–35; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.2.

671. *See* PLANIOL & RIPERT VII, *supra* note 157, at 24 n.1; CATALA, *supra* note 648, No. 214; Strickler, *supra* note 648, No. 10. *But see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 162–63 (observing that the rendition of services is a performance that may fall under the scope of an action for payment of a thing not due and citing Smith Constr. Co. v. Maryland Gas Co., 422 So. 2d 697, 698 (La. Ct. App. 3d Cir. 1982)); Descheemaeker, *supra* note 533, at 80 n.7 (noting that under the revised French law of obligations, restitution of the value of services now falls under an action for payment of a thing not due).

person.[672] The practical significance of this distinction is twofold—first, the requirement of error only applies to subjectively undue payments; and second, the aforementioned overlap with the doctrines of cause and nullity is found in certain objectively undue payments.

*i. Payment Not Due Objectively—Debt Does Not Exist*

When payment is not due objectively, there is no enforceable obligation between the parties to justify the payment. This type of undue payment is contemplated in revised articles 2299 through 2301 of the Louisiana Civil Code.[673] In this type of payment, error of the parties is irrelevant.[674] Focus instead is placed on the objective factor of the lack of an obligation between the payor and the payee.[675]

Several reasons exist for the lack of such obligation. These reasons may be placed in three categories—nonexistent obligations (*condictio indebiti*), obligations for a cause that failed (*condictio sine causa*), and obligations for an illicit cause (*condictio ob turpem causam*). The latter two categories overlap with the doctrines of nullity and cause, as discussed.

First, the obligation may be nonexistent because the parties either never had a contract or other legal relationship giving rise to an enforceable obligation, or the obligation between the parties was

672. In traditional French doctrine, a subcategory of subjectively undue payments also included cases in which the true debtor paid a non-creditor. Contemporary French doctrine correctly assimilates this case with the objectively undue payment. *See infra* note 677.

673. *See* LA. CIV. CODE arts. 2299, 2300 (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, arts. 1302, 1302-1; QUEBEC CIVIL CODE, *supra* note 13, art. 1491–1492; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 6 & 11 (AM. L. INST. 2011).

674. Thus, recovery under article 2299 of the Louisiana Civil Code exists regardless of whether payment was made knowingly or through error. *See* LA. CIV. CODE art. 2299 cmt. d (2023); Leisure Recreation & Entertainment, Inc. v. First Guaranty Bank, 339 So. 3d 508, 518 (La. 2022); Ark-La-Tex Timber Co., Inc. v. General Electric Capital Corp. et al., 482 F.3d 319, 329–30 (5th Cir. 2007).

675. *See* LA. CIV. CODE art. 2300 (2023).

not enforceable when the payment was made.[676]

Examples from this category include: accidental payments to third persons who are not true obligees,[677] such as payment of a non-enforceable debt by a surety to a creditor;[678] payments of imaginary or nonexistent debts,[679] such as the mistaken payment of taxes[680] and

676. *See* Strickler, *supra* note 648, No. 16. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 6, 9 (AM. L. INST. 2011). Here, no conventional obligation ever existed between the parties because the parties never negotiated a contract, or their negotiations fell through. Alternatively, payment may be premature, as when the parties agreed to an obligation with a suspensive condition that had not yet been fulfilled. *See* LA. CIV. CODE art. 2301 (2023). Another theoretical example is when the contract between the parties is "inexistent," that is, when an essential constituent element of the contract is lacking. However, the concept of "inexistent contracts" has not been accepted by French and Louisiana legal doctrines. *See* LITVINOFF & TÊTE, *supra* note 113, at 186–88; Scalise, Nullity, *supra* note 608, at 699; 1 JACQUES FLOUR, JEAN-LUC AUBERT & ERIC SAVAUX, DROIT CIVIL. LES OBLIGATIONS. L'ACTE JURIDIQUE No. 326 (16th ed. 2014).

677. *See, e.g.*, Jackson v. State, Teachers' Retirement System of Louisiana, 407 So. 2d 416, 417–18 (La. Ct. App. 1st Cir. 1981). In traditional French doctrine, payment by a true obligor to a person who was not the true obligee is a subcategory of subjectively undue payments referred to as *indu subjectif actif*. The other subcategory of subjectively undue payments is when the payor is paying the debt of another to the true obligee. This subcategory is identified as *indu subjectif passif*. Contemporary French doctrine, however, assimilates the *indu subjectif actif* with the objectively undue payment. Indeed, when the true debtor is paying a non-creditor, there is objectively no debt between payor and payee. This doctrinal opinion finds support in the revised French Civil Code and the revised Louisiana Civil Code. *Compare* FRENCH CIVIL CODE, *supra* note 11, art. 1302-1 and LA. CIV. CODE art. 2299 (2023) (imposing an obligation of restitution on a person who has received a payment not owed to him) *with* FRENCH CIVIL CODE, *supra* note 11, art. 1302-2 and LA. CIV. CODE art. 2302 (2023) (providing specifically for the case of mistaken payment of the debt of another). *See* TERRÉ ET AL., *supra* note 57, Nos 1292, 1293; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 26.

678. Furthermore, a surety who has lost her right of subrogation and reimbursement from the debtor may recover from the creditor under a theory of unjust enrichment. *See* LA. CIV. CODE arts. 3050, 3051 (2023); Michael H. Rubin, *Ruminations on Suretyship*, 57 LA. L. REV. 565, 588–89 (1997). *See infra* note 736.

679. *See* TERRÉ ET AL., *supra* note 57, No. 1284 (referring to examples of incorrect electronic payments of utility bills, automated banking transactions, insurance payments, etc.).

680. *But see* Clark v. State, 30 So. 3d 812 (La. Ct. App. 1st Cir. 2009) (holding that refund of state taxes is governed by special provisions, and not by the Louisiana Civil Code provisions on payment of a thing not due). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 22-01 to 22-17.

the delivery of a gift to the wrong person;[681] and advance payments for a transaction that was never completed.[682]

Another frequent example are duplicate payments and overpayments. Duplicate payments are repeated payments of a debt that was already paid.[683] Overpayments are payments of sums greater than what was actually due.[684] Overpayments can be made by accident or knowingly, such as in the everyday case of an overpayment in cash with the anticipation of being paid change.[685] Finally, payment may be premature, such as in the case of an obligation subject to a suspensive condition that has not yet been fulfilled.[686] The action for restitution of this category of objectively undue payments is the traditional *condictio indebiti*, which exists outside the doctrines of cause and nullity. In other words, restitution of this category of objectively undue payments is not available by an action in contract. Instead, restoration is possible by means of a personal quasi-contractual action for payment of a thing not due, a real action for

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681. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 (AM. L. INST. 2011); *See* 3 GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 18.1–18.10 (1978 & Suppl.) [hereinafter PALMER III].

682. *See, e.g.*, Head v. Adams, 275 So. 2d 476 (La. Ct. App. 2d Cir. 1973); Busse v. Lambert, 773 So. 2d 182 (La. Ct. App. 5th Cir. 2000). *Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1491 ("A payment made in error, *or merely to avoid injury to the person making it while protesting that he owes nothing*, obliges the person who receives it to make restitution") (emphasis added).

683. *See*., *e.g.*, Prudential Ins. Co. of America v. Harris, 748 F.Supp. 445, 447 (M.D. La. 1990); LA. CIV. CODE art. 2300 cmt. b (2023); CARBONNIER II, *supra* note 45, No. 1219.

684. *See, e.g.*, Shatoska v. International Grain Transfer, Inc., 634 So. 2d 897, 899 (La. Ct. App. 1st Cir. 1993); Bell v. Rogers, 698 So. 2d 749, 757 (La. Ct. App. 2d Cir. 1997); Strickler, *supra* note 648, No. 23.

685. *See* Strickler, *supra* note 648, No. 25 (also discussing other examples of overpayment as a preventive measure). Payments made by solidary obligors that exceed their virile portion in the debt are recovered under the theory of legal subrogation. *See* LA. CIV. CODE arts. 1804, 1829, 1830 (2023). *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 109–15, 188–89; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 11.55.

686. *See* LA. CIV. CODE arts. 2301, 1767 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 80; Prudential Ins. Co. of America v. Harris, 748 F.Supp. 445, 447 (M.D. La. 1990); Merrill Lynch Realty, Inc. v. Williams, 526 So. 2d 380, 382–83 (La. Ct. App. 4th Cir. 1988); Strickler, *supra* note 648, No. 20. Naturally, this rule does not apply when the obligation to pay was subject to a suspensive term, *See* LA. CIV. CODE arts. 1781, 2301 cmt. d (2023); Texas General Petroleum Corp. v. Brown, 408 So. 2d 288 (La. Ct. App. 2d Cir. 1981).

revendication of the thing, or a personal delictual action for conversion, as the case may be.[687]

Next, payment may have been made to discharge an obligation that once existed, but the cause for that obligation was either absent or it failed at a later time.[688] Examples from the area of conventional obligations abound.[689] The contract giving rise to the conventional obligation that justified the payment could have expired,[690] or it might have been judicially declared absolutely null due to lack of its cause or object.[691] Thus, an insurer may demand restitution of payments made to the insured under a void insurance policy.[692] A potential buyer may demand restitution of her down-payment for the

687. *See* Dual Drilling Co. v. Mills Equip. Inv., 721 So. 2d 853 (La. 1998) (enunciating "principles of civilian conversion," which can be exercised through one of the following actions: (a) by means of a revendicatory action under LA. CIV. CODE art. 526; (b) by an action for *restitution* based on payment of a thing not due under LA. CIV. CODE art. 2299; or (c) by a delictual action for damages under LA. CIV. CODE art. 2315). *See also* LA. CIV. CODE art. 2299 cmt. c (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 13:13–13:16 (discussing the several theories for recovery of movables). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 40, 41 (AM. L. INST. 2011). *See infra* notes 701–06, 932–36, and accompanying text.

688. For a more detailed discussion of absence and failure of cause, *see* Litvinoff, Cause, *supra* note 521, at 5–8. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 13–16, 31, 35 (AM. L. INST. 2011).

689. Examples also exist outside the area of conventional obligations. One example is the restitution of a legacy under a will that was invalid. *See* LA. CIV. CODE art. 2300 cmt. b (2023). Another example is the restitution of the payment for a judgment that was later annulled or reversed. *See* Gootee Const., Inc. v. Amwest Sur. Ins. Co., 856 So. 2d 1203, 1206–07 (La. 2003); Louisiana Health Service & Indem. Co. v. Cole, 418 So. 2d 1357, 1359–60 (La. Ct. App. 2d Cir. 1982); City Financial Corp. v. Bonnie, 762 So. 2d 167, 169–70 (La. Ct. App. 1st Cir. 2000); FRANK L. MARAIST, CIVIL PROCEDURE, §§ 12:6 and 14.15, *in* 1 LOUISIANA CIVIL LAW TREATISE (2d ed., Nov. 2021 update); Strickler, *supra* note 648, No. 29. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 26-01 to 26-06.

690. *See, e.g.*, Wall v. HMO Louisiana, Inc., 979 So. 2d 536 (La. Ct. App. 5th Cir. 2008).

691. *See, e.g.*, Coleman v. Bossier City, 305 So. 2d 444 (La. 1974).

692. *See, e.g.*, Shelter Ins. Co. v. Cruse, 446 So. 2d 893, 895 (La. Ct. App. 1st Cir. 1984). Likewise, payments by the insurer to third persons who do not have a valid claim against the insured are recoverable as payments not due objectively. Conversely, mistaken payments by the insurer to a third person with a valid claim against an insured whose policy was void are recoverable as payments not due subjectively, falling under article 2302 of the Louisiana Civil Code. *See* Continental Oil Co. v. Jones, 191 So. 2d 895 at 897–98 (La. Ct. App. 1st Cir. 1966). *See also infra* notes 717–18, 785–88 and accompanying text.

purchase of a thing that was fortuitously destroyed at the time of the sale.[693] The contract could have been rescinded as relatively null,[694] such as in the case of incapacity or a vice of consent.[695] The conventional obligation could be null due to nonfulfillment of a suspensive condition.[696] The conventional obligation may be subject to a resolutory condition that was fulfilled having retroactive effect to the inception of the obligation.[697] On the other hand, the contract giving rise to the conventional obligation may have failed later in whole or in part. In such cases, care must be taken to determine whether the dissolution of the failed contract has only prospective effect as in the case of contracts for continuous performance,[698] or

693. *See* LA. CIV. CODE arts. 1966, 1873, 1876 (2023); LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 16.61; Litvinoff, Cause, *supra* note 521, at 6.

694. Payments made in performance of a relatively null contract can be reclaimed if the contract is rescinded. However, if the payment was made as an express or tacit confirmation of the contract, then rescission is excluded, and the payment is not recovered. *See* LA. CIV. CODE art. 1842 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.52–12.57; Strickler, *supra* note 648, No. 28.

695. *See* LA. CIV. CODE arts. 1918–1926, 1948–1964, 1470–1484, 2031–2035 (2023). Thus, an obligee who discharged the debt by mistake can demand restitution by rescinding the relatively null tacit remission of debt that was made by mistake. *See* LA. CIV. CODE art. 1889 cmt. b (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 1308, at 719; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 297–98, 302–03; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 18.2. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 8 (AM. L. INST. 2011). *See also* Strickler, *supra* note 648, No. 15 (giving the example of misrepresentation by the insured in a contract of insurance).

696. Likewise, the obligation might be null due to impossibility or illegality of the condition. *See* LA. CIV. CODE arts. 1767–1774 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 257–63, 267–87; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 5.1, 5.4–5.6, 5.14.

697. However, retroactive fulfillment of the condition does not affect certain payments, such as administrative expenses and fruits. Furthermore, restitution is excluded if fulfillment of the condition had no retroactive effect. *See* LA. CIV. CODE arts. 1775, 1776 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 83–86; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 5.12–5.14; Strickler, *supra* note 648, No. 20. Naturally, if the obligation is with a term, any voluntary payments cannot be recovered. *See* LA. CIV. CODE arts. 1781, 2301 cmt. d (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 63–65; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 6.9; Strickler, *supra* note 648, No. 21.

698. *See* LA. CIV. CODE art. 2019 (2023); *id.* art. 2714 (providing for termination of a lease due to destruction of the thing leased without damages or restitution); *id.* 2715 (providing for partial termination of a lease in the case of partial destruction).

retroactive effect, such as when the performance of a contract becomes partially or fully impossible due to a fortuitous event.[699]

Finally, a party to a contract may have dissolved the contract because of the other party's failure to perform.[700] In all of the above cases, recovery of performances made without a valid cause (condictio sine causa) is authorized pursuant to the provisions on nullity[701] and dissolution[702] of contracts. If the defendant is withholding the thing, the plaintiff can also institute a real action for its revendication or a delictual action for conversion and damages, as the case may be.[703] Nevertheless, these same instances also give rise to an action for recovery of a payment not due.[704] Thus, in this category of lack of obligation known as condictio since causa, the action for recovery of a payment not due is available alongside other personal or real actions, but there can be no double recovery. The plaintiff may therefore elect the theory of recovery that best suits her interests.[705] The same result seems to apply in France, although several scholars and some courts have noted that restoration of performances following the rescission or the dissolution of the contract is governed only by the rules of dissolution and nullity.[706]

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699. *See* LA. CIV. CODE arts. 1876–1878 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 260–63; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 16.61–16.63.

700. *See* LA. CIV. CODE arts. 2013–2024 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 36–38 (AM. L. INST. 2011).

701. *See* especially LA. CIV. CODE art. 2033 (2023) (providing for the effects of nullity of contracts).

702. *See* especially LA. CIV. CODE arts. 2018–2024 (2023).

703. *See supra* note 687and *infra* notes 932–36, and accompanying texts.

704. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 158 (explaining the confusion in the French legal tradition that was prompted by merging together the *condictio indebiti* and the *condictio sine causa*).

705. *See* LA. CIV. CODE art. 2299 cmt. c (2023); Morgan's Louisiana & T.R. & S.S. Co. v. Stewart, 119 La. 392, 407–09 (1907); Kramer v. Freeman, 3 So. 2d 609 (La. 1941). *But see* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 13:13, 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20 (noting that Louisiana is a "fact pleading" system requiring no technical form of pleadings—the court knows the law (*jura novit curia*)). LA. CODE CIV. PROC. arts. 854, 862 (2023). *Cf.* PALMER I, *supra* note 214, §§ 2.2–2.4. *See supra* notes 548, 624, 663, 687 and accompanying text; *see also infra* notes 932–36 and accompanying text.

706. *See* Strickler, *supra* note 648, No. 42; CATALA, *supra* note 648, No. 224.

Finally, payment may have been made for an illicit cause. For instance, payment could have been made in performance of an unlawful or immoral contract, such as a gambling contract not authorized by law.[707] Recovery of payments made under such contracts is governed by the law of nullity, which expressly embraces the "clean hands doctrine."[708]

Thus, a performing party who knew or should have known of the defect making the contract absolutely null may not recover her performance, unless she invokes the nullity to withdraw from the contract before its purpose is achieved, or in exceptional cases when recovery is would further the interests of justice.[709] The special provisions on nullity limit any possible recovery under a theory of quasi-contract.

Therefore, restitution of a payment for an illegal cause (*condictio ob turpem causam*) is available via the action for payment of a thing not due only when recovery is permitted under the law of nullity.[710]

In all of the above cases of payments not due objectively, it should be noted that there is no requirement of error either on the part of the person who paid or on the part of the recipient of the payment. Furthermore, the payor's negligence is not a bar to recovery.[711] Here, restitution is grounded on the objective lack of legal

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707. *See* LA. CIV. CODE arts. 1968, 2033 (2023). *Cf.* LA. CIV. CODE art. 2984 (1870). *See also* Prudential Ins. Co. of America v. Harris, 748 F.Supp. 445, 447–48 (M.D. La. 1990) (insurance fraud). On the other hand, a lender who in good faith has lent money to a borrower who uses the money for unlawful gambling may recover the money lent. *See* West v. Loe Pipe Yard et al., 125 So. 2d 469 (La. Ct. App. 3d Cir. 1960).

708. *See* LA. CIV. CODE art. 2033 cmt. c (2023); Strickler, *supra* note 648, Nos 18, 19. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 32, 63 (AM. L. INST. 2011).

709. *See* LA. CIV. CODE art. 2033 (2023); Scalise, Nullity, *supra* note 608, at 682–83.

710. *See* Coleman v. Bossier City, 305 So. 2d 444 (La. 1974); STARCK, *supra* note 30, No. 244–45; Strickler, *supra* note 648, Nos 18 and 19.

711. *See* Eilts v. Twentieth Century Fox TV, 349 So. 3d 1038 (La. Ct. App. 2d Cir. 2022); *cf.* Wall v. HMO Louisiana, Inc., 979 So. 2d 536, 538–39 (La. Ct. App. 5th Cir. 2008).

justification for the payment. Therefore, the subjective element of error is inoperative.[712]

On the other hand, if payment was made knowingly with the express or implied intent to provide a gratuity or to confirm a relatively null juridical act, then no action is allowed for restitution of the payment.[713] Also, restitution is excluded when the payment was made freely to discharge a natural obligation.[714]

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712. *See* LA. CIV. CODE art. 2299 cmt. d (2023) ("a person who *knowingly or through error* has paid or delivered a thing not owed may reclaim it from the person who received it") (emphasis added); Leisure Recreation & Entertainment, Inc. v. First Guaranty Bank, 339 So. 3d 508, 518 (La. 2022) (holding that article 2299 of the Louisiana Civil Code legislatively overruled the common-law "voluntary payment doctrine" that had previously been adopted by Louisiana courts). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. e (AM. L. INST. 2011) (discussing the doctrine of voluntary payment).

713. *See, e.g.*, Allen v. Thigpen, 594 So. 2d 1366, 1371 (La. Ct. App. 3d Cir. 1992). Such gratuitous intent, however, is not presumed. Payments of disputed debts made under protest exclude any such presumption of "voluntary payment." *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 (AM. L. INST. 2011); QUEBEC CIVIL CODE, *supra* note 13, art. 1491. Contemporary French jurisprudence and doctrine also agree that the requirement of error is not necessary in cases of payments that are not due objectively. *See* Strickler, *supra* note 648, Nos 37–41 (discussing the evolution of French doctrine and jurisprudence on this issue). For confirmation of relatively null juridical acts, *see* LA. CIV. CODE art. 1842 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.52–12.57.

714. *See* LA. CIV. CODE arts. 1761, 1762 (2023); LA. CIV. CODE art. 2303 (1870). *See, e.g.*, Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698, 705–06 (La. Ct. App. 1st Cir. 1976). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1302; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 62 (AM. L. INST. 2011). A person "freely" performs a natural obligation when performance was not induced by fraud or duress. Performance by error in principle still constitutes a performance "freely" rendered. *See* LA. CIV. CODE art. 1762 cmt. b (2023). Obligations that are unenforceable due to the accrual of liberative prescription and obligations discharged in bankruptcy are common examples of natural obligations. *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 21–26; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 2.22; PLANIOL & RIPERT VII, *supra* note 157, No. 741; Strickler, *supra* note 648, Nos 2, 12. *Cf.* Gallo v. Gallo, 861 So. 2d 168 (La. 2003) (refusing recovery of child support payments by putative father whose disavowal action was perempted); Coffey v. Coffey, 554 So. 2d 202 (La Ct. App. 2d Cir. 1989) (denying recovery of spousal support payments that were made in the absence of a judicial decree ordering such payments); Roy E. Blossman, *An Unborn Child's Right to Prove Filiation: Malek v. Yehaki-Ford*, 44 LA. L. REV. 1777, 1788–89 (1984).

*ii. Payment Not Due Subjectively—Payment of the Debt of Another*

Payment is not due subjectively when there is an enforceable obligation that is due to the payee (who is the true obligee), but the payor is not the true obligor.[715] In this case, the payor pays the debt of another by mistake.[716] A frequent example is when an insurer by mistake pays a third person who has a valid claim against an insured whose policy was void.[717] The third person is a true obligee of the insured; however, the insurer is not a true obligor because the insured's policy had lapsed.[718] Restitution in this situation is contemplated in revised article 2302 of the Louisiana Civil Code.[719] Because the debt to the payee existed and was enforceable, restitution cannot be granted here on objective factors having to do with the debt. As a matter of fact, objective factors would exclude a claim for restitution of a payment made for the debt of another. With respect to the payor, it would be reasonable to assume that she paid the debt

715. *See* Strickler, *supra* note 648, No. 30. Traditionally, this category also included the case in which the true debtor paid a non-creditor. Modern doctrine treats this case the same as an objectively undue payment. *See supra* note 677.

716. *See* Continental Service Life and Health Ins. Co. v. Grantham, 811 F.2d 273, 275–76 (5th Cir. 1987); DeVillier v. Highland Ins. Co., 389 So. 2d 1133 (La. Ct. App. 3d Cir. 1980); New York Life Ins. Co. v. Gulf States Utilities, Co., 336 So. 2d 320 (La. Ct. App. 1st Cir. 1976); *Mathews v. Louisiana Health Service & Indem. Co.,* 471 So. 2d 1199, 1203 (La. Ct. App. 3d Cir. 1985); CARBONNIER II, *supra* note 45, No. 1219.

717. *See, e.g.*, Pennsylvania Casualty Co. v. Brooks, 24 So. 2d 262, 263 (La. Ct. App. 1st Cir. 1945).

718. Another example is when a bank mistakenly pays a debt of judgment debtor to judgment creditor pursuant to garnishment proceedings, even though the judgment debtor did not have an account with the bank. *See* Pioneer Bank & Trust Co. v. Dean's Copy Products, Inc., 441 So. 2d 1234, 1236–37 (La. Ct. App. 2d Cir. 1983).

719. LA. CIV. CODE art. 2302 (2023). *See* Dauphin v. Lafayette Ins. Co., 817 So. 2d 144, 147–48 (La. Ct. App. 3d Cir. 2002) (explaining the difference between the action for "payment of a thing not due" of article 2299 and the action for "payment of the debt of another person" of article 2302 of the Louisiana Civil Code). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

in order to help the debtor—as a *negotiorum gestor*,[720] a delegate,[721] or a donor[722]—or to secure a subrogation[723] to the rights of the payee.[724] In all these cases, payment is justified, thus excluding any claim of restitution against the payee.[725] This hypothesis as to the motives of the payor is grounded upon the logical proposition that no reasonable person would pay a debt that is not hers without justification.[726] When examining the situation of the payee, it should be remembered that the payee—who is also the true obligee—has no duty to investigate the details of payment.[727] On the contrary, the payee is bound to accept payment from a third person payor, unless

720. *See supra* notes 232, 249 and *see infra* note 838 and accompanying texts.

721. *See* LA. CIV. CODE art. 1886 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 283–85, 292–94; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 10.32; MALAURIE ET AL., *supra* note 30, No. 1043.

722. Payment of the debt of another may be characterized as an indirect liberality made by the payor in favor of the debtor. *See* MALAURIE ET AL., *supra* note 30, No. 1043; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 228–30; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.3.

723. *But see* LA. CIV. CODE art. 1855 (2023) ("Performance rendered by a third person effects subrogation only when so provided by law or by agreement"); LA. CIV. CODE art. 2302 cmt. b (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 228–32; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.3.

724. Under modern French law, there seems to be a presumption that a payment of a debt of another is a service (e.g., management of affairs) or an indirect liberality, unless the payor can prove that she paid in error. *See* TERRÉ ET AL., *supra* note 57, Nos 1292, 1293 (arguing that the language of revised articles 1302-1 and 1302-2 of the French Civil Code support this proposition).

725. *See* CARBONNIER II, *supra* note 45, No. 1219; Strickler, *supra* note 648, Nos 35. If the payor made the payment as a gift to the true debtor, restitution is excluded, unless the donation is revoked, rescinded, or dissolved. On revocation, rescission and dissolution of donations, *see* LORIO & WALLACE, *supra* note 619, §§ 8:12, 9:3, 9:5, 11:1–11:9; CARTER, *supra* note 609, at 116–23.

726. *See* TERRÉ ET AL., *supra* note 57, No. 1292; Strickler, *supra* note 648, No. 31. This principle was expressly stated in the old provisions of the French and Louisiana Civil Codes. *See* CODE NAPOLÉON, *supra* note 10, art. 1235; LA. CIV. CODE art. 2133 (1870) ("Every payment presupposes a debt; what has been paid without having been due, is subject to be reclaimed"). Indeed, a person would logically pay the debt of another as a *negotiorum gestor*, or as an indirect liberality in favor of the true obligor, or in anticipation of a conventional or legal subrogation to the rights of the payee. *See* TERRÉ ET AL., *supra* note 57, No. 1292; PLANIOL & RIPERT VII, *supra* note 157, No. 740; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 26; Strickler, *supra* note 648, No. 35.

727. Even an obligor of limited capacity can validly accept payment. *See* LA. CIV. CODE art. 1858 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 230–32; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.9.

the payee has an interest in a personal performance by the obligor.[728] It is clear, therefore, that restitution of a payment of the debt of another cannot be based on objective factors. Instead, restitution of the payment finds justification in a subjective factor—the error of the payor.[729]

Under revised article 2302, the payor has a claim in restitution if she pays the debt of another in the mistaken belief that she was the actual obligor. When this error is excusable, it seems equitable to protect the party in error, even though payment was tendered to the true obligee. Thus, the error of the payor rebuts the objective presumption that the payor intended to make the payment and gives rise to a claim in restitution against the payee. The same result should follow by even greater force if the payor made the payment under fraud or duress.[730] On the other hand, if the payor knowingly and voluntarily pays the debt of another, a claim of restitution against the payee is excluded. The payor might then seek recovery from the true debtor under a theory of *negotiorum gestio*, enrichment without cause, or subrogation, as the case may be.[731]

To be entitled to recovery from the payee, the payor of the debt of another must be laboring under "the erroneous belief that he was

728. *See* LA. CIV. CODE art. 1855 (2023). Under this provision, the payor is subrogated to the rights of the obligee only by law or agreement. *See* LA. CIV. CODE art. 2302 cmt. b (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 230; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.3.

729. *See* Strickler, *supra* note 648, Nos 30–31.

730. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1302–2 ("One who *by error or under duress* pays the debt of another can bring an action in restitution against the creditor") (emphasis added). For example, the paying non-obligor may have been defrauded by the obligee, the true obligor, or a third person. Alternatively, the non-obligor could have been forced to pay by threat of seizure of her own assets. *See* CARBONNIER II, *supra* note 45, No. 1219; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 27; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 181–83. Although a threat of exercising a lawful right might not constitute duress, it still might give rise to error which allows for restitution of the payment. *See* LA. CIV. CODE art. 1962 (2023); Litvinoff, Vices of Consent, *supra* note 618, at 90–94.

731. *See* CARBONNIER II, *supra* note 45, No. 1219; Strickler, *supra* note 648, No. 35. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

himself the [true] obligor."[732] In other words, the payor must prove that she thought she was bound to pay a debt when in reality the payment was not her responsibility.[733] To make that determination, the general rules of error apply.[734] Thus, the error could be bilateral among the payor and payee or unilateral only on the side of the payor.[735]

The error can be an error of fact or of law.[736] Under the general law of error, only substantial and excusable errors are actionable.[737] An error is substantial when it concerns a cause that affected the party's action.[738] The payor must establish that, had it not been for her error, she would not have made the payment.

In essence, as one authority aptly observes, "[t]he proof of the solvens's error is tantamount to establishing that the performance was involuntary and ought to be returned because it was without

732. *See* LA. CIV. CODE art. 2302 (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1302–2.

733. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 27; Strickler, *supra* note 648, No. 43.

734. *See* LA. CIV. CODE arts. 1948–1952 (2023); Litvinoff, Vices of Consent, *supra* note 618, at 11–49 (discussing the general law of error).

735. *See* 3 RENE DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL No. 92 (1923) [hereinafter DEMOGUE III]. *See also* Litvinoff, Vices of Consent, *supra* note 618, at 34–35.

736. *See* LA. CIV. CODE art. 1950 (2023). *See* PLANIOL & RIPERT VII, *supra* note 157, No. 740; DEMOLOMBE XXXI, *supra* note 63, No. 280; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2832; DEMOGUE III, *supra* note 735, No. 92. An example of error of law can be a misapplication of succession law. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 27; Litvinoff, Vices of Consent, *supra* note 618, at 12–30. Mistaken payments might arise in the context of multiple obligors owing the same debt. A joint obligor of a divisible obligation might demand restitution from the obligee for paying her co-debtor's virile share in the mistaken belief that the debt is solidary. *See* LA. CIV. CODE art. 1788 (2023). A person who paid the debt of another in the mistaken belief that she was a surety may demand restitution from the obligee. *See supra* note 678. On the other hand, reimbursements of payments made by a true solidary obligor or by an inferior creditor to a superior creditor are governed by special provisions of the laws of solidarity and subrogation, as the case may be. *See* LA. CIV. CODE arts. 1800–1806, 1825–1830, 3047–3054 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15, 188–96; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.21, 7.23, 7.24, 7.29, 7.78–7.84, 11.1, 11.8–11.59.

737. *See* Litvinoff, Vices of Consent, *supra* note 618, at 36–38.

738. *See* LA. CIV. CODE art. 1949 (2023); Litvinoff, Vices of Consent, *supra* note 618, at 12–13; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 171–80.

cause."[739] Determination of an excusable error is made according to the circumstances surrounding the parties and the transaction,[740] based on a reasonable person standard.[741] This general rule ought to apply for payments subjectively undue, but with some necessary adaptations concerning both parties. For instance, errors made by professionals, such as financial institutions and insurance companies, might more easily be characterized as inexcusable.[742]

On the other hand, automated payments in complex transactions might seem like a fertile ground for mistaken payments, which could be deemed excusable errors.[743] "Honest" mistakes made in the ordinary course of business are also generally excusable.[744] French scholars take account of these peculiarities and correctly observe that excusability of the error should not be a requirement for the action for restitution of a subjectively undue payment. Instead, the excusable or inexcusable character of the payor's error ought to be juxtaposed with the payee's good or bad faith, and together they should serve as factors for determining the appropriate award of restitution. A similar approach is found in the Third Restatement of Restitution and Unjust Enrichment.[745] This doctrinal approach seems to find support also in the revised French Civil Code.[746]

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739. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 177–78 (footnotes omitted).

740. *See* Litvinoff, Vices of Consent, *supra* note 618, at 36–38.

741. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 178–80.

742. *See* Litvinoff, Vices of Consent, *supra* note 618, at 36; MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 237.

743. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 237.

744. *See* Pioneer Bank & Trust Co. v. Dean's Copy Products, Inc., 441 So. 2d 1234, 1236–37 (La. Ct. App. 2d Cir. 1983); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 178–80.

745. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 237; Strickler, *supra* note 648, No. 36. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (AM. L. INST. 2011) (considering the circumstances of the plaintiff's mistake when determining the extent of relief available with regard to the defense of change of position); *id.* § 52 (considering the recipient's bad faith or misconduct in the ultimate measure of unjust enrichment).

746. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1302-3 ("[Restitution] may be reduced if payment was preceded by a fault"); TERRÉ ET AL., *supra* note 57, No. 1298; Strickler, *supra* note 648, Nos 36, 113–26.

Under the general law of error, the court may also consider whether the party not in error has changed her position in a good-faith reliance on the acts of the party in error.[747] This principle finds expression in the remaining language of revised article 2302 of the Louisiana Civil Code, pursuant to which, "The payment may not be reclaimed to the extent that the obligee, because of the payment, disposed of the instrument or released the securities relating to the claim. In such a case, the person who made the payment has a recourse against the true obligor."[748] This provision derives from the Code Napoléon[749] and is based on equitable considerations.[750]

Indeed, if the obligee—after being paid by the payor and prior to learning of the payor's error—changed her position substantially by impairing her ability to collect[751] or secure[752] her credit-right, the loss must be borne by the payor.[753] As an expression of equity, this

747. *See* LA. CIV. CODE art. 1952 cmt. d (2023); Litvinoff, Vices of Consent, *supra* note 618, at 40–42.

748. LA. CIV. CODE art. 2302 (2012). *See* Pioneer Bank & Trust Co. v. Dean's Copy Products, Inc., 441 So. 2d 1234, 1237 (La. Ct. App. 2d Cir. 1983).

749. *See* CODE NAPOLÉON, *supra* note 10, art. 1377; LA. CIV. CODE art. 2310 (1870).

750. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2829.

751. Physical destruction or cancellation of the instrument evidencing the obligation, might be considered as a tacit remission of the debt. Surrender of the instrument to the obligor might give rise to a presumption of remission or it might be considered as a receipt of full payment. *See* LA. CIV. CODE art. 1889 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 302–03; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 18.2, 18.3. The obligee "disposes of her title" also when she allows the prescriptive period to lapse without bringing suit against the true obligor. In any event, disposal of the instrument impairs the obligee's ability to prove her claim. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2829, 2829i, 2830; PLANIOL & RIPERT VII, *supra* note 157, No. 742.

752. Releasing or failing to maintain the real or personal securities given for the performance of the obligation does not amount to a remission of the debt. *See* LA. CIV. CODE arts. 1891, 1892 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 299–303; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 18.4, 18.11–18.13. Nevertheless, it impairs substantially the obligee's ability to collect the debt from the true obligor. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2830; PLANIOL & RIPERT VII, *supra* note 157, No. 742.

753. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2828. However, a fortuitous impairment of the obligee's credit-right—such as the fortuitous destruction of the object of a real security, insolvency of a surety, or the fortuitous loss of the instrument—should not be imputed to the payor. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 742.

rule only operates if the obligee is in good faith, that is, if she did not know of the payor's error when she changed her position.[754] When that is the case, the payor cannot demand full restitution from the obligee. Instead, the payor must now seek recourse—for the full amount or for any amount not collected from the obligee—against the true obligor.[755] French doctrine steadily accepts that the appropriate recourse to pursue in this circumstance is an action against the true debtor for enrichment without cause (*actio de in rem verso*).[756]

This view seems correct. The payor in this case cannot possibly have an action against the true obligor in *negotiorum gestio* or subrogation. To have these actions presupposes that the payor voluntarily paid the obligee, which would exclude any claim for restitution against the obligee by an action under article 2302 of the Louisiana Civil Code. The true obligor must, therefore, compensate the payor to the extent of the obligor's enrichment or the payor's impoverishment, whichever is less.[757]

*b. Restoration of Undue Payments*

When the payment is not due in accordance with the above requirements, the payor has an action against the payee for recovery of the undue payment. If the action is successful, the court orders restoration of a thing or of its value that belongs to the plaintiff, as if the defendant had borrowed the thing. Thus, the payee's obligation to restore the undue payment is determined according to

754. If the obligee is in bad faith, the exception does not apply. Thus, if the payor can establish the obligee's bad faith, then the obligee is bound to make restitution to the payor and must seek to enforce the true obligor's debt. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2829. On the distinction of payees in good or in bad faith, *see infra* note 760.

755. *See* LA. CIV. CODE art. 2302 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

756. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4. *Cf.* LA. CIV. CODE art. 2298 (2023).

757. *See* LA. CIV. CODE art. 2298 (2023). *But see id.* art. 2302 cmt. c ("When the payment cannot be reclaimed from the obligee, the person who made the payment has 'a recourse against the true obligor,' that is, *he can recover from whatever he paid to the obligee*") (emphasis added).

the nature of the underlying object.

If the thing is an immovable or a nonconsumable movable, then the payee's obligation to restore the thing is likened to that of a borrower on a nonconsumable (*commodatum*).[758] Restoration must be made in kind (*in natura*) if the thing still exists.[759] If the thing has been damaged, destroyed or not returned, then the obligation of the payee is determined according to her good or bad faith.[760] A payee in good faith must restore the value of the thing if the loss was caused by her fault.[761] If the loss was not caused by her fault, a payee in good faith is obligated to return anything that remains of the thing, including any actions she might have or sums she received on occasion of the loss of the thing.[762] A payee in bad faith is liable to pay the value of the thing even if the loss occurred by a fortuitous event.[763] A payee in bad faith is also bound to restore the fruits and

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758. *See* LA. CIV. CODE art. 2891 (2023).

759. *See id.* art. 2304; Kramer v. Freeman, 3 So. 2d 609 (La. 1941); PLANIOL & RIPERT VII, *supra* note 157, No. 746. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352; QUEBEC CIVIL CODE, *supra* note 13, art. 1700.

760. A payee is in good faith when she honestly believes that the payment was due to her, or she had no reason to believe that the payment was not due. Good faith of the payee is presumed. A payee may receive the thing in good faith, but may fall out of good faith prospectively when she discovers the truth or when she should know that the payment was undue. A "bad faith payee" is a payee not in good faith according to the above definition, regardless of malicious intent of causing damage. *See* Broussard v. Friedman, 40 So. 2d 669 (La. Ct. App. 1st Cir. 1949); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 257. *Cf.* LA. CIV. CODE art. 487 (2023). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 218–19, 221, 229; Strickler, *supra* note 648, No. 103. The universal successors of the payee continue the payee's good or bad faith. *See* Strickler, *supra* note 648, No. 104.

761. *See* LA. CIV. CODE art. 2304 cmt. b (2023); Kramer v. Freeman, 3 So. 2d 609 (La. 1941); River Cities Const. Co., Inc. v. Ray, 428 So. 2d 1060 (La. Ct. App. 1st Cir. 1983); PLANIOL & RIPERT VII, *supra* note 157, No. 746. The value is estimated as of the day that restitution must be made. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352; QUEBEC CIVIL CODE, *supra* note 13, art. 1700.

762. *See* LA. CIV. CODE art. 2304 cmt. b (2023); River Cities Const. Co., Inc. v. Ray, 428 So. 2d 1060 (La. Ct. App. 1st Cir. 1983); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 256; PLANIOL & RIPERT VII, *supra* note 157, No. 746; DEMOLOMBE XXXI, *supra* note 63, Nos 365–68.

763. *See* LA. CIV. CODE art. 2304 (2023); Kramer v. Freeman, 3 So. 2d 609 (La. 1941); River Cities Const. Co., Inc. v. Ray, 428 So. 2d 1060 (La. Ct. App. 1st Cir. 1983); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 257. However, the payee in bad faith is released from her obligation when the fortuitous event would have destroyed the object even in the hands of the payor. *See* LA. CIV. CODE arts. 2304 cmt. b, 1874 (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 746;

products of the thing as of the day she was in bad faith.[764] Regardless of her good or bad faith, a payee who restores the thing in kind is entitled to reimbursement for her necessary expenses.[765]

A special rule governs the payee's liability when the payee alienates the thing by onerous or gratuitous title.[766] In such a case, a payee in good faith is bound to restore whatever she received from the alienation; if the alienation was gratuitous, she owes nothing.[767]

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DEMOLOMBE XXXI, *supra* note 63, Nos 369–72; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 257–63; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 16.47. *But see also* DEMOLOMBE XXXI, *supra* note 63, Nos 372–73 (arguing that a payee who received payment in good faith and fell out of good faith later is treated as a bad faith payee from that time, except that she is not responsible for a fortuitous loss of the thing).

764. *See* LA. CIV. CODE art. 2303 (2023); *See* Julien v. Wayne, 415 So. 2d 540, 543 (La. Ct. App. 1st Cir. 1982). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-3; QUEBEC CIVIL CODE, *supra* note 13, art. 1704. Conversely, a payee in good faith is only liable for fruits and products as of the time the suit is brought. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-7; PLANIOL & RIPERT VII, *supra* note 157, No. 746. Fruits include natural as well as civil fruits (e.g., interest on money). *See* LA. CIV. CODE arts. 488, 551 (2023).

765. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 231 (explaining that former article 2314 of the Louisiana Civil Code of 1870 was repealed in 1979 because its subject matter was covered by revised articles 527 and 528 of the Louisiana Civil Code); LA. CIV. CODE arts. 527–529, 2899 (2023); LA. CIV. CODE art. 2314 (1870). *Cf.* CODE NAPOLÉON, *supra* note 10, art. 1381; FRENCH CIVIL CODE, *supra* note 11, art. 1352-5; QUEBEC CIVIL CODE, *supra* note 13, art. 1703. *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 746; DEMOLOMBE XXXI, *supra* note 63, No. 378; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2847; DEMOGUE III, *supra* note 735, No. 123; LAURENT XX, *supra* note 94, No. 382. A payee in good faith, is also entitled to reimbursement of useful expenses (but not luxurious expenses) that improved the thing, but only up to the added value of the thing or the amount of expenses, whichever is less. To deny this right of the payee would result in unjust enrichment of the payor. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 232; LA. CIV. CODE art. 528 (2023). In French law, payees in bad faith are also entitled to reimbursement for useful expenses. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 381–86; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2847. Large scale improvements, on the other hand, are governed by the law of accession. *See* LA. CIV. CODE arts. 487, 496, 497 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:21, 11:22; DEMOLOMBE XXXI, *supra* note 63, Nos 387. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 26 & 27 (AM. L. INST. 2011).

766. *See* LA. CIV. CODE art. 2305 & cmt. b (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-2; QUEBEC CIVIL CODE, *supra* note 13, art. 1701.

767. *See* LA. CIV. CODE art. 2305 cmt. d (2023); Munson v. Martin, 192 So. 2d 126, 129 (La. 1966); Gaty v. Babers, 32 La. Ann. 1091 (1880); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 256; PLANIOL & RIPERT VII, *supra* note 157, No. 746.

A payee in bad faith is bound to restore the value of the thing or the sum that she received for the alienation, if that sum is greater.[768] In all of the above cases, the payor, as owner of the thing, may also reclaim it by a real action.[769] Further, the payor may seek damages by instituting a delictual action where appropriate.[770]

Two substantive observations can be drawn from the rules discussed above. First, the rules consider the good-faith payee's change of position,[771] an approach that is also followed in other civil-law[772] and common-law systems.[773] Second, a payee might be compelled to disgorge her profits, particularly in the case of alienation of the thing for a price that exceeds the value of the thing,

768. Thus, a payee in bad faith who donated the thing is liable for its value. *See* LA. CIV. CODE art. 2305 cmt. d (2023); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 257; PLANIOL & RIPERT VII, *supra* note 157, No. 746; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2843; LAURENT XX, *supra* note 94, No. 376.

769. *See* LA. CIV. CODE arts. 2304 cmt. c, 2305 cmt. c (2023). *Cf. id.* arts. 2021, 2035.

770. *See* LA. CIV. CODE art. 2304 cmt. d (2023).

771. In civil and common-law systems, it is a defense to an action of unjust enrichment that the defendant is no longer enriched. *See* James Gordley, *Restitution Without Enrichment? Change of Position and Wegfall der Bereicherung*, *in* UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE 227 (David Johnston & Reinhard Zimmermann eds., 2002); BURROWS, *supra* note 103, at 523–568.

772. The defense of change of position (or disenrichment) appears in the German and Greek civil codes in the context of measuring the surviving enrichment for which the defendant is liable. *See* GERMAN CIVIL CODE, *supra* note 87, §§ 818–822; GREEK CIVIL CODE, *supra* note 88, arts. 909–913. *See also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65, note a (AM. L. INST. 2011). This defense has been the topic of intense debate among German and Greek scholars, who argue that the scope of the defense is too broad. *See* Thomas Krebs, *Disenrichment in German Law* 437, 438–39, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020). It is recalled, however, that enrichment without cause is a broader concept in Germany and Greece, encompassing also the payment of a thing not due (*condictio indebiti).* In France and Louisiana, the defense of change of position is also available to a good faith defendant in a case of enrichment without cause under the "double ceiling rule." *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1303-4. *See infra* notes 902–07 and accompanying text.

773. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (AM. L. INST. 2011); DOBBS & ROBERTS, *supra* note 6, § 4.5; Graham Virgo, *A Taxonomy of Defences in Restitution* 398, 403–04, 412–13, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020); Ross Grantham, *Change of Position-Based Defences* 418–36, *in id*.

and regardless of her good or bad faith.[774]

Thus, to paraphrase a proverbial common-law hypothetical,[775] if defendant, in good or in bad faith and without being so entitled, received plaintiff's watch, valued at $30, and defendant is able to sell the watch for $40, then plaintiff can reclaim defendant's gain ($40) under an action for payment of a thing not due.[776]

If the thing is a sum of money or other consumable, then the payee is responsible for returning sums or things of equal value.[777] Here, the obligation of the payee resembles that of a borrower of a consumable (*mutuum*).[778] The risk is on the payee, who is responsible regardless of any change of position, including fortuitous events.[779] A payee in bad faith is also responsible for

774. *See* LA. CIV. CODE art. 2305 (2023) ("A person who in *good faith alienated* a thing not owed to him is only bound to *restore whatever he obtained from the alienation*. If he received the thing in *bad faith,* he owes, *in addition*, damages to the person to whom restoration is due.") (emphasis added). *Cf.* LA. CIV. CODE article 2313 (1870); CODE NAPOLÉON, *supra* note 10, art. 1380. *See* DEMOLOMBE XXXI, *supra* note 63, No. 404 (observing that a payee in good or in bad faith who alienated the thing for a price that exceeds the value of the thing must restore that higher amount). In Louisiana, a remedy of disgorgement of profits may also be available in the law of mandate and *negotiorum gestio*. *See supra* note 416. Disgorgement of profits, however, is not an available remedy in cases of enrichment without cause. *See infra* note 908–09 and accompanying text. *But see also infra* note 919 and accompanying text.

775. *See* DOBBS & ROBERTS, *supra* note 6, § 4.1(1), at 371 (the hypothetical of the stolen watch— if defendant steals plaintiff's watch, which was valued at $30, and defendant is able to sell the watch for $40, then plaintiff can reclaim defendant's gain ($40) as a disgorgement of profit). As mentioned, the Louisiana action for payment of a thing not due is also available in cases of conversion. *See supra* note 687.

776. *See* LA. CIV. CODE art 2305 & cmt. d (2023) (explaining that a payee in good faith who alienated the thing is only liable for restoring the price whereas a payee in bad faith is liable for restoring the price or the value of the thing, whichever is higher). *See also supra* note 774.

777. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 746. Special rules of recovery exclude the application of the civil code provisions. *See, e.g.*, Taylor v. Woodpecker Corp., 562 So. 2d 888, 892 (La. 1990) (recovery of oil and gas proceeds by unleased mineral interest owners).

778. *See* LA. CIV. CODE art. 2904 (2023).

779. *See* LITVINOFF, OBLIGATIONS II, *supra* note 620, § 256; PLANIOL & RIPERT VII, *supra* note 157, No. 746; DEMOLOMBE XXXI, *supra* note 63, No. 391; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2845. Thus, a collection agency is liable to make restitution of overpayments it received from withholding debtor's salary, even though it had disbursed the overpaid funds to the debtor. *See* Bossier Parish School Board v. Pioneer Credit Recovery, Inc., 161

interest as of the date she was in bad faith.[780]

Under the revised French Civil Code, the payee's obligation to give restoration may be reduced if payment was preceded by the payor's fault.[781] Thus, French courts have reduced, or even excluded, awards for restoration of payments that were made by an inexcusable error of the payor—usually a financial institution or other professional held to high standards—attributed to the payor's gross negligence.[782] Louisiana courts have also held on occasion that inexcusable errors committed by professionals might limit or bar recovery of undue payments.[783] The Louisiana Supreme Court, on

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So. 3d 1007 (La. Ct. App. 2d Cir. 2015). On the other hand, where a payee of funds pursuant to a judgment disposes of a portion of the funds to pay her attorney, the payor must pursue the payee and may not recover the payment in the hands of the attorney once the judgment is annulled or reversed. *See* Louisiana Health Service & Indem. Co. v. Cole, 418 So. 2d 1357, 1359–60 (La. Ct. App. 2d Cir. 1982); City Financial Corp. v. Bonnie, 762 So. 2d 167, 169–70 (La. Ct. App. 1st Cir. 2000). The defendant's change of position would be considered in the case of enrichment without cause, if that remedy were available. *See* LA. CIV. CODE art. 2298 (2023). Although, in principle, the obligation to restore an undue payment does not take account of the payee's enrichment, there seems to be no convincing reason why a good faith payee is liberated when she donates an immovable, whereas she is still bound if she spends money for a serious purpose (e.g., health related expenses). *See also* DEMOGUE III, *supra* note 735, No. 115. In Germany and in Greece, a change of position of a payee in good faith can, under certain circumstances, release the payee from the obligation to restore money received. *See* STATHOPOULOS, OBLIGATIONS *supra* note 133, at 1133–34 (explaining that a payee in good faith is not liable for restitution if she spent the money in good faith, that is, when she did not know or should have known that the payment was undue, and before she was served with an action for restitution). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. a, b, c (AM. L. INST. 2011).

780. *See* LA. CIV. CODE art. 2303 (2023). Conversely, a payee in good faith is only liable for fruits and products as of the time the suit is brought. *See* Julien v. Wayne, 415 So. 2d 540, 542 (La. Ct. App. 1st Cir. 1982); Futorian Corp. v. Marx, 420 So. 2d 702, 704 (La. Ct. App. 4th Cir. 1982); Hebert v. Jeffrey, 655 So. 2d 353, 355 (La. Ct. App. 1st Cir. 1995); Matthews v. Sun Exploration & Prod. Co., 521 So. 2d 1192, 1198–99 (La. Ct. App. 2d Cir. 1988); Festermaker & Assocs. v. Regard, 471 So. 2d 1137, 1140 (La. Ct. App. 3d Cir. 1985); Shelter Ins. Co. v. Cruse, 446 So. 2d 893, 895 (La. Ct. App. 1st Cir. 1984). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-7; PLANIOL & RIPERT VII, *supra* note 157, No. 746.

781. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1302-3; Strickler, *supra* note 648, Nos 113–115.

782. For cases, *see* Strickler, *supra* note 648, Nos 116–126.

783. *See* Metropolitan Life Ins. Co. v. Mundy, 167 So. 894 (La. Ct. App. 1st Cir. 1936); Pennsylvania Casualty Co. v. Brooks, 24 So. 2d 262, 263 (La. Ct. App. 1st Cir. 1945).

the other hand, recently held that "an insurer's erroneous, or even negligent, payment of a claim to its insured does not bar the insurer from later recouping the amount paid."[784] A closer look at this jurisprudence, however, reveals that this recent Supreme Court decision and other decisions that allow recovery regardless of the payor's error or negligence involved objectively undue payments (under revised article 2299 of the Louisiana Civil Code).[785]

Indeed, when payment is not due objectively—e.g., payment of a nonexistent debt—the error of the payor, even if inexcusable, is not a requirement for recovery.[786] It is otherwise, however, when payment is not due subjectively, that is, when the payor erroneously paid the debt of another (under article 2302 of the Louisiana Civil Code).[787] When that is the case, the payor's error is a prerequisite to recovery. Thus, the nature of the payor's error as excusable or inexcusable ought to be taken into account when determining the amount of recovery under article 2302.[788] Another example of a defense to

784. Forvendel v. State Farm Mutual Automobile Ins. Co., 251 So. 3d 362, 366 (La. 2018) (quoting with approval American Intern. Specialty Lines Ins. Co. v. Canal Indemnity So., 352 F.3d 254 (5th Cir. 2003)).

785. *See, e.g.*, Forvendel v. State Farm Mutual Automobile Ins. Co., 251 So. 3d 362, 366 (La. 2018) (finding that an insurer does not, by virtue of making a payment on a claim, waive the right to assert coverage defenses to a subsequent claim); Dear v. Blue Cross of Louisiana, 511 So. 2d 73, 74–76 (La. Ct. App. 3d Cir. 1987) (holding than an insurer's erroneous payment of medical expenses that were excluded from coverage did not bar the insurer from recovering the amounts paid); Central Sur. & Ins. Corp. v. Corbello, 74 So. 2d 341, 344 (La. Ct. App. 1st Cir. 1954) (allowing insurer to recover erroneous payments made after the policy had expired).

786. *See* Eilts v. Twentieth Century Fox TV, 349 So. 3d 1038 (La. Ct. App. 2d Cir. 2022); LA. CIV. CODE art. 2299 cmt. d (2023) ("Under [this provision], a person who *knowingly or through error* has paid or delivered a thing not owed may reclaim it from the person who received it); Forvendel v. State Farm Mutual Automobile Ins. Co., 251 So. 3d 362, 366 (La. 2018). Thus, negligence per se is not a bar to recovery of an *objectively undue payment* under article 2299 of the Louisiana Civil Code. *Cf.* Wall v. HMO Louisiana, Inc., 979 So. 2d 536, 538–39 (La. Ct. App. 5th Cir. 2008).

787. *See* Dauphin v. Lafayette Ins. Co., 817 So. 2d 144, 147–48 (La. Ct. App. 3d Cir. 2002) (explaining the difference between the action for "payment of a thing not due" of article 2299 and the action for "payment of the debt of another person" of article 2302 of the Louisiana Civil Code).

788. If examined more carefully, some of the decisions that have barred recovery due to the payor's inexcusable error actually involved payments not due subjectively (now governed by revised article 2302 of the Louisiana Civil Code). *See,*

recovery—especially in cases of payment made in performance of an illegal or illicit contract—is when the payor has "unclean hands," that is, when she knew or should have known of the defect that makes the contract absolutely null.[789]

The more specific provisions on nullity apply in this case.[790] The obligation to restore an undue payment involves the payor and the payee.[791] The plaintiff in the action for restoration of the undue payment is the payor, that is, the person who made the payment or the person in whose name payment was made, if the payment was made by a mandatary or other representative.[792] Thus, a true obligee does not have standing to maintain an action for restoration against

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*e.g.*, Pennsylvania Casualty Co. v. Brooks, 24 So. 2d 262, 263 (La. Ct. App. 1st Cir. 1945) (dismissing insurer's action for recovery of money paid erroneously by insurer to third party to whom the insured was actually indebted). *See also* Continental Oil Co. v. Jones, 191 So. 2d 895, 897–98 (La. Ct. App. 1st Cir. 1966) (distinguishing Pennsylvania Casualty Co. v. Brooks, as a case involving the erroneous payment to a third-party creditor). Naturally, the payor may still recover the payment from the true debtor under a theory of enrichment without cause. *See* LA. CIV. CODE arts. 2302, 2298 (2023).

789. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 214–17; LA. CIV. CODE art. 2033 cmt. c (2023); West v. Lee Pipe Yard, 125 So. 2d 469 (La. Ct. App. 3d Cir. 1960) (refusing recovery of money lent for illegal gambling); Lagarde v. Dabon, 98 So. 744 (La. 1924) (refusing to grant restitution of performances under an immoral contract); A Better Place, Inc. v. Giani Inv. Co., 445 So. 2d 728, 732 (La. 1984) (explaining the "clean hands doctrine").

790. *See* LA. CIV. CODE art. 2033 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. L. INST. 2011).

791. *See* Franklin State Bank & Trust Co. v. Crop Production Services, Inc., 2018 WL 3244105 (W.D. La. Jul. 3, 2018). Third parties to whom the payment is traced may be liable in tort or enrichment without cause. *See* Soileau v. ABC Ins. Co., 844 So. 2d 108, 110–11 (La. Ct. App. 3d Cir. 2003).

792. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 744; DEMOLOMBE XXXI, *supra* note 63, Nos 245–246; Strickler, *supra* note 648, No. 54. A *negotiorum gestor* who made an undue payment on behalf of the owner can seek restoration herself, unless the owner has ratified the manager's acts, in which case the owner has the action whereas the *gestor* can claim reimbursement from the owner. *See* DEMOLOMBE XXXI, *supra* note 63, No. 250; Strickler, *supra* note 648, No. 57. The right to bring the action can also be assigned to a conventional subrogee, such as in the case of the insurer who indemnified the payor-insured for the undue payment and is now subrogated to the payor's rights against the payee. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 744; Strickler, *supra* note 648, No. 54. The payor's creditors can also claim restoration by way of the oblique action. *See* LA. CIV. CODE art. 2044 (2023). *See* PLANIOL & RIPERT VII, *supra* note 157, No. 744; Strickler, *supra* note 648, No. 55. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 47, 48 (AM. L. INST. 2011).

another obligee who was wrongly paid by the obligor.[793] The defendant is the person who received the payment as well as the person on whose behalf the payment was received.[794] Proof of the payment, its undue nature, and the payor's error, when required, rests with the plaintiff.[795] Actions for the recovery of a payment not due prescribe in ten years.[796]

*2. Enrichment Without Cause (*Actio de in Rem Verso*)*

The action for enrichment without cause (*actio de in rem verso*) was originally recognized and crafted by the French and Louisiana courts applying general principles of law.[797] This jurisprudence was

793. *See* Chrysler Credit Corp. v. Whitney Nat'l Bank, 1993 WL 70050, at *5 (E.D. La. Mar. 4, 1993); Nelson v. Young, 223 So. 2d 218, 223 (La. Ct. App. 2d Cir. 1969); Barton Land Co. v. Dutton, 541 So. 2d 382, 383–85 (La. Ct. App. 2d Cir. 1989). In such a case, however, the true obligee may have recourse against the payee under an action for enrichment without cause (*actio de in rem verso*) if the requirements for this action are met. *See* Barton, at 385.

794. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 745; Strickler, *supra* note 648, No. 58. If payment was received by a mandatary or other representative, the principal is the proper defendant. *See* Strickler, *supra* note 648, No. 61. The obligation to make restoration is heritable. *See* Strickler, *supra* note 648, No. 60. Nevertheless, the defendant cannot be the person on whose behalf the payment was made. Thus, a physician who was paid by the insurer to provide medical services that were not covered is the proper party defendant in the insurer's action for payment of a thing not due. The insured patient, on the other hand, can only be sued for enrichment without cause. *See* Strickler, *supra* note 648, No. 64.

795. *See* Julien v. Wayne, 415 So. 2d 540, 543 (La. Ct. App. 1st Cir. 1982); Strickler, *supra* note 648, Nos 96–100.

796. *See* LA. CIV. CODE art. 3499 (2023); State v. Pineville, 403 So. 2d 49, 55 (La. 1981); Julien v. Wayne, 415 So. 2d 540, 542–43 (La. Ct. App. 1st Cir. 1982). For the problem of prescription in the case of "election of remedies," *see* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20.

797. In France, the *actio de in rem verso* was introduced in the seminal decision of the Cour de cassation in the *Boudier* case. *See supra* note 542. The Louisiana Supreme Court recognized the *actio de in rem verso* in the landmark cases Minyard v. Curtis Prod., Inc., 205 So. 2d 422 (La. 1967) and Edmonston v. A-Second Mortgage Co., 289 So. 2d 116 (La. 1974) (basing the action on former articles 21 and 1965 of the Louisiana Civil Code of 1870 – revised articles 4 and 2055). LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 344, 355–60; LA. CIV. CODE art. 2298 cmts. a and c (2023).

codified fairly recently in France[798] and Louisiana.[799] Generally, liability for enrichment without cause requires a displacement of wealth in favor of the enriched obligor at the expense of the impoverished obligee. Moreover, this displacement is not justified by the will of the parties or by operation of law.[800] The remedy provided is subsidiary. It is intended to correct this patrimonial imbalance pursuant to the moral directives of equity and commutative justice.[801] To explore the contours of enrichment without cause, one must first refer to its legal foundation, residual character, and purpose.

Scholars have debated the legal foundation of the theory of enrichment without cause.[802] The first doctrinal approach considered enrichment without cause closer to tort—a form of quasi-delict generating legal obligations on the basis of the acts of the enriched obligor.[803] This approach is historically accurate, especially with regard to the legal nature of the Roman *condictio*.[804] Nevertheless, the

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798. *Enrichissement injustifié. See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4 (rev. 2016); QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496 (rev. 1991).

799. *See* LA. CIV. CODE. art. 2298 (rev. 1995).

800. *See* Scott v. Wesley, 589 So. 2d 26, 27 (La. Ct. App. 1st Cir. 1991) ("The root principle of an unjustified enrichment. . .is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit for which he has not paid."); Tate II, *supra* note 493, at 459.

801. *See* 9 CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS No. 578 (Etienne Bartin ed., 5th ed. 1897-1923) (introducing the doctrine of *actio de in rem verso*); AUBRY & RAU VI, *supra* note 157, Nos 314–24; GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 48, at 10–11, 30–31.

802. *See* LITVINOFF, OBLIGATIONS II, *supra* note 620, § 259.

803. *See, e.g.*, PLANIOL II.1, *supra* note 100, No. 937; Saúl Litvinoff, *Work of the Appellate Courts--1976-1968, Obligations*, 29 LA. L. REV. 200, 207–08 (1969); Georges Ripert & Michel Teisseire, *Essai d'une théorie de l'enrichissement sans cause*, RTDCIV 1904, p. 727 (arguing that the legal basis for unjustified enrichment can be found in the theory of risks); Stephen Smith, *Unjust Enrichment: Nearer to Tort than Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 181 (Robert Chambers et al. eds., 2009); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403, 403–04 (1995) ("The law of unjustified enrichment, in a way, is the mirror image of the law of delict").

804. *See* STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 4–6 (explaining that the early *condictiones* were focused solely on the act of the defendant and sanctioned an illicit misappropriation of wealth).

quasi-delictual approach focuses too much on the subjective element of the obligor's behavior, thus failing to account for cases in which the enriched obligor must make restitution regardless of her capacity or fault.[805] The second doctrinal approach places enrichment without cause closer to contract—a quasi-contract generating obligations as if there were a fictitious contract between enriched obligor and impoverished obligee. This approach ultimately prevailed in civil law doctrine[806] and jurisprudence.[807] Contemporary scholars, however, take issue with the misleading term "quasi-contract"[808] and argue that unjust enrichment is an autonomous source of obligations—a third pillar alongside contract and delict.[809] In civil-law language,

805. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 752; PLANIOL II.1, *supra* note 100, No. 937; 9*bis* CHARLES BEUDANT & PAUL LEREBOURS-PIGEONNIÈRE, COURS DE DROIT FRANÇAIS No. 1759 (R. Rodière ed., 2d ed. 1951-52); RIPERT & BOULANGER II, *supra* note 169, No. 1272; MAZEAUD ET AL., *supra* note 85, No. 711 (all arguing that admissibility of the *actio de in rem verso* is independent of the capacity or incapacity of the defendant).

806. Enrichment without cause has been compared to an abnormal *negotiorum gestio*, and an extension of the action for recovery of a payment of a thing not due. *See* Nicholas I, *supra* note 190, at 618–21 (discussing the development of a theory of abnormal *negotiorum gestio* (*negotiorum gestio utilis*) in the French jurisprudence); Nicholas II, *supra* note 190, at 49–62 (discussing the foundation of enrichment without cause on the basis of several quasi-contractual theories in the early Louisiana jurisprudence); LITVINOFF, OBLIGATIONS I, *supra* note 514, § 199, at 360 (discussing real contracts—contracts *re*, such as the loan contract—and observing that "the idea of unjust enrichment lies at the heart of these contractual figures"). *See supra* note 190.

807. From the recent Louisiana jurisprudence, *See, e.g.*, Canal/Claiborne, LTD v. Stonehedge Dev., L.L.C., 156 So. 3d 627, 633–34 (La. 2014) ("That a claim of enrichment without cause under LA. CIV. CODE art. 2298 is a quasi-contractual claim is well-settled in our jurisprudence."); Arc Industries, L.L.C. v. Nungesser, 970 So. 2d 690, 694–95 (La. Ct. App. 3d Cir. 2007) (holding that a quasi-contractual claim of enrichment without cause is sufficient to support the application of LA. CODE CIV. PROC. art. 76.1 on venue); Our Lady of the Lake Reg'l Med. Ctr. v. Helms, 754 So. 2d 1049, 1052 (La. Ct. App. 1st Cir. 1999), observing that:

> there is a general concept of quasi contractual obligations; it is a concept based upon the principle that where there is an unjust enrichment of one at the expense or impoverishment of another, then the value of that enrichment or, in some cases, the amount of the impoverishment must be restituted.

808. *See, e.g.*, LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 9–15.

809. *See* BIRKS, *supra* note 6, at 3–19 (referring to unjust enrichment as the *tertium quid*). *See also* Canal/Claiborne, Ltd. v. Stonehedge Development, LLC, 156 So. 3d 627, 633–34 (La. 2014) (holding that a constitutional waiver of sovereign immunity from suits in contract and tort does not include the quasi-contractual claim of unjust enrichment).

this means that enrichment without cause, payment of a thing not due, and *negotiorum gestio* ought to be characterized as separate licit juridical facts.[810] As discussed earlier in Part I of this Article, the only usefulness of the term "quasi-contract" in the civil law is merely descriptive—to group those licit juridical facts that impose an obligation to compensate for a benefit that was received without cause.

The law of enrichment without cause is general and residual (*lex generalis*).[811] Courts steadily characterize enrichment without cause as a "gap-filling" device of equitable origin, having exceptional application, pursuant to a judicially crafted principle of substantive subsidiarity.[812] Expression of the general principle of unjust enrichment is found in more specific provisions as well as the more general rule on enrichment without cause. Therefore, application of the provision of revised article 2298 of the Louisiana Civil Code must yield to more specific rules on cause, nullity, and dissolution of juridical acts, as well as to legal rules on delictual or quasi-delictual liability and other special rules governing the restoration of benefits received.[813]

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810. *See supra* note 122–30 and accompanying text. Thus, *negotiorum gestio* is based on general principles of unjust enrichment in the broader sense, but it should not be confused with the specific actions for unjust enrichment (*condictio indebiti* and *actio de in rem verso*). *See supra* notes 183–91 and accompanying text.

811. Under general principles of statutory interpretation, a posterior general law does not abrogate the provisions of a prior special law (*lex posterior generalis non derogat priori speciali*). *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 239. Furthermore, exceptional provisions are not susceptible of expansive interpretation or analogous application (*exceptio est strictissimae interpretationis*). *See id.* at 258.

812. *See* Walters v. MedSouth Record Mgmt., L.L.C., 38 So. 3d 243, 244 (La. 2010) (citing Mouton v. State, 525 So. 2d 1136, 1142 (La. Ct. App. 1st Cir. 1988)); Bd. of Sup'rs of La. State Univ. v. La. Agric. Fin. Auth., 984 So. 2d 72 (La. Ct. App. 1st Cir. 2008); *see also* Carriere v. Bank of La., 702 So. 2d 648, 657 (La. 1996); Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 19 (La. Ct. App. 1st Cir. 2001) ("[W]here there is a rule of law directed to the issue, an action must not be allowed to defeat the purpose of said rule. . .Stated differently, unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided").

813. For example, claims of reimbursement for improvements to land made by adverse possessors are governed primarily by the special rules on accession. *See*

Finally, enrichment without cause binds the enriched obligor to make restitution for the unjustified enrichment she received. The enriched obligor must return the benefit she received—or its traceable product—which corresponds to an impoverishment of the obligee.[814] This observation necessarily means that the object of the enrichment has exited the obligee's patrimony and is now part of the obligor's patrimony.[815]

This particular consequence of restitution ought to be distinguished from restoration of a thing or benefit already belonging to the "obligee." When a benefit or a particular thing is merely withheld by another, it is still owned by the "obligee" in question, who can reclaim it from the "obligor" by bringing a real action.[816] Especially in the case of a null or failed juridical act, the provisions on dissolution, nullity, and payment of a thing not due govern the restoration of the parties' performances.[817]

These general principles should inform the understanding and proper application of the remedy of restitution for enrichment without cause. A brief overview of the requirements and effects of enrichment without cause follows.[818]

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LA. CIV. CODE arts. 487, 496, 497 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 11:22; Symeon Symeonides, *Developments in the Law: 1983–84, Property*, 45 LA. L. REV. 541, 542–43 (1984). Furthermore, valid claims of reimbursement based on *negotiorum gestio* or payment of a thing not due exclude recovery under a theory of enrichment without cause. *See* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122–23 (La. 1974); Symeonides & Martin, *supra* note 23, at 100, 151; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 411–27. Finally, special statutes that impose a specific liability for unjust enrichment, such as the Louisiana Uniform Trade Secrets Act (LA. REV. STAT. § 51:1433 (2023)), are not displaced by the more general remedy for enrichment without cause in the Louisiana Civil Code. *See* Reingold v. Swiftships, 210 F.3d 320, 321–22 (5th Cir. 2000).

814. *See* PLANIOL II.1, *supra* note 100, No. 938A.

815. *See* Nicholas I, *supra* note 190, at 607–08.

816. *See* LA. CIV. CODE art. 526 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:7, 13:7

817. *See* LA. CIV. CODE arts. 2018–2021, 2033–2035, 2299–2305 (2023); *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 230, § 15:3 n.15; LITVINOFF, OBLIGATIONS II, *supra* note 620, § 271.

818. A detailed discussion of the requirements and effects of enrichment without cause would exceed the scope and space of this Article. For a fuller discussion of these topics in the Louisiana doctrine, *see* LEVASSEUR, UNJUST ENRICHMENT,

*a. Requirements*

The jurisprudence identifies five requirements for enrichment without cause:[819] (1) enrichment of the obligor; (2) impoverishment of the obligee; (3) causal link between the enrichment and the impoverishment; (4) lack of cause for the enrichment and the impoverishment; and (5) unavailability of another remedy at law.[820]

Enrichment of the obligor occurs when "his patrimonial assets increase or his liability diminishes."[821] The concept of enrichment is broad, encompassing any advantage appreciable in money and taking diverse forms that defy any systematic classification.[822]

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*supra* note 2, at 370–437; Nicholas I, *supra* note 190; Nicholas II, *supra* note 190; Barry Nicholas, *The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched*, 6 TUL. CIV. L. F. 3, 10-13 (1991-1992); Albert Tate, *The Louisiana Action for Unjustified Enrichment*, 50 TUL. L. REV. 883 (1976) [hereinafter Tate I]; Tate II, *supra* note 493; Nikolaos A. Davrados, *Demystifying Enrichment Without Cause*, 78 LA. L. REV. 1223 (2018).

819. The plaintiff bears the burden of proving these requirements by a preponderance of the evidence. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 427–28; Berthelot v. Berthelot, 254 So. 3d 735, 738 (La. Ct. App. 1st Cir. 2018); Tandy v. Pecan Shoppe of Minden, Inc., 785 So. 2d 111, 117 (La. Ct. App. 2d Cir. 2001).

820. *See* Minyard v. Curtis Prod., Inc., 205 So. 2d 422, 432–33 (La. 1967); Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 120–22 (La. 1974). French legal doctrine has grouped these requirements into material requirements (enrichment, impoverishment, and causal link) and juridical requirements (lack of cause and inexistence of other remedy). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 370. The usefulness of this classification lies in the burden of proof. Material conditions are positive, whereas juridical conditions are negative. Although the plaintiff must prove each of the five requirements, the defendant usually will base her defense on the lack of a juridical requirement and bears the burden of establishing peremptory exceptions against the action. Indust. Cos., Inc. v. Durbin, 837 So. 2d 1207, 1213-16 (La. 2003); Fagot v. Parsons, 958 So. 2d 750, 752-53 (La. Ct. App. 4th Cir. 2007) (both discussing the requirements for the success of a peremptory exception of no cause of action against an action for enrichment without cause). The plaintiff also shoulders the burden of proving the lack of a cause for the enrichment because the existence of the cause is presumed. *See* ALAIN BENABENT, DROIT DES OBLIGATIONS No. 485 (14th ed. 2014).

821. *See* LA. CIV. CODE art. 2298 cmt. b (2023).

822. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 39; *See* Valerio Forti, Enrichissement injustifié, Conditions juridiques, Nos 15, 17, *in* JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 10, June 2, 2016 (Fr.) [hereinafter Forti, Unjust Enrichment – Juridical Conditions]. *Cf.* GOFF & JONES, *supra* note 134, Nos 5-01 to 5-54 (discussing types of enrichment at common law).

Civil-law doctrine recognizes four general types of enrichment that, in some cases, may overlap: performance conferred on obligor at obligee's expense; obligor's interference with obligee's property; obligee's expenses incurred on obligor's property; and obligee's payment of obligor's debts to third persons.[823] First, enrichment can consist of a performance or other benefit that was conferred on the enriched obligor at the impoverished obligee's expense, in the absence of a contractual or legal obligation to confer such performance or benefit.[824] The most usual cases are services rendered by the obligee directly to the obligor without a contract, or in excess of a contractual obligation, or under a contract that failed.[825] Unrequested but useful services rendered by an incapable person who cannot serve as a *negotiorum gestor*[826] may be placed in this category. Claims referred to in the old Louisiana jurisprudence as "quasi-contractual quantum meruit"[827] also neatly fall under this category.[828]

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823. These general categories—originally devised by the Austrian scholar Wilburg and the German scholar von Caemmerer—are often cited by comparativists as a useful taxonomy of unjust enrichments. *See supra* note 563.

824. If the contract is null, the special provisions on nullity may authorize recovery under a theory of enrichment without cause. For recovery by unlicensed contractors under a theory of enrichment without cause, *see supra* note 628.

825. When the performance consists of services or another similar benefit to the recipient, recovery of the value of such services or benefit is made in the form of compensation for enrichment without cause. *See* LA. CIV. CODE art. 2018 (2023); Sylvester v. Town of Ville Platte, 49 So. 2d 746, 750 (La. 1950); McCarthy Corp. v. Pullman-Kellogg, Div. of Pullmann, Inc., 751 F2d 750, 760 (5th Cir. 1985); AUBRY & RAU VI, *supra* note 157, No. 320; PLANIOL & RIPERT VII, *supra* note 157, No. 764. *Cf.* LA. CIV. CODE arts. 2018, 2033 (2023). Conversely, recovery of movables, immovables or money that were paid without a valid contract is made pursuant to the more special provisions on payment of a thing not due. LA. CIV. CODE arts. 2299–2305 (2023). *See also supra* notes 620–28 and *infra* notes 932–36, and accompanying texts.

826. *See* LA. CIV. CODE art. 2296 (2023).

827. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e (AM. L. INST. 2011).

828. Reference is made here to the civilian concept of "quasi-contractual *quantum meruit*." *See* Baker v. Maclay Props. Co., 648 So. 2d 888, 896 (La. 1995) (finding that the civilian concept of *quantum meruit* in the absence of an agreement "is more correctly referred to as unjust enrichment, also known as *actio de in rem verso*"); Jackson v. Capitol City Family Health Ctr., 928 So. 2d 129, 132-33 (La. Ct. App. 1st Cir. 2005); Bayhi v. McKey, 2008 WL 2068076, at *4–5 (La. Ct. App. 1st Cir., May 2, 2008); Oakes, *supra* note 16, at 880–85 (1995). Louisiana law also recognizes "contractual *quantum meruit*" under a valid contract. *See*

The performance or benefit can also be indirect when it involves the patrimony of a third party.[829] The second type of enrichment entails an enriched obligor's interference with the impoverished obligee's patrimony through unauthorized use of the latter's property or services.[830] When such interference satisfies the requirements for delictual liability, the action against the obligor will sound in tort. Here, a subtortious interference is contemplated, usually because the requirements for delictual liability have not been met.[831] Examples include the unauthorized (but accidental) use of one's image, intellectual property,[832] or assets.[833] The unauthorized withholding of

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*generally* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 14.25; Nicholas II, *supra* note 190, at 56–62; Cent. Facilities Operating Co. v. Cinemark USA, Inc., 36 F. Supp. 3d 700, 707 (M.D. La. 2014) (discussing the types of *quantum meruit* in Louisiana law). For a critical review of the Louisiana law of *quantum meruit*, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 238.

829. Here, a third person receives an advantage from an unpaid performance rendered on an original contract. The facts in the seminal *Boudier* case of the French *Cour de cassation* provide a good example. In that case, a lessor was enriched from improvements made to her property by a contractor hired by the lessee who later defaulted on her obligations. *See supra* note 542. *See also* Vandervoort v. Levy, 396 So. 2d 480 (La. Ct. App. 4th Cir. 1981) (involving unjustified enrichment of owner of immovable property from additional work performed by contractor who was instructed by architect to perform additional work). An action based on indirect enrichment, however, often will stumble upon the usual existence of a lawful cause that will excuse retention of the enrichment in the hands of the third party. For a detailed discussion of third-party enrichments, *see* Nicholas I, *supra* note 190, at 626–33.

830. Use is "unauthorized" because the owner's permission was never granted, or it expired. *See, e.g.*, Masera v. Rosedale Inn, 1 So. 2d 160 (La. Ct. App. Orl. 1941) (continued use of leased property by the sublessee after expiration of the lease).

831. This category corresponds in an imperfect way to the common-law category of "restitution for wrongs." *See* Descheemaeker, *supra* note 533, at 96. *See also* DOBBS & ROBERTS, *supra* note 6, § 4.1, at 373–74; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 42, 44 (AM. L. INST. 2011).

832. For example, misappropriation of one's idea or proposal may give rise to a claim of enrichment without cause, so long as the element of enrichment and its connection to the plaintiff's impoverishment are facially plausible. *See* Boateng v. BP. plc., 2018 WL 3869499, at *3 (E.D. La. Aug. 15, 2018).

833. *See, e.g.*, Commercial Properties Development Corp. v. State Teachers Retirement System, 808 So. 2d 534 (La. Ct. App. 1st Cir. 2001) (finding defendant liable in unjust enrichment for electricity expended on defendant's property by use of a meter on plaintiff's property that was paid by plaintiff); Granger v. Fontenot, 3 So. 2d 215 (La. Ct. App. 1st Cir. 1941) (allowing plaintiff to recover in quasi-contract for unauthorized use of plaintiff's tractor and pump). German and

funds may also fall under this category.[834] The third type of enrichment involves expenses avoided on the part of the enriched obligor or improvements to the obligor's property as a result of work performed by the impoverished obligee.[835] Here, the obligor's enrichment usually consists of her diminished liability.[836] A usual example is making improvements on the obligor's property.[837] Finally, the

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Greek scholars usually refer to the example of a stowaway using a means of transportation without paying a fare. A celebrated example is the German "air-travel case," in which an unsupervised 17-year-old boy somehow managed to fly from Hamburg to New York without a ticket. The airline flew the boy back to Germany and was compensated for the return flight under the laws of *negotiorum gestio*. But what about the outbound flight to New York? Because the boy's act did not constitute a tort under German law, the boy's parents were ordered to compensate the airline for the boy's unjust enrichment. Bundesgerichtshof, Jan. 7, 1971 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 609, 1971 (Ger.); DANNEMANN, *supra* note 86, at 242–49; MARKESINIS ET AL., *supra* note 554, at 235–36. Louisiana tort law seems more amenable to full recovery in such cases, based on the Louisiana law concept of the tort of conversion. *See* FRANK L. MARAIST & THOMAS C. GALLIGAN, LOUISIANA TORT LAW § 2-6(i) (1996, Supp. 2003); WILLIAM CRAWFORD, TORT LAW § 12:13, *in* 12 LOUISIANA CIVIL LAW TREATISE (2d ed. 2009, Aug. 2022 update). It is only when the requirements for a delictual action are not met that an *actio de in rem verso* may become available. Based on the above, if the boy in the "air-travel case" had *mistakenly* boarded the wrong airplane and this mistake was not actionable under Louisiana Civil Code article 2316, then an action for enrichment without cause would likely be available.

834. *See* Industrial Companies, Inc. v. Durbin, 837 So. 2d 1207, 1213–15 (La. 2003) (finding that retention of plaintiff's funds without justification by defendant, who was plaintiff's attorney, gives rise to liability for enrichment without cause).

835. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 10, 26, 27 (AM. L. INST. 2011).

836. This third category of enrichments may overlap with the previous two categories. *See* STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1058–59. What sets this third category apart from the previous two, however, is that this category is more susceptible to cases of "imposed enrichments," that is, enrichments of the obligor's patrimony that occur without her consent, involvement, or knowledge. *See* O'Hara v. Krantz, 26 La. Ann. 504 (1874); STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1068–70; Descheemaeker, *supra* note 533, at 97–98.

837. The improvement can involve the plaintiff's movables. *See, e.g.*, Bennett v. Dauzat, 984 So. 2d 215, 218 (La. Ct. App. 3d Cir. 2008) (finding that defendant was enriched by plaintiff who paid off defendant's auto loan). Especially in cases of improvements to land by adverse possessors, the rules on accession will apply nevertheless as *lex specialis*. *See* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 11.22; Symeonides, *supra* note 813, at 542–43; Descheemaeker, *supra* note 533, at 97–98. *See also* Davis v. Elmer, 166 So. 3d 1082, 1087–88 (La. Ct. App. 1st Cir. 2015); Rumore v. Rodrigue, 2015 WL 9435213, at *4 n.12 (La. Ct. App. 1st Cir. Dec. 23, 2015) (both cases observing that a remedy under article 2695 of the Louisiana Civil Code on improvements made by lessees excludes the application of article 2298 on enrichment without cause). For the specific issue of

fourth type, which may be seen as a subset of the third type, focuses on the special case of extinguishing an obligation of the obligor to a third party.[838]

Impoverishment of the obligee occurs when "his patrimonial assets diminish or his liabilities increase."[839] In this sense, impoverishment is the negative aspect of enrichment, and it is understood broadly.[840] Cases of impoverishment without a cause, therefore, should not differ from cases of enrichment without cause.[841] The plaintiff must establish that the transfer of value was made at the expense of her patrimony—either as a loss sustained, a profit deprived,[842] or a loss of exclusive enjoyment of an asset[843]—and this

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improvements to separate property of a spouse that were made with separate funds of the other spouse, s*ee* LA. CIV. CODE art. 2367.1 (rev. 2009); Lemoine v. Downs, 125 So. 3d 1115, 1117–19 (La. Ct. App. 3d Cir. 2012); CARROLL & MORENO, *supra* note 256, § 7:17.

838. Thus, a person who paid the debt of another person may recover that payment: (a) from the payee under a theory of payment of a thing not due, if the payor paid in error. LA. CIV. CODE art. 2302 (2023); (b) from the true debtor according to the internal relationship between the payor and payee (e.g., mandate, *negotiorum gestio*, or subrogation); (c) from the true debtor under a theory of enrichment without cause when recovery from the payee or true debtor is not otherwise available. *See* LA. CIV. CODE arts. 2302 cmt. c, 2298; Standard Motor Car Co. v. State Farm Mut. Auto Ins., 97 So. 2d 435, 438–40 (La. Ct. App. 1st Cir. 1957) (explaining the above options with reference to French doctrine); Bennett v. Dauzat, 984 So. 2d 215, 218 (La. Ct. App. 3d Cir. 2008) (allowing plaintiff who paid defendant's debt to a third person in the absence of any agreement between plaintiff and defendant to recover under a theory of "unjust enrichment"). *See also* Lee v. Lee, 868 So. 2d 316, 318–19 (La. Ct. App. 3d Cir. 2004) (finding that ex-spouse who used separate funds to make mortgage payments on his ex-spouse's home may recover under a theory of enrichment without cause). On this issue, reimbursement of separate funds is now authorized directly by law. LA. CIV. CODE art. 2367.1 (rev. 2009); CARROLL & MORENO, *supra* note 256, § 7:17. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

839. *See* LA. CIV. CODE art. 2298 cmt. b (2018); Nicholas I, *supra* note 190, at 643–44; Tate II, *supra* note 493, at 447 (noting that impoverishment is "the loss of assets, increase in liabilities, or the prevention of a justified gain").

840. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 754; MALAURIE ET AL., *supra* note 30, No. 1064.

841. *See* RIPERT & BOULANGER II, *supra* note 169, No. 1278 ("What shocks equity is not that a person is enriched, which is indeed permissible; it is that it be at the expense of others").

842. *See* STARCK, *supra* note 30, No. 1812.

843. Thus, cases of profitable but harmless trespass may give rise to an action for enrichment without cause. For instance, a defendant water company that made

claim must be appreciable in money.[844] Benefits received by the obligee or the obligee's gratuitous intent will reduce or might exclude recovery.[845] Scholars have observed that the separate examination of impoverishment is unique to the French model of unjust enrichment.[846]

This uniqueness manifests itself when measuring the amount of recovery, especially when enrichment and impoverishment do not correspond in value. Indeed, there can be instances in which the obligor's enrichment is either greater or lesser than the obligee's impoverishment, such as when an obligee expends a great effort that produces only minor value to the obligor, or, conversely, when the obligor generates profit from the obligee's property without causing any appreciable economic detriment to the obligee. This possible

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unauthorized use of the plaintiff's pipeline was obligated to make restitution regardless of whether the plaintiff was actually using the pipeline. Cour de cassation, req., Dec. 11, 1928, D.H. 1928, p. 18 (Fr.); Nicholas I, *supra* note 190, at 644. Likewise, a landowner is deprived of exclusive use (and thus impoverished) by an unauthorized lease of his land. *But see* Barton Land Co. v. Dutton, 541 So. 2d 382, 383–85 (La. Ct. App. 2d Cir. 1989) (confusing the *actio de in rem verso* with the *condictio indebiti* and finding no impoverishment because the landowner maintained his rights against the lessee). *Cf.* Win Oil Co., Inc. v. UPG, Inc. 509 So. 2d 1023 (La. Ct. App. 2d Cir. 1987); Nelson v. Young, 223 So. 2d 218 (La. Ct. App. 2d Cir. 1969).

844. *See* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, 29–35. If an impoverishment that is correlative to the enrichment cannot be shown, the action must fail. *See* Kirkpatrick v. Young, 456 So. 2d 622, 624 (La. 1984); St. Pierre v. Northrop Grumman Shipbuilding, Inc., 102 So. 3d 1003, 1013–14 (La. Ct. App. 4th Cir. 2012).

845. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 754. Thus, a plaintiff who built a home on his partner's land and resided there rent-free to several years could not recover her expenses on a theory of enrichment without cause. Cour de cassation, 1e civ., May 6, 2009, JurisData No. 2009-048116.

846. *See* Dickson, *supra* note 510, at 144; Descheemaeker, *supra* note 533, at 89. To the extent that unjust enrichment is "at the expense of another," impoverishment is a constant requirement, although it is not examined separately in German law and at common law. *Cf.* GERMAN CIVIL CODE, *supra* note 87, § 812; GOFF & JONES, *supra* note 134, Nos 6–01 to 7-26; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 10, 26, 27 (AM. L. INST. 2011). *But see also id.* § 1 cmt. a:

> While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," without the need to show that the claimant has suffered a loss.

asymmetry of values is considered when measuring the amount of compensation, pursuant to the "double ceiling rule," that is, "by the extent to which one has been enriched or the other has been impoverished, whichever is less."[847]

There must be a connection, that is, a correlation between the enrichment and the resulting impoverishment, which must be the incontestable result of the same event.[848] The correlation can be direct or indirect, that is, through the patrimony of a third person.[849] Also, it does not matter that impoverishment has not been the only condition for enrichment, as long as there is a correlation between the two.[850] Nevertheless, there is no right to recover a clearly incidental benefit under a theory of unjust enrichment.[851] An established correlation can be impaired or severed when the obligee's impoverishment occurred as a result of her pursuit of her own personal interest, at her own risk, or by her own negligence or fault.[852] Thus, an obligee who imposes the enrichment on the obligor who normally would

847. *See* LA. CIV. CODE art. 2298 (2023). *See also infra* notes 881–93 and accompanying text.

848. *See* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 36; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 41; PHILIPPE MALINVAUD ET AL., DROIT DES OBLIGATIONS No. 812 (13th ed. 2014); BERTRAND FAGES, DROIT DES OBLIGATIONS No. 452 (5th ed. 2015).

849. *See* LA. CIV. CODE art. 2298 cmt. b (2023); Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 40.

850. *See* AUBRY & RAU VI, *supra* note 157, No. 317; Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 36. The impoverished obligee bears the burden of proving the correlation. When the correlation between enrichment and impoverishment emerges clearly from the facts of the case it is presumed to exist. *See* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 37.

851. For instance, heating expenses avoided by an upstairs condo owner who benefits from the rising heat from the downstairs neighbor, or free viewing of a concert from the balcony of an adjacent building, are not enrichments susceptible to restitution. *See* BIRKS, *supra* note 6, at 158–159 (characterizing these by-benefits as gifts).

852. This approach is steadily followed in the Louisiana and French jurisprudence, when examining the cause for the obligee's impoverishment. *See, e.g.*, Brignac v. Boladore, 288 So. 2d 31, 35 n.2 (La. 1973); Gray v. McCormick 663 So. 2d 480, 487 (La. Ct. App. 3d Cir. 1995); Tandy v. Pecan Shoppe of Minden, Inc., 785 So. 2d 111, 118 (La. Ct. App. 2d Cir. 2001); Quilio & Associates v. Plaquemines Parish, 931 So. 2d 1129, 1137 (La. Ct. App. 4th Cir. 2006); Bamburg Steel Buildings, Inc. v. Lawrence Gen. Corp., 817 So. 2d 427, 438 (La. Ct. App.

not incur such an expense cannot claim that her impoverishment is genuinely correlated to the obligor's enrichment—rather, her own personal interest caused her impoverishment.[853] Also, an obligee who assumed the risk of performing an act or who failed to take precautions to protect her rights should not rely on a claim of enrichment without cause.[854]

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2d Cir. 2002). *See also* John St. Claire, *Actio de in Rem Verso in Louisiana: Minyard v. Curtis Products Inc.*, 43 TUL. L. REV. 263, 286 (1969). The rationale for this approach is explained in Charrier v. Bell, 496 So. 2d 601, 606–07 (La. Ct. App. 1st Cir. 1986) ("Obviously the intent is to avoid awarding one who has helped another through his own negligence or fault or through actions taken at his own risk"). This jurisprudence remains controlling after the enactment of revised article 2298 of the Louisiana Civil Code. *But see* New Orleans v. BellSouth Telecommunications, Inc., 2011 WL 2293134, at *3–4 (E.D. La. June 7, 2011) rev'd and vacated, 690 F.3d 312 (5th Cir. 2012); *see also* Parker Auto Body, Inc. v. State Farm Mutual Automobile Ins. Co., 2016 WL 4086777, at 12 n.76 (M.D. Fla., Apr. 5, 2016). Legislative basis for this approach can be found in the theory of comparative fault, as well as in the equitable "clean hands doctrine." *See* LA. CIV. CODE arts. 2002, 2003, 2033, 2323 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 5.32–5.33, 10.6. A similar result is also reached under the revised French and Quebec Civil Codes. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-2; QUEBEC CIVIL CODE, *supra* note 13, art. 1494; TERRÉ ET AL., *supra* note 57, Nos 1308 and 1318.

853. Under French doctrine, the obligee's pursuit of her own interests and her own fault serve as a cause for her impoverishment, which excludes her claim of unjust enrichment. *See* TERRÉ ET AL., *supra* note 57, No. 1308. It is perhaps more accurate to state that the obligee's own fault impairs the connection between her impoverishment and the obligor's enrichment. *Cf.* Fox v. Sloo, 10 La. Ann. 11 (La. 1855) ("The equitable doctrine, that one at whose expense another is benefited must be indemnified, cannot be extended to a person who intrudes his services on another against his will and the policy of a statute"). *See also* Charrier v. Bell, 496 So. 2d 601, 603 (La. Ct. App. 1st Cir. 1986) ("[A]ny impoverishment claimed by plaintiff was a result of his attempts 'for his own gain' and that his presence and actions on the property of a third party placed him in a 'precarious position, if not in legal bad faith"'). This approach is preferable because it obviates a separate examination of the cause of the impoverishment, which is a French doctrinal oddity. *See* Dickson, *supra* note 510, at 144; Descheemaeker, *supra* note 533, at 89 (both explaining that a separate requirement of impoverishment is not one that is shared by other civil and common-law systems).

854. This approach is noticeable in the Louisiana jurisprudence. *See* Carriere v. Bank of La., 702 So. 2d 648, 672–73 (La. 1996) (holding that ground lessors who allowed the leasehold to be mortgaged cannot claim rentals from mortgagee under a theory of unjust enrichment); Rougeou v. Rougeou, 971 So. 2d 466 (La. Ct. App. 3d Cir. 2007) (dismissing unjust enrichment claim of homeowner who moved his home on defendant's property but abandoned it upon being evicted); MJH Operations, Inc. v. Manning, 63 So. 3d 296 (La. Ct. App. 2d Cir. 2011) (dismissing unjust enrichment action of car mechanic who neglected to take measures to protect his rights through a repairman's privilege and to collect his fee); Meyers v. Denton, 848 So. 2d 759 (La. Ct. App. 3d Cir. 2003) (dismissing

The most significant requirement for enrichment without cause is the lack of cause for the retention of the enrichment.[855] The term "cause" in this context should be understood in its broader sense, encompassing any legal justification for the retention of the enrichment in the hands of the enriched party.[856] The Louisiana Civil Code correctly identifies two instances of a lawful cause—a valid juridical act or the law.[857]

Juridical acts, such as contracts between the enriched and impoverished parties,[858] may serve as the lawful cause for retention of the enrichment.[859] Here, the enrichment was placed in the enriched party's hands voluntarily. The contract can be onerous,

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landowners' reimbursement claim for improvements made to road because they knew or should have known that the road was public); MKM, L.L.C. v. Revstock Marine Transp., Inc., 773 So. 2d 776 (La. Ct. App. 1st Cir. 2000) (dismissing reimbursement claim brought by sellers of vessel who refurbished vessel after parties had signed purchase option agreement); Zeising v. Shelton, 648 Fed. App'x 434, 441 (5th Cir. 2016) (finding that a business consultant cannot claim compensation for his impoverishment that was a result of a failed business deal). *See also* Kilpatrick v. Kilpatrick, 660 So. 2d 182, 187 (La. Ct. App. 2d Cir. 1995) (executor of will who failed to take legal steps to limit the estate's liability "cannot now resort to unjust enrichment to rectify his error"). *Cf.* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 37.

855. *See* Roubier, *supra* note 99, at 47. French legal doctrine examines separately the cause for enrichment and the cause for the impoverishment. *See* TERRÉ ET AL. *supra* note 57, No. 1306.

856. *See* Edmonston v. A-Second Mortg. Co. of Slidell, 289 So. 2d 116, 122 (La. 1974) ("'Cause' in not in this instance assigned the meaning commonly associated with contracts"). French and Louisiana doctrine understand "cause" as the broader and more descriptive *iusta causa* of the Roman law. *See* RIPERT & BOULANGER II, *supra* note 169, No. 1280; MARTY & RAYNAUD, *supra* note 98, No. 353.

857. *See* LA. CIV. CODE art. 2298 (2023); Gruning, *supra* note 490, at 57 (explaining the didactic, but useful, definition of the term "without cause" cause in revised article 2298 of the Louisiana Civil Code). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303-1 ("Enrichment is unjustified when it proceeds neither from the fulfillment of an obligation by the impoverished nor from his liberal intention").

858. Unilateral juridical acts, such as testaments, may also furnish a legal cause for retention of the enrichment. *See* Georges Bonet, *Enrichissement sans cause*, *in* JURISCLASSEUR CIVIL Articles 1370 à 1381, fascicule 8/1988, Nos 145–47 (1988) (Fr.).

859. *See* Drs. Bethea, Moustoukas & Weaver, L.L.C. v. St. Paul Guardian Ins. Co., 376 F.3d 399, 408 (5th Cir. 2004); Edwards v. Conforto, 636 So. 2d 901, 907 (La. 1993); Conn-Barr, LLC v. Francis, 103 So. 3d 1208, 1213–14 (La. Ct. App. 3d Cir. 2012).

such as a sale, or gratuitous, such as a donation.[860] The contract may also justify the enrichment even if it is a contract between the enriched party and a third party whose patrimony intervenes for the transfer of wealth.[861]

Enrichment may also find its justification in the existence of a legal rule. In this case, the enriched party retains the enrichment by operation of law. This category is vast, encompassing many situations involving the laws of property,[862] family,[863] and

860. "Cause" is understood broadly to include any type of "counter-performance" (*contrepartie*) given by a good faith enriched party or any liberal intention by the impoverished party, even in the absence of a juridical act. In short, the enrichment is not "without cause" if the enriched party is properly entitled to it. *See* Creely v. Leisure Living, Inc., 437 So. 2d 816, 822–23 (La. 1983). Thus, voluntary services or payments in exchange for some material benefit can constitute a "counter-performance" justifying retention of the enrichment. *See, e.g.*, Mendoza v. Mendoza, 249 So. 3d 67, at 72–74 (La. Ct. App. 4th Cir. 2018); Bourgeois v. Bourgeois, 40 So. 3d 150, 154–55 (La. Ct. App. 5th Cir. 2010); Troxler v. Breaux, 105 So. 3d 944 (La. Ct. App. 5th Cir. 2012). Conversely, voluntary services or performances—especially among family members, spouses, or partners—without a material benefit do not give rise to claims for unjust enrichment, if a liberal intent can be shown. *See* STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 99, at 102–30; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, Nos 8–18; TERRÉ ET AL., *supra* note 57, No. 1308. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-1; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10, 26, 27, 28 (AM. L. INST. 2011).

861. *See* Edmonston v. A-Second Mortg. Co., 289 So. 2d 116, 122 (La. 1974). A typical situation involves unpaid contractors hired by the lessee to make improvements to leased property. If the lease contract supplies a justification for the lessor's retention of these improvements, then the contractor's claim against the lessor must fail. *See* TERRÉ ET AL., *supra* note 57, No. 1307; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, Nos 19–21. Nevertheless, a contract between the enriched party and a third person will not furnish a valid justification if such contract is a product of collusion between the parties. *See* Bonet, *supra* note 858, No. 189.

862. For example, the law of acquisitive prescription vests ownership in the adverse possessor, who retains title and is not liable for unjust enrichment. *See* LA. CIV. CODE arts. 3473–3491 (2023). The laws of accession regulate the ownership and compensation for improvements to immovables and movables, as well as the right of retention of possession. *See* LA. CIV. CODE arts. 490–516, 529 (2023); Carriere v. Bank of La., 702 So. 2d 648, 672–73 (La. 1996). Likewise, the law of co-ownership regulates reimbursements and compensations for acts of the co-owners. *See* LA. CIV. CODE arts. 797–818 (2023).

863. For instance, the existence of spousal obligations to provide support and assistance during the marriage or upon divorce generally exclude any claim for unjust enrichment. *See* LA. CIV. CODE arts. 98, 111–124 (2023). Special rules on community property govern the rights and obligations of spouses in a matrimonial regime of community of acquets and gains. *See* LA. CIV. CODE arts. 2334–2369.8

successions.[864] In the law of obligations, examples can be found in the rules on nullity,[865] natural obligations,[866] and other quasi-contractual obligations.[867] Judicial decisions can also constitute lawful justification for retention of the enrichment.[868] Finally, the remedy for enrichment without cause is subsidiary, meaning that the action for enrichment without cause is allowed only when there is no other available remedy at law.[869] The principle of subsidiarity is accepted, with variations, in most civil law jurisdictions, but not without debate.[870] This rule appears in the civil codes of Louisiana

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(2023). *See also* Mendoza v. Mendoza, 249 So. 3d 67, 72–74 (La. Ct. App. 4th Cir. 2018).

864. Intestate succession to property finds its cause in the rules on the devolution of the estate, whereas testate succession refers to the testament. *See* LA. CIV. CODE arts. 847, 875 (2023).

865. Retention of a performance may be justified under the "clean hands doctrine." *See, e.g.*, LA. CIV. CODE art. 2033 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. L. INST. 2011).

866. A prescribed action gives rise to a natural obligation, thus justifying retention of the enrichment. Other natural obligations also justify retention of the enrichment and exclude an action for enrichment without cause. *See* LA. CIV. CODE arts. 1760–1762 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 21–25; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 2.1, 2.5, 2.7; TERRÉ ET AL., *supra* note 57, No. 1307; Dugas v. Thompson, 71 So. 3d 1059 (La. Ct. App. 4th Cir. 2011); Webb v. Webb, 835 So. 2d 713 (La. Ct. App. 1st Cir. 2002). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 62 (AM. L. INST. 2011).

867. As discussed, the rules on *negotiorum gestio* and payment of a thing not due generally exclude the application of the general rules on enrichment without cause. Furthermore, a claim of enrichment without can compensate for an adverse claim of enrichment without cause. *See* LA. CIV. CODE art. 1893 (2023); Munro v. Carstensen, 945 So. 2d 961 (La. Ct. App. 2d Cir. 2006).

868. *See* TERRÉ ET AL., *supra* note 57, No. 1307; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, No 24.

869. *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1303-3.

870. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 54; PLANIOL II.1, *supra* note 100, No. 937A; PLANIOL & RIPERT VII, *supra* note 157, No. 763; Alexis Posez, *La subsidiarité de l'enrichissement sans cause : étude de droit français à la lumière du droit comparé*, 67 REVUE INTERNATIONALE DE DROIT COMPARÉ 185 (2014); P. Drakidis, *La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause*, RTDciv 1961, p. 577, 589. The initial draft of article 2298 of the Louisiana Civil Code, as proposed by the Quasi-Contracts Committee of the Louisiana State Law Institute, had eliminated subsidiarity as a requirement. *See* Martin, *supra* note 16, at 69; Oakes, *supra* note 16, at 900 n.175. *But see also* Tate II, *supra* note 493, at 466 (highlighting the functional value of subsidiarity). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST

and France, and it is endorsed overwhelmingly by the jurisprudence.[871] Enrichment without cause, therefore, is excluded when the impoverished plaintiff can seek, or has sought,[872] or could have sought[873] another remedy against the enriched defendant,[874] or,

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ENRICHMENT § 4(2) (AM. L. INST. 2011) ("A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law"); *The Intellectual History of Unjust Enrichment, supra* note 7, at 2089–90 (observing that the equitable "irreparable injury rule" that barred an action for unjust enrichment if another adequate remedy existed "makes little sense in the context of unjust enrichment if unjust enrichment was itself a 'legal remedy' stemming from the common law").

871. *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1303-3; Carrier v. Bank of La., 702 So. 2d 648, 671 (La. 1996); Walters v. MedSouth Record Management, LLC, 38 So. 3d 241 (La. 2010); Morphy, Makofsky & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569, 575 (La. 1989); Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 19 (La. Ct. App. 1st Cir. 2001). The subsidiary nature of enrichment without cause is attributed to remedy's accessory nature as a gap-filling device that is based on equitable considerations. It cannot be used to circumvent other, more specific legal rules. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 411–12; Tate I, *supra* note 818, at 904; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, Nos 27–28.

872. *See* Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 19 (La. Ct. App. 1st Cir. 2001) ("[I]n cases where a claim has been exercised and a judgment obtained, it is most apparent that there is a practical remedy available at law"); Pilgrim Life Ins. Co. of America v. American Bank and Trust Co. of Opelousas, 542 So. 2d 804, 807 (La. Ct. App. 3rd Cir. 1989); Central Oil & Supply Corporation v. Wilson Oil Company, Inc., 511 So. 2d 19, 21 (La. Ct. App. 3d Cir. 1987).

873. Legal obstacles preventing the impoverished plaintiff from seeking another remedy, such as prescription of the action or peremption of the right, do not waive the requirement of subsidiarity. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 422–26; Walters v. Medsouth Record Management, LLP, 38 So. 3d 241, 242 (La. 2010); Dugas v. Thompson, 71 So. 3d 1059, 1068 (La. Ct. App. 4th Cir. 2011); Jim Walter Homes, Inc. v. Jessen, 732 So. 2d 699, 706 (La. Ct. App. 3d Cir. 1999). In such cases, the legal obstacle (e.g., prescription) furnishes the legal title for retention of the enrichment. *See* MALAURIE ET AL., *supra* note 30, No. 1071. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303-3. Factual obstacles, however, such as the insolvency of the third person whom the impoverished party should sue may waive the requirement of subsidiarity. *See* Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, No. 29; MALAURIE ET AL., *supra* note 30, No. 1071. *But see* Carriere v. Bank of La., 702 So. 2d 648, 672 (La. 1996) ("The existence of a "remedy" which precludes application of unjust enrichment does not connote the ability to recoup your impoverishment by bringing an action against a *solvent* person. It merely connotes the ability to bring the action or seek the remedy") (emphasis in original).

874. The action can be legal, contractual, quasi-contractual, or delictual. *See* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122–23 (La. 1974); Gar-

in some cases, against a third person.[875] However, the requirement of subsidiarity does not impose any positive obligation of the parties to "act prudently and reasonably" and to seek other recourse or remedies before the dispute arises.[876] Finally, the rule of subsidiarity is substantive rather than procedural. Thus, the plaintiff should not be precluded from pleading enrichment without cause in the alternative.[877]

*b. Effects*

If the above requirements are met, the impoverished plaintiff has an action in restitution against the enriched defendant under a theory of enrichment without cause. It should be recalled here that the

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ber v. Badon & Rainer, 981 So. 2d 92, 100 (La. Ct. App. 3d Cir. 2008); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 412–20; Symeonides & Martin, *supra* note 23, at 100, 151. Naturally, the expansion of available remedies by special statute would preclude the action for enrichment without cause. Thus, a consumer who can now bring a direct action against a manufacturer under special statute cannot recover under a theory of enrichment without cause. *See* Marseilles Homeowners Condominium Ass'n, Inc. v. Broadmoor, L.L.C., 111 So. 3d 1099, 1105–06 (La. Ct. App. 4th Cir. 2013):

> Today, however a contractor under these same circumstances [as the contractor in the seminal Minyard case who sought recovery against the manufacturer in unjust enrichment] does have a cause of action against a manufacturer under the Louisiana Product Liability Act, at least, and may have one if redhibition as well.

Minyard v. Curtis Products, 205 So. 2d 422, 433 (La. 1967); LA. REV. STAT. § 9:2800.51 (2023).

875. *See* V & S Planting Co. v. Red River Waterway Commission, 472 So. 2d 331, at 335–36 (La. Ct. App. 3d Cir. 1985). Thus, a sublessee who has an action for reimbursement against her sublessor for improvements she made to the property cannot recover from the lessor on a theory of enrichment without cause. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 420–22; Brignac v. Boisdore, 288 So. 2d 31, 34 (La. 1973).

876. *See* Hidden Grove, LLC v. Brauns, 356 So. 3d 974, 979 (La. 2023) ("Article 2298 does not include any requirement that parties act as reasonably prudent persons or require any preventive action in advance of the dispute arising").

877. *See* LA. CODE CIV. PROC. art. 892 (2023). *See also* Onstott v. Certified Capital Corp., 950 So. 2d 744, 749 (La. Ct. App. 1st Cir. 2006) ("[T]he subsidiary nature of Article 2298 [of the Louisiana Civil Code] does not prohibit a plaintiff from asserting unjust enrichment as an alternative, albeit 'mutually exclusive' form of relief"). *But see* Nave v. Gulf Services, LLC, 2020 WL 4584294 (E.D. La. 2020) (observing that "the mere fact that there are alternative remedies precludes a claim for unjust enrichment").

objective of the remedy for enrichment without cause is not restoration of a particular thing or value that already belongs to the plaintiff, such as in the case of nullity, dissolution, or restoration of an undue payment.

Rather, the purpose of the remedy is equitable—it aims to correct the imbalance between the parties' patrimonies that resulted from the unjust transfer of wealth that now belongs to the defendant.[878] This goal is achieved by an award of a specifically calculated compensation[879] in favor of the plaintiff.[880]

Under revised article 2298 of the Louisiana Civil Code, the amount of compensation due is the lesser of two amounts—the enrichment or the impoverishment.[881] This formula for recovery—

878. The enrichment is unjust because a benefit is added to the defendant's patrimony to the detriment of the plaintiff's patrimony without a corresponding transfer or compensation. *See* Tate II, *supra* note 493, at 446. *See also id.,* at 459 ("The root principle of an unjustified enrichment is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit for which he has not paid").

879. French legal doctrine distinguishes between restitution for enrichment without cause—which takes the form of indemnification for an enrichment that will usually not be a specific asset—and restoration of an undue payment of a specific thing that is usually made in kind. It is in this light that the term "compensation" should be understood. *See* Descheemaeker, *supra* note 533, at 99. *See also* Louisiana Specialty Hosp., LLC v. Adams, 2010 WL 3211077, at *3 (E.D. La. Aug. 13, 2010) ("Damages for conversion are intended to make the victim whole. . .Damages for unjust enrichment would amount to the lesser of [plaintiff's] impoverishment or [defendant's] enrichment"). At common law, restitution refers to gain-based recovery whereas compensation is loss-based recovery. *See* BIRKS, *supra* note 6, at 11–16; DOBBS & ROBERTS, *supra* note 6, § 4.1(1), at 375–76; Katy Barnett, Restitution, Compensation, and Disgorgement 459, 459–62, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020).

880. As discussed, separate rules apply for restoration of undue payments and performances from failed contracts. *See* LA. CIV. CODE arts. 2018–2021 (2023) (dissolution); *id.* arts. 2033–2035 (nullity); *id.* arts. 2302–2305 (payment of a thing not due). In France and Quebec, these restorations are made pursuant to the common rules on restitutions. FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1492, 1699–1707. The common French and Quebec rules on restitutions, however, do not apply to restitution for enrichment without cause. *See* Descheemaeker, *supra* note 533, at 98–99.

881. *See* LA. CIV. CODE art. 2298 (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303 ("[The] compensation [is] equal to the two values of the enrichment and the impoverishment"). *But see also* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4 ("In cases of bad faith of the enriched party, the compensation due is equal

fashioned by well-settled French doctrine and jurisprudence[882]—is known as the "double ceiling" rule (or "double limit" rule).[883] Placing a limit on the amount of recovery is justified by French doctrine on equitable grounds.[884]

Indeed, because the purpose of the remedy is to restore equilibrium of the parties' patrimonies, the plaintiff should not be enriched by recovering more than her impoverishment, whereas the defendant should not suffer a loss greater than his actual enrichment.[885] Article 2298 also fixes the time of evaluation of the enrichment and the impoverishment. As a rule, both are "measured as of the time the suit is brought."[886] This rule generally corresponds with traditional French doctrine, especially pertaining to the value of the enrichment which can fluctuate over time.[887]

Alternatively, the evaluation can be made "according to the circumstances, as of the time the judgment is rendered."[888] At the time of the revision, only a minority of French scholars supported this alternative, which was endorsed in Louisiana doctrine by Professor

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to the greater of the two values [of enrichment and impoverishment]"); TERRÉ ET AL., *supra* note 57, No. 1316.

882. *See* AUBRY & RAU VI, *supra* note 157, No. 324; Nicholas I, *supra* note 190, at 641; Cour de cassation, civ., Jan. 19, 1954, D. 1953, 234 (Fr.).

883. *Principe du « double plafond » ou de la « double limite ». See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 430; TERRÉ ET AL., *supra* note 57, No. 1316; Valerio Forti, Enrichissement injustifié, Effets Nos 16–17, JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 30, Jun. 2, 2016 (Fr.) [hereinafter Forti, Unjust Enrichment – Effects].

884. Although the "double ceiling" rule is not endorsed by German and Greek civil law, similar results are reached, nonetheless, especially when the enriched defendant has changed her position. *See supra* notes 771–72.

885. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 430; Nicholas I, *supra* note 190, at 641.

886. LA. CIV. CODE art. 2298 (2023).

887. French and Louisiana scholars have noted that impoverishment can generally be measured as of the time it took place. The value of enrichment on the other hand can fluctuate, especially due to subsequent acts or omissions of the enriched party or fortuitous events. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 434–35. Fixing the time of evaluation at the date the action is brought is also the default rule in Greek and German laws. It is on this date that the defendant is placed on judicial notice that she might be obligated to make restitution. *Cf.* GERMAN CIVIL CODE, *supra* note 87, § 818; GREEK CIVIL CODE, *supra* note 88, art. 909.

888. LA. CIV. CODE art. 2298 (2023).

Levasseur.[889] The "circumstances" under which this alternative would be preferred might refer to practicability or the need for a more equitable evaluation, especially when the value of enrichment fluctuates.[890] As explained by Professor Levasseur, "[p]resumably this alternative timing in the evaluation would favor the impoverishee in times of economic downturn, recession, or inflation."[891] The revisers of the Louisiana Civil Code wisely espoused this approach.[892] The revised French Civil Code has also come around to this view.[893]

Louisiana courts have encountered no difficulties when awarding compensation for enrichment without cause, especially in the post-revision jurisprudence.[894] Most often, the court will have to evaluate the plaintiff's services.[895]

In observance of the "double ceiling" rule, courts have applied a two-fold limitation to recovery. First, the plaintiff cannot recover more than the actual value of services and materials, plus a fair profit; and, second, the plaintiff cannot recover more than defendant

889. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 435–36; Forti, Unjust Enrichment – Effects, *supra* note 883, Nos 12–15.

890. *See* Oakes, *supra* note 16, at 902 ("If the circumstances dictate that such an evaluation is impracticable, or that subsequent developments would render such an evaluation inequitable, the court may choose to evaluate the enrichment and impoverishment at the time the judgment is rendered").

891. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 435–36 (observing that this alternative finds some support in the Louisiana laws of accession—e.g., LA. CIV. CODE art. 495).

892. *See* Oakes, *supra* note 16, at 902; Martin, *supra* note 16, at 209–11.

893. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4 ("The impoverishment that is determined on the date of the expense and the enrichment that subsists on the day when the action is brought, are evaluated as of the date of the judgment"); TERRÉ ET AL., *supra* note 57, No. 1317; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 15.

894. For a critical review of the pre-revision jurisprudence on this issue, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 429–34; Martin, *supra* note 16, at 209–11.

895. Older Louisiana jurisprudence—as well as some courts today—refer to these awards as "quasi-contractual *quantum meruit*." This common-law doctrine has been replaced with enrichment without cause. The method of evaluation of the services rendered, however, is similar. *See* Howell v. Rhoades, 547 So. 2d 1087, 1089–90 (La. Ct. App. 1st Cir. 1989); Ricky's Diesel Service, Inc. v. Pinell, 906 So. 2d 536, 539–40 (La. Ct. App. 1st Cir. 2005).

was enriched by plaintiff's services.[896] Thus, a contractor who wishes to recover under a theory of enrichment without cause must prove the value of the benefit her work conferred on the owner, which need not equal the contractor's cost of the work.[897]

There is no specific test that is applied to determine the reasonable value of the plaintiff's impoverishment or the defendant's enrichment.[898] Rather, courts must make an equitable case-by-case determination.[899] Nevertheless, speculative claims for compensation that have not been established with some degree of specificity are not awarded.[900] When assessing the award for compensation, much discretion is left to the trial court.[901] Apart from providing a method of calculation of the compensation, the "double ceiling" rule also furnishes two important substantive rules for recovery.

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896. *See* Bieber-Guillory v. Aswell, 723 So. 2d 1145, 1151 (La. Ct. App. 3d Cir. 1998); Custom Builders & Supply, Inc. v. Revels, 310 So. 2d 862 (La. Ct. App. 3d Cir. 1975); Coastal Timbers, Inc. v. Regard, 483 So. 2d 1110, 1113 (La. Ct. App. 3d Cir. 1986); PLANIOL II.1, *supra* note 100, No. 937B.

897. *See* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 14.25.

898. For examples of evaluation of plaintiff's services and defendant's benefit from such services, *see* Arc Industries, LLC v. Nungesser, 2018 WL 1181737, at *10 (La. Ct. App. 3d Cir., Mar. 7, 2018); Ricky's Diesel Service, Inc. v. Pinell, 906 So. 2d 536, 539–40 (La. Ct. App. 1st Cir. 2005); Simon v. Arnold, 727 So. 2d 699, 702–05 (La. Ct. App. 3d Cir. 1999); Central Facilities Operating Co., LLC v. Cinemark USA, Inc., 36 F.Supp.3d 700, 709 (M.D. La. 2014).

899. *See* Brankline v. Capuano, 656 So. 2d 1 (La. Ct. App. 3d Cir. 1995); Jones v. Lake Charles, 295 So. 2d 914 (La. Ct. App. 3d Cir. 1974).

900. *See* Smith v. First Nat. Bank of DeRidder, 478 So. 2d 185 (La. Ct. App. 3d Cir. 1985); Badeaux v. BP Exploration & Production, Inc., 2018 WL 6267308, at *3–4 (E.D. La. Nov. 30, 2018). Prejudgment interest on recovery for enrichment without cause is also not allowed. Gulfstream Serv, Inc. v. Hot Energy Serv., Inc., 907 So. 2d 96, 103 (La. Ct. App. 1st Cir. 2005); Bieber-Guillory v. Aswell, 723 So. 2d 1145, 1152 (La. Ct. App. 3d Cir. 1998); Howell v. Rhoades, 547 So. 2d 1087, 1090 (La. Ct. App. 1st Cir. 1989). *See also* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 9.16 ("[I]nterest on the pertinent amount runs from the time of judgment, but may run from the date of judicial demand if it was then ascertainable.") (footnotes omitted).

901. *See* LA. CIV. CODE art. 2324.1 (2023); Willis v. Ventrella, 674 So. 2d 991, 995–96 (La. Ct. App. 1st Cir. 1996). Appellate review is limited to instances in which the record clearly reveals that the trial court abused its discretion. Youn v. Maritime Overseas Corp., 623 So. 2d 1257, 1261 (La. 1993); Gulfstream Serv, Inc. v. Hot Energy Serv., Inc., 907 So. 2d 96, 103 (La. Ct. App. 1st Cir. 2005); Arc Industries, LLC v. Nungesser, 2018 WL 1181737, at *11 (La. Ct. App. 3d Cir. Mar. 7, 2018); Bieber-Guillory v. Aswell, 723 So. 2d 1145, 1151 (La. Ct. App. 3d Cir. 1998).

First, the rule considers the defendant's change of position,[902] an approach that is also followed in other civil-law and common-law systems.[903] The extent of the enrichment is measured at the time of the action or judgment, taking into account the fluctuation or depletion of the enrichment.[904] Thus, it is a valid defense to an action for enrichment without cause that the defendant is no longer enriched at that time.[905] Under Quebec law and modern French law, however, a defendant in bad faith—who knows that he is not entitled to the enrichment—cannot avail himself of this rule.[906] This exception ought to apply in Louisiana law on the basis of the overriding principle of good faith.[907] Second, the "double ceiling" rule practically excludes

902. *See* Descheemaeker, *supra* note 533, at 102 ("The fact that enrichment is assessed at the time the action is brought means that a defence of change of position is built into the rule for good faith defendants").

903. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (AM. L. INST. 2011). *See supra* notes 772–73.

904. The benefit received may have been expended or consumed, damaged or destroyed, lost or stolen, or diminished or depreciated, in whole or in part. *See* PALMER III, *supra* note 681, § 16.8; DOBBS & ROBERTS, *supra* note 6, § 4.5. According to German and Greek scholars, expenditure includes any expenses made by the defendant in reliance on the enrichment. *See* STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1132–33. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 note c (AM. L. INST. 2011).

905. Likewise, if the extent of the enrichment is reduced at that time, compensation will be reduced to that lower amount. *See* Gordley, *Restitution Without Enrichment?*, *supra* note 771, at 227.

906. *See* QUEBEC CIVIL CODE, *supra* note 13, art. 1495 ("The indemnity is due only if the enrichment continues to exist on the date of the demand. . .however, where the circumstances indicate the bad faith of the person enriched, the enrichment may be assessed as at the time he benefited therefrom"). Under traditional French jurisprudence, bad faith defendants were not treated differently from good faith defendants. A narrow exception focused on defendants who had fraudulently depleted their enrichment. In such cases, compensation was measured according to the extent of the original enrichment. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 753 n.3; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 20. Modern French law now sanctions bad faith defendants. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-2; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 21. *Cf. See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. f, g, h (AM. L. INST. 2011) (explaining that bad faith defendant may not rely on the change of position defense at common law). *See infra* note 919.

907. *Cf.* Forti, Unjust Enrichment – Effects, *supra* note 883, No. 20 (observing that the exception carved out by doctrine and jurisprudence was a practical consequence of the adage *fraus omnia corruptit*—fraud defeats all the rules). The defense of change of position is not available to a bad faith defendant in other civil-law and common-law systems as well. *See* GERMAN CIVIL CODE, *supra* note

disgorgement of profits as a possible remedy.[908] This is so because the defendant's consequential gains will normally exceed the value of the plaintiff's impoverishment.[909]

Because compensation for enrichment without cause focuses primarily on benefits, not losses, it is a familiar proposition that liability for enrichment without cause is independent of capacity or fault.[910] Nevertheless, due to the equitable nature of this remedy, courts will often scrutinize the parties' behavior to determine whether full, limited, or no recovery is warranted under the circumstances.[911] The impoverished plaintiff may have contributed to her loss by her own actions or fault.[912] As discussed, the causal link between enrichment and impoverishment can be impaired or severed when the plaintiff's impoverishment occurred as a result of her pursuit of her own personal interest, at her own risk, or by her own negligence or fault.[913] The revised French Civil Code codified this approach.[914]

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87, §§ 818; GREEK CIVIL CODE, *supra* note 88, arts. 911–912; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. f, g, h (AM. L. INST. 2011); Krebs, *supra* note 772, at 439–40; Grantham, *supra* note 773, at 427–30; DOBBS & ROBERTS, *supra* note 6, § 4.5. The revised French Civil Code also follows this approach. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4. *See infra* note 919.

908. In Louisiana, a remedy of disgorgement of profits may be available in the law of mandate and *negotiorum gestio*. *See supra* note 416. Disgorgement of profits may also be allowed when restoring undue payments. *See supra* notes 774–76 and accompanying text.

909. *See* Descheemaeker, *supra* note 533, at 102.

910. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmt. h (AM. L. INST. 2011). As a juridical fact, liability for enrichment without cause does not require contractual capacity. *See* TERRÉ ET AL. *supra* note 57, No. 1316 n.3; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 1.

911. *But see* Hidden Grove, LLC v. Brauns, 356 So. 3d 974, 979 (La. 2023) ("Article 2298 does not include any requirement that parties act as reasonably prudent persons or require any preventive action in advance of the dispute arising").

912. *See* Jim Walter Homes, Inc. v. Jessen, 732 So. 2d 699, 706 (La. Ct. App. 3d Cir. 1999) (observing that plaintiffs who by their fault failed to secure other remedies, let their remedies prescribe, or wrote bad contracts should not be allowed to recover under a theory of unjust enrichment).

913. *See supra* notes 852–54 and accompanying text.

914. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-2; TERRÉ ET AL., *supra* note 57, Nos 1308, 1318.

A similar result can be reached in Louisiana by application of the theory of comparative fault, as well as the equitable "clean hands doctrine."[915] On the other hand, the enriched defendant ought to make full restitution, without the benefit of certain defenses, especially if she is in bad faith, that is, if she knowingly benefited from an enrichment to which she knew she was not entitled.[916] Thus, as noted, in France and Quebec a bad faith defendant may not avail herself of the defense of a change of position.[917]

The revised French Civil Code, however, has taken the sanction of bad faith one step further—when the defendant is in bad faith, the compensation due is equal to the *greater* amount of enrichment or impoverishment as valued at the time of the judgment.[918] This inversion of the "double ceiling" rule practically excludes a change of position defense and it potentially—and perhaps inadvertently on the part of the drafters—allows claims for disgorgement of profits.[919]

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915. *See* LA. CIV. CODE arts. 2002, 2003, 2033, 2323 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 5.32–5.33, 10.6. *See also* Commercial Properties Development Corp. v. State Teachers Retirement System, 808 So. 2d 534, 543 (La. Ct. App. 1st Cir. 2001) (Wiemer, J., concurring) ("[T]he degree of fault of the parties in allowing this situation to continue is a relevant consideration in determining the extent of enrichment or impoverishment. Article 2298 and the comparative fault principles of 2323 are both in the title of the Civil Code which addresses 'Obligations Arising Without Agreement'").

916. *See* TERRÉ ET AL., *supra* note 57, No. 1316. Common-law doctrine draws a clear distinction between liability of an "innocent recipient" and a "conscious wrongdoer." The former is liable for cost or benefit, whichever is less. The latter is liable for all gains attributable to his misconduct, regardless of whether the plaintiff could show any impoverishment whatever. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. g, h (AM. L. INST. 2011).

917. *See supra* notes 906–07 and accompanying text. Likewise, a bad faith defendant at common law may not avail herself of the change of position defense. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. g, h (AM. L. INST. 2011).

918. FRENCH CIVIL CODE, *supra* note 11, art. 1303-4; TERRÉ ET AL., *supra* note 57, No. 1316; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 20. The different treatment of good faith and bad faith defendants brings the rules of restitution for enrichment without cause closer to the rules of restoration for payment of a thing not due. *See* Descheemaeker, *supra* note 533, at 98–99.

919. *See* Descheemaeker, *supra* note 533, at 102–03.

An action for enrichment without cause prescribes in ten years.[920]

## V. MAPPING THE LOUISIANA LAW OF *NEGOTIORUM GESTIO* AND UNJUST ENRICHMENT

Three conclusions may be drawn from the preceding analysis. First, the Louisiana term "quasi-contract" should be understood as a merely descriptive term referring to two distinct licit juridical facts that involve the receipt of a benefit without legal cause—*negotiorum gestio* and unjust enrichment.[921] Unjust enrichment encompasses the payment of a thing not due (*condictio indebiti*)[922] and the narrower action for enrichment without cause (*actio de in rem verso*).[923]

Conversely, in the modern common law, the older obscure terms "implied contracts", "constructive contracts," and "constructive trusts" have been eliminated in place of a broader substantive concept of unjust enrichment that gives rise to a remedy of restitution.[924] Second, because of the expanded application of the civilian theory of cause, most of Louisiana's law of restitution for failed contracts is found in the law of contract. Thus, the provisions on dissolution and nullity of contracts provide for restoration of performances from failed contracts—which include contracts that are absolutely null and contracts that are relatively null due to a vice of consent. The law of tort provides for damages in cases of misappropriated wealth. Restitution under a theory of unjust enrichment in Louisiana law is generally restricted to cases falling outside the theory of cause.

920. *See* LA. CIV. CODE art. 3499 (2023); Minyard v. Curtis Products, 205 So. 2d 422, 433 (La. 1967); State v. Pineville, 403 So. 2d 49, 55 (La. 1981).

921. *See* LA. CIV. CODE art. 2294 (1870); FRENCH CIVIL CODE, *supra* note 11, art. 1300.

922. *See* LA. CIV. CODE arts. 2299–2305 (2023); FRENCH CIVIL CODE, *supra* note 11, arts. 1302 to 1302-3; QUEBEC CIVIL CODE, *supra* note 13, arts. 1491–1492.

923. *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

924. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b (AM. L. INST. 2011).

Third, although the Louisiana concept of quasi-contract is intended to exist outside the doctrine of cause, there is nevertheless a great degree of overlap between cause and quasi-contract. This third observation requires further commentary because the overlap between these concepts has been the source of confusion in the Louisiana jurisprudence.

Louisiana courts have sometimes confused *negotiorum gestio* with enrichment without cause.[925] As discussed, however, these institutions are meant to be separate. *Negotiorum gestio* exists entirely outside the realm of the doctrine of cause, in the sense that there is no contract (juridical act) or provision of law (juridical fact) that creates the relationship between the manager of the affair and the owner other than the provisions on *negotiorum gestio*.[926] Further, *negotiorum gestio* excludes the application of the provisions of a payment of a thing not due (*condictio indebiti*) and enrichment without cause (*actio de in rem verso*).[927] Thus, when the manager voluntarily pays a debt of the owner to a third person as a *negotiorum gestor*, recovery of that payment is made under the law of *negotiorum gestio*, and not under a theory of unjust enrichment.[928] Also,

925. *See, e.g.*, O'Reilly v. McLeod, 2 La. Ann. 146 (1847); Hobbs v. Central Equip. Rental Inc., 382 So. 2d 238 (La. App. 3d Cir. 1980); Smith v. Hudson, 519 So. 2d 783 (La. App. 1st Cir. 1987); Police Jury v. Hampton, 5 Mart.(n.s.) 389 (La. 1827); Weber v. Coussy, 12 La. Ann. 534 (1857). *See also* LA. CIV. CODE art. 2292 cmt. e (2023); Martin, *supra* note 16, at 186–88; Alfredo de Castro Jr., Comment: *Negotiorum Gestio in Louisiana*, 7 TUL. L. REV. 253, 257 (1932–1933); Ayres & Landry, *supra* note 320, at 116–17, 132, 135–40. Some courts also use the generic term "quasi-contract" without qualifying the specific type—*negotiorum gestio* or unjust enrichment. *See, e.g.*, Masera v. Rosedale Inn, 1 So. 2d 160 (La. Ct. App. Orl. 1941); Teche Realty & Investment Co., Inc. v. A.M.F., Inc., 306 So. 2d 432, 436 (La. App. 3 Cir. 1975).

926. *See* LA. CIV. CODE art. 2292 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1301; QUEBEC CIVIL CODE, *supra* note 13, art. 1482.

927. *See* Symeonides & Martin, *supra* note 23, at 100. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303 (providing that the rules on enrichment without cause apply "except for cases of management of affairs and payment of a thing not due").

928. *See* LA. CIV. CODE arts. 2297, 2302 (2023). However, in the inverse situation where the defendant made unauthorized use of plaintiff's property resulting in plaintiff's impoverishment (increased liability) and plaintiff's enrichment (expenses avoided), the defendant will be liable for enrichment without cause if an

the manager's claim for reimbursement of expenses is entirely independent of the owner's enrichment.[929] A claim for enrichment without cause (*actio de in rem verso*) may be possible when the management of the affairs does not fall under the provisions *on negotiorum gestio*. An example is the management of the affair by a person of limited legal capacity.[930] The idea of *negotiorum gestio* is not only civilian. This concept exists in the common law of restitution and in other areas of the law, including the law of agency.[931]

Dicta in certain decisions conflate payment of a thing not due (*condictio indebiti*) with enrichment without cause (*actio de in rem verso*).[932] Although both institutions are based on the principle of unjust enrichment, they do not overlap. In an action for payment of a thing not due, the court orders restoration of a thing or of its value that belongs to the plaintiff, as if the defendant had borrowed the thing. That thing was given in payment although payment was never due (objectively undue payments) or was made by mistake (subjectively undue payments). Thus, the action focuses on an individual thing and not on a broader notion of enrichment. For this reason, the

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action in tort is not available. *See* Commercial Properties Development Corp. v. State Teachers Retirement System, 808 So. 2d 534 (La. Ct. App. 1st Cir. 2001).

929. *See id.* art. 2292 cmt. e.

930. *See id.* art. 2296.

931. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–30 (AM. L. INST. 2011).

932. For instance, some courts have applied article 2298 of the Louisiana Civil Code (*actio de in rem verso*) to cases of mistaken payments that should fall under articles 2299 and 2302 (*condictio indebiti*). *See, e.g.*, New Orleans and Baton Rouge Steamship Pilots Association v. Wartenburg, 316 So. 3d 39 (La. Ct. App. 1st Cir. 2020). *See also* Louisiana Specialty Hosp., LLC v. Adams, 2010 WL 3211077 (E.D. La. Aug. 13, 2010); *cf.* Willis North America, Inc. v. Walters 2011 WL 1226032, at *5 (E.D. Va. Mar. 30, 2011). Other times, courts discuss "unjust enrichment" as a unitary concept, conflating the provisions on enrichment without cause and payment of a thing not due. *See, e.g.*, Bennett v. Dauzat, 984 So. 2d 215, 218 (La. Ct. App. 3d Cir. 2008); Our Lady of the Lake Regional Medical Center v. Helms, 754 So. 2d 1049, 1052–53 (La. Ct. App. 1st Cir. 1999); New Orleans and Baton Rouge Steamship Pilots Association v. Wartenburg, 316 So. 3d 39, 44 n.5 (La. Ct. App. 1st Cir. 2020); Fielding v. MTL Ins. Co., 261 F.Supp.2d 619, 625–26 (E.D. La. 2003); Barton Land Co. v. Dutton, 541 So. 2d 382, 383–85 (La. Ct. App. 2d Cir. 1989). *See also* Chrysler Credit Corp. v. Whitney Nat. Bank, 1993 WL 70050, at *4 (E.D. La. Mar. 4, 1993) ("[T]he Louisiana jurisprudence is somewhat muddled on the question of whether these are, in fact, two distinct causes of action").

rules of restoration of an undue payment differ noticeably from the rules of restitution for enrichment without cause. For instance, a change of position defense is not always available to a payee of a thing not due. Furthermore, the action is not subsidiary. There is a great degree of overlap between objective undue payments and the doctrine of cause. Thus, a plaintiff may recover an objectively undue payment under several theories of recovery—contract (dissolution or nullity of a contract), property (real action for revendication of a movable or an immovable), tort (action for conversion), and quasi-contract (payment of a thing not due).[933] Payments made entirely outside the realm of a cause (e.g., payment to a wrong person or mistaken payments of debts of others) that cannot be recovered by an action in contract can be restored under the provisions on payment of a thing not due. Therefore, payment of a thing not due is the Louisiana equivalent of several instances of unjust enrichment at common law, such as the recovery of performances under a failed contract and mistaken payments.

On the other hand, a subsidiary action for enrichment without cause involves the restitution of displaced wealth that now belongs to the defendant and that cannot be recovered by any other remedy, including the action for payment of a thing not due. For instance, the value of services rendered without a contract, in excess of a contractual obligation, or under a contract that failed is recovered by an action for enrichment without cause.[934] Benefits derived from interference with the plaintiff's property that are not actionable in tort may be recovered by an action for enrichment without cause. Likewise, a payor of the debt of a third person who may not recover the payment from the payee has recourse against the debtor under a theory of enrichment without cause.[935] The defendant may avail herself of a change of position, to the extent that the compensation owed is the

933. *See* LA. CIV. CODE art. 2299 cmt. c (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 13:13, 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20.

934. *See* LA. CIV. CODE art. 2018 (2023).

935. *See id.* art. 2302 cmt. c.

lesser of her subsisting enrichment and the plaintiff's impoverishment.

Finally, because of the equitable (in the civil-law sense) nature of all quasi-contractual remedies, the court ought to look into the good or bad faith of the parties and the particularity of each individual case to reach a just result.

Therefore, there is a clear, albeit partial, overlap between "cause" (the laws of contract and tort)[936] and "quasi-contract" (*negotiorum gestio*, payment of a thing not due, and enrichment without cause), which is shown in Figure 1. The Venn diagram there shows that: (1) Damages for tort or breach of contract are recovered by an action in tort or in contract. (2) Restoration of movables and immovables that were transferred under a failed contract can be made by an action in contract, or by an action in tort if there was conversion, or by a real action, or by an action for payment of a thing not due. Here, there is an overlap between cause and part of the action for payment of a thing not due. (3) Restoration of mistaken payments and payments of nonexistent or non-enforceable obligations can be made by an action for payment of a thing not due or by a real action if available (or by an action in tort if there was conversion). (4) If the requirements for *negotiorum gestio* are met, recovery is possible only by the owner's direct action against the manager or the manager's contrary action against the owner. *Negotiorum gestio* is outside the realm of cause and unjust enrichment. (5) If none of the above remedies is available, restitution may be possible by an action for enrichment without cause.

936. The term "cause" used here is broader and it refers to recovery of a performance under a failed contract, and damages due to breach of contract or tort.

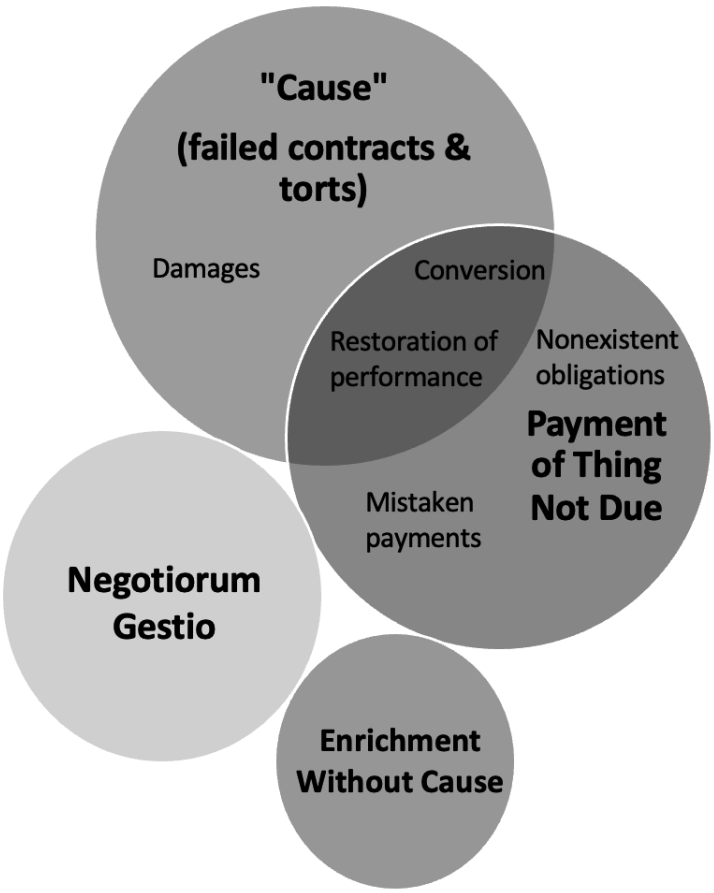


Figure 1. Overlap between "cause" and "quasi-contract"

## VI. CONCLUSION

This Article has examined the revised Louisiana law of *negotiorum gestio* and unjust enrichment, through a historical and comparative lens. The purpose of this analysis was to provide a commentary on the revised law that should help clarify certain concepts and misunderstandings that have confused Louisiana courts and lawyers. The analysis traced the historical roots of this confusion back to the concept of "quasi-contract," a term that is still widely used by courts and scholars.

This Article proposed a redefinition and proper use of the concept "quasi-contract" as a term describing a group of two separate sources of obligations—*negotiorum gestio* and unjust enrichment, which consists of the actions for payment of thing not due (*condictio indebiti*) and enrichment without cause (*actio de in rem verso*).

This redefinition is intended to dispel the false impression among Louisiana judges and lawyers that quasi-contract is supposedly a broader concept that goes beyond *negotiorum gestio* and unjust enrichment and includes other "innominate types." Such an overly broad notion of quasi-contract is doctrinally unsound and has no practical utility.

The commentary on the revised law of *negotiorum gestio* expounded the precise requirements and the effects of a proper management of the affairs of another, with reference to civil-law and common-law sources. This analysis also aimed to disentangle the confusion in the Louisiana jurisprudence between *negotiorum gestio* and unjust enrichment. The commentary on the law of unjust enrichment clarified the distinction between the two separate actions of *condictio indebiti* and *actio de in rem verso*, which at times has eluded the Louisiana courts and has been misconstrued by comparativists. Drawing the precise contours of the Louisiana law of unjust enrichment will facilitate further research of this area of the law, particularly with comparative reference to the Third Restatement of Restitution and Unjust Enrichment.

Finally, this Article attempts to highlight Louisiana's unique position, and therefore capacity, as a "mixed-jurisdiction" to borrow useful elements from both civil-law and common-law systems for its own doctrines of restitution and unjust enrichment. These doctrines might then serve as a model for other jurisdictions. It is hoped that this Article will stimulate further scholarship in this area of the law that may lead to the addition of a Louisiana chapter to the national casebooks on restitution and unjust enrichment.[937]

937. *See, e.g.*, ANDREW KULL & WARD FARNSWORTH, RESTITUTION AND UNJUST ENRICHMENT. CASES AND NOTES (2018).

# NO TRESPASSING: THE LEGAL ORIGINS OF LOUISIANA'S WATER ACCESS DISPUTE

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ABSTRACT

*Since the birth of the civil law tradition, the public's right to access and use running waters has been recognized and protected through written legal sources, statutes, and codes. However, although the State of Louisiana is often lauded as the "Sportsman's Paradise," the current judicial interpretation of water access rights has restricted the public's ability to use waterways, in particular running waters, for recreational pursuits such as fishing and hunting. The purpose of this essay is first to highlight the trajectory of the development of the law relative to the public's right to access and use running waters. The analysis ranges from the time of Emperor Justinian to present day Louisiana in order to underline the deviance of Louisiana's current jurisprudence, which steps away from the original and/or legislative intent regarding running waters. This Article also aims at offering legal solutions with minimal impact to address the aforementioned discrepancy in the law moving forward.*

Keywords: trespassing, water access, recreation, Louisiana Civil Code, Louisiana Revised Statutes, navigability, original intent, Roman law, *corpus iuris civilis*

## I. INTRODUCTION

*As we sped down the Intracoastal Waterway—wind whipping our cheeks and the hot Louisiana sun warming our upturned faces––I took a moment to admire the view around me. The canal, lined by stately cypress trees laden with springy Spanish moss, framed the expanse of muddy blue waters. Our Champion sliced through the mirror slick calm, pushing wake against the banks and into the myriad of smaller waterways connecting to the Intracoastal Canal.*

*The boat slowed as Dad spotted the entrance to our honey-hole, and my mouth watered with anticipation at the thought of the fried fish filets we would eat tonight. Idling slowly into the opening, dad expertly navigated the canal until we reached our favorite spot. We both grabbed our poles, rigged a spinner bait onto our lines, and tossed out a few test casts. On the second cast (this was the honey-hole, after all), I felt the familiar, exciting tug on my line. Eagerly as I reeled in my fish, I turned to my dad, ready to triumphantly announce my catch.*

*Rather than focusing on his own pole and my hooked fish, Dad's attention was fixated on an approaching boat. The Gatortail, holding two passengers, pulled up next to our boat. One of the men pulled out his phone and began taking pictures of our boat and license plate number while a large, older bald man yelled, "I've seen you two here before. This is private property, and y'all are trespassing. I'm callin' the sheriff."*

*"If we're on private property, we'll leave. I was here fishing today with my son as we have done many times before. There are no signs or gates on the entrance to the waterway, so we did not realize this was private property," my dad calmly stated as he began picking up his pole.*

*"Like I said, this is private water, so you can't be here. I'm sick of fishermen thinkin' they own any waters they can access with a boat. Expect a visit from the sheriff because I will be pressing trespassin' charges," said the bald man.*

*Our fishing trip ruined, Dad and I headed home. Upon arrival at our house, a sheriff's deputy was waiting in the driveway with a citation that read "R.S. 14:63 Criminal Trespass."*[1]

Louisiana, affectionately nicknamed "Sportsman's Paradise" by her residents, boasts one of the most unique ecosystems in the United States of America. By virtue of the marshlands, swamps, and a vast array of water bodies dominating the landscape, Louisiana is a veritable oasis of exceptional wildlife species, ranging from crawfish to speckled trout, wood ducks to muskrats. The state's unique wildlife and aquatic species captivate native residents and visitors alike, generating both economic revenue and public enjoyment throughout the state.

However, not all is well in "Paradise." Recently, the current state of property law regarding Louisiana waterways has created conflict between private landowners, who claim ownership to certain canals and waterways, and recreational sportsmen who wish to use such waterways for fishing and hunting. The water access dispute has resulted in the proliferation of criminal trespassing tickets assessed upon anglers for the "crime" of fishing, boating, or hunting in waterways used by generations of Louisianians prior to the exclusion of access by these private landowners.

This privatization of coastal waterways—though, in part, stemming from coastal erosion and land loss—has been bolstered and upheld by Louisiana courts, rendering Louisiana one of the only jurisdictions in the world where navigable, running waters may be subject to private ownership and where traversing these waters can trigger trespassing charges. These court rulings run counter to the plain statutory language of Louisiana law regarding the classification of waters and water bodies, namely Civil Code article 450, which provides that all running waters are a public thing subject to public use. However, courts have consistently upheld the exclusion

1. This introduction is based on a true story which resulted in the assessment of criminal trespassing charges on South Louisiana recreational anglers.

of the public from waterways claimed by private owners, despite the fact that these waterways contain running waters, which are subject to public use.[2]

This essay aims to confront this line of jurisprudence as contrary to Louisiana law, the original legislative and historical intent of article 450, and basic principles of civilian equity. To accomplish these goals, this essay will compare the current state of water law—focusing on the law regarding the public's rights in relation to running waters—in Louisiana with previous iterations in the Louisiana Civil Code. It will also focus on the European and Roman source materials which provided the drafters of the Louisiana code with guidance, to discern the original legislative intent regarding public interaction with running waters of the state. This essay will consider American sister-state jurisdictions as well to examine how other states regulate public access to natural resources such as water and water bodies. Furthermore, this essay will discuss steps that could be taken to remediate this crisis, addressing solutions that range from proposing legislative changes to Louisiana's water law to more creative legal arguments, such as servitude rights to the disputed waterways acquired by the public through acquisitive prescription. Ultimately, this essay does not contend that the public should be able to access all waterways, such as a private pond in the middle of someone's landlocked property. Rather, this essay asserts that waterways which support recreational pursuits like fishing or pleasure boating and contain running waters should be subject to public use.

Part I of this Article will explain the extent of the problem referenced by the phrase "water access crisis," providing historical background to highlight the roots from which this problem stems. Part II, on the other hand, will provide an overview of the current law regarding the public's rights to water access. This will involve

2. *See* Part IV for a detailed examination of the jurisprudence supporting this assertion.

examining both the legal definition of navigability and running waters; addressing Louisiana law found in legislation, jurisprudence, and doctrine; and comparing the common law equivalent for reference. Part III of this Article will provide analysis of previous versions of article 450 of the Louisiana Civil Code to discern the original intent of its meaning and application. Part IV will examine historical civil law sources, which inspired article 450, to provide context and perspective on the development of property law applicable to water and water bodies, from the first promulgations of written laws to the modern codification in certain European civil law jurisdictions. Part V will discuss possible options to address the water access crisis moving forward, which, thanks to an erroneous "precedent" created by the National Audubon[3] jurisprudence and its progeny, likely requires action by the Louisiana legislature. One option includes recognition by the legislature of public servitudes of surface water passage acquired through acquisitive prescription. As a second option, the Louisiana legislature should recognize public recreational navigation servitudes, which would grant the public access rights to surface waters while recognizing and protecting the private ownership of the immovable water bottom itself. Finally, to address the burgeoning number of water trespass citations being issued in Louisiana, the legislature should consider amending La. R.S. 14:63 to reinstate the law, including posting requirements and affirmative defenses to trespass as it existed for many decades prior to its change by Act 802 of 2003. While changing the language of 14:63 will not address the core issue of the public's right of access to running waters, it may serve to alert the general public and reduce the threat of criminal prosecution.

3. *See* National Audubon Society v. White, 302 So. 2d 660 (La. App. 3d Cir. 1974), *writ denied* 305 So. 2d 542 (La. 1975).

## II. WHAT IS THE WATER ACCESS CRISIS, AND WHY IS IT A PROBLEM?

### *A. Water Access Crisis*

The "water access crisis" encapsulates the growing trend in coastal Louisiana of private landowners asserting ownership claims over bodies of accessible water. With increasing frequency, both canals and naturally occurring, navigable waterways, which have been open to the public for generations, have been gated off, allowing the waters and fish through the gates while barring the public from access. In certain areas, fishermen are criminally prosecuted for trespassing upon entering allegedly "private" waters, even though these "private" waters are indistinguishable from the adjoining public waters.

Recreational sportsmen are increasingly frustrated by the derogation of public rights in favor of alleged ownership rights asserted by private landowners over water bodies. By asserting these claims, private landowners are taking natural resources and codally designated "public things" as private property. Natural, navigable waterways, including their waters and bottoms, running waters, and the seashore along with its overflow, are all designated as public things subject to public use by the Louisiana Civil Code.[4] Thus, any naturally occurring waterway that is "navigable" should be a public thing, though the current definition of navigability creates some of the access problems discussed in this essay.[5] Any body of water that contains running waters should be considered a public thing, separately and distinctly from the classification of underlying beds and bottoms of the water body itself.[6] Any area designated as the seashore should also be a public thing. Despite the plain text of the

4. LA. CIV. CODE art. 450 (2023).

5. *See* Part III, Section A, Subpart 2, for a discussion of the definition of navigability.

6. "Running water is distinguishable from the space it occupies and from the bed that contains it. The bed of a non-navigable river is a private thing whereas the water of the non-navigable river is a public thing subject to public use."

Louisiana Civil Code designating them as public things, private landowners are still allowed to assert ownership over public things and use Louisiana's criminal trespass law to enforce their claims of exclusion.

The true problem arises when waterways are classified as non-navigable, which means their beds and bottoms can be alienated and subjected to private ownership. Even though beds are deemed private things, the waters flowing over these beds—running waters—are public things subject to public use. In fact, the trend followed by Louisiana courts is to prohibit public access to running waters that flow over private beds and bottoms. This author asserts that the interpretation followed by Louisiana courts is erroneous and violates the historical and original intent of the public's right to use public things.

*B. Historical Background*

Approximately 80% of Louisiana's coastal region is currently under private ownership, and the pervasiveness of the private ownership of coastal regions is at the heart of the water access crisis.[7] The rationale for this phenomenon is rooted in historical legislation as well as modern and natural causes.

Historically, legislation passed by the United States and Louisiana governments in the nineteenth century contributed to Louisiana's unique property ownership in coastal regions. In 1849 and 1850, the United States government passed the Swamp Land Grant Acts, in which the federal government conveyed to Louisiana an estimated nine million acres of "swamp lands subject to overflow," lands which were unfit for cultivation.[8]

Through a series of state legislative acts, Louisiana then

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RONALD J. SCALISE JR. & A.N. YIANNOPOULOS, LA. CIV. L. TREATISE, PROPERTY § 3:13 (5th ed. 2015-2022).

7. Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 LA. L. REV. 889, 920 (2016).

8. A.N. YIANNOPOULOS, PROPERTY: THE LAW OF THINGS – REAL RIGHTS – REAL ACTIONS, § 66-67 (4th ed. 2001); Mestayer, *supra* note 7.

conveyed much of these lands to private owners so that they could be used for more productive private purposes. One act in particular––Act 75 of 1880—authorized the sale of "sea marsh or prairie, subject to tidal overflow" to private entities, and created confusion regarding classifications of private waters versus public waters.[9]

To explain the law at stake, one must keep in mind that while areas subject to the ebb and flow of the tide are considered seashore and public things, areas merely subject to tidal overflow can be alienated as private things.[10] These alternative definitions, while distinguishable in the abstract, are hard to differentiate in practice on the Louisiana Gulf coast where the character of water bodies is constantly in flux due to the ever-shifting coastline. Thus, it is likely that part of the property alienated by this act should have been classified as public, rendering it inalienable by the state.

Presently, the most pervasive causal event contributing to the water access dispute is the dynamic nature of Louisiana's fluctuating coastline. A familiar refrain repeated throughout the state is that Louisiana loses the equivalent of a football field of coastal land every hour,[11] while a new statistic has indicated that it actually does every hour and a half.[12] Regardless of the modest improvement in the rate of coastal land loss, subsidence and erosion are still serious issues faced by the state, especially in relation to the water access dispute. As once dry tracts of land become submerged and permanently accessible by boat, private landowners attempt to maintain ownership claims to the land now covered by water and access to the water above said land. This author argues that this amounts to a violation of the Louisiana Civil Code.

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9. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 66-67.
10. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 4:12 (5th ed. 2021).
11. *See* Mark Schleifstein, *Louisiana is Losing a Football Field of Wetlands Every Hour, New U.S. Geological Survey Study Says*, THE TIMES-PICAYUNE (June 2, 2011), available at: https://perma.cc/S8XT-ZADB.
12. *See* Elizabeth Kolbert, *Louisiana's Disappearing Coast*, THE NEW YORKER (March 25, 2019), available at: https://perma.cc/V8TM-A7WP. The impact of the 2020 and 2021 hurricane seasons, which devastated the Louisiana coastline, were not taken into consideration by this statistic.

In 2006, the Louisiana Legislature realized that the privatization of submerged lands was a problem for public access to waterways.[13] Under authority of Civil Code article 450, the Office of State Lands engaged in a large-scale mapping project to clarify public versus private lands and water bottoms, but it immediately faced backlash from angry landowners trying to defend their land and threatening lawsuits the state could not afford.[14] The Office of State Land's "solution" to the problem was to classify disputed submerged lands as "claimed by the state and the adjoining property owner," and advise the public citizens to enter the waterways at their own risk. These lands are commonly referred to as "dual claimed lands."[15]

Because of the rapidly changing landscape of Louisiana waterways, areas that historically were uplands or non-navigable waters owned by private landowners are now transforming into waterways that are accessible by boat. To fishermen, these areas are indistinguishable from the surrounding waters, but to the landowner who purchased the property and pays taxes on it, it is considered as private property upon which the fishermen are trespassing.[16]

Prior to the rise of "marsh management plans" in the 1970s and 1980s, landowners were more inclined to tolerate the presence of recreational fishermen on their submerged property.[17]

With growing frequency over the last fifty years, more landowners have posted "no trespassing" signs on their property, forcing fishermen to keep out of waterways that many anglers claim to have

13. Mestayer, *supra* note 7, at 889-91.
14. *Id*.
15. *Id*.
16. In 2003, Louisiana repealed the prior law requiring landowners to post signs declaring that certain waterways were private if the landowner wanted to exclude the public from recreational pursuits in the area. Tristan Baurick, *Lawmakers reject effort to make Louisiana coastal waters public*, THE TIMES-PICAYUNE (July 12, 2019), available at: https://perma.cc/U32M-LU5M.
17. Marsh management plans rose to prominence as a mechanism to protect private land from coastal erosion using levees, weirs, and flood gates on marsh to retard erosion. These protective mechanisms isolated the marshes, cutting off public access to the marshlands as well as obstructing public access to natural waterways within the marshes. Kathy Ketchum, *Waterways of the Marsh: Marsh Management Plans and Public Rights*, 1 TUL. ENVTL. L.J. 3 (1988).

fished for decades.[18] Members of the Louisiana legislature have proposed bills to settle this dispute between sportsmen and landowners; however, due to the effects of the COVID-19 pandemic, these bills were never heard.[19] The issue was again brought before the Louisiana legislature during the 2022 legislative session in the form of HB 754, which was withdrawn from the files of the House prior to debate in committee hearings due to political pressure over this issue.[20] During the 2023 Regular Session, H.B.4, proposed by Representative Bacala, offered an amendment to Louisiana's criminal trespassing statute to bar its applicability when a person is "operating a watercraft on running water of the state in accordance with Civil Code Article 450, 452, 455, or 456." Unfortunately, H.B.4 died after being referred to the Committee on Administration of Criminal Justice.[21]

Although the legislature has placed priority on other issues in past sessions, the water access dispute is surging in importance, creating further problems in coastal Louisiana. As the issue has

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18. *See* Drew Miller, *Orange Grove is Closed to the Public; Future Gates might make Sure of That*, HOUMA TIMES (May 29, 2020), available at: https://perma.cc/8YTE-ZNYS.

19. The 2020 Regular Legislative Session proposed a variety of bills designed to alleviate some of the contention between recreational water users and private landowners. *See* S.B. 176, 2020 Leg., Reg. Sess. (La. 2020), which allows for the state and private landowners to enter into boundary agreements concerning disputed property; *See* S.B. 177, 2020 Leg., Reg. Sess. (La. 2020), a proposal Pending Senate Natural Resources to amend the constitution and allow the state to enter into agreements with riparian owners to establish permanent and fixed boundaries between state owned and privately owned water bottoms notwithstanding the navigability of the water body in question to preserve the mineral rights of the land; *See* S.B. 320, 2020 Leg., Reg. Sess. (La. 2020), a proposal Pending Senate Judiciary C to allow the occupant of a watercraft traveling on state waters and engaged in any lawful activity to remain on those waters unless forbidden to do so by the owner; *See* S.B. 479, 2020 Leg., Reg. Sess. (La. 2020), a proposal Pending Senate Judiciary C to allow people engaged in commercial fishing over waters that are navigable in fact to have an affirmative defense to the crime of trespassing; *See* H.B. 627, 2020 Leg., Reg. Sess. (La. 2020), which provides for an affirmative defense to the crime of trespass when certain property is not properly posted; *See* H.B. 650, 2020 Leg., Reg. Sess. (La. 2020), which provides for the regulation of gates across waterways in the coastal areas.

20. *See* H.B. 754, 2022 Leg., Reg. Sess. (La. 2022). For full disclosure, this author was involved in the drafting of H.B. 754, although the original text provided on the legislature's website is placeholder language for the actual bill text, which did not have a chance to be amended prior to its withdrawal.

21. *See* H.B. 4, 2023 Leg., Reg. Sess. (La. 2023).

received national attention, the Bass Anglers Sportsman Society ("BASS"), an influential bass fishing organization, announced that they will no longer allow Louisiana to host Bassmaster tournaments. This decision is due to the difficulty distinguishing public from private waterways to ensure participants do not break Louisiana law.[22]

## III. CURRENT APPLICABLE WATER ACCESS LAW IN LOUISIANA AND SISTER JURISDICTIONS

### *A. Louisiana*

As a mixed law jurisdiction adhering more closely to civil law than to common law,[23] the primary source of law in Louisiana regarding water access rights rests in legislation and custom,[24] while jurisprudence and doctrine are deemed to be secondary sources of law. However, an examination of these sources shows that while a plain language reading of Louisiana law provides for public use of running waters, the jurisprudence has improperly—both from a procedural and substantive legal perspective—limited the public's rights of use.

Examination of this improper interpretation will begin with review of various applicable legislative texts, followed by jurisprudential and doctrinal gloss to impute meaning to the legislative texts. The analysis will culminate with case law focusing on the courts' interpretation of the public's rights to use running waters, especially when the waterbody is not natural or navigable.

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22. James Varney, *BASS pulls Bassmaster Tournaments from Louisiana Over Coastal Lawsuits*, THE WASHINGTON TIMES (May 10, 2018), available at: https://perma.cc/G4MW-QMJ6.

23. This adherence to the civil law tradition is true with regard to Louisiana private law. Louisiana public law aligns more closely with the common law. *See generally*, A.N. YIANNOPOULOS, CIVIL LAW SYSTEM, LOUISIANA AND COMPARATIVE LAW: A COURSEBOOK: TEXTS, CASES, AND MATERIALS (2nd ed., Claitor's Pub. Division 1999).

24. LA. CIV. CODE art. 1 (2023).

*1. Legislation*

Article 9 of the Louisiana Constitution provides the general public policy regarding natural resources in the state of Louisiana. The article reads,

> [t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.[25]

Taking this article into consideration, Louisiana recognizes the protection of natural resources for the good of all Louisianians as a desired public policy.

Book II of the Civil Code, which addresses property law, begins with a division of things that provides the structure of property ownership in Louisiana, including the ownership of natural resources. The Code divides things into three categories: common things, public things, and private things.[26]

Common things—such as the air and high seas—may not be owned by anyone, not even by the state, and may be freely used by everyone in the manner nature intended.[27] Public things—including running waters,[28] the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore[29]—are owned by the state or its political subdivisions in their capacity as public persons.

As such, public things are subject to public use, in accordance with applicable laws and regulations, which includes the right to fish.[30] Running waters, a central focus of this essay, are defined by the Mineral Code as follows: "'Running surface waters means the

25. LA. CONST. art. IV, § 1.
26. LA. CIV. CODE art. 448 (2023).
27. LA. CIV. CODE art. 449 (2023); LA. CIV. CODE art. 449 (cmt. b) (2023).
28. *See* Part III, Section A, Subsection 2 for jurisprudential and doctrinal gloss on the definition of running waters.
29. Seashore is codified as "the space of land over which the waters of the sea spread in the highest tide during the winter season." LA. CIV. CODE art. 451 (2023).
30. LA. CIV. CODE art. 450 (2023); LA. CIV. CODE art. 452 (2023).

running waters of the state, including the waters of navigable water bodies and state owned lakes."[31] Private things—including banks of navigable rivers or streams[32] and inland non-navigable water beds or bottoms[33]—may be owned by individuals and the state or by its political subdivisions in their capacity as private persons. Owners of private things may freely dispose of them so long as the actions comply with the law.[34] Thus, where common things are insusceptible of any ownership and may be freely used by everyone, public things are owned by the state, subject to public use in accordance with applicable laws and regulations.[35] The chief distinction between the classification of a thing as common versus public is the increased ability of the state to impose restrictions and regulations on the public thing to determine the scope of its use.

Beyond the rights of the general public to use running waters in its capacity as a public thing, owners of estates fronting a river or stream have additional riparian rights—or natural servitudes—for the use of running waters. According to article 657 of the Civil Code, the owner of such an estate may use the running waters "for the purpose of watering his estate or for other purposes."[36] However, a riparian owner does not have absolute rights to the running waters bordering his estate.

Article 658 states that a riparian owner may make use of the running waters when running over his lands. However, "he cannot stop

31. LA. REV. STAT. ANN. § 30:962 (2023). Note that although Louisiana law provides a definition of running waters, the fact that the definition appears in the Mineral Code raises the possibility that this definition only applies in the context of mineral rights and mineral law, rather than property and water law.

32. According to LA. CIV. CODE art. 456 (2023), while banks of navigable rivers or streams are private things, they are subject to public use. Banks in this context are defined as the land lying between the ordinary low and high-water level of the river or stream. However, when a levee is in proximity to a river or stream, this rule does not apply, and the levee forms the bank.

33. "Inland non-navigable water bodies are those which are not navigable in fact and are not sea, arms of the sea, or seashore." LA. REV. STAT. ANN. § 9:1115.2 (A) & (B) (2023).

34. LA. CIV. CODE art. 453 (2023); LA. CIV. CODE art. 454 (2023).

35. *See* LA. CIV. CODE art. 449, 452 (2023).

36. LA. CIV. CODE art 657 (2023).

it or give it another direction and is bound to return it to its ordinary channel where it leaves his estate."[37] Riparian owners may not exclude the public use of running waters by exhausting the supply, rendering the water unsuitable, obstructing the flow, or taking substantial enough quantities of the water to cause damage.[38] If an owner of an estate does not return the running waters to their ordinary channel before the waters leave his estate, and if the area is located within the coastal area and involves integrated coastal protection, the owner may even be subject to fines and imprisonment.[39] Based upon a plain reading of these provisions as well as the public policy espoused in the Louisiana Constitution, running waters—as a public thing—should be subject to public use, which includes the use of fishing[40] and arguably other recreational pursuits, in accordance with applicable laws and regulations.

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37. LA. CIV. CODE art. 658 (2023); *see* LA. REV. STAT. ANN. § 38:218 (2023) ("No person diverting or impeding the course of water from a natural drain shall fail to return the water to its natural course before it leaves his estate without any undue retardation of the flow of water outside of his enclosure thereby injuring an adjacent estate.").

38. A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 2:8 (4th ed. 2019 update), *citing* LA. CIV. CODE art. 657 (2023) (providing "he may use it as it runs"); LA. CIV. CODE ANN. art. 658 (2023) (providing he may "make use of it while it runs"); *see generally* McFarlain v. Jennings Heywood Oil Syndicate, 43 So 155 (La. 1907); s*ee generally* Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942).

39. LA. REV. STAT. ANN. § 38:218 (2016) ("Every person who is convicted of a violation of this Section shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned for not less than ten days nor more than thirty days, or both."). Coastal area is defined as "the Louisiana Coastal Zone and contiguous areas subject to storm or tidal surge and the area comprising the Louisiana Coastal Ecosystem as defined in Section 7001 of P.L. 110-114." Conservation and restoration are defined as

> conservation, protection, enhancement, and restoration of coastal resources including but not limited to coastal wetlands, marshes, cheniers, ridges, coastal forests, and barrier islands, shorelines, coastal passes, or reefs through the construction and management of coastal resources enhancement projects, including privately funded marsh management projects or plans, and those activities requiring a coastal use permit which significantly affect such projects or which significantly diminish the benefits of such projects or plans insofar as they are intended to conserve or enhance coastal resources consistent with the legislative intent as expressed in R.S. 49:214.1.
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> LA. REV. STAT. ANN. § 49:214.2 (4) & (5) (2012).

40. LA. CIV. CODE ANN. art 452 (2023).

*2. Jurisprudential and Doctrinal "Gloss"*

The legislative provisions above have been further interpreted and defined by jurisprudence and doctrinal writings from civil law scholars regarding running waters. Both jurisprudence and doctrine place limitations upon the rights of the public to access running waters. To begin, three concepts must be defined with help from these secondary sources: navigability, standing waters, and running waters.

The concept of navigability must be examined because the classification of water bodies in general as a public or private thing typically hinges upon whether the water body is "navigable" in the legal sense of the term. The term "navigable" is not clearly defined by the Civil Code, and indeed holds different definitions depending upon the context in which it is used. According to the jurisprudence and doctrine, for a water body to be "navigable," the water body must be "capable of being used for a commercial purpose over which trade and travel are or may be conducted in the customary modes of trade and travel."[41] This definition is distinguishable from the definition of navigability as it relates to ownership, which examines whether the water body was capable of being used for commercial purposes in 1812, when Louisiana became a state and was granted ownership of the beds and bottoms of navigable waterways under the Equal Footing Doctrine.[42] This essay deals solely with the first definition because use of the waterways is the core of the arguments set forth, rather than ownership.

Louisiana courts have expressly rejected the use of a water body for recreational purposes as sufficient to satisfy the definition of navigability.[43]

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41. Walker Lands, Inc. v. E. Carroll Parish Police Jury, 871 So.2d 1258, 1264-65 (La. Ct. App. 2004); Ramsey River Rd. Prop. Owners Ass'n v. Reeves, 396 So. 2d 873, 875 (La. 1981).

42. *See* Pollard v. Hagan, 44 U.S. 212 (1845).

43. Clinton Lancaster, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to*

The current definition also does not account for commercial trades such as commercial oystering, charter hunting, or charter fishing, where the water merely needs to be deep enough to float a Gatortail or mud boat to support commercial activities. The inadequacies in the definition of navigability have led water access advocates to turn to running waters. According to article 450, running waters qualify as a public thing subject to public use, providing the public with the right to fish and hunt in accessible running waters deep enough to float their boats, even if such water bodies are not considered navigable under Louisiana's strict definition of navigability. Modification to the concept of navigability has been identified as one solution to the water access crisis and is discussed in further detail in Part VI.

This author argues that running waters should be both defined and contrasted with standing waters, which is challenging due to the lack of clear definitions of the terms in the doctrine and jurisprudence. Standing waters—the waters in non-navigable lakes, swamps, and ponds—are presumed to be owned by the owner of the ground through accession and are *not* public things.[44] Water bodies filled with standing waters are not included in the scope of the discussion of this essay because they are unarguably private things when over private water bottoms.

In contrast, running waters have been defined as "running waters of the state, including the waters of navigable water bodies and state-owned lakes."[45] This legislative definition is vague, non-exhaustive, and merely illustrates examples of types of running waters. Unfortunately, the doctrine and jurisprudence do not provide much clarity, merely supplying characteristics and general principles regarding running waters. The jurisprudence provides that classifying waters as running requires a judicial determination in which the judge

*Waterways and Its Effect on Riparian Owners*, 33 U. ARK. LITTLE ROCK L. REV. 161, 164-65 (2011).

44. YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 38; CODE CIVIL [C. CIV] [CIVIL CODE] (2023) art. 558 (Fr.).

45. LA. REV. STAT. ANN. § 30:962 (2023).

makes a factual inquiry, examining, for example, whether the waters contain a continuous current.[46] One principle that appears clear from the doctrine and jurisprudence is that running waters are a separate and distinct entity from their beds.[47] For example, even running waters over a non-navigable and private riverbed are a public thing subject to public use.[48]

However, there is a consensus in the doctrine that this does not provide the public with access to running waters—though a public thing—when the waters are on private land. According to Professor Yiannopoulos,[49]

> [l]andowners and members of the general public thus have the right to use running water for their needs, if they have access to it. Neither landowners nor members of the general public have the right to cross private lands in order to avail themselves of running water. Such a right may only be established by agreement, destination of the owner, or prescription.[50]

Professor Yiannopoulos' quote indicates that the public can commit a trespass by crossing private lands to access running waters on private lands, but many fishermen cited for trespass in recent years had merely been navigating their boats from one body of water to the next, never actually touching dry land.

Based on the characteristics and vague definitions provided, it appears that running waters must have a current or "flow" rather

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46. Verzwyvelt v. Armstrong-Ratterree, Inc., 463 So. 2d 979, 985 (La. App. 3d Cir. 1985).

47. SCALISE, *supra* note 6.

48. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 3:13 (5th ed. 2019 update).

49. Cited by more than 700 cases and countless law review articles, dubbed "Louisiana's Most Influential Jurist in Our Time," and remembered for the extensive work done serving as the Reporter for revisions for many portions of the Louisiana Civil Code, Athanassios Yiannopoulos is one of the most impressive and decorated professors to have ever graced the institutions of both Tulane and Louisiana State University's law schools. Elizabeth R. Carter, *In Memoriam: Professor A.N. Yiannopoulos*, 78 LA. L. REV. 1103, 1104 (2018). Consequently, the opinions of Professor Yiannopoulos carry significant weight in Louisiana's legal debates.

50. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 79 (3rd ed. 1991).

than remain stagnant. Running waters include the waters in navigable rivers and streams but are not limited to waters contained in those water bodies. Running waters are also separate and distinct from the bed over which they flow. The definition of running water is important because this author asserts that all running waters are public things subject to public use based upon the clear language of the Civil Code, which has been misinterpreted by Louisiana courts.

*3. "Precedential" Jurisprudence of Running Waters Decisions*

The jurisprudence supports and expounds upon these doctrinal viewpoints, consistently holding that the public does not have access rights to water over private land merely because the water flowing through the water body is a public thing.[51] Louisiana courts have also stipulated that while the classification of running water as a public thing imposes certain obligations upon riparian owners through whose estates running waters pass—namely the obligation to allow the water to exit the estate through its natural channel without diminishing its flow—those obligations do not mandate that the landowner allow public access to the waterway.[52] These holdings, discussed below, appear counterintuitive to the spirit of the legal definition of a public thing, namely that public things are subject to public use.

Although the jurisprudence has repeatedly ruled that the public does not have rights of access to running waters—though a public thing—over private lands, support for this *jurisprudence constante* is unsubstantiated by appropriate civilian legal analysis and source materials from the authoring judges, who rely instead on inconsistent and unpersuasive precedent. In a civil law jurisdiction such as Louisiana, the common law concept of *stare decisis*, in which a

51. *See* National Audubon Society v. White, 302 So. 2d 660, 665 (La. App. 3d Cir. 1974), *writ denied* 305 So. 2d 542 (La. 1975); Buckskin Hunting Club v. Bayard, 868 So. 2d 266, 274 (La. App. 3d Cir. 3/3/04).

52. *See* People for Open Waters, Inc., v. Estate of J.G. Gray, 643 So. 2d 415, 418 (La. App. 3d Cir. 10/5/94).

court is bound to make decisions based upon case precedent, is not applicable.[53] Rather, Louisiana judges are required to independently examine and interpret the factual circumstances of every individual case, applying the relevant legislation to reach the most equitable interpretation of the legislation.

Indeed, an illustrative quote from the Louisiana Supreme Court states that "[i]n Louisiana, this court has never hesitated to overrule a line of decisions . . . when greater harm would result from perpetuating the error rather than from correcting it."[54] While jurisprudence is "invaluable as previous interpretation of the broad standard . . . [it] is nevertheless secondary information."[55] The only caveat to

53. Instead, Louisiana follows a concept called *jurisprudence constante* in which three courts must come to the same conclusion on a particular area of the law for there to be any precedential value. However, Louisiana courts are still willing to overrule cases even in areas of the law substantiated by *jurisprudence constante*. State v. Thornhill, 188 La. 762, 810 (La. 1937) ("There is no such doctrine as *stare decisis* to stand in the way of correcting errors"); Lee v. Jones, 224 La. 231, 248-49 (La. 1953) ("Our common law brothers have the rule of *stare decisis*. Such does not prevail in Louisiana. Each case must stand or fall on its own facts."); State v. Cenac, 241 La. 1055, 1073 (La. 1961) (Hawthorne, J., dissenting) ("this court had occasion to declare forcefully and clearly that even in regard to the rules of property the maxim of *stare decisis* is not absolutely inflexible, particularly when it is shown that by following rather than by disregarding previous erroneous decisions from which evil resulted the community would suffer greater damage") (*citing* Miami Corp. v. State, 186 La. 784 (La. 1936); Carter v. Moore, 258 La. 921, 959 (La. 1971) (Barham, J., *concurring*) ("That concept stems from the theory of *stare decisis*, is founded entirely upon common law, and finds no basis in our Constitution, in our Civil Code, or in our statutory law. A study of the jurisprudence will show that the rule has been used in order to obtain a result in some cases but just as quickly discarded in other cases."); Eubanks v. Brasseal, 310 So. 2d 550, 555 (La. 1975) (Barham, J., *concurring*) ("In this civilian jurisdiction we do not follow decisional 'law.' Neither *stare decisis* nor *jurisprudence constante*, are in and of themselves *loi* in Louisiana. Jurisprudence may create custom, and jurisprudence penned by an astute judge may become doctrine, but jurisprudence can only supersede the Code when that jurisprudence has become entrenched as custom and the Code provision has fallen into complete desuetude."); Ardoin v. Hartford Acc. & Indem. Co., 360 So. 2d 1331, 1334 (La. 1978) ("the notion of *stare decisis*, derived as it is from the common law, should not be thought controlling in this state"); Doerr v. Mobile Oil Corp., 774 So. 2d 119, 128 (La 2000); Unwired Telecom Corp. v. Par. of Calcasieu, 903 So. 2d 392, 405–06 (La. 2005); Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n, 903 So. 2d 1071, 1105–06 (La. 2005), adhered to on reh'g (June 22, 2005); Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246, 256 (La. 2012).

54. Miami Corp., 173 So. 315, 320.

55. Hartford Acc. & Indem. Co., 360 So. 2d 1331, 1334.

this general rule is that "[i]n a civilian system, especially amidst the extraordinary development of contemporary legislative action, the highest court has the mission of guarding and regulating the unity and regularity of the interpretation of law."[56] Thus, Louisiana courts must make decisions using their judicial discretion to delve into the facts of the case before their court to reach an equitable decision, limited only by guiding decisions rendered by the Louisiana Supreme Court.

Based upon the body of jurisprudence in Louisiana regarding running waters, the Louisiana courts rendering decisions on running waters ignore these principles, instead following the common law principle of *stare decisis* on numerous occasions while ignoring the weight of an applicable Louisiana Supreme Court decision. To explore the judicial rationale for the claim that running waters over private lands may not be used by the public, it would be beneficial to mention the relevant judicial holdings to isolate the "sources" comprising this line of jurisprudence.

The running waters jurisprudence in Louisiana, held in part because of the use of precedent as the main support of the holdings, consists of a chain of cases that build from each other and use the precedent of prior cases as the main support for the decisions. Turning to the oldest decision, the author was able to identify that *National Audubon Society v. White* directly addressed whether the public may use running waters based on its characterization as a public thing. The case involved an injunctive proceeding by a landowner to enjoin a farmer from trespassing in a man-made canal.[57] The canal was constructed on private land with private funds and further widened and maintained with private funds, but the canal also contained running waters.[58] The court in *National Audubon* held "that the canal was not a common or public thing and that title to the canal

56. Bergeron v. Bergeron, 492 So. 2d 1193, 1199 (La. 1986).
57. National Audubon Society v. White, 302 So. 2d 660, 662 (La. App. 3d Cir. 1974).
58. *Id*.

should not be 'vested in a whole nation' because it contains running waters," making this statement by analogy to a quote from Professor Yiannopoulos.[59] The court here reasoned that because a road built on private property for private purposes is privately owned, a canal built on private property with private funds should therefore also be considered as privately owned.[60] This analogy is fundamentally flawed because while a road may arguably be similar to a water bottom, a road does not contain a separate and distinct thing that can be independently classified as public or private.

The *Audubon* court did allow for the future possibility that:

> if a navigable canal should be constructed with public funds, or if it should be located on a publicly owned right-of-way or on public property, then it at least arguably is a public canal, and the owner of adjacent property would have no right to regulate or prevent its use by anyone else.[61]

As a brief aside, the classification of canals should be addressed as well. While the Civil Code does not mention whether canals are public or private things, the jurisprudence and doctrine provide some guidance to fill in this gap and explain how the public is able to use canals.[62]

According to doctrinal sources, a navigation canal constructed by public authorities on public lands should be classified as a public thing.[63] Conversely, a canal built entirely on private property for private purposes is a private thing, as articulated by the *National Audubon* court.[64] However, to further complicate the issue, the Supreme

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59. *Id.* at 665, *writ denied* 305 So. 2d 542, ("Vol. 2, Yiannopoulos, Civil Law Treatise, Sec. 31.5") (no longer available on Westlaw).

60. *Id*. at 662.

61. *Id.* at 665; the current law regarding access to canals is set forth in Vaughn v. Vermilion Corp., which held that the public is not afforded any rights of use via the Commerce Clause when a canal is built on private property with private funds even if ultimately joined with other navigable waterways. Vaughn v. Vermilion Corp., 444 U.S. 206, 208–09 (1979).

62. A canal is an artificial waterway constructed by public authorities or by private persons.

63. A.N. Yiannopoulos, *The Public Use of the Banks of Navigable Rivers in Louisiana*, 31 LA. L. REV. 563 (1971).

64. *Id*.

Court of the United States has held that a navigable water body made by a private person on his land with his own funds that alters pre-existing natural, navigable waterways is subject to a federal navigation servitude.[65] This indicates that even canals which are dug on private land with private funds could be subject to public use depending on the manner in which the private canal alters the natural hydrology of the particular area.

Turning back to jurisprudence, *Chaney v. State Mineral Board*[66] is one of the few cases in Louisiana supportive of public access rights to waterways using the running waters argument. However, judges in Louisiana have continuously and inexplicably declined to follow this Louisiana Supreme Court case. The *Chaney* case involved a consolidated possessory action between landowners and the state disputing ownership of the bed and bottom of the judicially determined non-navigable Amite River. The court held that the landowners failed to meet their burden to prove corporeal possession of the bed of the non-navigable river, finding that posting signs, dredging for sand and gravel, wading, and other recreational uses were not sufficient acts of possession to prevail on the possessory action.[67] Most relevant to this essay, the court also addressed in dicta the "peculiar" nature of the land and its use in the case.[68] The *Chaney* court described the Amite river as "a unique juxtaposition of private and public things" because while the bed was a private thing, the water that traversed the private bed was a public thing, and the riparian owner "may not interfere with, nor prevent, its use by the general public."[69] The court supported this dicta through analysis and interpretation of article 450.[70]

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65. Vaughn v. Vermilion Corp., 444 U.S. 206, 100 S. Ct. 399, 62 L. Ed. 2d 365 (1979).
66. Chaney v. State Mineral Board, 444 So. 2d 105 (La. 1983).
67. *Id.* at 107.
68. *Id.* at 109.
69. *Id.* at 109-10.
70. *Id.* The holding of *Chaney* has been addressed in other doctrinal sources. In a law review article delineating the public's access rights to marsh waterways in the context of marsh management plans, the article states:

While technically non-binding dicta, the case provides an example of the Louisiana Supreme Court recognizing a few principles which are central to this essay: (i) running waters are a separate and distinct thing from their bed, (ii) non-navigable waterways can contain running waters, and (iii) possessors or owners of the bed may not impede the use of running waters by the public. Despite this recognition by the Louisiana Supreme Court, subsequent courts have declined to implement similar rationale in their decisions.

All of the following decisions were rendered after both *National Audubon* and *Chaney* were decided and follow the rationale of *National Audubon* rather than the Louisiana Supreme Court decision of *Chaney*. The *People for Open Waters* case is one such case that references *National Audubon*, specifically regarding the court's holding in relation to running waters.

Identical to the facts at issue in *National Audubon*, this case involved a navigable-in-fact, man-made canal built on private land with private funds for private purposes. The court stated that although the owner of an estate which has water running through the estate has an obligation to allow that water to leave his estate undiminished, this civil code rule does not "mandate that the landowner allow public access to the waterway."[71]

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> In this case, the Supreme Court clearly contemplates that the public not be denied access to non-navigable waterways. While marsh landowners may exercise their rights of ownership to deny the public access to their land, they may not legally deny access to the waterways. As the trustee of public things, the State has a duty to ensure that the waters are kept open. Not only are landowners illegally denying the public access to non-navigable waterways, but the state . . . is breaching its fiduciary duty as public trustee . . . . Under the *Chaney* reasoning, whether the channel is a natural non-navigable waterway or a man-made canal is irrelevant. Thus, the public should be assured access to the running waters contained therein. Public access to the waters of the canals also may be provided via federal law. As noted earlier, the federal government regulates navigable waters. In Louisiana, most of the man-made canals are in fact navigable.
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> Ketchum, *supra* note 17.

71. People for Open Waters, Inc., v. Estate of J.G. Gray, 643 So. 2d 415, 418 (La. App. 3d Cir. 10/5/94).

To continue following the applicable jurisprudence, *Buckskin Hunting Club v. Bayard* depicts a case in which the plaintiffs brought suit to enjoin the defendants from hunting on property—a portion of which allegedly included man-made navigable streams, banks along natural, navigable rivers, and man-made pipeline canals—leased by the plaintiff hunting club in the Atchafalaya Basin.[72]

Regarding the running waters argument, the court held that the mere fact that running waters flow through the channels does not give the public any rights of use.[73] The court's holding regarding running waters was a direct restatement of the holding in *People* without any further analysis of the factual circumstance unique to the present case, namely the fact that very different bodies of water and even areas of dry land were at issue in the case. [74]

In *Amigo Enterprises*, plaintiff landowners sought an injunction to prevent the defendants from trespassing on Amigo's property, namely a man-made canal constructed on private land but burdened by a government servitude and dug by the Army Corp of engineers with public money. There are two important arguments asserted by the defendants in this case.

First, the defendants claimed that the canal should be classified as a public thing "by virtue of its having been built with public funds on land over which the United States had a servitude."[75]

Second, the defendants asserted the running waters argument. Regarding the first argument, the court dismissed their contention because the defendants offered no jurisprudential or doctrinal

72. Buckskin Hunting Club v. Bayard, 868 So. 2d 266 (La. App. 3d Cir.).
73. *Id.* at 274.
74. Note that factual circumstances such as those presented in *Buckskin* where the alleged trespass occurs over dry land are not encompassed by the arguments presented in this essay. This essay advocates for access only to waterways which connect to navigable-at-law waterways and can be reached by boat without touching dry, private lands. The purpose of the *Buckskin* citation is to highlight how the courts sloppily apply prior decisions and holdings to dissimilar circumstances without true analysis of the facts.
75. Amigo Enterprises, Inc. v. Gonzales, 581 So. 2d 1082, 1084 (La. App. 4th Cir. 1991).

support for their position that the public was owed a servitude of passage.[76]

Further, the court noted that the canal could not be considered a natural, navigable waterway because it was created by man rather than nature.[77] Regarding the running waters argument, the court stated that *Chaney* does not apply because it involved a possessory action, and the instant case was more analogous to *Brown v. Rougon,* which dealt with a drainage canal servitude.[78]

In the *Rougon* case, two commercial fishermen sued defendant landowners and the parish sheriff, seeking recognition of public use rights over a drainage canal constructed and maintained over private property with public funds by the State.[79] The canal was built to allay flooding from False River and was only accessible part of the year when the water from the river was high.

Thus, the waterway was man-made, only seasonally accessible, and non-navigable. The court held that the fact that the canal contained running waters did not grant the fishermen access to the canal, relying most heavily upon a statute that dictates that "no person shall . . . use the [drainage] channels for transportation or navigation except under authority of and in agreement with the levee or drainage districts."[80]

Because the water body in question was an artificial drainage canal with additional legislative regulations, this holding is only applicable to the narrow factual circumstances presented in this

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76. Arguably, the court overlooked prior helpful jurisprudence that existed to support their contention. National Audubon Society v. White, 302 So. 2d 660, 665:

> If a navigable canal should be constructed with public funds, or if it should be located on a publicly owned right-of-way or on public property, then it at least arguably is a public canal, and the owner of adjacent property would have no right to regulate or prevent its use by anyone else.

Based on the *Audubon* opinion, the court had jurisprudential support to reach the opposite decision.

77. Amigo Enterprises, Inc., 581 So. 2d 1082, 1084.

78. *Id.*

79. Brown v. Rougon, 552 So. 2d 1052, 1054-55 (La. Ap. 1st Cir. 1989).

80. *Id.* at 1058 (*citing* La. R.S. 38:219(8)).

particular case and is not binding on circumstances that do not include drainage canals subject to this additional statutory regulation.

In *Dardar v. Lafourche Realty Co., Inc.*,[81] commercial fishermen sought access to use a system of navigable waters controlled by the defendants who claimed they artificially created access to the waterways through the dredging of an artificial canal, rendering the natural waterways private.[82]

First, the issue of navigability was addressed, and the court found that since none of the waterways were navigable in 1812, the waterways could not presently be classified as navigable or as public things, despite being navigable at the time of the trial.[83] Upon failure of the navigability argument, the appellants asserted the running waters argument, namely that the waterways were public because they contained running waters. The *Dardar* court simply stated that "such arguments [referring to the running waters argument] have failed to carry the day in Louisiana courts," citing *Amigo Enterprises v. Gonzales* and *Brown v. Rougon* without providing any additional rationale or analysis.[84] Because the factual circumstances in *Dardar* did not include a drainage canal, the court's citation to *Rougon* was inappropriately applied to a factually dissimilar circumstance, and the citation to *Amigo* constitutes a flimsy citation to a precedent with no new legal analysis on the facts in the instant case.

*Parm v. Shumate*[85]—one of the most cited, often taught, and recent cases regarding water law in Louisiana—also addresses the issue of running waters.[86] As one argument, plaintiffs in the case

81. Although a federal case, the court in *Dardar* applied Louisiana's substantive law.
82. Dardar v. Lafourche Realty Co., Inc., 985 F. 2d 824, 826 (5th Cir. 1993).
83. *Id.* at 827. One should note that the definition of navigability used by the court in this case was arguably improper because the issue examined was the issue of access and use rather than that of ownership.
84. *Id.* at 834.
85. Although a federal case, the court in *Parm* applied Louisiana's substantive law.
86. Parm v. Shumate, 513 F. 3d 135 (5th Cir. 2007).

claim that Gassoway Lake, a water body three and a half miles from the Mississippi River which only held water during the springtime due to the influx of rainfall and snowmelt waters, was filled with running waters of the Mississippi River. Therefore a public thing, the plaintiffs argued that it gave them the right to fish in the waters.[87] The court discounted this argument, finding that the waters were not navigable and holding that "although an owner must permit running waters to pass through his estate, [Louisiana] law does not mandate that the landowner allow public access to the waterway."[88]

Instead of providing original analysis and original factual determinations of the situation of the parties in regard to the running waters argument, the only rationale provided by the court was to cite to the precedential cases of *Dardar v. Lafourche Realty Co., Inc*[89] and *Buckskin Hunting Club v. Bayard*[90], as well as to decline to follow the rationale in *Chaney v. State Mineral Board* without providing any further analysis.

In sum, the controlling *jurisprudence constante* governing the use of running waters dictates that the public has no rights of access or use to running waters that flow over private land or man-made canals. However, the entire jurisprudence regarding running waters hinges upon *National Audubon*, a string of precedential case citations with little legal analysis, and an erroneous interpretation of Louisiana law.

Every case subsequent to *National Audubon* endorsed the court's rationale for refusing to recognize the running waters public access argument, by lazily claiming "precedent" and little else, which is not how the Louisiana jurisprudence—as a *civil* law jurisdiction—should operate. No case in the Louisiana jurisprudence has provided a truly satisfactory explanation for why the public cannot access running waters when over private lands, refusing to address

87. *Id.* at 138.
88. Parm, 513 F. 3d 135.
89. Dardar, 985 F. 2d 824 at 826.
90. Buckskin Hunting Club v. Bayard, 868 So. 2d 266.

that running waters are a public thing and must be analyzed separately from their beds.[91]

Additionally, Louisiana courts have willfully turned a blind eye to the exception provided in *National Audubon*—namely that a navigable canal constructed with public funds or located on a publicly owned right of way is arguably a public thing—as well as the strong dicta of the only Louisiana Supreme Court case within this line of jurisprudence, *Chaney*. The entire jurisprudence regarding running waters is a cyclic loop that continues to turn based upon the utilization of one 1974 Third Circuit case that has been imperfectly interpreted.

### *B. United States of America*

Examination of water law in the United States shows that Louisiana's sister-state jurisdictions provide much more expansive rights to the public to use natural resources than Louisiana. In the United States, the recreational use of water and natural resources is governed by the common law public trust doctrine rather than by statutory provisions or codes, and stipulates generally "that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people."[92]

The word "trust" in the title references the legal definition of a trust, with the corpus of the trust being navigable waters, the lands beneath the waters, living resources within the waters, and the public

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91. SCALISE, *supra* note 6.

92. Coastal States Organization, *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters and Living Resources of the Coastal States* at 3 (1997), available at: https://perma.cc/8C9M-Y66A. The Public Trust Doctrine has been further bolstered by case law. Matthews v. Bay Head Improvement Association, 471 A.2d 355 (N.J. 1984), *citing* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972):

> The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses . . .

property interests.[93] The state legislatures, state coastal commissions, and state municipalities are the trustees with the duty to protect the trust and preserve the beneficiary's, otherwise the public's ability to fully use and enjoy the lands, waters, and resources encompassed within. While widespread and general guiding principles do exist, the public trust doctrine has fifty different interpretations that depend upon the state in which the waters and lands are located.[94]

In general, public trust lands—comprising lands below navigable waters, including tidelands, shorelands of navigable lakes and rivers, and the lands below oceans, navigable lakes, and navigable rivers—are designated as such because of their unsuitability for commercial agriculture and their role as water highways of commerce.[95]

In many common law jurisdictions, navigable waters are those that support not only water commerce, but also recreational activities such as fishing, hunting, and pleasure boating.[96]

To clarify which "assets" are actually included within the public trust, a few key terms require definitions. Aptly named, tidelands are lands subject to the ebb and flow of the tide, regardless of whether those tidal waters are navigable-in-fact.[97] The definition of shorelands, while slightly varying by state, may be described as "the more or less narrow band where, on salt water, the tide ebbs and flows, and, on freshwater, fluctuations in the water level cover and uncover the upland edge."[98]

The lands below oceans, navigable lakes, and navigable rivers comprise the bottoms of the water bodies which—depending on the state—include the land up to either the low water mark or the high-

93. Coastal States Organization, *supra* note 92.
94. *Id.*
95. *Id.* at 5.
96. *See* Part VI, Section B.
97. Coastal States Organization, *supra* note 92, at 26-7.
98. William B. Stoebuck, *Condemnation of Riparian Rights, A Species of Taking without Touching*, 30 LA. L. REV. 394-95 (1970).

water mark.[99]

Also included in the public trust are the waters—namely navigable waters, not non-navigable waters or the lands beneath them—that can be divided into tidewaters and navigable freshwaters.[100] Similarly to tidelands, tidewaters are those which fluctuate based on the influence of the oceanic tide.[101] Regarding navigable freshwaters, the only defining criteria is that such waters are navigable.[102]

All waters and lands encompassed by the above definitions are included within the Public Trust, regardless of public or private ownership.[103] Private ownership and public use of waters was made compatible by subjecting the use of such waters to a public servitude.[104] These waters and lands are protected by state governments, and preserved so that the public may have free access to and use of these resources, regardless of ownership. Based on the general tenets of the public trust doctrine, recreational fishermen should not be prohibited from fishing in waters where the definition of navigation includes recreational pursuits. However, Louisiana operates differently than the majority of the United States.

How does the public trust doctrine operate in Louisiana, if at all? In this state, the scope of the public trust doctrine is implicit within

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99. In Louisiana, public ownership extends to the high water mark. A.N. YIANNOPOULOS, PROPERTY, *supra* note 8, at §4:1 (5th ed. 2020 update).

100. Coastal States Organization, *supra* note 92, at 30.

101. *Id.* at 31.

102. Like the Public Trust Doctrine in general, different states may have different variations on the definition of navigability. When Louisiana became a state, the United States government granted the Louisiana government ownership of all of the beds and bottoms of navigable waterways. *See* Coyle v. Smith, 221 U.S. 559 (1911). The state of Louisiana was granted ownership of the beds and bottoms in 1812, therefore the status of navigability hinges upon whether the waterway in question was navigable when Louisiana was admitted for statehood. *See* Pollard v. Hagan, 44 U.S. 212 (1845). In Louisiana, navigability is further defined by the jurisprudence. For a body of water to be navigable, the waterway must be used or be susceptible of being used as a highway of commerce over which trade and travel are or may be conducted. *See* Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258, 1265 (La. App. 2d Cir. 2004); Coastal States Organization, *supra* note 92, at 30-31.

103. Coastal States Organization, *supra* note 92, at 3.

104. YIANNOPOULOS, PROPERTY *supra* note 8*,* at § 4:19 (5th ed.).

the aforementioned provisions from the Louisiana Constitution and Louisiana Civil Code.[105]

Waters, water bodies, and lands classified as common things or public things in the Louisiana Civil Code are encompassed in the public trust doctrine within the state of Louisiana.[106] From the legislative texts, it would appear that running waters as well as any other navigable body of water is encompassed within the Louisiana public trust doctrine, and subject to public use. Furthermore, private landowners should not have the authority to restrict this right of use of running waters and navigable water bodies from the public. However, as explained above, this is not the manner in which the courts have interpreted the available use of running waters, primarily due to the restrictive manner in which Louisiana defines navigability, as discussed above.[107]

## IV. RUNNING WATERS: COMMON OR PUBLIC? AN EXAMINATION OF PRESENT AND PAST ITERATIONS OF ARTICLE 450

The previous Part of this essay examined the current version of the Louisiana Civil Code,[108] which provides that running water is a public thing owned by the state and indicates that running water is subject to public use.[109] However, in previous iterations of the code, running waters were classified differently. Since the first official codification of Louisiana law, running waters were classified as a

105. *See* LA CIV. CODE art. 450, cmt. b (2023) ("'[public things] [are] dedicated to public use, and held as a public trust, for public use'. City of New Orleans v. Carrollton Land Co., 60 So. 695, 696 (La. 1913); 'The parochial authorities are mere trustees for the benefit of the inhabitants of the parish.' Kline v. Parish of Ascension, 33 La. 652, 656 (La. 1881)").

106. James G. Wilkins and Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 868 (1992).

107. *See* Part III, Section A, Subsection 2.

108. Whereas the common law developed through case law and precedent, the hallmark of a civil law system is a written and comprehensive system of rules and principles, usually arranged in codes. A civil code is well organized, avoids excessive detail, and contains general legal principles that permit adaption to change. LSU Law, *What is the Civil Law*?, available at: https://perma.cc/M7HW-FZQE.

109. LA CIV. CODE art. 450 (2023).

"common thing," which bolsters the arguments of this essay, namely that running waters are intended for public use.

Since becoming an American territory in 1803, Louisiana has revised and rewritten its civil code on multiple occasions. The three major iterations of Louisiana law are as follows: The Digest of the Civil Laws now in Force in the Territory of Orleans ("The Digest of 1808"), the Louisiana Civil Code of 1825, and the Louisiana Civil Code of 1870 (supplemented by the 1978 Revision of the Louisiana Civil Code).

The first body of law promulgated by the Louisiana territory was the Digest of 1808.[110] After becoming a territory of the United States and receiving permission to remain a civil law jurisdiction rather than adopting US common law, the Louisiana government commissioned attorneys James Brown and Louis Moreau-Lislet to compile all laws in force in the territory that were not contrary or irreconcilable to the United States Constitution.[111] The laws in force at the time were Spanish, although Louisiana scholars debate whether the Digest of 1808 was more heavily influenced by French or Spanish laws.[112] The Digest of 1808 was not a civil code; rather, the document served to compile the laws of the territory into one cohesive body after the rapid regime changes from French to Spanish to French to American.[113]

The Digest of 1808 addressed the classification of running water, reading: "Things which are *common* are those whose property belongs to nobody, and which all men may freely use, conformably to the use for which nature has intended them, such as air, *running water*, the sea and its shores."[114] This 1808 version of article 450

110. John W. Cairns, *Spanish Law, the Teatro de la legislación universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808*, 3132 TUL. EUR. & CIV. L.F. 79 (2017).

111. John Tucker, *Source Books of Louisiana Law; Part IV – Constitution, Statutes, Reports and Digests,* 9 TUL. L. REV. 2 (1935).

112. *Id.* at 5.

113. *Id.* at 3.

114. Louisiana, "Title I. Of Things (Art. 448 - 487)" (1940). *Book II*. 6, available at: https://perma.cc/BP4U-924L (emphasis added).

presents a dramatically different article from the current article, classifying running waters as a common rather than a public thing. Common things are insusceptible of any ownership and may be freely used by all men.[115]

The idea according to which running waters should be reclassified from common to public existed as far back as the nineteenth century. The jurisconsults tasked with the *Projet of 1823*[116] proposed an amendment to the precursor of article 450 to read as follows: "Things which are common, are those of which the property belongs to nobody in particular, and which nature has intended them, such as air, the sea, and its shores."[117] The draftsmen recommended omission of the term "running waters" in the code's definition of common things because "[w]e have thought proper to omit *running water* in the enumeration of things which are common, lest it should be thought that one has a right to enter and take water from the premises of a person without his permission."[118] The Louisiana legislature—when incorporating the recommendations proposed by the jurisconsults for the revision of article 450—disagreed with this recommendation, and kept running waters in the classification of common things.

The official article from the 1825 Louisiana Civil Code reads: "Things, which are common, are those of which the property belongs to nobody in particular, and which all men may freely use,

115. *See* LA. CIV. CODE art. 449 (2023).

116. The "Additions et amendements au Code civil de l'état de la Louisiane; proposés en vertu de la résolution de la législature du 14 Mars, 1822, par les juristes chargés de ce travail," or *Projet of 1825*, which was published in 1823, was a precursor to the Louisiana Civil Code of 1825. Louis Moreau-Lislet, Edward Livingston, and Pierre Derbigny comprised the group of jurisconsults whom the legislature tasked with providing recommendations, revisions, and amendments to the Digest of 1808. The legislature then discussed the proposals by the jurisconsults and promulgated the Louisiana Civil Code of 1825. LOUISIANA LEGAL ARCHIVES, REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, p. xxiii-xxiv (1936).

117. LOUISIANA LEGAL ARCHIVES, *supra* note 116, at 35.

118. *Id.* Note that the concern expressed by the jurisconsults in the *Projet* was the threat of trespass over private land and a taking of the water itself. Advocates of water access are arguing for the use of waters for navigation and recreation purposes, not access to private land.

conformably to the use for which nature has intended them, such as air, *running water*, the sea and its shores."[119] The legislature made the conscious and deliberate decision to disregard the recommendation of the *Projet* jurisconsults. Instead, the legislature kept the law the same, indicating that they believed that running waters should be classified as a common thing, and should be used freely by all men for the purposes nature intended.[120]

The next major revision of the Civil Code occurred in 1870, but the text of Article 450 remained identical to the version presented in the Civil Code of 1825. The original text of the Civil Code of 1870 provided as follows: "Things, which are *common*, are those the ownership of which belongs to nobody in particular, and which all men may freely use, conformably with the use for which nature has intended them; such as air, *running water*, the sea and its shores."[121]

The reclassification of running waters from common to public began in the early 1900s as a result of the legislature passing Act 258, which provided:

> [t]he waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the state … it is hereby declared that the ownership of the water itself and the beds thereof in the said navigable waters is vested in the state.[122]

In 1978, the legislature undertook a substantial revision of the Code and revised article 450 to reflect the changes to the ownership of running waters reflected in this statute.

Upon examination of the history of Civil Code article 450, it is clear that the original intent of the Louisiana legislature was for running waters to be freely enjoyed by all men and insusceptible of

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119. Louisiana, "Title I. Of Things" *supra* note 114.

120. Any articles from the Digest of 1808 not adopted by the Code of 1825 were expressly repealed by Act 40 of 1828, so the drafters and the legislators made the conscious decision to preserve the provision of Article 450 from the Digest of 1808 into the Code of 1825. Tucker*, supra* note 111.

121. Louisiana, "Title I. Of Things" *supra* note 114.

122. La. Act No. 258 (1910), *codified* in LA. REV. STAT. ANN. § 9:1101.

ownership; however, over time, the Louisiana legislature modified this classification in order to have the power to regulate running waters. While the classification of common versus public does not carry huge differences, one major difference between the two is that common things are insusceptible of any ownership and freely used by all. The use of common things cannot be limited by the legislature or the state. If running waters were still classified as a common thing today, this author believes that the argument for the use of running waters by the public would have an even stronger case.

However, this author also recognizes that the reclassification of running waters from common to public brings Louisiana on par with other Continental civil law jurisdictions, and that it would be highly unlikely for the Louisiana legislature to revert the classification back to a common thing. Nevertheless, the prior classification of running waters as a common thing highlights the historical legislative intent for running waters to be used and enjoyed by the public.

## V. CONTINENTAL GUIDANCE: INTERPRETING THE EUROPEAN AND ROMAN SOURCES OF LOUISIANA LAW

### *A. Louisiana's Legal Tradition*

Despite Louisiana's geographical location firmly entrenched within a nation governed by common law, Louisiana follows more closely the civil law tradition.[123] Indeed, the drafters of the first bodies of Louisiana law wholesale adopted various provisions of French and Spanish—and by extension Roman—law.[124]

The basis for Louisiana's legal divergence stems from its colonial history. The European discovery of Louisiana by Robert de la Salle in 1682 placed the territory under the French flag. As the

123. Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1162 (2009) ("Louisiana is striving to survive as a civil law island in a common law ocean").

124. *See generally* Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1 (2010).

region developed, the Louisiana territory was thus governed by French law.[125]

In 1769, France sold the territory to Spain, and after Spanish governor Don Alejandro O'Reilly took possession of Louisiana, he promulgated an ordinance declaring that:

> This publication, followed from that moment by an uninterrupted observance of the Spanish law, has been received as an introduction of the Spanish Code in all its parts, and must be considered as having repealed the laws formerly prevailing in Louisiana, whether continued in force by the tacit or express consent of the government.[126]

O'Reilly's ordinance supplanted French law with Spanish law as the legal authority over the Louisiana colony. At the time, both French and Spanish law were similarly rooted in Roman law dating back to Emperor Justinian, therefore the change in legal regimes brought little practical modification to the local laws.[127] Louisiana remained under Spanish law until becoming a United States territory in 1803, and it was not until 1808 following the completion of the Digest of 1808 by Brown and Moreau-Lislet that Louisiana was governed by its own system of laws, albeit with heavy influence from the prior French and Spanish regimes.[128] Civilian legal scholars still dispute which legal tradition was the most prominent

125. Sources of French law which governed the Louisiana territory included royal proclamations of France, the Customs of Paris, and ordinances by French governors in control of the territory. Shael Herman, *Louisiana's Contribution to the 1852 Project of the Spanish Civil Code*, 42 LA. L. REV. 1509 (1982).

126. Tucker, *supra* note 111, at 36.

127. As an aside and to correct a mistaken notion that permeates the history of Louisiana, when Louisiana became a territory of the United States, Louisianians rejected common law and petitioned the federal government to keep their civil law system. The federal government allowed "the laws in force in the said territory . . . shall continue in force, until altered, modified, or repealed by the legislature." U.S. Congress, "An Act erecting Louisiana into two territories, and providing for the temporary government thereof" (March 26, 1804). The law in force at the time was based exclusively on Spanish law because the French, though again in possession of the Louisiana territory, had never reimposed French law upon the Louisiana territory. Thus, "The Digest of the Civil Laws now in force in the Territory of Orleans" (1808) was based solely upon Roman and Spanish law, not French law.

128. Herman, *supra* note 125.

influence upon the first promulgation of American Louisiana law.[129] An examination of the history and substance of both French and Spanish law as well as Roman law is thus relevant to determine the original intent and historical scope of the public's right to access running waters.[130] Examination of these historical legal sources from France, Spain, and Rome indicate that running waters have been intended for free public use for the past 1500 years—and perhaps longer—rendering the restrictions upon running waters imposed by the Louisiana judiciary in recent decades simply baffling.

### *B. Roman law: The* Corpus Juris Civilis

#### *1. Historical Background: Why Rome is Still Relevant in Modern Legal Practice*

Like every great human institution, legal systems have a long and comprehensive history depicting their progression through time, showcasing how we arrived at the modern establishments of law we are familiar with today. To understand the contemporary legal traditions of Louisiana, one must go back in time, namely to the era of the Roman Empire, where the civil law tradition was born. While legal progress prior to the Roman Empire existed—for example, with the Code of Hammurabi—Roman innovation serves as the foundation of the world's legal systems, in particular regarding the civil law tradition and written legal scholarship.[131]

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129. *See generally*, Cairns*, supra* note 110, at 79, 92; *but also* Parise, *supra* note 124.

130. A study was done examining the breakdown of authorities cited in judicial decisions between 1809 and 1828, which totaled 2,247 reported decisions and 6,585 citations to authorities within those cases. The study found that Louisiana legal sources were cited with overwhelming majority, but Spanish codes and statutes were cited with substantially more frequency than French legal sources, at 4 times and 12 times as often as French sources, respectively. Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485,1499,1504 (1982).

131. ALAIN LEVASSEUR, DECIPHERING A CIVIL CODE: SOURCES OF LAW AND METHODS OF INTERPRETATION 24 (Carolina Academic Press 2015).

In 527 CE, Emperor Justinian rose to power with a great desire to restore Rome to its former glory. One of the ways he strove to accomplish this goal was through the creation of the *Corpus Iuris Civilis*, a compilation of written laws and doctrinal writings, preserved in four major bodies: the *Codex*,[132] the *Digest*,[133] the *Institutes*,[134] and the *Novellae*.[135] The *Corpus Iuris Civilis* remained prominent as the centuries passed, forming the body of legal study in universities across Europe and influencing Enlightenment thinkers.

When European nations—such as France, Spain, and Germany––attempted to codify their laws, the legal scholars turned to ancient Roman laws for both substantive and structural guidance. Codification in Louisiana was no different. Indeed, the Louisiana Civil Code has been praised as being "of all republications of Roman Law . . . the clearest, fullest, the most philosophical, and the best adapted to the exigencies of modern society."[136] The remainder of

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132. The *Codex Justinianus*, created in 529 CE, was a compilation of all relevant constitutions of prior Roman emperors. Levasseur, *supra* note 131.

133. Justinian's Digest was a compilation of the writings of all classical Roman jurists, namely "the books dealing with Roman law, written by those learned men of old to whom the most revered emperors gave authority to compose and interpret the laws so that the whole substance may be extracted from them." Levasseur, *supra* note 131, at 25, *citing* 1 THE DIGEST OF JUSTINIAN xlvii-xlix (Mommsen, Krueger Watson eds., University of Pennsylvania Press 1985).

134. Because of the complexity of the *Digest* and its lack of easy comprehension, Justinian commissioned the Institutes as a simplified version of the *Digest*. Opening the *Institutes* by addressing "the youth desirous of studying the law," Justinian explains that the purpose of the *Institutes* is one of the pursuits of justice and accurate imperial learning. Levasseur, *supra* note 131, at 26; J.B. MOYLE, THE INSTITUTES OF JUSTINIAN, 1-2 (4th ed., Clarendon Press 1905).

135. Throughout Justinian's reign, he continued to create additional laws and new constitutions—*Novellae constitutiones*—which consisted of edicts, decrees, mandates, and rescripts promulgated by the emperor and directed to the public, judges, provincial governors, and public officials, respectively. Timothy Kearley, *Introduction to Justinian's Novels*, University of Wyoming, George W. Hopper Law Library (2014), available at: https://perma.cc/8MH9-NB95; Timothy Kearley, *The Creation and Transmission of Justinian's Novels*, 102:3 LAW LIBR. J. 377-80 (2010).

136. Tucker, *supra* note 111, at 11. Furthermore, on numerous occasions, the Louisiana Supreme Court has cited Justinian's *Corpus Iuris Civilis* to support their holdings. A. Copeland Enterprises, Inc. v. Slidell Mem'l Hosp., 657 So. 2d 1292, 1296 (La. 1995); Todd v. State Through Dep't of Nat. Res., 456 So. 2d 1340, 1353 (La. 1983), amended on reargument, 474 So. 2d 430 (La. 1985); Plaquemines Par.

this Section will examine Roman, French, and Spanish legal sources as well as codifications to highlight the manner in which these bodies of law impacted Louisiana's law regarding water access rights and running waters.

*2. Roman Legal Provisions Relevant to the Running Waters Inquiry*

The *Corpus Iuris Civilis* contained numerous provisions related to the use and maintenance of water and water bodies in the Roman empire, many of which can be directly linked to provisions contained in the current Louisiana Civil Code. Included within this body of Roman law were three important topics: (1) the Roman structure for classification of things, (2) the scope of the public's use of water, and (3) the manner in which water usage intersected with property ownership.

Like in modern times, Justinian's Rome classified things into groups. According to Roman jurist Marcianus, "Some things belong in common to all men by *jus naturale*, some to a community corporately, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds."[137] Essentially, these classifications were the precursors to the classifications of things seen in Louisiana today.

In particular, some things included in the category as being "common to all men" were the air, running water, the sea, and the shores of the sea.[138] Book II of the Institutes, entitled "Of the Different Kinds of Things," provides details as to what privileges and

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Comm'n Council v. Perez, 379 So. 2d 1373, 1376 (La. 1980); Ducuy v. Falgoust, 83 So. 2d 118, 121 (La. 1955); Succession of Onorato, 51 So. 2d 804, 811 (La 1951); Malone v. Cannon, 41 So. 2d 837, 843 (1949); Successions of Lissa, 3 So. 2d 534, 536 (La. 1941); Smith v. Cook, 180 So. 469, 472 (La. 1937); Adams v. Golson, 174 So. 876, 879 (La. 1937); Succession of Lannes, 174 So. 94, 96 (La. 1936); Succession of Schonekas, 99 So. 345, 347 (La. 1924); Succession of Carbajal, 98 So. 666, 668 (La. 1923).

137. 1 Digest of Justinian, Book 8 (Alan Watson trans., University of Pennsylvania Press 1998).

138. *Id*.

rights of use the classification of common things affords. The original (translated) text reads:

> No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations.[139] On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein . . . again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequentially every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself . . . again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.[140]

While the text does not elaborate on the public uses of running water, the article elaborates on the public uses of other common things—namely the seashore, river banks, and harbor—which *a pari ratione*, arguably would also apply to running water. No one was forbidden access to the seashore, river banks, and harbors, and public use of these resources by all was part of the law of nations. From a plain reading of the texts, navigable waters—and indeed all running waters—were common things available for free use by all

139. The meaning of the phrase "law of nations" has had multiple interpretations, both in Roman times and by later scholars. In the second century, prominent Roman jurist, Gaius, associated the law of nations—or *ius gentium*—with natural law, defining it as "the law which natural reason appoints for all mankind . . . is called the law of nations." Similarly, the authors of the *Institutes*, from whence this quotation originates, stipulated that the law of nations was identical to natural law, but they associated the source of natural law to God, stating "The law of nature . . . being established by a divine providence, remain ever fixed and immutable." On the other hand, a Roman jurist from the third century, Ulpian, distinguished natural law from the law of nations, stating that natural law is that which "nature teaches to all animals" whereas the law of nations "was common only to human beings and established by their customs and usages." Genc Trnacvi, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26.2 U. PA. J. INT'L ECON. L. 193, 201-02 (2005).

140. MOYLE, *supra* note 134, at 35.

and insusceptible of private ownership.

Turning more fully to the scope of the public's rights to use water under Roman law, in general, the water supply in Roman cities was public, especially when water came from aqueducts constructed at the expense of the public.[141] Water from public water bodies could be used by citizens for their own private purposes, such as watering fields. However, this personal right had to be balanced with the rights of other fellow citizens, meaning "[a] party should only be permitted to conduct water [from a public river] where this can be done without injury to another."[142]

If water was "unlawfully conducted to another place," a Roman citizen could obtain an order from a judge holding that the water should be restored to its former condition.[143] Additionally, the waters of rivers were of great importance and were not allowed to be disturbed or diverted from their customary use; indeed, if the waters of the Nile were diverted by any man,

> he shall be committed to the flames at the place where he disregarded the reverence due to antiquity and nearly the safety of the empire itself; his accomplices and confederates shall be punished by deportation, and they shall have no permission to supplicate for restoration of citizenship, dignity, or property.[144]

The proper utilization of water held a very high place in Roman society, as evidenced by the harsh punishment for the misappropriation of river water in the previous textual excerpt. Water was a valuable resource to be used by all. If one person destroyed the character of a water body in a manner that rendered it unable to fulfill its customary usage, that misdeed harmed all others

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141. FRED H. BLUME, ANNOTATED JUSTINIAN CODE, Book III, Title XXXIV (Timothy Kearley ed., College of Law George W. Hopper Law Library 1920-1952), available at: https://perma.cc/M77Q-SNWW.

142. S.P. SCOTT, THE ENACTMENTS OF JUSTINIAN: THE DIGEST OR PANDECTS, Book VIII, (*The Civil Law* III, Cincinnati 1932), available at: https://perma.cc/JPL2-FB9Y; MOYLE, THE INSTITUTES OF JUSTINIAN, *supra* note 134, at 35.

143. BLUME, *supra* note 141.

144. *Id*.

and infringed upon the public's rights of use.

Justinian's *Digest* also addressed—albeit implicitly—the manner in which water impacted property rights. Particularly relevant to a state with coastal land loss such as Louisiana,

> [w]here a field whose usufruct is ours is flooded by a river or by the sea, the usufruct is extinguished, since even the ownership itself is lost in this instance; nor can we retain the usufruct even by fishing. But as the ownership is restored if the water recedes with the same rapidity with which it came, so also, it must be said that the usufruct is restored.[145]

In Rome, the law recognized that a person could not privately own water, even if the property under said water originally had been privately owned dry land. When a river or the sea—or indeed by comparison, any public waters—flooded private land, the lands ceased being private and reverted to the public domain to be used freely by the public. However, if the land regained its dry characteristic with "rapidity," the land could revert back to being private property. This excerpt from the *Digest* raises a few questions, namely how long does a piece of land need to be flooded by public waters for private ownership to be extinguished, but overall, the text is clear: inundation of waters over privately owned land extinguishes private ownership.

To summarize, Roman legal sources from the *Corpus Iuris Civilis* were very clear in designating a public policy of allowing public access, use, and enjoyment of many of the things enumerated in modern day Article 450 of the Louisiana Civil Code, including running water. Reading the text of these legal sources, some of which were written over 1,500 years ago, one notices the remarkably similar language to modern civilian legal sources, including the Louisiana Civil Code. With such strong ties readily apparent, a study of Roman law presents an interesting perspective that showcases the historical preference for expansive public access rights to water bodies, including running waters.

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145. SCOTT, *supra* note 142.

*C. France: The Code Napoleon*[146]

The French Civil Code, or Code Napoleon, was first promulgated in 1804 after decades of codification attempts by various French legal intellectuals and the radical reformation effects of the French Revolution.[147] Emperor Napoleon Bonaparte and Jean Etienne Portalis were the masterminds behind the French Civil Code, the first truly successful, modern codification attempt in Europe.[148] The Code Napoleon, drafted only a handful of years before the drafting of the Louisiana Digest of 1808, played a highly influential role upon the fledgling legal system in Louisiana as a model and guide for the Louisiana drafters.[149]

The Code Napoleon and the Louisiana Civil Code do not align; after all—and contrary to the misconception that Louisiana's legal system uses the Napoleonic Code—they are two separate legal regimes.[150] Nevertheless, both codes have comparable articles in relation to the classification of things. For example, Article 537 of the

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146. After the fall of the Roman Empire in the West in 476 CE, the territory of present-day France fell under the control of barbarian tribes who implemented a modified version of Roman law to control their subjects. Once the barbarian reign ceased and French kings replaced them, the remnants of Roman influence remained strong in the southern part of France and as a supplement to customary law in the northern portion of France. All of these materials were the chief sources used when French law was first codified as the Code Napoleon. Levasseur, *supra* note 131, at 37-9.

147. Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C.J. INT'L & COM. REG. 273 (1995).

148. Pierre Crabites, *Napoleon Bonaparte and the Code Napoleon*, 8 AM. BAR ASS'N J. 439 (1927):

> My greatest title to glory is not the forty battles which I have won. Waterloo alone will wipe out the memory of so many victories. I have, however, one accomplishment to my credit which nothing can efface and which will live until time will be no more. It is my Civil Code.

149. See Moréteau, *supra* note 147, at 279 (asserting that Louisiana imitated the French Civil Code).

150. Civilian legal scholar and Louisiana State University professor John Randall Trahan aptly analogized the relationship between French and Louisiana law, stating,

> [i]f one were to conceive of Louisiana's private law as a 'natural person,' then it would not be unfair to say that the 'parents' of that person are le droit civil of France and el derecho civil of Spain. It was, after all, from those two 'civil laws' that Louisiana's private law was first born. As this 'child' has grown up, it has, like any other child, differentiated itself from

Code Napoleon states that "[t]hings which do not belong to individuals are administered and may be alienated only in the forms and according to the rules which particularly pertain to them."[151] The text of this article is fairly vague, but hints at the premise that there are at least two groups of things: things belonging to individuals which may be freely disposed of, and things not belonging to individuals which may not be freely alienated.[152]

To expound on article 537, article 538 of the Code Napoleon, which articulates a similar premise as article 450 of the Louisiana Civil Code, states that:

> Highways, roads, and streets maintained by the nation, *navigable or floatable* rivers and streams, the shores, accretions and derelictions of the sea, sea ports, harbors, roadsteads, and in general all portions of the national territory which are

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> its parents, both physically and psychologically. Indeed, in the case of this particular child, one could say that, as it has grown up, it has, at the physical level, undergone a good bit of 'cosmetic surgery,' more than a few 'organ transplants,' and even some wholesale 'amputations' and it has, at the psychological level, adopted a mindset that, at least in part, is at odds with that of its parents. But through it all and despite all these many changes, it remains the case that Louisiana's private law, in both its body and its mind, still bears a striking resemblance to its parents.

John R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. (2003).

151. Louisiana, "Title I. Of Things", *supra* note 114. Another translation of the same article of the Code Napoleon states that "Private persons have the free disposition of the property belonging to them, subject to the modifications established by the laws. Property not belonging to private persons is administered and cannot be alienated except in the forms and in pursuance of the regulations peculiar to it." THE CODE NAPOLEON, OR, THE FRENCH CIVIL CODE. LITERALLY TRANSLATED FROM THE ORIGINAL AND OFFICIAL EDITION, PUBLISHED AT PARIS, IN 1804. BY A BARRISTER OF THE INNER TEMPLE (William Benning, 1827).

152. The source of the premise of this concept stems from the Projet du Gouvernement (1800) Book II, Title I, Art. 23, which preceded the Code Napoleon. The text from the *Projet* reads:

> Individuals have the free disposal of the things which belong to them, saving the exceptions contained in the laws. But the estates, the property of the nation, of public institutions and communes, are administered according to the laws and regulations which are peculiar to them. It is, moreover, only according to the forms prescribed by these laws and regulations that the nation, public institutions, and communes may sell their estates, or acquire new ones.

Louisiana, "Title I. Of Things (Art. 448 - 487)" *supra* note 114.

> not susceptible of private ownership, are considered as pertaining to the public domain.[153]

Inferring from the text of this article and the previous article, things may be susceptible of private ownership, or belong to individuals. If they are not susceptible of private ownership and do not belong to individuals, they are thus part of the public domain. The French concept of "public domain" is arguably comparable to Louisiana's classification of "things" as public things; indeed, many of the things in the above article classified as public domain—such as highways, roads, streets maintained by the nation, navigable streams, and the shores—are also public things in the Louisiana Civil Code.[154]

Beyond the classification of things as part of the public or private domain, article 714 of the Code Napoleon portrays a third category of things: things belonging to no one—common things—or things insusceptible of ownership. The text of Article 714 states that "[t]here are things which belong to no one, and the use whereof is common to all. The laws of police regulate the manner of enjoying such."[155] The Code Napoleon does not provide any examples of things which would fall under this characterization.[156]

No article of the Code Napoleon explicitly mentions running waters; however, this absence still provides important information. As mentioned above, the Code Napoleon was highly influential on the drafters of the first Louisiana laws. When the drafters of the Digest of 1808 made use of the Code Napoleon as a resource, the Louisiana drafters actively chose to include running waters as a common thing in the Digest, even though running waters were not mentioned in the Code Napoleon.

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153. *Id.*

154. DIAN TOOLEY-KNOBLETT ET AL., YIANNOPOULOS' CIVIL LAW PROPERTY COURSEBOOK, 11 (10th ed., Claitor's Pub. Division 2014).

155. THE CODE NAPOLEON, *supra* note 151.

156. According to Professor Yiannopoulos' analysis of the French legal system, running waters—along with the sea shore—are examples of common things in the French legal system. YIANNOPOULOS, PROPERTY, *supra* note 8, at 84 (2nd ed. 1980).

### *D. Spain: The* Siete Partidas

While the Code Napoleon was highly influential on the early development of Louisiana law, the Spanish Civil Code, known as *Código Civil*,[157] was not promulgated until 1889, nearly 81 years after the Louisiana Digest of 1808.[158] Instead, the *Siete Partidas,* a precursor to the *Código Civil*, was of huge influence on the drafters, especially regarding Louisiana's classification of things.

To provide some background, the *Siete Partidas* of 1348,[159] or the Code of Seven Parts, was a complete compilation of Spanish laws, with source materials including the *Fuero Juzgo*, the *Fuero Real*, Canonical law, Roman law, and works of Roman jurisconsults.[160] Due in part to its compilation in imitation of the Roman *Pandects*, the *Siete Partidas* was the subject of praise and admiration by civilian jurists across the world as a great source of civil law that brought uniformity to Spanish law for centuries.[161] As a consequence of Spain's occupation of the Louisiana territory in the 1700s, the Louisiana territory was subject to the laws contained in the *Siete Partidas* immediately prior to becoming an American state.

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157. Different from the Louisiana Civil Code, the Spanish Civil Code provides much more detail regarding water and ownership of water, granting an entire chapter of the code to the subject under the title of "Special Properties." The code includes continuous or intermittent waters over beds or lands as part of the public domain. SPAIN, THE SPANISH CIVIL CODE IN FORCE IN SPAIN, CUBA, PUERTO RICO, AND THE PHILIPPINES, art. 407 (Clifford S. Walton & Nestor Ponce de Leon trans., La Propaganda literaria Printing House 1899), available at: https://perma.cc/DA25-46NS.

158. Moréteau & Parise, *supra* note 123.

159. After the fall of Rome, Spain was dominated by gothic tribes—namely the Visigoths—who enacted vulgar Roman law to govern their territory. The Visigothic rule was short lived and was ended by the Arab conquest of the Iberian Peninsula in 711. The Moorish occupation caused conflict with the remaining pockets of Christian Spaniards, dividing Spain into a multiplicity of kingdoms and principalities with no uniform law. As the Christians slowly forced the Moors out of Spain – which culminated in 1492 with the ousting of the last Arab stronghold in Granada – the Catholic monarchs enacted laws to govern their territories, creating a prolific compilation of legal sources, the most important of which being the *Siete Partidas*.

160. Tucker, *supra* note 111, at 38.

161. LOUIS MOREAU-LISLET & HENRY CARLETON, THE LAW OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (1820).

The particular English translation of the *Siete Partidas* examined herein is especially relevant because the co-author of the translation was Louis Moreau-Lislet. Drafter of both the Digest of 1808 and the Louisiana Civil Code of 1825, Moreau-Lislet and Henry Carlton translated only those portions of the *Siete Partidas* considered as having the force of law in Louisiana.[162] Thus, each provision of the *Siete Partidas* examined below functioned as controlling law in the Louisiana territory during the Spanish occupation, and many of these provisions were adopted wholesale into the Digest of 1808.

The Third *Partida* details the laws of property—namely the domain of things—in a manner reminiscent of the modern edition of the Louisiana Civil Code. Similar to the Louisiana Civil Code, in regard to "common things," the *Siete Partidas* states that:

> The things which belong in common, to all the living creatures of this world, are, the air, rain, water, the sea and its shores; for every living creature may use them, according to their wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing, or navigation; or doing there whatever else he may conceive advantageous to him.[163]

Although the *Siete Partidas* does not explicitly mention "running water," it is reasonable to assume that "running water" could be classified as a subsection of the broader term of "water," which is designated in the article above. According to this Spanish law, water was a common thing available to all men for use, including fishing, navigation, and any other beneficial purpose.

Similar to modern Louisiana jurisprudence, the *Siete Partidas* recognized that water's classification as a common thing to be enjoyed freely by the public was not intended to hinder the rights of landowners. According to Law 32 of the Third *Partida*,

> Lands are sometimes covered with water, by the inundation of rivers, and remain so covered for many days; and though the owner, during that time, loses the possession of them, he

162. *Id.* at iii.
163. *Id.* at 335.

> nevertheless preserves his right to the property: for as soon as the waters retire to their former channel and leave the lands uncovered, he will enjoy them as before.[164]

In cases of seasonal fluctuations of water levels or extreme cases of flooding and water rise that did not result in permanent cover of lands by water, the landowner did not lose the right to his lands. However, reading this provision *a contrario sensu*, if a private tract of land became permanently covered by water and the waters did not "retire," the landowner could lose his rights to privately own the property.

Another relevant provision from the *Partidas* comes from Law 8 of the Third *Partida*, which states:

> No man has a right to dig a new canal, construct a new mill, house, tower, cabin or any other building whatever, in rivers which are navigated by vessels; nor upon their banks, by which the common use of them may be obstructed. And if he does, whether the canal or edifice be newly or anciently made; if it interferes with such common use, it ought to be destroyed. For it is not just the common good of all men generally, should be sacrificed to the interest of some persons only.[165]

This provision from the *Partidas* portrays the importance of preserving navigation for the public. If the "works of a man," such as a canal, infringe on the navigable character of a river— and read more broadly, of any body of water used for navigation—that canal should be destroyed. Law 8 articulates a public policy of protecting the common good of all men to access waters used for navigation purposes, at the expense of the rights of the individual claiming private ownership.

Examination of these historical legal sources from France, Spain, and Rome presents a relevant historical perspective, highlighting the original intent of the civil law tradition—which Louisiana proudly follows—to grant expansive water access rights to the

164. *Id.* at 349.
165. *Id.* at 338.

public for recreational and navigational pursuits. These historical sources, while certainly nonbinding, provide compelling legal source material which could provide persuasive support to the modern-day Louisiana legal system for protection of the public's right to use running waters.

## VI. ADDRESSING THE WATER ACCESS DISPUTE MOVING FORWARD

Historical sources, prior iterations of the Louisiana Civil Code, the Public Trust Doctrine, and even the plain text of the current legislation, all indicate that the public should have expansive access and use rights to public things, like running waters. However, because Louisiana courts have interpreted legislative provisions restrictively, historical origins research or common law comparison may not be sufficient to force the courts to reconsider the public's rights to access running waters. Logical options to address the water access dispute, in the opinion of this author, rests either in the hands of creative lawyering or in revisions by the Louisiana legislature.

### *A. Acquisitive Prescription*

Acquisitive prescription has long been recognized as a mode of creating servitudes, but until the 1977 revision of the Louisiana Civil Code, only servitudes which were apparent and continuous could be acquired through acquisitive prescription.[166]

Since the revision, however, a servitude must only be apparent, not continuous, to be acquired through prescription, making it possible for a person to acquire a right-of-passage servitude through acquisitive prescription.[167] The 1977 revisions were not retroactive, and therefore the ability to acquire apparent servitudes of passage through acquisitive prescription could only be obtained after 10

166. Christopher M. Hannan, *Prescription Lenses: How Louisiana Courts Should Apply the Revised Articles Governing Thirty-Year Acquisitive Prescription of Apparent Servitudes*, 53 LOY. L. REV. 937, 945 (2007).

167. For a more detailed history and discussion of the acquisition of servitudes through acquisitive prescription, *see* Hannan, *supra* note 166.

years of use with just title, or 30 years of use without just title; this meant that a passage servitude without just title could not be acquired until 2007.[168] Proponents of water access rights have made the argument that use of a private waterway for thirty years provides the public with a servitude of passage over the water body. In *People for Open Waters*, argued in 1994, plaintiffs made an identical argument, asserting that the public had acquired a servitude of passage for a private canal through 30 year acquisitive prescription.[169] However, the court held that the 1977 revisions were not retroactive, and that since "30 years [had] not passed since the 1977 revision, the plaintiffs [had] not acquired a servitude of passage through Gray Canal."[170]

While the *People* case did not rule in favor of the plaintiffs, the court left open the possibility that a servitude of passage could be acquired by the public over private waterways, such as private canals, once the requisite amount of time had passed. Assuming certain canals and waterways have been in use by the public for thirty years or more, the public arguably could have acquired servitudes of passage over such private waterways, if the public had used the waterways in a manner sufficient to satisfy the requisite elements of acquisitive prescription.

The acquisition of a servitude of passage would be a highly fact intensive inquiry determined on a case-by-case basis, likely requiring litigation and judicial determination. Thus, while being a possible argument to combat the water access crisis, this solution is impracticable to resolve these issues on a large scale.

168. A.N. Yiannopoulos, *Canals, 2* LA. CIV. L. TREATISE, PROPERTY § 4:18 (5th ed.).
169. People For Open Waters, Inc. v. Estate of Gray, 643 So. 2d 415 (La. Ct. App. 3d Cir. 1994), *writ not considered* 646 So. 2d 370 (La. 1994).
170. *Id.* at 418.

*B. Legislative Amendment of Navigability under Louisiana Law: A Recreational Navigation Servitude?*

As discussed previously, Louisiana's definition of navigability requires that a water body be capable of supporting commerce. This definition of navigability ignores the fact that our definition of commerce has broadened in modern times to include business ventures, such as charter fishing and hunting and other such activities which can be achieved with shallow waters and narrow water bodies.

Furthermore, waterways can have more uses than commercial uses, such as recreation purposes. The current, restrictive definition of navigability has been supported by Louisiana courts, such as the Fourth Circuit, which has stated "[w]e cannot accept the State's premise that any body of water deep enough to float a pirogue is navigable under Louisiana law."[171] The Fourth Circuit's opinion begs the question: why not?

Numerous sister jurisdictions in the United States have expanded their definition of navigability to encompass more than just commerce, the recognition of which is called the recreational navigation doctrine. In Mississippi, for example, the state has expanded its definition of navigable-in-fact to include water bodies that support activities such as fishing, logging, and recreational pleasure boating.[172] Tennessee, thanks to a definition that requires the water to be "capable of and suited to the usual purposes of navigation," recognizes duck hunting as an activity included in the scheme of defining navigability.[173] In Oregon, the supreme court held that pleasure boating is a part of commerce just the same as a commercial vessel transporting lumber.[174] California, Idaho, and Arkansas recognize a form of the recreational navigation doctrine as

171. *See* Sinclair Oil & Gas Co. v. Delacroix Corp., 285 So. 2d 845, 852 (La. Ct. App. 4th 1973).
172. Lancaster, *supra* note 43, at 161, 164-165.
173. *Id*. at 161, 165.
174. *Id*. at 161, 166.

well.[175] Although other states have a more encompassing definition of navigability, precautions are put into place to safeguard against infringement upon the rights of private landowners. The mere fact that a water body can support activities such as duck hunting, rowing, or bathing does not alone constitute navigability; rather, a water body is navigable for recreational purposes only if the water body may be reached without trespass over private dry land.[176]

In a state renowned for its recreational sportsman pleasures and pursuits, why isn't recreational use sufficient to enable public access to running waters, when such waters are navigable based on a layman's definition of the word, especially in light of the text of article 450? What statutory authorization allows private landowners to strip the public of the right to use what it owns? There is none. Regretfully, Louisiana courts have failed to recognize any distinction between public access rights to running waters of this state, instead improperly giving landowners the right to exclude the public from exercising a public property right on the basis of an improper line of jurisprudence beginning with *National Audubon*. The public right to access and utilize running waters has been recognized since the Roman Empire. This is nothing new. Since before Louisiana's admission into the Union, private property rights in Louisiana have been subject to and burdened with the public right of access to running waters.

A curious student of Louisiana Civil Law may ask how or why the courts have adopted an approach that runs contrary to the historical intent and plain language of the Louisiana Civil Code. Perhaps the historic role of Louisiana's oil and gas industry and the substantial monetary stakes involved in mineral ownership have led courts to take an approach that favors private landowners. Perhaps the courts in *National Audubon* and its progeny did not adequately familiarize themselves with the origins of article 450—its history and

175. *Id*.
176. *Id*. at 161, 165.

purpose—failing to recognize the public right of access and focusing instead on property ownership. Regardless, the current contrary jurisprudence requires the legislature to revisit the scope of "navigability" in Louisiana to recognize the rights of public access to the running waters of this state guaranteed by article 450.

One possible solution to balance the inequity of this improper application of the law would be the legislative establishment of a public recreational navigation servitude: the regulation would operate to grant the public access for recreation to any water body that is accessible by boat without the boater first crossing dry, private land to reach the waters. The water body must contain running waters to be subject to the servitude. The landowner would retain ownership to the water bottoms they claim to own, including any mineral rights or any other ownership privileges. Further, the private landowner would continue to enjoy immunity from liability—in tort or otherwise—for injuries that may occur to public persons using the waters above the property owner's lands. The recreational sportsmen, on the other hand, would be prohibited from engaging in any sort of activity that disturb or infringe upon the use of the private landowner's adjoining dry land, facing liability for damages resulting from such disturbance or infringement.

Legislative action is imperative in the face of this crisis, and a vehicle for action already exists: Senate Resolution 171.[177] In 2014, the Louisiana legislature requested that the Law Institute establish a Water Code Committee to "study the legal issues surrounding groundwater and surface water law and any needs for revision to current law" and subsequently enact a comprehensive Water Code to "integrate all of its water resources ... and enable Louisiana to successfully manage and conserve its water resources as it prepares to face the inevitable challenges that lie ahead."[178]According to

177. *See* Sen. Res. 171, 2014 Leg., Reg. Sess. (La. 2014).

178. Louisiana State Law Institute, *Report in Response to SCR 53 of the 2012 Regular Session: The Use of Surface Water Versus Groundwater*, at 3, 87 (2014), available at: https://perma.cc/W5PW-R5YN.

committee member and LSU Law Professor Keith Hall, the main focus of the committee is regulation of mass subsurface water usage to prevent indiscriminate takings of subsurface water without limit, which does not overlap with the concepts of water law discussed in this essay.[179] Nevertheless, if the focus of the Water Committee broadens to also revise issues such as navigability or address the possibility of a recreational navigation servitude, the Water Committee and a subsequent Water Code could become a valuable resource in the pursuit of legal change regarding water access.

### *C. Reinstatement of the Affirmative Defense to Trespass for Improperly Posted Land*

Prior to 2003, the charge of criminal trespass on waterways could be countered by proving an affirmative defense to the crime. According to the pre-2003 version of R.S. 14:63, "It shall be an affirmative defense to a prosecution [of trespass] to show that property was not adequately posted in accordance with Subsections D or E, and F of this Section." The posting requirement mandated that owners place some identifying markers—such as paint marks on trees, posts, signs stipulating "No Trespassing," or fences—to put the public on notice that the land, or water, was private.[180] In the absence of such markers, a trespasser could not face liability for his trespass. However, in 2003, the legislature removed the posting defense to trespass for reasons unknown.[181]

The legislature could consider reinstating this affirmative defense. While a mere affirmative defense to trespassing does not constitute a complete solution to the water access problem, it at least offers an alternative. This affirmative defense to trespass would allow fishermen to travel more freely through Louisiana wetlands and

179. LSU Law Center Professor, Director of the Mineral Law Institute, and Committee Member of the Water Committee (July 9, 2021).
180. LA. REV. STAT. ANN. § 14:63 (2002).
181. *See* SB 98, 2003 Leg., Reg. Sess. (La. 2003).

waterways without fear of accidentally stumbling upon "private" waters.

Should the affirmative defense be reinstated, fishermen would only be prosecuted for trespass if they willfully ignored posted signs on private waterways and entered the waterways in spite of the posting. This solution, while still favoring the private landowners and wholly insufficient to address the core of the issue, affords some protections to the public seeking to legally enjoy Louisiana's waterways.

## VII. CONCLUSION

Over the course of roughly 2,000 years of written legal history and scholarship, waters—namely running waters—have been classified as a common thing and subjected to the free use and access of the public. Rome elucidated this sentiment in the *Corpus Iuris Civilis*. Spain expressed this principle in the various bodies of legal scholarship. Only Louisiana, within the past century, has altered the traditional legal classification of running waters by steadily placing limitations on the public's use of waters which traditionally would have been available for enjoyment by the public for any purpose, especially for the purpose of recreation. Only Louisiana has allowed lands inundated by river waters and waters from the seashore—running waters—to remain privately owned at the exclusion of the public, even though the waters can be easily accessed by boat and connect to other navigable waterways.

The legal scholarship that comprises the Louisiana legal tradition portrays very clearly how and to what extent the public may access running waters. Even with the present classification of running waters as a public thing instead of a common thing by the Louisiana legislature, the public should still receive broad rights of access and use.

However, the Louisiana jurisprudence has adopted a different interpretation, one that favors private landowners at the expense of

public rights of access without clear legal support or logic for these policies. This divergence from the historical civilian interpretation of broad public access rights to water bodies can be traced back to an improperly interpreted case from the Third Circuit Court of Appeals, which wrongly applied a doctrinal analogy and has been poorly referenced in the Louisiana jurisprudence. Louisiana courts have used this improperly interpreted case as the cornerstone for subsequent decisions in a manner dangerously analogous to the common law doctrine of *stare decisis*, a legal methodology that has no applicability in a civilian legal system.

As always, the citizens of Louisiana are bound by the decisions of their courts, because civilian judges interpret and apply the primary source of law: legislation. However, in light of the water access crisis that presently plagues the state of Louisiana—a crisis that could have steep economic ramifications for a state dependent on tourism and recreational sportsmanship—perhaps it is time to confront this issue directly.

Lawyers may be called upon to make novel and creative arguments in court, such as arguing for servitudes of passage over "private" waterways acquired through acquisitive prescription. However, the most effective way to address this crisis rests solely in the hands of the Louisiana legislature, namely, to revise the law regarding water access rights.

Revisions to the concept of navigability or allowing recreational access to areas accessible by boat via a navigational servitude, would be an ideal solution to this problem. In the alternative, reinstating the posting requirement in the criminal trespass statute would be another way to balance the rights of the public with private rights, although this solution still favors private landowner rights over the public's rights of access.

The beauty of the civilian legal system is its responsiveness to change as well as foundation in principles of equity and fairness. The water access crisis in Louisiana presents a situation that is inequitable and unfair. Thus, in the words of a great French civilian

scholar, we should look to the spirit of the law when the letter, or in this case the jurisprudence, kills.[182]

182. Alain Levasseur, *Code Napoleon or Code Portalis*?, 63 TUL. L. REV. 762, 772 (1969).

# BILINGUAL ENGLISH-SPANISH LOUISIANA CIVIL CODE, BOOK III, TITLES III–V

Mariano Vitetta*

The CCLS is now offering the translation into Spanish of Titles III–V of Book III of the Louisiana Civil Code. In Volume 14, Number I, of the Journal of Civil Law Studies, we published a full version in English and Spanish of Book II.[1] In Volume 13, Number 2, we offered the translation into Spanish of Titles IV-X of Book I[2] and a trilingual version in English, French, and Spanish of Book IV.[3] In Volume 13, Number 1, we published an introduction to the Louisiana Civil Code Spanish Translation Project[4] together with the first articles (Titles I–III) translated into Spanish.[5] This means that so far we have published Books I, II, and IV in full and a substantial part of Book III in English and Spanish. More titles of Book III will follow in upcoming numbers of this Journal. At the same time, we will continue updating the Louisiana Civil Code Online web page.[6]

This translation into Spanish was done by Mariano Vitetta, under the supervision of Olivier Moréteau. María Natalia Rezzonico contributed as an assistant translator and reviser. The Validation Committee is made up by Jimena Andino Dorato (Montreal, Canada), Francisco Alterini (Buenos Aires, Argentina), Ignacio Alterini

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1. Mariano Vitetta, *Bilingual English-Spanish Louisiana Civil Code, Book II*, 14 J. CIV. L. STUD. 131 (2021–2022).

2. Mariano Vitetta, *Bilingual English-Spanish Louisiana Civil Code, Book I, Titles IV-X*, 13 J. CIV. L. STUD. 277 (2020).

3. Olivier Moréteau & Mariano Vitetta, *Trilingual Louisiana Civil Code, Book IV: Conflict of Laws in English, French, and Spanish*, 13 J. CIV. L. STUD. 351 (2020).

4. Mariano Vitetta, *A Brief Introduction to the Louisiana Civil Code Spanish Translation Project*, 13 J. CIV. L. STUD. 161 (2020).

5. *Louisiana Civil Code — Código Civil de Luisiana, Preliminary Title, Book I, Titles I, II, III*, 13 J. CIV. L. STUD. 165 (2020).

6. Louisiana Civil Code Online, available at https://perma.cc/57WS-D5TA.

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The Center of Civil Law Studies looks forward to any comments on the translation that readers may have. We welcome corrections, as well as proposals, to improve the Spanish text.

TITLE III. OBLIGATIONS IN GENERAL

*TÍTULO III. DE LAS OBLIGACIONES EN GENERAL*

CHAPTER 1. GENERAL PRINCIPLES

*CAPÍTULO 1. PRINCIPIOS GENERALES*

[Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

*[Sección 1, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

Art. 1756. An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something.

*Art. 1756. Una obligación es una relación jurídica por medio de la cual una persona, denominada "acreedor", debe realizar una prestación en favor de otra, denominada "deudor". La prestación puede consistir en dar, hacer o no hacer.*

Art. 1757. Obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts.

*Art. 1757. Las obligaciones surgen de los contratos y de otras declaraciones de voluntad. También surgen directamente de la ley, independientemente de las declaraciones de voluntad, en casos tales como los actos ilícitos, la gestión de negocios ajenos, el enriquecimiento sin causa, entre otros actos o hechos.*

Art. 1758. A. An obligation may give the obligee the right to:

(1) Enforce the performance that the obligor is bound to render;

*Art. 1758. A. La obligación puede dar al acreedor el derecho de:*

*1) ejecutar la prestación debida por el deudor;*

(2) Enforce performance by causing it to be rendered by another at the obligor's expense;

(3) Recover damages for the obligor's failure to perform, or his defective or delayed performance.

*2) ejecutar la prestación requiriéndola a un tercero a expensas del deudor;*

*3) obtener una indemnización en concepto de daños y perjuicios por la falta de cumplimiento, el cumplimiento defectuoso o la demora en el cumplimiento por parte del deudor.*

B. An obligation may give the obligor the right to:

(1) Obtain the proper discharge when he has performed in full;

(2) Contest the obligee's actions when the obligation has been extinguished or modified by a legal cause.

*B. La obligación puede dar al deudor el derecho de:*

*1) ser debidamente liberado después de haber cumplido con la prestación en su totalidad;*

*2) oponerse a las acciones del acreedor cuando la obligación se haya extinguido o haya sido modificada por causas legales.*

Art. 1759. Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.

*Art. 1759. La conducta del deudor y la del acreedor se rigen por la buena fe en todo lo relacionado con la obligación.*

## CHAPTER 2. NATURAL OBLIGATIONS

## *CAPÍTULO 2. DE LAS OBLIGACIONES NATURALES*

Art. 1760. A natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance.

*Art. 1760. La obligación natural surge cuando la ley presupone un deber moral de realizar una prestación.*

Art. 1761. A natural obligation is not enforceable by judicial action. Nevertheless,

*Art. 1761. La obligación natural no se puede exigir mediante acción judicial. No*

whatever has been freely performed in compliance with a natural obligation may not be reclaimed.

A contract made for the performance of a natural obligation is onerous.

*obstante, no se puede recuperar la prestación cumplida libremente en virtud de una obligación natural.*

*El contrato celebrado para cumplir con una obligación natural es oneroso.*

Art. 1762. Examples of circumstances giving rise to a natural obligation are:

(1) When a civil obligation has been extinguished by prescription or discharged in bankruptcy.

(2) When an obligation has been incurred by a person who, although endowed with discernment, lacks legal capacity.

(3) When the universal successors are not bound by a civil obligation to execute the donations and other dispositions made by a deceased person that are null for want of form.

*Art. 1762. Los siguientes son ejemplos de supuestos que dan lugar a una obligación natural:*

*1) La extinción de una obligación civil por prescripción o por liberación en una quiebra.*

*2) La asunción de una obligación por una persona que, aun con discernimiento, carece de capacidad jurídica.*

*3) La inexistencia de obligación civil sobre los sucesores universales de ejecutar las donaciones y otras disposiciones hechas por el difunto que sean nulas por incumplimiento de las formalidades previstas en la ley.*

## CHAPTER 3. KINDS OF OBLIGATIONS

## *CAPÍTULO 3. DE LOS TIPOS DE OBLIGACIONES*

### SECTION 1. REAL OBLIGATIONS

### *SECCIÓN 1. DE LAS OBLIGACIONES REALES*

Art. 1763. A real obligation is a duty correlative and incidental to a real right.

*Art. 1763. La obligación real es un deber vinculado con un derecho real del que deriva la obligación.*

Art. 1764. A real obligation is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect.

But a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing, and he may liberate himself of the real obligation by abandoning the thing.

*Art. 1764. La obligación real se transfiere de pleno derecho al sucesor a título universal o particular que adquiera el bien mueble o inmueble al que afecte tal obligación.*

*Sin embargo, el sucesor a título particular no está obligado personalmente, a menos que asuma las obligaciones personales del transfiriente respecto del bien, y puede liberarse de la obligación real abandonando la cosa.*

SECTION 2. STRICTLY PERSONAL AND HERITABLE OBLIGATIONS

*SECCIÓN 2. DE LAS OBLIGACIONES ESTRICTAMENTE PERSONALES Y LAS OBLIGACIONES HEREDABLES*

Art. 1765. An obligation is heritable when its performance may be enforced by a successor of the obligee or against a successor of the obligor.

Every obligation is deemed heritable as to all parties, except when the contrary results from the terms or from the nature of the contract.

A heritable obligation is also transferable between living persons.

*Art. 1765. La obligación es heredable cuando puede ser ejecutada por un sucesor del acreedor o contra un sucesor del deudor.*

*Toda obligación se considera heredable entre las partes, a menos que los términos o la naturaleza del contrato indiquen lo contrario.*

*La obligación heredable también puede transferirse entre personas vivas.*

Art. 1766. An obligation is strictly personal when its performance can be enforced only

*Art. 1766. La obligación es estrictamente personal cuando su ejecución solo puede ser*

by the obligee, or only against the obligor.

When the performance requires the special skill or qualification of the obligor, the obligation is presumed to be strictly personal on the part of the obligor. All obligations to perform personal services are presumed to be strictly personal on the part of the obligor.

When the performance is intended for the benefit of the obligee exclusively, the obligation is strictly personal on the part of that obligee.

*exigida por el acreedor o solo puede ser exigida contra el deudor.*

*Cuando la prestación requiere una habilidad o aptitud especial del deudor, se presume que la obligación es estrictamente personal respecto del deudor. Todas las obligaciones de prestar servicios personales se presumen estrictamente personales respecto del deudor.*

*Cuando se prevé que la prestación sea en beneficio exclusivo del acreedor, la obligación es estrictamente personal respecto del acreedor.*

## SECTION 3. CONDITIONAL OBLIGATIONS

## *SECCIÓN 3. DE LAS OBLIGACIONES SUJETAS A CONDICIÓN*

Art. 1767. A conditional obligation is one dependent on an uncertain event.

If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.

If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutory.

*Art. 1767. La obligación sujeta a condición depende de un hecho incierto.*

*Cuando la obligación no se puede ejecutar hasta que ocurra el hecho incierto, la condición es suspensiva.*

*Cuando la obligación puede ejecutarse de inmediato pero se extingue cuando ocurre el hecho incierto, la condición es resolutoria.*

Art. 1768. Conditions may be either expressed in a stipulation or implied by the law, the

*Art. 1768. Las condiciones pueden ser expresas al estar contenidas en una estipulación*

nature of the contract, or the intent of the parties.

*o estar implícitas en la ley, la naturaleza del contrato o la voluntad de las partes.*

Art. 1769. A suspensive condition that is unlawful or impossible makes the obligation null.

*Art. 1769. La condición suspensiva que es ilícita o imposible convierte en nula la obligación.*

Art. 1770. A suspensive condition that depends solely on the whim of the obligor makes the obligation null.

A resolutory condition that depends solely on the will of the obligor must be fulfilled in good faith.

*Art. 1770. La condición suspensiva que depende exclusivamente del capricho del deudor convierte en nula la obligación.*

*La condición resolutoria que depende exclusivamente de la voluntad del deudor debe cumplirse de buena fe.*

Art. 1771. The obligee of a conditional obligation, pending fulfillment of the condition, may take all lawful measures to preserve his right.

*Art. 1771. El acreedor de una obligación sujeta a condición puede tomar todas las medidas legales a su disposición para preservar su derecho mientras esté pendiente la condición.*

Art. 1772. A condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment.

*Art. 1772. Se considera cumplida la condición si no se cumple por culpa de una parte con un interés opuesto al cumplimiento.*

Art. 1773. If the condition is that an event shall occur within a fixed time and that time elapses without the occurrence of the event, the condition is considered to have failed.

*Art. 1773. Si la condición consiste en un hecho que debe ocurrir dentro de un plazo y el plazo finaliza sin que ocurra el hecho, se considera que la condición falló.*

If no time has been fixed for the occurrence of the event, the condition may be fulfilled within a reasonable time.

Whether or not a time has been fixed, the condition is considered to have failed once it is certain that the event will not occur.

Art. 1774. If the condition is that an event shall not occur within a fixed time, it is considered as fulfilled once that time has elapsed without the event having occurred.

The condition is regarded as fulfilled whenever it is certain that the event will not occur, whether or not a time has been fixed.

Art. 1775. Fulfillment of a condition has effects that are retroactive to the inception of the obligation. Nevertheless, that fulfillment does not impair the validity of acts of administration duly performed by a party, nor affect the ownership of fruits produced while the condition was pending. Likewise, fulfillment of the condition does not impair the right acquired by third persons while the condition was pending.

*En caso de que no se hubiera fijado un plazo para el acaecimiento del hecho, la condición podrá cumplirse dentro de un plazo razonable.*

*Independientemente de la determinación de un plazo, se considerará que la condición falló una vez que haya certeza de que el hecho no ocurrirá.*

*Art. 1774. Si la condición consiste en que un hecho no ocurra durante un plazo determinado, se considerará que la condición se cumplió una vez que haya transcurrido el plazo sin que haya ocurrido el hecho.*

*La condición se considerará cumplida cuando haya certeza de que el hecho no ocurrirá, independientemente de que se haya fijado un plazo o no.*

*Art. 1775. El cumplimiento de la condición surte efectos retroactivos a la concepción de la obligación. Sin embargo, el cumplimiento de la condición no afecta la validez de los actos de administración debidamente realizados por una parte, ni afecta la titularidad de los frutos producidos mientras estaba pendiente la condición. Del mismo modo, el cumplimiento de la condición no afecta los derechos adquiridos*

*por terceros mientras estaba pendiente la condición.*

Art. 1776. In a contract for continuous or periodic performance, fulfillment of a resolutory condition does not affect the validity of acts of performance rendered before fulfillment of the condition.

*Art. 1776. En los contratos de ejecución periódica o continuada, el cumplimiento de la condición resolutoria no afecta la validez de los actos de cumplimiento realizados antes del cumplimiento de la condición.*

SECTION 4. OBLIGATIONS WITH A TERM

*SECCIÓN 4. DE LAS OBLIGACIONES SUJETAS A PLAZO*

Art. 1777. A term for the performance of an obligation may be express or it may be implied by the nature of the contract.

Performance of an obligation not subject to a term is due immediately.

*Art. 1777. El plazo para el cumplimiento de una obligación puede ser expreso o puede ser implícito en virtud la naturaleza del contrato.*

*El cumplimiento de la obligación que no está sujeto a un plazo es exigible inmediatamente.*

Art. 1778. A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future and certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time.

*Art. 1778. El plazo para el cumplimiento de una obligación es un período de tiempo que puede ser cierto o incierto. Es cierto cuando está determinado. Es incierto cuando no está determinado, pero es determinable a partir de la voluntad de las partes o del acaecimiento de un hecho futuro y cierto. También es incierto cuando no es determinable, en cuyo caso la*

*obligación debe cumplirse dentro de un plazo razonable.*

Art. 1779. A term is presumed to benefit the obligor unless the agreement or the circumstances show that it was intended to benefit the obligee or both parties.

*Art. 1779. El plazo se presume en beneficio del deudor a menos que el acuerdo o las circunstancias indiquen que la intención era beneficiar al acreedor o a ambas partes.*

Art. 1780. The party for whose exclusive benefit a term has been established may renounce it.

*Art. 1780. La parte en cuyo beneficio exclusivo se estableció un plazo puede renunciar a él.*

Art. 1781. Although performance cannot be demanded before the term ends, an obligor who has performed voluntarily before the term ends may not recover the performance.

*Art. 1781. Si bien no se puede exigir el cumplimiento antes de finalizado el plazo, el deudor que haya cumplido voluntariamente antes de finalizado el plazo no podrá recuperar la prestación.*

Art. 1782. When the obligation is such that its performance requires the solvency of the obligor, the term is regarded as nonexistent if the obligor is found to be insolvent.

*Art. 1782. Cuando el cumplimiento de la obligación exige la solvencia del deudor, el plazo se considera inexistente si el deudor es declarado insolvente.*

Art. 1783. When the obligation is subject to a term and the obligor fails to furnish the promised security, or the security furnished becomes insufficient, the obligee may require that the obligor, at his option, either perform the obligation immediately or furnish

*Art. 1783. Cuando la obligación está sujeta a un plazo y el deudor no presta la garantía prometida, o la garantía prestada se torna insuficiente, el acreedor puede exigir que el deudor, a su criterio, elija cumplir la obligación inmediatamente o prestar garantía*

sufficient security. The obligee may take all lawful measures to preserve his right.

*suficiente. El acreedor podrá tomar todas las medidas lícitas que sean necesarias para preservar su derecho.*

Art. 1784. When the term for performance of an obligation is not marked by a specific date but is rather a period of time, the term begins to run on the day after the contract is made, or on the day after the occurrence of the event that marks the beginning of the term, and it includes the last day of the period.

*Art. 1784. Cuando el plazo para el cumplimiento de una obligación no está delimitado por una fecha específica, sino que es un período de tiempo, el plazo comenzará a computarse a partir de la fecha de celebración del contrato, o el día posterior al acaecimiento del hecho que indique el comienzo del plazo, e incluirá el último día del período.*

Art. 1785. Performance on term must be in accordance with the intent of the parties, or with established usage when the intent cannot be ascertained.

*Art. 1785. El cumplimiento dentro del plazo debe producirse de conformidad con la voluntad de las partes, o con los usos y costumbres en caso de que no pueda determinarse la voluntad.*

SECTION 5. OBLIGATIONS WITH MULTIPLE PERSONS

*SECCIÓN 5. DE LAS OBLIGACIONES DE SUJETO PLURAL*

Art. 1786. When an obligation binds more than one obligor to one obligee, or binds one obligor to more than one obligee, or binds more than one obligor to more than one obligee, the obligation may be several, joint, or solidary.

*Art. 1786. Cuando una obligación vincula a más de un deudor con un acreedor, a un deudor con más de un acreedor o a más de un deudor con más de un acreedor, la obligación puede ser independiente, mancomunada o solidaria.*

Art. 1787. When each of different obligors owes a separate performance to one obligee, the obligation is several for the obligors.

When one obligor owes a separate performance to each of different obligees, the obligation is several for the obligees.

A several obligation produces the same effects as a separate obligation owed to each obligee by an obligor or by each obligor to an obligee.

*Art. 1787. Cuando hay más de un deudor y cada uno debe una prestación independiente a un único acreedor, la obligación es individual respecto de los deudores.*

*Cuando hay más de un acreedor y un único deudor debe una prestación independiente a cada uno de los diferentes acreedores, la obligación es individual respecto de los acreedores.*

*La obligación individual produce los mismos efectos que una obligación independiente debida a cada acreedor por un deudor o por cada deudor a un acreedor.*

Art. 1788. When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors.

When one obligor owes just one performance intended for the common benefit of different obligees, neither of whom is entitled to the whole performance, the obligation is joint for the obligees.

*Art. 1788. Cuando diferentes deudores deben juntos una sola prestación a un acreedor, pero ninguno está obligado a la totalidad, la obligación es mancomunada respecto de los deudores.*

*Cuando un deudor debe una sola prestación en beneficio común de diferentes acreedores, ninguno de los cuales tiene derecho a la totalidad de la prestación, la obligación es mancomunada respecto de los acreedores.*

Art. 1789. When a joint obligation is divisible, each joint obligor is bound to perform, and

*Art. 1789. Cuando una obligación mancomunada es divisible, cada deudor*

each joint obligee is entitled to receive, only his portion.

*mancomunado debe, y cada acreedor mancomunado tiene derecho a recibir, solo su parte.*

When a joint obligation is indivisible, joint obligors or obligees are subject to the rules governing solidary obligors or solidary obligees.

*Cuando una obligación mancomunada es indivisible, los deudores o acreedores mancomunados están sujetos a las reglas aplicables a los deudores solidarios o a los acreedores solidarios.*

Art. 1790. An obligation is solidary for the obligees when it gives each obligee the right to demand the whole performance from the common obligor.

*Art. 1790. La obligación es solidaria respecto de los acreedores cuando da a cada acreedor el derecho de exigir la totalidad de la prestación al deudor en común.*

Art. 1791. Before a solidary obligee brings action for performance, the obligor may extinguish the obligation by rendering performance to any of the solidary obligees.

*Art. 1791. Antes de que el acreedor solidario inicie una acción de ejecución, el deudor puede extinguir la obligación cumpliendo con la prestación respecto de cualquiera de los acreedores solidarios.*

Art. 1792. Remission of debt by one solidary obligee releases the obligor but only for the portion of that obligee.

*Art. 1792. La remisión de la deuda por un acreedor solidario libera al deudor, pero solo respecto de ese acreedor.*

Art. 1793. Any act that interrupts prescription for one of the solidary obligees benefits all the others.

*Art. 1793. Todo acto que interrumpe la prescripción respecto de uno de los acreedores solidarios beneficia a todos los demás.*

Art. 1794. An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

*Art. 1794. La obligación es solidaria respecto de los deudores cuando cada deudor debe la totalidad de la prestación. La prestación por parte de uno de los deudores solidarios libera a los demás de responsabilidad frente al acreedor.*

Art. 1795. An obligee, at his choice, may demand the whole performance from any of his solidary obligors. A solidary obligor may not request division of the debt.

Unless the obligation is extinguished, an obligee may institute action against any of his solidary obligors even after institution of action against another solidary obligor.

*Art. 1795. El acreedor, a su elección, puede exigir la totalidad de la prestación a cualquiera de los deudores solidarios. El deudor solidario no puede solicitar la división de la deuda.*

*A menos que la obligación se haya extinguido, el acreedor puede accionar contra cualquiera de sus deudores solidarios incluso después de haber accionado contra otro deudor solidario.*

Art. 1796. Solidarity of obligation shall not be presumed. A solidary obligation arises from a clear expression of the parties' intent or from the law.

*Art. 1796. No se presume la solidaridad de la obligación. La obligación solidaria surge de una expresión clara de la voluntad de las partes o de la ley.*

Art. 1797. An obligation may be solidary though it derives from a different source for each obligor.

*Art. 1797. La obligación puede ser solidaria aunque derive de una fuente diferente respecto de cada deudor.*

Art. 1798. An obligation may be solidary though for one

*Art. 1798. La obligación puede ser solidaria aun si está*

of the obligors it is subject to a condition or term.

*sujeta a plazo o condición respecto de alguno de los deudores.*

Art. 1799. The interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs.

*Art. 1799. La interrupción de la prescripción contra un deudor solidario surte efectos respecto de todos los deudores solidarios y sus sucesores.*

Art. 1800. A failure to perform a solidary obligation through the fault of one obligor renders all the obligors solidarily liable for the resulting damages. In that case, the obligors not at fault have their remedy against the obligor at fault.

*Art. 1800. El incumplimiento de una obligación solidaria por culpa de uno de los deudores produce la responsabilidad solidaria de todos los deudores por los daños y perjuicios resultantes. En tal caso, los deudores que no son culpables pueden recurrir contra el deudor culpable.*

Art. 1801. A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are personal to him, or that are common to all the solidary obligors. He may not raise a defense that is personal to another solidary obligor.

*Art. 1801. El deudor solidario puede invocar contra el acreedor las excepciones que deriven de la naturaleza de la obligación, que sean de carácter personal respecto de él o que sean comunes a todos los deudores solidarios. No puede invocar una excepción de carácter personal correspondiente a otro deudor solidario.*

Art. 1802. Renunciation of solidarity by the obligee in favor of one or more of his obligors must be express. An obligee who receives a partial performance from an obligor

*Art. 1802. La renuncia de la solidaridad por parte del acreedor respecto de uno o más deudores debe ser expresa. El acreedor que recibe una prestación parcial de un*

separately preserves the solidary obligation against all his obligors after deduction of that partial performance.

*deudor conserva de manera independiente la obligación solidaria frente a todos sus deudores después de la deducción de esa prestación parcial.*

Art. 1803. Remission of debt by the obligee in favor of one obligor, or a transaction or compromise between the obligee and one obligor, benefits the other solidary obligors in the amount of the portion of that obligor.

Surrender to one solidary obligor of the instrument evidencing the obligation gives rise to a presumption that the remission of debt was intended for the benefit of all the solidary obligors.

*Art. 1803. La remisión de una deuda por parte del acreedor respecto de un deudor, o la transacción o compensación entre el acreedor y un deudor, beneficia a los demás deudores solidarios por el monto correspondiente a la parte de ese deudor.*

*La entrega a un deudor solidario de un instrumento en el que consta la obligación crea la presunción de que la remisión de la deuda tuvo por objetivo beneficiar a todos los deudores solidarios.*

Art. 1804. Among solidary obligors, each is liable for his virile portion. If the obligation arises from a contract or quasi-contract, virile portions are equal in the absence of agreement or judgment to the contrary. If the obligation arises from an offense or quasi-offense, a virile portion is proportionate to the fault of each obligor.

A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may

*Art. 1804. Entre los deudores solidarios, cada uno está obligado a su porción viril. Si la obligación surge de un contrato o cuasicontrato, a falta de acuerdo o sentencia en contrario, las porciones viriles son iguales. Si la obligación surge de un delito o cuasidelito, la porción viril es proporcional a la culpa de cada deudor.*

*El deudor solidario que haya cumplido la obligación en su totalidad, aunque subrogado en el derecho del*

claim from the other obligors no more than the virile portion of each.

If the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties.

*acreedor, no puede reclamar a los restantes deudores más que la porción viril de cada uno.*

*Si las circunstancias que dan lugar a la obligación solidaria se refieren solo a uno de los deudores, tal deudor es responsable por el total frente a los demás deudores, que entonces se consideran sus fiadores.*

Art. 1805. A party sued on an obligation that would be solidary if it exists may seek to enforce contribution against any solidary co-obligor by making him a third party defendant according to the rules of procedure, whether or not that third party has been initially sued, and whether the party seeking to enforce contribution admits or denies liability on the obligation alleged by plaintiff.

*Art. 1805. Quien es demandado por una obligación que sería solidaria en caso de existir puede exigir la contribución contra cualquier codeudor solidario convirtiéndolo en tercero demandado conforme a las reglas procesales, independientemente de que ese tercero haya sido demandado inicialmente o no, e independientemente de que la parte que solicita hacer valer la contribución admita o rechace la responsabilidad por la obligación aducida por el demandante.*

Art. 1806. A loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion.

Any obligor in whose favor solidarity has been renounced

*Art. 1806. La pérdida resultante de la insolvencia de un deudor solidario debe ser asumida por los demás deudores solidarios en proporción a sus respectivas porciones.*

*El deudor en cuyo favor se haya renunciado a la*

must nevertheless contribute to make up for the loss.

*solidaridad debe aportar para compensar la pérdida.*

SECTION 6. CONJUNCTIVE AND ALTERNATIVE OBLIGATIONS

*SECCIÓN 6. DE LAS OBLIGACIONES CONCURRENTES Y ALTERNATIVAS*

Art. 1807. An obligation is conjunctive when it binds the obligor to multiple items of performance that may be separately rendered or enforced. In that case, each item is regarded as the object of a separate obligation.

The parties may provide that the failure of the obligor to perform one or more items shall allow the obligee to demand the immediate performance of all the remaining items.

*Art. 1807. La obligación es concurrente cuando obliga al deudor a varias prestaciones que pueden prestarse o ejecutarse independientemente. En tal caso, cada prestación se considera objeto de una obligación independiente.*

*Las partes pueden disponer que el incumplimiento por parte del deudor de una o más prestaciones permita al acreedor exigir el cumplimiento inmediato de las prestaciones restantes.*

Art. 1808. An obligation is alternative when an obligor is bound to render only one of two or more items of performance.

*Art. 1808. La obligación es alternativa cuando el deudor tiene que cumplir solo una de dos o más prestaciones.*

Art. 1809. When an obligation is alternative, the choice of the item of performance belongs to the obligor unless it has been expressly or impliedly granted to the obligee.

*Art. 1809. Cuando la obligación es alternativa, corresponde al deudor elegir la prestación, a menos que tal opción haya sido otorgada expresa o implícitamente al acreedor.*

Art. 1810. When the party who has the choice does not exercise it after a demand to do

*Art. 1810. Si, ante un requerimiento de elegir la prestación, la parte que tiene la*

so, the other party may choose the item of performance.

*opción no la ejerce, la otra parte puede elegir la prestación.*

Art. 1811. An obligor may not perform an alternative obligation by rendering as performance a part of one item and a part of another.

*Art. 1811. El deudor no puede cumplir una obligación alternativa cumpliendo una parte de una prestación y una parte de otra.*

Art. 1812. When the choice belongs to the obligor and one of the items of performance contemplated in the alternative obligation becomes impossible or unlawful, regardless of the fault of the obligor, he must render one of those that remain.

*Art. 1812. Cuando la opción corresponde al deudor y una de las prestaciones contempladas en la obligación alternativa deviene imposible o ilícita, independientemente de que tal cambio sea atribuible al deudor, el deudor debe cumplir una de las prestaciones que siguen pendientes.*

When the choice belongs to the obligee and one of the items of performance becomes impossible or unlawful without the fault of the obligor, the obligee must choose one of the items that remain. If the impossibility or unlawfulness is due to the fault of the obligor, the obligee may choose either one of those that remain, or damages for the item of performance that became impossible or unlawful.

*Cuando la opción corresponde al acreedor y una de las prestaciones deviene imposible o ilícita sin que tal cambio sea atribuible al deudor, el acreedor debe elegir una de las prestaciones que siguen pendientes. Si la imposibilidad o ilicitud son atribuibles al deudor, el acreedor puede elegir una de las prestaciones pendientes o puede exigir los daños y perjuicios por la prestación que devino imposible o ilícita.*

Art. 1813. If all of the items of performance contemplated in the alternative obligation

*Art. 1813. Si todas las prestaciones contempladas en la obligación alternativa*

become impossible or unlawful without the obligor's fault, the obligation is extinguished.

*devienen imposibles o ilícitas sin que tal cambio sea atribuible al deudor, la obligación queda extinguida.*

Art. 1814. When the choice belongs to the obligor, if all the items of performance contemplated in the alternative obligation have become impossible and the impossibility of one or more is due to the fault of the obligor, he is liable for the damages resulting from his failure to render the last item that became impossible.

*Art. 1814. Cuando la opción corresponde al deudor, si todas las prestaciones contempladas en la obligación alternativa devienen imposibles y la imposibilidad de una o más de esas prestaciones es atribuible al deudor, este debe responder por los daños y perjuicios resultantes de su incumplimiento de la última prestación que devino imposible.*

If the impossibility of one or more items is due to the fault of the obligee, the obligor is not bound to deliver any of the items that remain.

*Si la imposibilidad de una o más prestaciones es atribuible al acreedor, el deudor no está obligado a cumplir las prestaciones restantes.*

## SECTION 7. DIVISIBLE AND INDIVISIBLE OBLIGATIONS

## *SECCIÓN 7. DE LAS OBLIGACIONES DIVISIBLES E INDIVISIBLES*

Art. 1815. An obligation is divisible when the object of the performance is susceptible of division.

*Art. 1815. La obligación es divisible cuando el objeto de la prestación puede dividirse.*

An obligation is indivisible when the object of the performance, because of its nature or because of the intent of the parties, is not susceptible of division.

*La obligación es indivisible cuando el objeto de la prestación no puede dividirse debido a su naturaleza o a la voluntad de las partes.*

Art. 1816. When there is only one obligor and only one obligee, a divisible obligation must be performed as if it were indivisible.

*Art. 1816. Cuando hay un solo deudor y un solo acreedor, la obligación divisible debe cumplirse como si fuera indivisible.*

Art. 1817. A divisible obligation must be divided among successors of the obligor or of the obligee.

Each successor of the obligor is liable only for his share of a divisible obligation.

Each successor of the obligee is entitled only to his share of a divisible obligation.

*Art. 1817. La obligación divisible debe dividirse entre los sucesores del deudor o del acreedor.*

*Cada sucesor del deudor solo es responsable por su parte de la obligación divisible.*

*Cada sucesor del acreedor solo tiene derecho a su parte de la obligación divisible.*

Art. 1818. An indivisible obligation with more than one obligor or obligee is subject to the rules governing solidary obligations.

*Art. 1818. La obligación indivisible con más de un deudor o más de un acreedor está sujeta a las reglas de las obligaciones solidarias.*

Art. 1819. An indivisible obligation may not be divided among the successors of the obligor or of the obligee, who are thus subject to the rules governing solidary obligors or solidary obligees.

*Art. 1819. La obligación indivisible no puede dividirse entre los sucesores del deudor o del acreedor, quienes están sujetos a las reglas de los deudores solidarios o los acreedores solidarios.*

Art. 1820. A stipulation of solidarity does not make an obligation indivisible.

*Art. 1820. La estipulación de solidaridad no torna indivisible la obligación.*

## CHAPTER 4. TRANSFER OF OBLIGATIONS

## *CAPÍTULO 4. DE LA TRANSMISIÓN DE LAS OBLIGACIONES*

### SECTION 1. ASSUMPTION OF OBLIGATIONS

### *SECCIÓN 1. DE LA ASUNCIÓN DE LAS OBLIGACIONES*

Art. 1821. An obligor and a third person may agree to an assumption by the latter of an obligation of the former. To be enforceable by the obligee against the third person, the agreement must be made in writing.

The obligee's consent to the agreement does not effect a release of the obligor.

The unreleased obligor remains solidarily bound with the third person.

*Art. 1821. El deudor y un tercero pueden estipular que el tercero asuma una obligación del deudor. Para que el acreedor pueda hacer valer la estipulación contra el tercero, el acuerdo debe constar por escrito.*

*El consentimiento del acreedor respecto del acuerdo no libera al deudor.*

*El deudor no liberado permanece obligado solidariamente con el tercero.*

Art. 1822. A person who, by agreement with the obligor, assumes the obligation of the latter is bound only to the extent of his assumption.

The assuming obligor may raise any defense based on the contract by which the assumption was made.

*Art. 1822. El tercero que, mediante acuerdo con el deudor, asume la obligación de este queda obligado solo en la medida de dicha asunción.*

*El tercero que asume la obligación como deudor puede oponer toda excepción que surja del contrato en virtud del que asumió la obligación.*

Art. 1823. An obligee and a third person may agree on an assumption by the latter of an obligation owed by another to the former. That agreement

*Art. 1823. El acreedor y un tercero pueden estipular que el tercero asuma una obligación debida por otro al acreedor. Tal acuerdo debe constar*

must be made in writing. That agreement does not effect a release of the original obligor.

*por escrito. El acuerdo no libera al deudor original.*

Art. 1824. A person who, by agreement with the obligee, has assumed another's obligation may not raise against the obligee any defense based on the relationship between the assuming obligor and the original obligor.

*Art. 1824. El tercero que, mediante acuerdo con el acreedor, asume la obligación de otro no puede invocar contra el acreedor ninguna excepción fundada en la relación entre el tercero que asume la obligación como deudor y el deudor original.*

The assuming obligor may raise any defense based on the relationship between the original obligor and obligee. He may not invoke compensation based on an obligation owed by the obligee to the original obligor.

*El tercero que asume la obligación como deudor puede oponer toda excepción que surja de la relación entre el deudor y el acreedor originales. No puede invocar la existencia de compensación sobre la base de la obligación debida por el acreedor al deudor original.*

## SECTION 2. SUBROGATION

## *SECCIÓN 2. DE LA SUBROGACIÓN*

Art. 1825. Subrogation is the substitution of one person to the rights of another. It may be conventional or legal.

*Art. 1825. La subrogación es la sustitución de una persona en los derechos de otra. Puede ser convencional o legal.*

Art. 1826. A. When subrogation results from a person's performance of the obligation of another, that obligation subsists in favor of the person who performed it who may avail

*Art. 1826. A. Cuando la subrogación se produce a partir de que una persona cumple la obligación de otro, esa obligación subsiste en favor de la persona que la cumplió, quien*

himself of the action and security of the original obligee against the obligor, but is extinguished for the original obligee.

B. An original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee. This right shall not be waived or altered if the original obligation arose from injuries sustained or loss occasioned by the original obligee as a result of the negligence or intentional conduct of the original obligor. [Acts 2001, No. 305, 1]

*puede aprovechar la acción y la garantía del acreedor original contra el deudor, pero se extingue respecto del acreedor original.*

*B. El acreedor original que recibe un pago parcial puede ejercer su derecho por el saldo de la deuda con preferencia sobre el nuevo acreedor. Este derecho no se puede renunciar ni modificar si la obligación original surgió a partir de lesiones sufridas o pérdidas ocasionadas por el acreedor original a consecuencia de la culpa o conducta intencional del deudor original. [Sección 1, ley n.º 305 de 2001].*

Art. 1827. An obligee who receives performance from a third person may subrogate that person to the rights of the obligee, even without the obligor's consent. That subrogation is subject to the rules governing the assignment of rights.

*Art. 1827. El acreedor que recibe una prestación de un tercero puede subrogar a esa persona en sus derechos como acreedor, incluso sin el consentimiento del deudor. Tal subrogación está sujeta a las reglas que rigen la cesión de derechos.*

Art. 1828. An obligor who pays a debt with money or other fungible things borrowed for that purpose may subrogate the lender to the rights of the obligee, even without the obligee's consent.

*Art. 1828. El deudor que paga una deuda con dinero u otra cosa fungible tomadas en préstamo para ese efecto puede subrogar al prestamista en los derechos del acreedor, incluso sin el consentimiento del acreedor.*

The agreement for subrogation must be made in writing expressing that the purpose of the loan is to pay the debt.

*El acuerdo de subrogación debe constar por escrito y debe expresar que el fin del préstamo es pagar la deuda.*

Art. 1829. Subrogation takes place by operation of law:

(1) In favor of an obligee who pays another obligee whose right is preferred to his because of a privilege, pledge, mortgage, or security interest;

(2) In favor of a purchaser of movable or immovable property who uses the purchase money to pay creditors holding any privilege, pledge, mortgage, or security interest on the property;

(3) In favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment;

(4) In favor of a successor who pays estate debts with his own funds; and

(5) In the other cases provided by law. [Acts 1989, No. 137, §16, eff. Sept. 1, 1989; Acts 2001, No. 572, §1]

*Art. 1829. La subrogación se produce de pleno derecho en los siguientes supuestos:*

*1) en favor del acreedor que paga a otro acreedor cuyo derecho tiene preferencia sobre el propio debido a un privilegio, prenda, hipoteca u otra garantía real;*

*2) en favor del adquirente de un bien mueble o inmueble que utiliza el dinero de la compra para pagar a los acreedores que poseen un privilegio, prenda, hipoteca u otra garantía real sobre el bien;*

*3) en favor del deudor que paga una deuda que debe junto con terceros o por terceros y que tiene acción contra tales terceros a consecuencia del pago;*

*4) en favor del sucesor que paga deudas del acervo hereditario con fondos propios; y*

*5) en todos los demás casos previstos en la ley. [Sección 16, ley n.º 137 de 1989, vigente desde el 1 de septiembre de 1989; sección 1, ley n.º 572 de 2001].*

Art. 1830. When subrogation takes place by operation of law, the new obligee may recover from the obligor only to the extent of the performance rendered to the original obligee. The new obligee may not recover more by invoking conventional subrogation.

*Art. 1830. Cuando la subrogación se produce de pleno derecho, el nuevo acreedor puede cobrar al deudor solo en la medida de la prestación ofrecida al acreedor original. El nuevo acreedor no puede cobrar más invocando la subrogación convencional.*

## CHAPTER 5. PROOF OF OBLIGATIONS

## *CAPÍTULO 5. DE LA PRUEBA DE LAS OBLIGACIONES*

Art. 1831. A party who demands performance of an obligation must prove the existence of the obligation.

A party who asserts that an obligation is null, or that it has been modified or extinguished, must prove the facts or acts giving rise to the nullity, modification, or extinction.

*Art. 1831. La parte que exige el cumplimiento de una obligación debe demostrar su existencia.*

*La parte que alega la nulidad, modificación o extinción de una obligación debe probar los hechos o actos que dan lugar a la nulidad, modificación o extinción.*

Art. 1832. When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen.

*Art. 1832. Cuando la ley exige la forma escrita, el contrato no puede probarse por testimonios o presunciones, a menos que el instrumento escrito haya sido destruido, perdido o robado.*

Art. 1833. A. An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each

*Art. 1833. A. Se considera acto auténtico al documento otorgado ante notario público u otro funcionario autorizado a desempeñar tal función en presencia de dos testigos, y*

party who executed it, by each witness, and by each notary public before whom it was executed. The typed or hand-printed name of each person shall be placed in a legible form immediately beneath the signature of each person signing the act.

B. To be an authentic act, the writing need not be executed at one time or place, or before the same notary public or in the presence of the same witnesses, provided that each party who executes it does so before a notary public or other officer authorized to perform that function, and in the presence of two witnesses and each party, each witness, and each notary public signs it. The failure to include the typed or hand-printed name of each person signing the act shall not affect the validity or authenticity of the act.

C. If a party is unable or does not know how to sign his name, the notary public must cause him to affix his mark to the writing. [Acts 2003, No. 965, §1, eff. Jan. 1, 2005]

*firmado por cada una de las partes que lo otorgaron, por cada testigo y por cada notario público ante el que se haya firmado. El nombre de cada persona, tipeado o escrito a mano, debe constar de manera legible inmediatamente debajo de la firma de cada persona que firma el acto.*

*B. Para ser un acto auténtico, no es necesario que el documento se firme en el mismo momento o lugar, ante el mismo notario público ni en presencia de los mismos testigos, siempre y cuando cada parte que lo celebra lo haga ante un notario público u otro funcionario autorizado a desempeñar esa función y en presencia de dos testigos, y cada parte, cada testigo y cada notario público firmen el documento. La omisión del nombre de cada persona, tipeado o escrito a mano, que firma el documento no afectará la validez ni la autenticidad del acto.*

*C. En caso de que una parte no pueda o no sepa firmar, el notario público deberá procurar que esa parte inserte una marca en el documento a modo de firma. [Sección 1, ley n.º 965 de 2003, vigente desde el 1 de enero de 2005].*

Art. 1834. An act that fails to be authentic because of the lack of competence or capacity of the notary public, or because of a defect of form, may still be valid as an act under private signature.

*Art. 1834. El acto que no es auténtico por falta de competencia o de capacidad del notario público o por defecto de forma puede ser válido de todos modos como acto con firma privada.*

Art. 1835. An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title.

*Art. 1835. El acto auténtico hace plena prueba del acuerdo que contiene, frente a las partes, sus herederos y sucesores a título universal o particular.*

Art. 1836. An act under private signature is regarded prima facie as the true and genuine act of a party executing it when his signature has been acknowledged, and the act shall be admitted in evidence without further proof.

An act under private signature may be acknowledged by a party to that act by recognizing the signature as his own before a court, or before a notary public, or other officer authorized to perform that function, in the presence of two witnesses. An act under private signature may be acknowledged also in any other manner authorized by law.

Nevertheless, an act under private signature, though acknowledged, cannot

*Art. 1836. El acto bajo firma privada se presume prima facie verdadero y genuino de la parte que lo firma cuando su firma fue reconocida, y el acto debe admitirse como prueba sin necesidad de presentar otro medio probatorio.*

*El acto bajo firma privada puede ser reconocido por una parte del acto mediante el reconocimiento de la firma como propia ante un tribunal o ante un notario público u otro funcionario autorizado a desempeñar tal función, en presencia de dos testigos. El acto bajo firma privada puede reconocerse también de cualquier otro modo previsto por la ley.*

*Sin embargo, el acto bajo firma privada, aun reconocido, no puede sustituir el acto*

substitute for an authentic act when the law prescribes such an act.

*auténtico cuando la ley prescribe tal acto.*

Art. 1837. An act under private signature need not be written by the parties, but must be signed by them.

*Art. 1837. No es necesario que el acto bajo firma privada sea escrito por las partes, pero debe estar firmado por ellas.*

Art. 1838. A party against whom an act under private signature is asserted must acknowledge his signature or deny that it is his.

In case of denial, any means of proof may be used to establish that the signature belongs to that party.

*Art. 1838. La parte contra la cual se alega un acto bajo firma privada debe reconocer o desconocer su firma.*

*En caso de desconocerla, se puede usar cualquier medio de prueba para demostrar que la firma pertenece a esa parte.*

Art. 1839. A transfer of immovable property must be made by authentic act or by act under private signature. Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath.

An instrument involving immovable property shall have effect against third persons only from the time it is filed for registry in the parish where the property is located.

*Art. 1839. La transferencia de bienes inmuebles debe hacerse por acto auténtico o por acto bajo firma privada. No obstante, la transferencia realizada oralmente es válida entre las partes cuando la propiedad fue entregada efectivamente y el enajenante reconoce la transferencia al ser interrogado bajo juramento.*

*El instrumento relativo a un inmueble tiene efectos frente a terceros solo desde el momento en que se presenta para su inscripción en la parroquia en la que se encuentra el bien.*

Art. 1840. When certified by the notary public or other

*Art. 1840. Cuando está certificada por notario público u*

officer before whom the act was passed, a copy of an authentic act constitutes proof of the contents of the original, unless the copy is proved to be incorrect.

*otro funcionario ante el cual se firmó el acto, la copia de un acto auténtico constituye prueba del contenido del original, a menos que se compruebe que la copia es incorrecta.*

Art. 1841. When an authentic act or an acknowledged act under private signature has been filed for registry with a public officer, a copy of the act thus filed, when certified by that officer, constitutes proof of the contents of the original.

*Art. 1841. Cuando un acto auténtico o un acto reconocido bajo firma privada fue presentado para su inscripción ante un funcionario público, la copia del acto presentado, si está certificada por el funcionario, constituye prueba del contenido del original.*

Art. 1842. Confirmation is a declaration whereby a person cures the relative nullity of an obligation.

An express act of confirmation must contain or identify the substance of the obligation and evidence the intention to cure its relative nullity.

Tacit confirmation may result from voluntary performance of the obligation.

*Art. 1842. La confirmación consiste en la declaración mediante la cual una persona subsana la nulidad relativa de una obligación.*

*El acto de confirmación expreso debe contener o detallar la sustancia de la obligación y hacer constar la voluntad de subsanar su nulidad relativa.*

*La confirmación tácita puede producirse a consecuencia del cumplimiento voluntario de la obligación.*

Art. 1843. Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another without authority.

*Art. 1843. La ratificación es una declaración mediante la cual una persona presta su consentimiento respecto de una obligación que asume en*

*su nombre un tercero sin autorización.*

An express act of ratification must evidence the intention to be bound by the ratified obligation.

*El acto de ratificación expreso debe hacer constar la voluntad de obligarse en virtud de la obligación ratificada.*

Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation.

*La ratificación tácita se produce cuando una persona, con conocimiento de una obligación incurrida por un tercero en su nombre, acepta el beneficio de la obligación.*

Art. 1844. The effects of confirmation and ratification are retroactive to the date of the confirmed or ratified obligation. Neither confirmation nor ratification may impair the rights of third persons.

*Art. 1844. Los efectos de la confirmación y la ratificación son retroactivos a la fecha de la obligación confirmada o ratificada. Ni la confirmación ni la ratificación pueden afectar derechos de terceros.*

Art. 1845. A donation inter vivos that is null for lack of proper form may be confirmed by the donor but the confirmation must be made in the form required for a donation.

*Art. 1845. La donación entre vivos que es nula por defecto de forma puede ser confirmada por el donante, pero la confirmación debe hacerse en la forma exigida para las donaciones.*

The universal successor of the donor may, after his death, expressly or tacitly confirm such a donation.

*El sucesor universal del donante puede, tras la muerte de este, confirmar la donación de manera expresa o tácita.*

Art. 1846. When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess

*Art. 1846. Cuando la ley no exige la forma escrita, el contrato que no consta por escrito, y que fue celebrado por un precio o, en ausencia de un precio, por un valor que no*

of five hundred dollars may be proved by competent evidence.

If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances.

*excede los quinientos dólares, puede demostrarse mediante prueba apta.*

*Si el precio o valor excede los quinientos dólares, el contrato debe probarse mediante al menos un testigo u otras circunstancias corroborantes.*

Art. 1847. Parol evidence is inadmissible to establish either a promise to pay the debt of a third person or a promise to pay a debt extinguished by prescription.

*Art. 1847. No se admite la prueba oral para demostrar la promesa de pago de la deuda hecha por un tercero ni la promesa de pagar una deuda extinguida por prescripción.*

Art. 1848. Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent or to prove that the written act was modified by a subsequent and valid oral agreement. [Acts 2012, No. 277, §1, eff. Aug. 1, 2012]

*Art. 1848. La prueba testimonial o de otro tipo no puede admitirse para rechazar o alterar el contenido de un acto auténtico o de un acto bajo firma privada. Sin embargo, en aras de la justicia, esa prueba puede admitirse para demostrar circunstancias tales como un vicio del consentimiento o para demostrar que el acto escrito fue modificado por un acuerdo oral posterior y válido. [Sección 1, ley n.º 277 de 2012, vigente desde el 1 de agosto de 2012].*

Art. 1849. In all cases, testimonial or other evidence may be admitted to prove the existence or a presumption of a simulation or to rebut such a presumption. Nevertheless,

*Art. 1849. En todos los casos, la prueba testimonial o de otro tipo puede admitirse para demostrar la existencia o la presunción de una simulación o para rebatir tal presunción.*

between the parties, a counter-letter is required to prove that an act purporting to transfer immovable property is an absolute simulation, except when a simulation is presumed or as necessary to protect the rights of forced heirs. [Added by Acts 2012, No. 277, §1, eff. Aug. 1, 2012]

*Sin embargo, entre las partes, es necesario un contradocumento para demostrar que un acto por el que se pretende transferir un bien inmueble es una simulación absoluta, excepto cuando se presume una simulación o cuando sea necesario para proteger los derechos de los herederos forzosos. [Ley de 2012, n.º 277, sección 1, en vigencia el 1 de agosto de 2012].*

Arts. 1850-1852. [Repealed by Acts 1997, No. 577, §3]

*Arts. 1850-1852. [Derogado por sección 3, ley n.º 577 de 1997].*

Art. 1853. A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.

A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

*Art. 1853. La confesión judicial es la declaración hecha por una parte en un proceso judicial. Tal confesión hace plena prueba contra la parte que la hizo.*

*La confesión judicial es indivisible y puede revocarse solo por un error de hecho.*

## CHAPTER 6. EXTINCTION OF OBLIGATIONS

## *CAPÍTULO 6. DE LA EXTINCIÓN DE LAS OBLIGACIONES*

### SECTION 1. PERFORMANCE

### *SECCIÓN 1. DEL CUMPLIMIENTO*

Art. 1854. Performance by the obligor extinguishes the obligation.

*Art. 1854. El cumplimiento por parte del deudor extingue la obligación.*

Art. 1855. Performance may be rendered by a third person, even against the will of the obligee, unless the obligor or the obligee has an interest in performance only by the obligor.

Performance rendered by a third person effects subrogation only when so provided by law or by agreement.

*Art. 1855. La prestación puede ser cumplida por un tercero, incluso contra la voluntad del acreedor, a menos que el deudor o el acreedor estén interesados en que el cumplimiento esté exclusivamente a cargo del deudor.*

*El cumplimiento de la prestación realizado por un tercero produce la subrogación solo por disposición legal o convencional.*

Art. 1856. An obligation that may be extinguished by the transfer of a thing is not extinguished unless the thing has been validly transferred to the obligee of performance.

*Art. 1856. La obligación que puede extinguirse por la transferencia de una cosa no se extingue a menos que la cosa haya sido transferida válidamente al acreedor de la prestación.*

Art. 1857. Performance must be rendered to the obligee or to a person authorized by him.

However, a performance rendered to an unauthorized person is valid if the obligee ratifies it.

In the absence of ratification, a performance rendered to an unauthorized person is valid if the obligee has derived a benefit from it, but only for the amount of the benefit.

*Art. 1857. El cumplimiento de la prestación debe ser en favor del acreedor o de una persona autorizada por él.*

*No obstante, la prestación cumplida en favor de una persona no autorizada es válida si el acreedor la ratifica.*

*A falta de ratificación, la prestación cumplida en favor de una persona no autorizada es válida si el acreedor obtuvo un beneficio a partir de ella, pero solo por el monto del beneficio.*

Art. 1858. Performance rendered to an obligee without capacity to receive it is valid to the extent of the benefit he derived from it.

*Art. 1858. La prestación cumplida en favor de un acreedor sin capacidad de recibirla solo tiene validez en la medida del beneficio obtenido a partir de ella.*

Art. 1859. A performance rendered to an obligee in violation of a seizure is not valid against the seizing creditor who, according to his right, may force the obligor to perform again.

*Art. 1859. La prestación cumplida en favor de un acreedor en incumplimiento de un embargo no es oponible contra el acreedor embargante, quien, fundado en su derecho, puede requerir que el deudor vuelva a cumplir la prestación.*

In that case, the obligor may recover the first performance from the obligee.

*En tal caso, el deudor puede recuperar la primera prestación del acreedor.*

Art. 1860. When the performance consists of giving a thing that is determined as to its kind only, the obligor need not give one of the best quality but he may not tender one of the worst.

*Art. 1860. Cuando la prestación consiste en dar una cosa determinada únicamente respecto de su especie, el deudor no está obligado a dar una cosa de mejor calidad, pero tampoco puede entregar una de peor calidad.*

Art. 1861. An obligee may refuse to accept a partial performance.

Nevertheless, if the amount of an obligation to pay money is disputed in part and the obligor is willing to pay the undisputed part, the obligee may not refuse to accept that part. If the obligee is willing to accept the

*Art. 1861. El acreedor puede negarse a aceptar una prestación parcial.*

*Sin embargo, si el monto de una obligación de dar dinero es disputado en parte y el deudor está dispuesto a pagar la parte no disputada, el acreedor no puede negarse a aceptar esa parte. Si el acreedor*

undisputed part, the obligor must pay it. In either case, the obligee preserves his right to claim the disputed part.

*está dispuesto a aceptar la parte no disputada, el deudor debe pagarla. En cualquiera de estos casos, el acreedor conserva el derecho de reclamar la parte disputada.*

Art. 1862. Performance shall be rendered in the place either stipulated in the agreement or intended by the parties according to usage, the nature of the performance, or other circumstances.

In the absence of agreement or other indication of the parties' intent, performance of an obligation to give an individually determined thing shall be rendered at the place the thing was when the obligation arose. If the obligation is of any other kind, the performance shall be rendered at the domicile of the obligor.

*Art. 1862. La prestación debe cumplirse en el lugar estipulado en el acuerdo o en el que hayan pretendido las partes conforme al uso, la naturaleza de la prestación u otras circunstancias.*

*A falta de acuerdo u otra indicación de la voluntad de las partes, el cumplimiento de la obligación de dar una cosa determinada deberá realizarse en el lugar en que estaba la cosa cuando surgió la obligación. Si la obligación es de cualquier otro tipo, la prestación debe cumplirse en el domicilio del deudor.*

Art. 1863. Expenses that may be required to render performance shall be borne by the obligor.

*Art. 1863. Los gastos necesarios para cumplir la prestación deberán ser soportados por el deudor.*

SUBSECTION A. IMPUTATION OF PAYMENT

*SUBSECCIÓN A. DE LA IMPUTACIÓN DE PAGO*

Art. 1864. An obligor who owes several debts to an obligee has the right to impute payment to the debt he intends to pay.

*Art. 1864. El deudor que haya contraído varias deudas con un acreedor tiene derecho a imputar el pago a la deuda que pretende pagar.*

The obligor's intent to pay a certain debt may be expressed at the time of payment or may be inferred from circumstances known to the obligee.

*La voluntad del deudor de pagar una deuda determinada puede expresarse al momento del pago o puede inferirse de las circunstancias conocidas por el acreedor.*

Art. 1865. An obligor may not, without the obligee's consent, impute payment to a debt not yet due.

*Art. 1865. El deudor no puede imputar el pago a una deuda aún no vencida sin el consentimiento del acreedor.*

Art. 1866. An obligor of a debt that bears interest may not, without the obligee's consent, impute a payment to principal when interest is due.

A payment made on principal and interest must be imputed first to interest.

*Art. 1866. El deudor de una deuda que genera intereses no puede, sin el consentimiento del acreedor, imputar el pago al capital cuando se deben intereses.*

*El pago hecho en concepto de capital e intereses se imputa primero a los intereses.*

Art. 1867. An obligor who has accepted a receipt that imputes payment to one of his debts may no longer demand imputation to another debt, unless the obligee has acted in bad faith.

*Art. 1867. El deudor que aceptó un recibo por el que se imputa el pago a una de sus deudas ya no puede exigir la imputación a otra deuda, a menos que el acreedor haya actuado de mala fe.*

Art. 1868. When the parties have made no imputation, payment must be imputed to the debt that is already due.

If several debts are due, payment must be imputed to the debt that bears interest.

If all, or none, of the debts that are due bear interest,

*Art. 1868. Cuando las partes no imputaron el pago, este se imputa a la deuda que ya está vencida.*

*Si hay varias deudas vencidas, el pago se imputa a la deuda que devenga intereses.*

*Si todas o ninguna de las deudas que están vencidas*

payment must be imputed to the debt that is secured.

If several unsecured debts bear interest, payment must be imputed to the debt that, because of the rate of interest, is most burdensome to the obligor.

If several secured debts bear no interest, payment must be imputed to the debt that, because of the nature of the security, is most burdensome to the obligor.

If the obligor had the same interest in paying all debts, payment must be imputed to the debt that became due first.

If all debts are of the same nature and became due at the same time, payment must be proportionally imputed to all.

*devengan intereses, el pago se imputa a la deuda que está garantizada.*

*Si varias deudas no garantizadas devengan intereses, el pago se imputa a la deuda que, debido a la tasa de interés, es más onerosa para el deudor.*

*Si varias deudas garantizadas no devengan intereses, el pago se imputa a la deuda que, debido a la naturaleza de la garantía, es más onerosa para el deudor.*

*Si el deudor tiene el mismo interés en pagar todas las deudas, el pago se imputa a la deuda que venció primero.*

*Si todas las deudas son de la misma naturaleza y vencen al mismo tiempo, el pago se imputa proporcionalmente a todas ellas.*

## SUBSECTION B. TENDER AND DEPOSIT

## *SUBSECCIÓN B. DE LA OFERTA DE PAGO Y LA CONSIGNACIÓN*

Art. 1869. When the object of the performance is the delivery of a thing or a sum of money and the obligee, without justification, fails to accept the performance tendered by the obligor, the tender, followed by deposit to the order of the court, produces all the effects of a performance from the time

*Art. 1869. Cuando el objeto de la prestación consiste en la entrega de una cosa o una suma de dinero y el acreedor, sin justificación alguna, no acepta la prestación ofrecida por el deudor, la oferta de pago, seguida por la consignación a la orden del juez, produce todos los efectos del*

the tender was made if declared valid by the court.

A valid tender is an offer to perform according to the nature of the obligation.

*cumplimiento desde que se hizo la oferta de pago, si es declarada válida por el juez.*

*La oferta de pago válida consiste en el ofrecimiento de cumplir conforme a la naturaleza de la obligación.*

Art. 1870. If the obligor knows or has reason to know that the obligee will refuse the performance, or when the object of the performance is the delivery of a thing or a sum of money at a place other than the obligee's domicile, a notice given to the obligee that the obligor is ready to perform has the same effect as a tender.

*Art. 1870. Si el deudor sabe o tiene motivos para saber que el acreedor rechazará la prestación o si el objeto de la prestación consiste en la entrega de una cosa o de una suma de dinero en un lugar que no es el domicilio del acreedor, la notificación al acreedor de que el deudor está listo para cumplir tiene el mismo efecto que la oferta de pago.*

Art. 1871. After the tender has been refused, the obligor may deposit the thing or the sum of money to the order of the court in a place designated by the court for that purpose, and may demand judgment declaring the performance valid.

*Art. 1871. Después del rechazo de la oferta de pago, el deudor puede depositar la cosa o la suma de dinero a la orden del juzgado en un lugar designado por el juez a tal efecto, y puede exigir una sentencia por la que se declare la validez de la prestación cumplida.*

If the deposit is accepted by the obligee, or if the court declares the performance valid, all expenses of the deposit must be borne by the obligee.

*Si el acreedor acepta la consignación o si el juez declara la validez de la prestación, todos los gastos de la consignación deben ser soportados por el acreedor.*

Art. 1872. If performance consists of the delivery of a perishable thing, or of a thing whose deposit and custody are excessively costly in proportion to its value, the court may order the sale of the thing under the conditions that it may direct, and the deposit of the proceeds.

*Art. 1872. Si la prestación consiste en la entrega de una cosa perecedera, o de una cosa cuya consignación y custodia son excesivamente onerosas en proporción a su valor, el juez puede ordenar la venta de la cosa conforme a las condiciones que indique, así como la consignación de los fondos obtenidos.*

## SECTION 2. IMPOSSIBILITY OF PERFORMANCE

## *SECCIÓN 2. DE LA IMPOSIBILIDAD DE CUMPLIMIENTO*

Art. 1873. An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible.

An obligor is, however, liable for his failure to perform when he has assumed the risk of such a fortuitous event.

An obligor is liable also when the fortuitous event occurred after he has been put in default.

An obligor is likewise liable when the fortuitous event that caused his failure to perform has been preceded by his fault, without which the failure would not have occurred.

*Art. 1873. El deudor no es responsable por su incumplimiento si este es causado por un hecho fortuito que imposibilita el cumplimiento.*

*Sin embargo, el deudor es responsable por su incumplimiento cuando asumió el riesgo de tal hecho fortuito.*

*El deudor también es responsable cuando el hecho fortuito ocurrió después de haber sido constituido en mora.*

*El deudor es asimismo responsable cuando el hecho fortuito que causó su incumplimiento fue precedido por su culpa, sin la cual no habría ocurrido el incumplimiento.*

Art. 1874. An obligor who had been put in default when a fortuitous event made his

*Art. 1874. El deudor que fue constituido en mora después de que un hecho fortuito hizo*

performance impossible is not liable for his failure to perform if the fortuitous event would have likewise destroyed the object of the performance in the hands of the obligee had performance been timely rendered.

That obligor is, however, liable for the damage caused by his delay.

*imposible su cumplimiento no es responsable por su incumplimiento si el hecho fortuito igualmente habría destruido el objeto de la prestación en manos del acreedor si se hubiera cumplido la prestación a tiempo.*

*Sin embargo, el deudor es responsable por los daños causados por su demora.*

Art. 1875. A fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen.

*Art. 1875. El hecho fortuito es aquel que, al momento de la celebración del contrato, no se podría haber previsto razonablemente.*

Art. 1876. When the entire performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved.

The other party may then recover any performance he has already rendered.

*Art. 1876. Cuando la totalidad de una prestación debida por una parte deviene imposible a raíz de un hecho fortuito, se resuelve el contrato.*

*En tal caso, la otra parte puede recuperar la prestación que ya haya cumplido.*

Art. 1877. When a fortuitous event has made a party's performance impossible in part, the court may reduce the other party's counterperformance proportionally, or, according to the circumstances, may declare the contract dissolved.

*Art. 1877. Cuando por un hecho fortuito la prestación de una parte devenga imposible en parte, el juez puede reducir la contraprestación de la otra parte proporcionalmente o, según las circunstancias, puede declarar la resolución del contrato.*

Art. 1878. If a contract is dissolved because of a

*Art. 1878. En caso de que un contrato se resuelva por un*

fortuitous event that occurred after an obligor has performed in part, the obligee is bound but only to the extent that he was enriched by the obligor's partial performance.

*hecho fortuito ocurrido después de que el deudor cumplió en parte, el acreedor solo está obligado en la medida en que se enriqueció por el cumplimiento parcial del deudor.*

SECTION 3. NOVATION

*SECCIÓN 3. DE LA NOVACIÓN*

Art. 1879. Novation is the extinguishment of an existing obligation by the substitution of a new one.

*Art. 1879. La novación es la extinción de una obligación existente mediante la sustitución por otra nueva.*

Art. 1880. The intention to extinguish the original obligation must be clear and unequivocal. Novation may not be presumed.

*Art. 1880. La voluntad de extinguir la obligación original debe ser clara e inequívoca. La novación no se puede presumir.*

Art. 1881. Novation takes place when, by agreement of the parties, a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation. If any substantial part of the original performance is still owed, there is no novation.

Novation takes place also when the parties expressly declare their intention to novate an obligation.

Mere modification of an obligation, made without intention to extinguish it, does not effect a novation. The

*Art. 1881. La novación se produce cuando, por acuerdo de las partes, una prestación nueva sustituye otra debida con anterioridad o una causa nueva sustituye la de la obligación original. En caso de que aún se deba una parte sustancial de la prestación original, no hay novación.*

*La novación también se produce cuando las partes declaran expresamente su voluntad de novar una obligación.*

*La mera modificación de una obligación, hecha sin voluntad de extinguirla, no produce la novación. La*

execution of a new writing, the issuance or renewal of a negotiable instrument, or the giving of new securities for the performance of an existing obligation are examples of such a modification.

*suscripción de un nuevo documento, la emisión o la renovación de un título de crédito, o el otorgamiento de garantías nuevas para el cumplimiento de una obligación existente son ejemplos de tal modificación.*

Art. 1882. Novation takes place when a new obligor is substituted for a prior obligor who is discharged by the obligee. In that case, the novation is accomplished even without the consent of the prior obligor, unless he had an interest in performing the obligation himself.

*Art. 1882. La novación se produce cuando un nuevo deudor sustituye al deudor anterior, que queda liberado por el acreedor. En tal caso, la novación se produce aun sin el consentimiento del deudor anterior, a menos que tenga interés en cumplir la obligación por sí mismo.*

Art. 1883. Novation has no effect when the obligation it purports to extinguish does not exist or is absolutely null.

If the obligation is only relatively null, the novation is valid, provided the obligor of the new one knew of the defect of the extinguished obligation.

*Art. 1883. La novación no produce efectos cuando la obligación que pretende extinguir no existe o es nula de nulidad absoluta.*

*En caso de que la obligación solo sea de nulidad relativa, la novación es válida siempre y cuando el deudor de la nueva obligación tenga conocimiento del defecto de la obligación extinguida.*

Art. 1884. Security given for the performance of the extinguished obligation may not be transferred to the new obligation without agreement of the parties who gave the security.

*Art. 1884. La garantía prestada por el cumplimiento de la obligación extinguida no puede transferirse a la obligación nueva sin acuerdo de las*

*partes que prestaron la garantía.*

Art. 1885. A novation made by the obligee and one of the obligors of a solidary obligation releases the other solidary obligors.

In that case, the security given for the performance of the extinguished obligation may be retained by the obligee only on property of that obligor with whom the novation has been made.

If the obligee requires that the other co-obligors remain solidarily bound, there is no novation unless the co-obligors consent to the new obligation.

*Art. 1885. La novación realizada por el acreedor y uno de los deudores de una obligación solidaria libera a los demás deudores solidarios.*

*En tal caso, el acreedor puede retener la garantía prestada por el cumplimiento de la obligación extinguida solo respecto de los bienes del deudor con quien se haya producido la novación.*

*Si el acreedor exige que los demás codeudores permanezcan obligados solidariamente, no hay novación a menos que los codeudores consientan la nueva obligación.*

Art. 1886. A delegation of performance by an obligor to a third person is effective when that person binds himself to perform.

A delegation effects a novation only when the obligee expressly discharges the original obligor.

*Art. 1886. La delegación del cumplimiento por parte del deudor a un tercero produce efectos cuando esa persona se obliga a cumplir.*

*La delegación produce una novación solo cuando el acreedor libera expresamente al deudor original.*

Art. 1887. If the new obligor has assumed the obligation and acquired the thing given as security, the discharge of any prior obligor by the obligee does not affect the security or its rank.

*Art. 1887. Si el nuevo deudor asumió la obligación y adquirió la cosa dada en garantía, la liberación de un deudor anterior por parte del acreedor no afecta la garantía ni su grado.*

SECTION 4. REMISSION OF DEBT

Art. 1888. A remission of debt by an obligee extinguishes the obligation. That remission may be express or tacit.

Art. 1889. An obligee's voluntary surrender to the obligor of the instrument evidencing the obligation gives rise to a presumption that the obligee intended to remit the debt.

Art. 1890. A remission of debt is effective when the obligor receives the communication from the obligee. Acceptance of a remission is always presumed unless the obligor rejects the remission within a reasonable time.

Art. 1891. Release of a real security given for performance of the obligation does not give rise to a presumption of remission of debt.

Art. 1892. Remission of debt granted to the principal obligor releases the sureties.

Remission of debt granted to the sureties does not release the principal obligor.

Remission of debt granted to one surety releases the other

*SECCIÓN 4. DE LA REMISIÓN DE LA DEUDA*

*Art. 1888. La remisión de la deuda por el acreedor extingue la obligación. La remisión puede ser expresa o tácita.*

*Art. 1889. La entrega voluntaria al deudor por parte del acreedor del instrumento en el que conste la obligación da lugar a la presunción de que el acreedor pretendió remitir la deuda.*

*Art. 1890. La remisión de la deuda surte efectos cuando el deudor recibe la notificación del acreedor. Se presume la remisión de la deuda a menos que el deudor rechace la remisión dentro de un plazo razonable.*

*Art. 1891. La liberación de la garantía real prestada para el cumplimiento de la obligación no da lugar a una presunción de remisión de la deuda.*

*Art. 1892. La remisión de la deuda otorgada al deudor principal libera a los fiadores.*

*La remisión de la deuda otorgada a los fiadores no libera al deudor principal.*

*La remisión de la deuda otorgada a uno de los fiadores*

sureties only to the extent of the contribution the other sureties might have recovered from the surety to whom the remission was granted.

If the obligee grants a remission of debt to a surety in return for an advantage, that advantage will be imputed to the debt, unless the surety and the obligee agree otherwise.

*libera a los demás solo en la medida del aporte que los demás fiadores hayan recuperado del fiador a quien se le otorgó la remisión.*

*Si el acreedor otorga una remisión de deuda a un fiador a cambio de una ventaja, esa ventaja se imputa a la deuda, a menos que el fiador y el acreedor acuerden otra cosa.*

## SECTION 5. COMPENSATION

## *SECCIÓN 5. DE LA COMPENSACIÓN*

Art. 1893. Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.

In such a case, compensation extinguishes both obligations to the extent of the lesser amount.

Delays of grace do not prevent compensation.

*Art. 1893. La compensación se produce de pleno derecho cuando dos personas se deben mutuamente sumas de dinero o cantidades de bienes fungibles de idéntica especie, y estas sumas o cantidades son líquidas y exigibles.*

*En tal caso, la compensación extingue ambas obligaciones en la medida del monto inferior.*

*Los plazos de gracia no impiden la compensación.*

Art. 1894. Compensation takes place regardless of the sources of the obligations.

Compensation does not take place, however, if one of the obligations is to return a thing of which the owner has been unjustly dispossessed, or is to

*Art. 1894. La compensación se produce con independencia de la fuente de las obligaciones.*

*Sin embargo, no se produce la compensación en caso de que una de las obligaciones consista en devolver una cosa de la que haya sido*

return a thing given in deposit or loan for use, or if the object of one of the obligations is exempt from seizure.

*injustamente desapoderado el dueño, en devolver una cosa dada en depósito o en comodato, o si el objeto de una de las obligaciones es inembargable.*

Art. 1895. Compensation takes place even though the obligations are not to be performed at the same place, but allowance must be made in that case for the expenses of remittance.

*Art. 1895. La compensación surte efectos aun si las obligaciones no deben cumplirse en el mismo lugar, pero deben preverse en tal caso los gastos de pago.*

Art. 1896. If an obligor owes more than one obligation subject to compensation, the rules of imputation of payment must be applied.

*Art. 1896. En caso de que un deudor deba más que una obligación sujeta a compensación, se aplican las reglas de la imputación del pago.*

Art. 1897. Compensation between obligee and principal obligor extinguishes the obligation of a surety.

Compensation between obligee and surety does not extinguish the obligation of the principal obligor.

*Art. 1897. La compensación entre el acreedor y el deudor principal extingue la obligación del fiador.*

*La compensación entre el acreedor y el fiador no extingue la obligación del deudor principal.*

Art. 1898. Compensation between the obligee and one solidary obligor extinguishes the obligation of the other solidary obligors only for the portion of that obligor.

Compensation between one solidary obligee and the obligor extinguishes the obligation

*Art. 1898. La compensación entre el acreedor y un deudor solidario extingue la obligación de los demás deudores solidarios solo respecto de la parte de ese deudor.*

*La compensación entre un acreedor solidario y el deudor extingue la obligación solo*

only for the portion of that obligee.

The compensation provided in this Article does not operate in favor of a liability insurer.

*respecto de la parte de ese acreedor.*

*La compensación dispuesta en este artículo no opera en favor de la aseguradora de responsabilidad civil.*

Art. 1899. Compensation can neither take place nor may it be renounced to the prejudice of rights previously acquired by third parties.

*Art. 1899. La compensación no puede producirse ni puede renunciarse en perjuicio de derechos adquiridos previamente por terceros.*

Art. 1900. An obligor who has consented to an assignment of the credit by the obligee to a third party may not claim against the latter any compensation that otherwise he could have claimed against the former.

An obligor who has been given notice of an assignment to which he did not consent may not claim compensation against the assignee for an obligation of the assignor arising after that notice.

*Art. 1900. El deudor que hubiera consentido la cesión del crédito por parte del acreedor a un tercero no puede reclamar contra el tercero la compensación que podría haber reclamado contra el acreedor.*

*El deudor que haya sido notificado de una cesión que no consintió no puede reclamar la compensación contra el cesionario de la obligación del cedente resultante después de la notificación.*

Art. 1901. Compensation of obligations may take place also by agreement of the parties even though the requirements for compensation by operation of law are not met.

*Art. 1901. La compensación de las obligaciones también puede producirse por acuerdo entre las partes aun si no se están dados los requisitos para la compensación de pleno derecho.*

Art. 1902. Although the obligation claimed in

*Art. 1902. Aunque la obligación reclamada en la*

compensation is unliquidated, the court can declare compensation as to that part of the obligation that is susceptible of prompt and easy liquidation.

*compensación no sea líquida, el juez puede declarar la compensación respecto de la parte de la obligación que es susceptible de liquidación rápida y fácil.*

SECTION 6. CONFUSION

*SECCIÓN 6. DE LA CONFUSIÓN*

Art. 1903. When the qualities of obligee and obligor are united in the same person, the obligation is extinguished by confusion.

*Art. 1903. Cuando la condición de acreedor y la de deudor coinciden en la misma persona, la obligación queda extinguida por confusión.*

Art. 1904. Confusion of the qualities of obligee and obligor in the person of the principal obligor extinguishes the obligation of the surety.

Confusion of the qualities of obligee and obligor in the person of the surety does not extinguish the obligation of the principal obligor.

*Art. 1904. La confusión de la condición de acreedor y la de deudor en la persona del deudor principal extingue la obligación del fiador.*

*La confusión de la condición de acreedor y la de deudor en la persona del fiador no extingue la obligación del deudor principal.*

Art. 1905. If a solidary obligor becomes an obligee, confusion extinguishes the obligation only for the portion of that obligor.

If a solidary obligee becomes an obligor, confusion extinguishes the obligation only for the portion of that obligee.

*Art. 1905. Si el deudor solidario se convierte en acreedor, la confusión extingue la obligación solo respecto de la parte de ese deudor.*

*Si el acreedor solidario se convierte en deudor, la confusión extingue la obligación solo respecto de la parte de ese acreedor.*

## TITLE IV. CONVENTIONAL OBLIGATIONS OR CONTRACTS

## *TÍTULO IV. DE LAS OBLIGACIONES CONVENCIONALES O CONTRATOS*

### CHAPTER 1. GENERAL PRINCIPLES

### *CAPÍTULO 1. PRINCIPIOS GENERALES*

[Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

*[Sección 1, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

Art. 1906. A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.

*Art. 1906. El contrato es el acuerdo entre dos o más partes por medio del cual se crean, modifican o extinguen obligaciones.*

Art. 1907. A contract is unilateral when the party who accepts the obligation of the other does not assume a reciprocal obligation.

*Art. 1907. El contrato es unilateral cuando la parte que acepta la obligación de la otra no asume una obligación recíproca.*

Art. 1908. A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other.

*Art. 1908. El contrato es bilateral o sinalagmático cuando las partes se obligan recíprocamente, de manera tal que la obligación de cada parte es correlativa a la obligación de la otra.*

Art. 1909. A contract is onerous when each of the parties obtains an advantage in exchange for his obligation.

*Art. 1909. El contrato es oneroso cuando cada una de las partes obtiene una ventaja a cambio de su obligación.*

Art. 1910. A contract is gratuitous when one party obligates himself towards another

*Art. 1910. El contrato es gratuito cuando una parte se obliga frente a la otra en*

for the benefit of the latter, without obtaining any advantage in return.

*beneficio de esta última, sin obtener ventaja alguna a cambio.*

Art. 1911. A contract is commutative when the performance of the obligation of each party is correlative to the performance of the other.

*Art. 1911. El contrato es conmutativo cuando el cumplimiento de la obligación de cada parte es correlativo al cumplimiento de la otra.*

Art. 1912. A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event.

*Art. 1912. El contrato es aleatorio cuando, debido a su naturaleza o en virtud de la voluntad de las partes, el cumplimiento de la obligación de una de las partes, o la medida del cumplimiento, depende de un hecho incierto.*

Art. 1913. A contract is accessory when it is made to provide security for the performance of an obligation. Suretyship, mortgage, pledge, and other types of security agreements are examples of such a contract.

When the secured obligation arises from a contract, either between the same or other parties, that contract is the principal contract. [Acts 1989, No. 137, §16, eff. Sept. 1, 1989]

*Art. 1913. El contrato es accesorio cuando se celebra para prestar garantía por el cumplimiento de una obligación. Son ejemplos de tal tipo de contrato la fianza, la hipoteca, la prenda y otros tipos de acuerdos de garantía.*

*Cuando la obligación garantizada surge de un contrato, ya sea entre las mismas u otras partes, tal contrato es el contrato principal. [Sección 16, ley n.º 137 de 1989, vigente desde el el 1 de septiembre de 1989].*

Art. 1914. Nominate contracts are those given a special

*Art. 1914. Los contratos nominados son aquellos que reciben una denominación*

designation such as sale, lease, loan, or insurance.

Innominate contracts are those with no special designation.

*especial, tal como el de venta, locación, préstamo o seguro.*

*Los contratos innominados son aquellos sin denominación especial.*

Art. 1915. All contracts, nominate and innominate, are subject to the rules of this title.

*Art. 1915. Todos los contratos, nominados e innominados, están sujetos a las normas de este título.*

Art. 1916. Nominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title.

*Art. 1916. Los contratos nominados están sujetos a las normas especiales de los respectivos títulos en caso de que esas normas modifiquen, complementen o se aparten de las de este título.*

Art. 1917. The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations.

*Art. 1917. Las normas de este título también se aplican a las obligaciones que surgen de fuentes extracontractuales en tanto sean compatibles con la naturaleza de dichas obligaciones.*

## CHAPTER 2. CONTRACTUAL CAPACITY AND EXCEPTIONS

## *CAPÍTULO 2. DE LA CAPACIDAD CONTRACTUAL Y DE LAS EXCEPCIONES*

Art. 1918. All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting.

*Art. 1918. Todas las personas tienen capacidad para contratar, excepto los menores no emancipados, los interdictos y las personas privadas de razón al momento de celebrar el contrato.*

Art. 1919. A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative.

*Art. 1919. El contrato celebrado por una persona sin capacidad jurídica es nulo de nulidad relativa y solo puede anularse a pedido de esa persona o de su representante legal.*

Art. 1920. Immediately after discovering the incapacity, a party, who at the time of contracting was ignorant of the incapacity of the other party, may require from that party, if the incapacity has ceased, or from the legal representative if it has not, that the contract be confirmed or rescinded.

*Art. 1920. Inmediatamente después de descubierta la incapacidad, la parte que al momento de contratar ignoraba la incapacidad de la otra parte podrá exigir a esa parte, en caso de que hubiera cesado la incapacidad, o al representante, en caso de que no hubiera cesado, que se confirme o anule el contrato.*

Art. 1921. Upon rescission of a contract on the ground of incapacity, each party or his legal representative shall restore to the other what he has received thereunder. When restoration is impossible or impracticable, the court may award compensation to the party to whom restoration cannot be made.

*Art. 1921. Ante la anulación de un contrato por falta de capacidad, cada parte o su representante legal deberá restituir a la otra lo que haya recibido en virtud del contrato. Cuando la restitución resulte imposible o impracticable, el juez puede regular una indemnización en favor de la parte que no puede obtener la restitución.*

Art. 1922. A fully emancipated minor has full contractual capacity.

*Art. 1922. El menor totalmente emancipado tiene capacidad contractual plena.*

Art. 1923. A contract by an unemancipated minor may be

*Art. 1923. El contrato celebrado por un menor no*

rescinded on grounds of incapacity except when made for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business.

*emancipado puede anularse por falta de capacidad, a menos que tal contrato haya sido celebrado con el fin de proveer al menor algo necesario para su sustento o educación, o con un fin relacionado con su actividad lucrativa.*

Art. 1924. The mere representation of majority by an unemancipated minor does not preclude an action for rescission of the contract. When the other party reasonably relies on the minor's representation of majority, the contract may not be rescinded.

*Art. 1924. La mera declaración de mayoría de edad expresada por un menor no emancipado no impide la acción de anulación del contrato. Cuando la otra parte se base razonablemente en la declaración de mayoría de edad expresada por el menor, no se puede anular el contrato.*

Art. 1925. A noninterdicted person, who was deprived of reason at the time of contracting, may obtain rescission of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity.

*Art. 1925. La persona no interdicta privada de razón al momento de contratar puede obtener la anulación de un contrato a título oneroso por incapacidad solo si demuestra que la otra parte sabía o debería haber sabido sobre la incapacidad.*

Art. 1926. A contract made by a noninterdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous, or it evidences lack of understanding, or was made within thirty days

*Art. 1926. El contrato celebrado por una persona no interdicta privada de razón al momento de contratar puede impugnarse después de su muerte, por incapacidad, solo cuando el contrato sea gratuito, exhiba falta de comprensión, haya sido celebrado*

of his death, or when application for interdiction was filed before his death.

*dentro de los treinta días anteriores a su muerte o cuando la solicitud de interdicción haya sido presentada antes de su muerte.*

## CHAPTER 3. CONSENT

## *CAPÍTULO 3. DEL CONSENTIMIENTO*

Art. 1927. A contract is formed by the consent of the parties established through offer and acceptance.

*Art. 1927. El contrato se forma mediante el consentimiento de las partes demostrado mediante la oferta y la aceptación.*

Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent.

*A menos que la ley prescriba una formalidad especial para el contrato que se pretende celebrar, la oferta y la aceptación pueden hacerse oralmente, por escrito o por acciones u omisiones que, en función de las circunstancias, indiquen claramente el consentimiento.*

Unless otherwise specified in the offer, there need not be conformity between the manner in which the offer is made and the manner in which the acceptance is made.

*A menos que se especifique de otro modo en la oferta, no es necesario que haya correspondencia entre la manera en que se hagan la oferta y la aceptación.*

Art. 1928. An offer that specifies a period of time for acceptance is irrevocable during that time.

When the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time, the

*Art. 1928. La oferta que indica un plazo para su aceptación es irrevocable durante ese plazo.*

*Cuando el oferente manifiesta la intención de dar tiempo al destinatario de la oferta para aceptarla, sin*

offer is irrevocable for a reasonable time.

*especificar un plazo, la oferta es irrevocable por un plazo razonable.*

Art. 1929. An irrevocable offer expires if not accepted within the time prescribed in the preceding Article.

*Art. 1929. La oferta irrevocable caduca si no se acepta dentro del plazo indicado en el artículo anterior.*

Art. 1930. An offer not irrevocable under Civil Code Article 1928 may be revoked before it is accepted.

*Art. 1930. La oferta que no es irrevocable en los términos del artículo 1928 puede revocarse antes de que sea aceptada.*

Art. 1931. A revocable offer expires if not accepted within a reasonable time.

*Art. 1931. La oferta revocable caduca si no se acepta dentro de un plazo razonable.*

Art. 1932. An offer expires by the death or incapacity of the offeror or the offeree before it has been accepted.

*Art. 1932. La oferta caduca por la muerte o incapacidad del oferente o del destinatario de la oferta antes de haber sido aceptada.*

Art. 1933. An option is a contract whereby the parties agree that the offeror is bound by his offer for a specified period of time and that the offeree may accept within that time.

*Art. 1933. El contrato de opción es aquel mediante el cual las partes acuerdan que el oferente queda obligado por su oferta durante un plazo específico y que el destinatario de la oferta puede aceptar dentro de ese plazo.*

Art. 1934. An acceptance of an irrevocable offer is effective when received by the offeror.

*Art. 1934. La aceptación de una oferta irrevocable surte efectos cuando la recibe el oferente.*

Art. 1935. Unless otherwise specified by the offer or the law, an acceptance of a revocable offer, made in a manner and by a medium suggested by the offer or in a reasonable manner and by a reasonable medium, is effective when transmitted by the offeree.

*Art. 1935. A menos que la oferta o la ley indiquen algo diferente, la aceptación de una oferta revocable, hecha conforme al modo y por el medio indicados en la oferta o conforme a un modo y por un medio razonables, surte efectos cuando es transmitida por el destinatario de la oferta.*

Art. 1936. A medium or a manner of acceptance is reasonable if it is the one used in making the offer or one customary in similar transactions at the time and place the offer is received, unless circumstances known to the offeree indicate otherwise.

*Art. 1936. El medio o modo de aceptación es razonable si es el utilizado al hacer la oferta o uno habitual en operaciones similares en el momento y en el lugar en que se recibe la oferta, a menos que las circunstancias conocidas por el destinatario de la oferta indiquen otra cosa.*

Art. 1937. A revocation of a revocable offer is effective when received by the offeree prior to acceptance.

*Art. 1937. La revocación de una oferta revocable tiene efectos si la recibe el destinatario de la oferta antes de la aceptación.*

Art. 1938. A written revocation, rejection, or acceptance is received when it comes into the possession of the addressee or of a person authorized by him to receive it, or when it is deposited in a place the addressee has indicated as the place for this or similar communications to be deposited for him.

*Art. 1938. Se considera recibida la revocación, el rechazo o la aceptación por escrito cuando está en poder del destinatario o de una persona autorizada por este para recibirla, o cuando se deposita en un lugar indicado por el destinatario como lugar de depósito de este tipo de comunicaciones u otras similares.*

Art. 1939. When an offeror invites an offeree to accept by performance and, according to usage or the nature or the terms of the contract, it is contemplated that the performance will be completed if commenced, a contract is formed when the offeree begins the requested performance.

*Art. 1939. Si el oferente invita a un destinatario de la oferta a aceptar mediante la ejecución y, conforme a los usos, la naturaleza o los términos del contrato, se contempla que la prestación se ejecutará por completo en caso de haberse iniciado, el contrato queda celebrado cuando el destinatario de la oferta comienza a ejecutar la prestación solicitada.*

Art. 1940. When, according to usage or the nature of the contract, or its own terms, an offer made to a particular offeree can be accepted only by rendering a completed performance, the offeror cannot revoke the offer, once the offeree has begun to perform, for the reasonable time necessary to complete the performance. The offeree, however, is not bound to complete the performance he has begun.

*Art. 1940. Cuando, en virtud de los usos, la naturaleza del contrato o sus propios términos, la oferta hecha a un destinatario en particular solo puede aceptarse mediante la ejecución completa, el oferente no puede revocar la oferta una vez que el destinatario de la oferta comenzó con la ejecución, durante el tiempo razonable necesario para ejecutar la prestación en su totalidad. Sin embargo, el destinatario de la oferta no está obligado a completar la ejecución que comenzó.*

The offeror's duty of performance is conditional on completion or tender of the requested performance.

*El deber de ejecución del oferente está condicionado a la ejecución total o al ofrecimiento de ejecución de la prestación solicitada.*

Art. 1941. When commencement of the performance either

*Art. 1941. Cuando el comienzo de la ejecución*

constitutes acceptance or makes the offer irrevocable, the offeree must give prompt notice of that commencement unless the offeror knows or should know that the offeree has begun to perform. An offeree who fails to give the notice is liable for damages.

*constituye aceptación o torna la oferta irrevocable, el destinatario de la oferta debe notificar rápidamente de tal comienzo a menos que el oferente sepa o deba saber que el destinatario de la oferta inició la ejecución. El destinatario de la oferta que no cumple en notificar es responsable por los daños y perjuicios.*

Art. 1942. When, because of special circumstances, the offeree's silence leads the offeror reasonably to believe that a contract has been formed, the offer is deemed accepted.

*Art. 1942. Cuando, debido a circunstancias especiales, el silencio del destinatario de la oferta conduce al oferente a la creencia razonable de que se celebró un contrato, la oferta se considera aceptada.*

Art. 1943. An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer.

*Art. 1943. La aceptación que no es conforme a los términos de la oferta se considera contraoferta.*

Art. 1944. An offer of a reward made to the public is binding upon the offeror even if the one who performs the requested act does not know of the offer.

*Art. 1944. La oferta de recompensa hecha al público es vinculante para el oferente incluso si el que cumple el acto solicitado no sabe de la existencia de la oferta.*

Art. 1945. An offer of reward made to the public may be revoked before completion of the requested act, provided the revocation is made by the same or an equally effective means as the offer.

*Art. 1945. La oferta de recompensa hecha al público puede revocarse antes de cumplido el acto solicitado, siempre que la revocación sea por el mismo medio que la oferta o uno que surta iguales efectos.*

Art. 1946. Unless otherwise stipulated in the offer made to the public, or otherwise implied from the nature of the act, when several persons have performed the requested act, the reward belongs to the first one giving notice of his completion of performance to the offeror.

*Art. 1946. A menos que se estipule otra cosa en la oferta hecha al público o que esté implícita otra cosa en la naturaleza del acto, cuando varias personas realizaron el acto solicitado, la recompensa corresponde a la primera que notifica el cumplimiento completo al oferente.*

Art. 1947. When, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form.

*Art. 1947. Cuando, a falta de exigencia legal, las partes contemplaron cierta forma, se presume que no pretenden obligarse hasta que el contrato no se celebre conforme a esa forma.*

## CHAPTER 4. VICES OF CONSENT

## *CAPÍTULO 4. DE LOS VICIOS DEL CONSENTIMIENTO*

### SECTION 1. ERROR [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

### *SECCIÓN 1. DEL ERROR [Sección 1, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

Art. 1948. Consent may be vitiated by error, fraud, or duress.

*Art. 1948. El consentimiento puede estar viciado por error, dolo o violencia.*

Art. 1949. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

*Art. 1949. El error vicia el consentimiento solo cuando afecta una causa sin la cual la obligación no se habría contraído y esa causa era conocida o debería haber sido conocida por la otra parte.*

Art. 1950. Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

*Art. 1950. El error puede referirse a una causa cuando afecta la naturaleza del contrato, la cosa objeto del contrato o una característica sustancial de esa cosa, la persona o las características de la otra parte, la ley o cualquier otra circunstancia que hayan tenido en consideración las partes o que de buena fe deberían haber considerado como causa de la obligación.*

Art. 1951. A party may not avail himself of his error if the other party is willing to perform the contract as intended by the party in error.

*Art. 1951. Una parte no puede aprovechar su propio error si la otra quiere cumplir el contrato tal como lo pretendió la parte que incurrió en el error.*

Art. 1952. A party who obtains rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error.

The court may refuse rescission when the effective protection of the other party's interest requires that the contract be upheld. In that case, a reasonable compensation for the loss he has sustained may be granted to the party to whom rescission is refused.

*Art. 1952. La parte que obtiene la anulación sobre la base de su propio error es responsable por la pérdida sufrida por la otra parte a menos que la otra parte sepa o deba haber sabido del error.*

*El juez puede rechazar la anulación cuando la protección efectiva del interés de la otra parte exige que subsista el contrato. En tal caso, se puede regular una indemnización razonable por la pérdida sufrida en favor de la parte a la que se le negó la anulación.*

SECTION 2. FRAUD

Art. 1953. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

*SECCIÓN 2. DEL DOLO*

*Art. 1953. El dolo es la tergiversación y la ocultación de la verdad hecha con la intención de obtener una ventaja indebida para una parte o de causar una pérdida o inconvenientes a la otra. El dolo también puede producirse a raíz del silencio o la inactividad.*

Art. 1954. Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill.

This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations.

*Art. 1954. El dolo no vicia el consentimiento cuando la parte contra la que se dirige podría haber determinado la verdad sin dificultad, inconvenientes ni habilidades especiales.*

*Esta excepción no se aplica cuando una relación de confianza indujo a una parte razonablemente a fundarse en las afirmaciones o declaraciones de la otra.*

Art. 1955. Error induced by fraud need not concern the cause of the obligation to vitiate consent, but it must concern a circumstance that has substantially influenced that consent.

*Art. 1955. No es necesario que el error inducido por el dolo se refiera a la causa de la obligación para viciar el consentimiento, sino que debe referirse a una circunstancia que haya influido sustancialmente en el consentimiento.*

Art. 1956. Fraud committed by a third person vitiates the consent of a contracting party if the other party knew or

*Art. 1956. El dolo cometido por un tercero vicia el consentimiento de una parte contratante si la otra parte sabía o*

should have known of the fraud.

*debería haber sabido de la existencia del dolo.*

Art. 1957. Fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence.

*Art. 1957. Basta para probar el dolo la preponderancia de la prueba; el dolo puede probarse mediante presunciones.*

Art. 1958. The party against whom rescission is granted because of fraud is liable for damages and attorney fees.

*Art. 1958. La parte en contra de la cual se ordena la rescisión a causa del dolo debe responder por daños y perjuicios y honorarios de abogados.*

## SECTION 3. DURESS

## *SECCIÓN 3. DE LA VIOLENCIA*

Art. 1959. Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.

*Art. 1959. El consentimiento está viciado cuando es obtenido mediante una violencia tal que causa temor razonable de un daño indebido y considerable en la persona, los bienes o la reputación de una parte.*

Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.

*Para determinar la razonabilidad del temor, se deben tener en cuenta la edad, la salud, la disposición y otras circunstancias personales de la parte.*

Art. 1960. Duress vitiates consent also when the threatened injury is directed against the spouse, an ascendant, or

*Art. 1960. La violencia vicia el consentimiento asimismo cuando la amenaza de daño se dirige contra el cónyuge, un*

descendant of the contracting party.

If the threatened injury is directed against other persons, the granting of relief is left to the discretion of the court.

*ascendiente o un descendiente de la parte contratante.*

*Si la amenaza de daño está dirigida contra otras personas, el otorgamiento de la reparación queda a discreción del juez.*

Art. 1961. Consent is vitiated even when duress has been exerted by a third person.

*Art. 1961. El consentimiento está viciado incluso cuando la violencia fue ejercida por un tercero.*

Art. 1962. A threat of doing a lawful act or a threat of exercising a right does not constitute duress.

A threat of doing an act that is lawful in appearance only may constitute duress.

*Art. 1962. La amenaza de realizar un acto lícito o de ejercer un derecho no constituye violencia.*

*La amenaza de realizar un acto que es lícito solo en apariencia puede constituir violencia.*

Art. 1963. A contract made with a third person to secure the means of preventing threatened injury may not be rescinded for duress if that person is in good faith and not in collusion with the party exerting duress.

*Art. 1963. El contrato celebrado con un tercero para asegurar los medios a fin de prevenir el daño con el que se amenazó no puede anularse por violencia si la persona actúa de buena fe y sin estar en complicidad con la parte que ejerce la violencia.*

Art. 1964. When rescission is granted because of duress exerted or known by a party to the contract, the other party may recover damages and attorney fees.

*Art. 1964. Cuando se declara la rescisión debido a la violencia ejercida o conocida por una parte del contrato, la otra tiene derecho a percibir una indemnización en*

When rescission is granted because of duress exerted by a third person, the parties to the contract who are innocent of the duress may recover damages and attorney fees from the third person.

*concepto de daños y perjuicios y los honorarios de abogados.*

*Cuando se declara la anulación debido a la violencia ejercida por un tercero, las partes del contrato no culpables de la violencia pueden obtener del tercero daños y perjuicios y honorarios de abogados.*

SECTION 4. LESION

*SECCIÓN 4. DE LA LESIÓN*

Art. 1965. A contract may be annulled on grounds of lesion only in those cases provided by law.

*Art. 1965. El contrato solo puede anularse por lesión en los casos previstos en la ley.*

CHAPTER 5. CAUSE

*CAPÍTULO 5. DE LA CAUSA*

Art. 1966. An obligation cannot exist without a lawful cause.

*Art. 1966. No puede existir obligación sin causa lícita.*

Art. 1967. Cause is the reason why a party obligates himself.

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a

*Art. 1967. La causa es la razón por la que se obliga una parte.*

*La parte puede verse obligada por una promesa cuando sabía o debería haber sabido que la promesa induciría a la otra parte a fundarse en ella en su perjuicio y la otra parte actuó de manera razonable al obrar de ese modo. El resarcimiento puede limitarse a los gastos incurridos o a los daños sufridos a consecuencia del hecho de que el*

gratuitous promise made without required formalities is not reasonable.

*beneficiario de la promesa se haya fundado en ella. No se considera razonable fundarse en una promesa gratuita sin las debidas formalidades.*

Art. 1968. The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

*Art. 1968. La causa de una obligación es ilícita cuando la ejecución de la obligación produciría un resultado prohibido por la ley o contrario al orden público.*

Art. 1969. An obligation may be valid even though its cause is not expressed.

*Art. 1969. La obligación puede ser válida aun cuando no se haya expresado su causa.*

Art. 1970. When the expression of a cause in a contractual obligation is untrue, the obligation is still effective if a valid cause can be shown.

*Art. 1970. En caso de que la expresión de la causa en una obligación contractual sea falsa, la obligación conserva su vigencia si puede demostrarse una causa válida.*

## CHAPTER 6. OBJECT AND MATTER OF CONTRACTS

## *CAPÍTULO 6. DEL OBJETO DEL CONTRATO*

[Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

*[Sección 1, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

Art. 1971. Parties are free to contract for any object that is lawful, possible, and determined or determinable.

*Art. 1971. Las partes tienen libertad de contratar sobre cualquier objeto lícito, posible y determinado o determinable.*

Art. 1972. A contractual object is possible or impossible

*Art. 1972. El objeto del contrato es posible o imposible*

according to its own nature and not according to the parties' ability to perform.

*según su naturaleza y no según la capacidad de cumplir de las partes.*

Art. 1973. The object of a contract must be determined at least as to its kind.

The quantity of a contractual object may be undetermined, provided it is determinable.

*Art. 1973. El objeto del contrato debe ser determinado al menos respecto de su especie.*

*La cantidad del objeto del contrato puede ser indeterminada, en tanto sea determinable.*

Art. 1974. If the determination of the quantity of the object has been left to the discretion of a third person, the quantity of an object is determinable.

If the parties fail to name a person, or if the person named is unable or unwilling to make the determination, the quantity may be determined by the court.

*Art. 1974. La cantidad del objeto se considera determinable cuando la determinación fue dejada a discreción de un tercero.*

*Si las partes omiten nombrar a un tercero o si la persona nombrada no puede o no quiere hacer la determinación, el juez puede determinar la cantidad.*

Art. 1975. The quantity of a contractual object may be determined by the output of one party or the requirements of the other.

In such a case, output or requirements must be measured in good faith.

*Art. 1975. La cantidad del objeto del contrato puede determinarse por la producción de una parte o los requerimientos de la otra.*

*En tal caso, la producción o los requerimientos deben medirse de buena fe.*

Art. 1976. Future things may be the object of a contract.

The succession of a living person may not be the object of a contract other than an

*Art. 1976. La cosa futura puede ser objeto del contrato.*

*La sucesión de una persona viva no puede ser objeto de un contrato, excepto en el caso de*

antenuptial agreement. Such a succession may not be renounced.

*acuerdo prenupcial. Tal sucesión no puede renunciarse.*

Art. 1977. The object of a contract may be that a third person will incur an obligation or render a performance.

The party who promised that obligation or performance is liable for damages if the third person does not bind himself or does not perform.

*Art. 1977. El objeto del contrato puede consistir en que un tercero contraiga una obligación o cumpla una prestación.*

*La parte que prometió esa obligación o prestación es responsable por daños y perjuicios si el tercero no se obliga o no cumple.*

CHAPTER 7 - THIRD PARTY BENEFICIARY

*CAPÍTULO 7. DE LA ESTIPULACIÓN A FAVOR DE TERCERO*

Art. 1978. A contracting party may stipulate a benefit for a third person called a third party beneficiary.

*Art. 1978. Una parte del contrato puede estipular un beneficio a favor de un tercero denominado tercero beneficiario.*

Once the third party has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by mutual consent without the beneficiary's agreement.

*Cuando el tercero manifiesta su intención de aprovechar el beneficio, las partes no pueden resolver el contrato por acuerdo mutuo sin el consentimiento del beneficiario.*

Art. 1979. The stipulation may be revoked only by the stipulator and only before the third party has manifested his intention of availing himself of the benefit.

If the promisor has an interest in performing, however, the

*Art. 1979. La estipulación solo puede ser revocada por el estipulante y únicamente antes de que el tercero manifieste su intención de aprovechar el beneficio.*

*Sin embargo, si el promitente tiene interés en el*

stipulation may not be revoked without his consent.

*cumplimiento, no se puede revocar la estipulación sin su consentimiento.*

Art. 1980. In case of revocation or refusal of the stipulation, the promisor shall render performance to the stipulator.

*Art. 1980. En caso de revocación o rechazo de la estipulación, el promitente debe ofrecer la prestación al estipulante.*

Art. 1981. The stipulation gives the third party beneficiary the right to demand performance from the promisor.

Also the stipulator, for the benefit of the third party, may demand performance from the promisor.

*Art. 1981. La estipulación faculta al tercero beneficiario a exigir la prestación al promitente.*

*Asimismo, el estipulante puede exigir la prestación al promitente en beneficio del tercero.*

Art. 1982. The promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator.

*Art. 1982. El promitente puede oponer contra el beneficiario las excepciones contractuales que podría haber opuesto contra el estipulante.*

## CHAPTER 8. EFFECTS OF CONVENTIONAL OBLIGATIONS

## *CAPÍTULO 8. DE LOS EFECTOS DE LAS OBLIGACIONES CONVENCIONALES*

### SECTION 1. GENERAL EFFECTS OF CONTRACTS

### *SECCIÓN 1. DE LOS EFECTOS GENERALES DE LOS CONTRATOS*

Art. 1983. Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by

*Art. 1983. Los contratos surten los efectos de la ley para las partes y pueden resolverse solo con el consentimiento de las partes o en los supuestos previstos por la ley.*

law. Contracts must be performed in good faith.

*Los contratos deben ejecutarse de buena fe.*

Art. 1984. Rights and obligations arising from a contract are heritable and assignable unless the law, the terms of the contract or its nature preclude such effects.

*Art. 1984. Los derechos y las obligaciones que surgen del contrato son transmisibles y cedibles a menos que la ley, los términos del contrato o su naturaleza impidan tales efectos.*

Art. 1985. Contracts may produce effects for third parties only when provided by law.

*Art. 1985. Los contratos producen efectos frente a terceros solo cuando así lo dispone la ley.*

SECTION 2. SPECIFIC PERFORMANCE

*SECCIÓN 2. DE LA EJECUCIÓN FORZADA*

Art. 1986. Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee.

*Art. 1986. En caso de que el deudor no cumpla la obligación de entregar una cosa, de no hacer o de firmar un instrumento, el juez debe ordenar la ejecución forzada más el daño moratorio si el acreedor así lo solicita. Si la ejecución forzada es excesivamente dificultosa, el juez puede conceder una indemnización por daños y perjuicios a favor del acreedor.*

Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

*Ante el incumplimiento de una obligación que tiene otro objeto, como una obligación de hacer, corresponde al juez decidir si ordena la ejecución forzada.*

Art. 1987. The obligor may be restrained from doing anything in violation of an obligation not to do.

*Art. 1987. Puede prohibirse al deudor que haga algo contrario a una obligación de no hacer.*

Art. 1988. A failure to perform an obligation to execute an instrument gives the obligee the right to a judgment that shall stand for the act.

*Art. 1988. El incumplimiento de una obligación de firmar un instrumento faculta al acreedor a obtener una sentencia que reemplace el acto.*

SECTION 3. PUTTING IN DEFAULT

*SECCIÓN 3. DE LA CONSTITUCIÓN EN MORA*

Art. 1989. Damages for delay in the performance of an obligation are owed from the time the obligor is put in default.

Other damages are owed from the time the obligor has failed to perform.

*Art. 1989. Los daños y perjuicios por la demora en el cumplimiento de la obligación se deben desde el momento en que se constituye en mora al deudor.*

*Los demás daños y perjuicios se deben desde el momento en que el deudor incumple.*

Art. 1990. When a term for the performance of an obligation is either fixed, or is clearly determinable by the circumstances, the obligor is put in default by the mere arrival of that term. In other cases, the obligor must be put in default by the obligee, but not before performance is due.

*Art. 1990. Cuando el plazo para el cumplimiento de una obligación está fijado o es claramente determinable en función de las circunstancias, el deudor queda constituido en mora por el mero vencimiento del plazo. En los demás casos, el acreedor debe constituir en mora al deudor, pero no antes de que sea exigible la prestación.*

Art. 1991. An obligee may put the obligor in default by a written request of performance, or by an oral request of performance made before two witnesses, or by filing suit for performance, or by a specific provision of the contract.

*Art. 1991. El acreedor puede constituir en mora al deudor mediante la intimación de cumplimiento por escrito u oralmente ante dos testigos, mediante la presentación de la demanda para exigir el cumplimiento o mediante una disposición específica del contrato.*

Art. 1992. If an obligee bears the risk of the thing that is the object of the performance, the risk devolves upon the obligor who has been put in default for failure to deliver that thing.

*Art. 1992. Si el acreedor asume el riesgo de la cosa sobre la que recae el cumplimiento, el riesgo se transfiere al deudor que fue constituido en mora por no haber dado la cosa.*

Art. 1993. In case of reciprocal obligations, the obligor of one may not be put in default unless the obligor of the other has performed or is ready to perform his own obligation.

*Art. 1993. En el caso de las obligaciones recíprocas, el deudor no puede ser constituido en mora a menos que el deudor del otro haya cumplido o esté listo para cumplir su obligación.*

## SECTION 4. DAMAGES

## *SECCIÓN 4. DE LOS DAÑOS Y PERJUICIOS*

Art. 1994. An obligor is liable for the damages caused by his failure to perform a conventional obligation.

A failure to perform results from nonperformance, defective performance, or delay in performance.

*Art. 1994. El deudor es responsable por los daños causados por su incumplimiento de una obligación convencional.*

*El incumplimiento incluye el incumplimiento propiamente dicho, el cumplimiento defectuoso y la demora en el cumplimiento.*

Art. 1995. Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.

*Art. 1995. Los daños y perjuicios se miden en función de la pérdida sufrida por el acreedor y el beneficio económico del que fue privado.*

Art. 1996. An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made.

*Art. 1996. El deudor de buena fe solo es responsable por los daños previsibles al momento de la celebración del contrato.*

Art. 1997. An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.

*Art. 1997. El deudor de mala fe es responsable por todos los daños, previsibles o no, que sean consequencia directa de su incumplimiento.*

Art. 1998. Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

*Art. 1998. Se puede cobrar una indemnización por daños no pecuniarios cuando el contrato, debido a su naturaleza, tiene por fin satisfacer un interés no pecuniario y, debido a las circunstancias en torno a la formación o al incumplimiento del contrato, el deudor sabía o debería haber sabido que su incumplimiento causaría tal tipo de pérdida.*

*Con independencia de la naturaleza del contrato, se puede cobrar esta indemnización también cuando el deudor pretende, mediante su incumplimiento, herir los sentimientos del acreedor.*

Art. 1999. When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.

*Art. 1999. Cuando no se pueden medir con precisión los daños, debe dejarse amplitud de criterio para que el juez calcule los daños de manera razonable.*

Art. 2000. When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by R.S. 9:3500.

*Art. 2000. Cuando la prestación consiste en una suma de dinero, los daños por la demora en el cumplimiento se miden por los intereses de esa suma desde el momento en que la suma se convierte en exigible, a la tasa acordada por las partes o, en ausencia de acuerdo, a la tasa de intereses legales fijada en la R.S. 9:3500.*

The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well. [Acts 1985, No. 137, §1, eff. July 3, 1985; Acts 1987, No. 883, §1; Acts 2004, No. 743, §3, eff. Jan. 1, 2005]

*El acreedor puede cobrar una indemnización en concepto de estos daños sin tener que probar pérdida alguna y no puede cobrar más, independientemente de la pérdida sufrida. Si las partes estipularon, mediante contrato por escrito, que el deudor también debe hacerse cargo de los honorarios de los abogados del acreedor por un monto fijo o determinable, el acreedor también está facultado a recibir ese monto. [Sección 1, ley n.º 137 de 1985, vigente desde el 3 de julio de 1985; sección 1, ley n.º 883 de 1987; sección 3, ley n.º 743 de 2004, Vigente desde el 1 de enero de 2005].*

Art. 2001. Interest on accrued interest may be recovered as damages only when it is added to the principal by a new agreement of the parties made after the interest has accrued.

*Art. 2001. Los intereses sobre intereses devengados pueden recuperarse mediante la indemnización por daños y perjuicios solo cuando se añaden al capital mediante un nuevo acuerdo de las partes celebrado después de devengados los intereses.*

Art. 2002. An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be accordingly reduced.

*Art. 2002. El acreedor debe hacer esfuerzos razonables para mitigar el daño causado por el incumplimiento del deudor. Cuando el acreedor no hace estos esfuerzos, el deudor puede exigir que se reduzca la indemnización en concepto de daños y perjuicios.*

Art. 2003. An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

*Art. 2003. El acreedor no puede percibir la indemnización por daños y perjuicios cuando su propia mala fe causó el incumplimiento del deudor o cuando, al momento de contratar, ocultó hechos al deudor respecto de los que sabía o debería haber sabido que causarían el incumplimiento.*

If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.

*Si la negligencia del acreedor contribuye al incumplimiento del deudor, se reduce la indemnización en proporción a esa negligencia.*

Art. 2004. Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.

*Art. 2004. Es nula la cláusula por la que anticipadamente se excluye o limita la responsabilidad de una parte por dolo o culpa grave que cause un daño a la otra parte.*

*Es nula la cláusula por la que anticipadamente se excluye o limita la responsabilidad de una parte por causar daño físico a la otra.*

SECTION 5. STIPULATED DAMAGES

*SECCIÓN 5. DE LA CLÁUSULA PENAL*

Art. 2005. Parties may stipulate the damages to be recovered in case of nonperformance, defective performance, or delay in performance of an obligation.

That stipulation gives rise to a secondary obligation for the purpose of enforcing the principal one.

*Art. 2005. Las partes pueden estipular la indemnización correspondiente en el caso de incumplimiento, cumplimiento defectuoso o demora en el cumplimiento de una obligación.*

*Tal estipulación crea una obligación secundaria a los efectos de la ejecución de la principal.*

Art. 2006. Nullity of the principal obligation renders the stipulated damages clause null.

Nullity of the stipulated damages clause does not render the principal obligation null.

*Art. 2006. La nulidad de la obligación principal implica la nulidad de la cláusula penal.*

*La nulidad de la cláusula penal no implica la nulidad de la obligación principal.*

Art. 2007. An obligee may demand either the stipulated damages or performance of the principal obligation, but he may not demand both unless

*Art. 2007. El acreedor puede reclamar la aplicación de la cláusula penal o la ejecución de la obligación principal, pero no puede exigir*

the damages have been stipulated for mere delay.

*ambas a menos que se hubiera estipulado la cláusula penal por la mera demora en el cumplimiento de la prestación.*

Art. 2008. An obligor whose failure to perform the principal obligation is justified by a valid excuse is also relieved of liability for stipulated damages.

*Art. 2008. El deudor cuyo incumplimiento de la obligación principal está justificado por una excusa válida también queda liberado de la responsabilidad por la cláusula penal.*

Art. 2009. An obligee who avails himself of a stipulated damages clause need not prove the actual damage caused by the obligor's nonperformance, defective performance, or delay in performance.

*Art. 2009. El acreedor que reclama la aplicación de la cláusula penal no debe probar el daño efectivo causado por el incumplimiento, el cumplimiento defectuoso o la demora en el cumplimiento por parte del deudor.*

Art. 2010. An obligee may not avail himself of a clause stipulating damages for delay unless the obligor has been put in default.

*Art. 2010. El acreedor no puede reclamar la aplicación de la cláusula penal por demora a menos que se haya constituido en mora al deudor.*

Art. 2011. Stipulated damages for nonperformance may be reduced in proportion to the benefit derived by the obligee from any partial performance rendered by the obligor.

*Art. 2011. El monto de la cláusula penal por incumplimiento puede reducirse en proporción al beneficio que obtuvo el acreedor del cumplimiento parcial del deudor.*

Art. 2012. Stipulated damages may not be modified by the court unless they are so

*Art. 2012. El juez no puede modificar la cláusula penal a menos que sus disposiciones sean contrarias al orden*

manifestly unreasonable as to be contrary to public policy.

*público en razón de su manifiesta irrazonabilidad.*

## CHAPTER 9. DISSOLUTION

## *CAPÍTULO 9. DE LA RESOLUCIÓN*

Art. 2013. When the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, to regard the contract as dissolved. In either case, the obligee may recover damages.

*Art. 2013. Ante el incumplimiento del deudor, el acreedor está facultado a requerir la resolución judicial del contrato o, según las circunstancias, a considerarlo resuelto. En cualquier caso, el acreedor puede percibir una indemnización en concepto de daños y perjuicios.*

In an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.

*En una acción de resolución judicial, el deudor incumplidor puede recibir, según las circunstancias, un período adicional para cumplir.*

Art. 2014. A contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the interest of the obligee.

*Art. 2014. El contrato no puede ser resuelto cuando el deudor ejecutó una parte sustancial de la prestación a su cargo y la parte pendiente no afecta sustancialmente los intereses del acreedor.*

Art. 2015. Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time

*Art. 2015. Ante el incumplimiento de una parte, la otra puede intimarla al cumplimiento dentro de un cierto plazo, con la advertencia de que, a menos que el cumplimiento se produzca dentro de ese plazo, el contrato se*

allowed for that purpose must be reasonable according to the circumstances.

The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

*considerará resuelto. El plazo permitido a esos efectos debe ser razonable en función de las circunstancias.*

*La intimación de cumplimiento está sujeta a los requisitos que rigen la constitución en mora del deudor incumplidor y, respecto del cobro de los daños y perjuicios por la demora, surte los mismos efectos que la constitución en mora del deudor.*

Art. 2016. When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor.

*Art. 2016. Cuando la prestación carece de valor para el acreedor por la demora en el cumplimiento o cuando resulta evidente que el deudor no cumplirá, el acreedor puede considerar resuelto el contrato sin necesidad de notificar al deudor.*

Art. 2017. The parties may expressly agree that the contract shall be dissolved for the failure to perform a particular obligation. In that case, the contract is deemed dissolved at the time it provides for or, in the absence of such a provision, at the time the obligee gives notice to the obligor that he avails himself of the dissolution clause.

*Art. 2017. Las partes pueden acordar expresamente que el contrato se resuelva por incumplimiento de una obligación en particular. En tal caso, el contrato se considera resuelto en el momento previsto en el contrato mismo o, en ausencia de tal disposición, en el momento en que el acreedor notifica al deudor de que aplicará la cláusula de resolución.*

Art. 2018. Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made. If restoration in kind is impossible or impracticable, the court may award damages.

*Art. 2018. Resuelto el contrato, las partes deben quedar en la situación en la que se encontraban antes de su celebración. En caso de que la restitución en especie sea imposible o excesivamente dificultosa, el juez puede regular una indemnización por daños y perjuicios.*

If partial performance has been rendered and that performance is of value to the party seeking to dissolve the contract, the dissolution does not preclude recovery for that performance, whether in contract or quasi-contract.

*En caso de ejecución parcial y si esta tiene valor para la parte que pretende resolver el contrato, la resolución no impide el cobro de esa prestación, con fundamento en el derecho contractual o cuasicontractual.*

Art. 2019. In contracts providing for continuous or periodic performance, the effect of the dissolution shall not be extended to any performance already rendered.

*Art. 2019. En los contratos de ejecución continua o periódica, el efecto de la resolución no se extiende a ninguna prestación ya cumplida.*

Art. 2020. When a contract has been made by more than two parties, one party's failure to perform may not cause dissolution of the contract for the other parties, unless the performance that failed was essential to the contract.

*Art. 2020. Cuando un contrato es celebrado por más de dos partes, el incumplimiento de una parte no causa la resolución del contrato respecto de las demás, a menos que la prestación incumplida sea esencial para el contrato.*

Art. 2021. Dissolution of a contract does not impair the rights acquired through an

*Art. 2021. La resolución del contrato no afecta los derechos adquiridos por el tercero*

onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title. [Acts 2005, No. 169, §2, eff. Jan. 1, 2006; Acts 2005, 1st Ex. Sess., No. 13, §1, eff. Nov. 29, 2005]

*de buena fe mediante un contrato oneroso.*

*Si el contrato involucra bienes inmuebles, se aplican los principios registrales al tercero adquirente de un derecho sobre el bien, ya sea a título oneroso o gratuito. [Sección 2, ley n.º 169 de 2005, vigente desde el 1 de enero de 2006; sección 1, ley n.º 13 de 2005, 1.ª Ses. Ex., vigente desde el 29 de noviembre de 2005].*

Art. 2022. Either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously.

*Art. 2022. Cualquiera de las partes de un contrato conmutativo puede negarse a cumplir su prestación si la otra no cumplió o no ofrece cumplir su propia prestación al mismo tiempo, en caso de que las prestaciones se deban simultáneamente.*

Art. 2023. If the situation of a party, financial or otherwise, has become such as to clearly endanger his ability to perform an obligation, the other party may demand in writing that adequate security be given and, upon failure to give that security, that party may withhold or discontinue his own performance.

*Art. 2023. Si la situación financiera o de otro tipo de una parte se ve afectada de tal modo que peligra su capacidad de cumplir la obligación, la otra parte puede exigir por escrito que preste garantía suficiente y, ante la falta de presentación de la garantía, esa parte puede retener o interrumpir la prestación a su cargo.*

Art. 2024. A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.

*Art. 2024. El contrato de duración indeterminada puede resolverse a pedido de cualquiera de las partes mediante notificación, de una forma y con una antelación razonables, a la otra parte.*

## CHAPTER 10. SIMULATION

## *CAPÍTULO 10. DE LA SIMULACIÓN*

[Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

*[Sección 1, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

Art. 2025. A contract is a simulation when, by mutual agreement, it does not express the true intent of the parties.

If the true intent of the parties is expressed in a separate writing, that writing is a counterletter.

*Art. 2025. El contrato constituye simulación cuando, por acuerdo mutuo, no expresa la verdadera intención de las partes.*

*Si la verdadera intención de las partes se expresa en un instrumento aparte, tal instrumento es el contradocumento.*

Art. 2026. A simulation is absolute when the parties intend that their contract shall produce no effects between them. That simulation, therefore, can have no effects between the parties.

*Art. 2026. La simulación es absoluta cuando las partes pretenden que el contrato no produzca efecto alguno entre ellas. Por ende, tal simulación no tiene efecto alguno entre las partes.*

Art. 2027. A simulation is relative when the parties intend that their contract shall produce effects between them though different from those recited in their contract. A relative

*Art. 2027. La simulación es relativa cuando las partes pretenden que el contrato produzca efectos entre ellas, aunque diferentes de los expresados en el contrato. La*

simulation produces between the parties the effects they intended if all requirements for those effects have been met.

*simulación relativa produce entre las partes los efectos que las partes pretendieron siempre y cuando se hayan cumplido todos los requisitos de esos efectos.*

Art. 2028. A. Any simulation, either absolute or relative, may have effects as to third persons.

B. Counterletters can have no effects against third persons in good faith. Nevertheless, if the counterletter involves immovable property, the principles of recordation apply with respect to third persons. [Acts 2012, No. 277, §1, eff. Aug. 1, 2012]

*Art. 2028. A. Toda simulación, ya sea absoluta o relativa, puede surtir efectos respecto de terceros.*

*B. Los contradocumentos no pueden producir efectos frente a terceros de buena fe. Sin embargo, si el contradocumento se refiere a un bien inmueble, se aplican los principios registrales respecto de los terceros. [Sección 1, ley n.º 277 de 2012, vigente desde el 1 de agosto de 2012].*

## CHAPTER 11. NULLITY

## *CAPÍTULO 11. DE LA NULIDAD*

Art. 2029. A contract is null when the requirements for its formation have not been met.

*Art. 2029. El contrato es nulo cuando no se observaron los requisitos para su formación.*

Art. 2030. A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed.

*Art. 2030. El contrato es nulo de nulidad absoluta cuando es contrario a una regla de orden público, lo que ocurre, por ejemplo, cuando el objeto es ilícito o inmoral. El contrato nulo de nulidad absoluta no puede confirmarse.*

Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

*La nulidad absoluta puede ser invocada por cualquier persona o puede ser declarada por el juez de oficio.*

Art. 2031. A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed.

*Art. 2031. El contrato es nulo de nulidad relativa cuando es contrario a una norma destinada a proteger los intereses particulares de las partes, como, por ejemplo, cuando la parte carecía de capacidad o no prestó su consentimiento libre al celebrar el contrato. El contrato nulo de nulidad relativa puede confirmarse.*

Relative nullity may be invoked only by those persons for whose interest the ground for nullity was established, and may not be declared by the court on its own initiative.

*La nulidad relativa solo puede ser invocada por las personas en cuyo interés se estableció la causal de nulidad y no puede ser declarada de oficio por el juez.*

Art. 2032. Action for annulment of an absolutely null contract does not prescribe.

*Art. 2032. La acción de nulidad de un contrato nulo de nulidad absoluta es imprescriptible.*

Action of annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud.

*La acción de anulación de un contrato nulo de nulidad relativa debe iniciarse dentro de los cinco años de la finalización de la causal de la nulidad, como en el caso de incapacidad o violencia, o de su descubrimiento, como en el caso del error o el dolo.*

Nullity may be raised at any time as a defense against an

*La nulidad puede oponerse como excepción en cualquier*

action on the contract, even after the action for annulment has prescribed.

*momento contra una acción contractual, incluso después de prescrita la acción de nulidad o anulación.*

Art. 2033. An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages.

*Art. 2033. Se considera que el contrato nulo de nulidad absoluta o el contrato nulo de nulidad relativa declarado nulo por el juez nunca existieron. Las partes deben quedar en la situación en la que se encontraban antes de la celebración del contrato. En caso de que sea imposible o excesivamente dificultosa la restitución en especie, el juez puede ordenar una indemnización por daños y perjuicios.*

Nevertheless, a performance rendered under a contract that is absolutely null because its object or its cause is illicit or immoral may not be recovered by a party who knew or should have known of the defect that makes the contract null. The performance may be recovered, however, when that party invokes the nullity to withdraw from the contract before its purpose is achieved and also in exceptional situations when, in the discretion of the court, that recovery would further the interest of justice.

*Sin embargo, la prestación cumplida en virtud de un contrato nulo de nulidad absoluta debido a la ilicitud o inmoralidad de su causa no puede ser recuperada por la parte que sabía o debería haber sabido del defecto que tornó nulo el contrato. Sin embargo, se puede recuperar la prestación cuando la parte invoca la nulidad para retractarse del contrato antes de que se logre su fin y también en las situaciones excepcionales en que, a criterio del juez, tal recuperación promovería los intereses de la justicia.*

Absolute nullity may be raised as a defense even by a

*La nulidad absoluta también puede ser alegada como*

party who, at the time the contract was made, knew or should have known of the defect that makes the contract null.

*excepción por la parte que, al momento de celebrado el contrato, sabía o debería haber sabido del defecto que torna nulo el contrato.*

Art. 2034. Nullity of a provision does not render the whole contract null unless, from the nature of the provision or the intention of the parties, it can be presumed that the contract would not have been made without the null provision.

*Art. 2034. La nulidad de una disposición no anula la totalidad del contrato a menos que, a partir de la naturaleza de la disposición o la intención de las partes, pueda presumirse que el contrato no se habría celebrado sin la disposición nula.*

Art. 2035. Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title. [Acts 2005, No. 169, §2, eff. July 1, 2006; Acts 2005, 1st Ex. Sess., No. 13, §1, eff. Nov. 29, 2005]

*Art. 2035. La nulidad del contrato no afecta los derechos adquiridos por el tercero de buena fe mediante un contrato oneroso.*

*Si el contrato involucra bienes inmuebles, se aplican los principios registrales al tercero adquirente de un derecho sobre el bien, ya sea a título oneroso o gratuito. [Sección 2, ley n.º 169 de 2005, vigente desde el 1 de julio de 2006; sección 1, ley n.º 13 de 2005, 1.ª Ses. Ex., vigente desde el 29 de noviembre de 2005.]*

## CHAPTER 12. REVOCATORY ACTION AND OBLIQUE ACTION

## *CAPÍTULO 12. DE LA ACCIÓN REVOCATORIA Y DE LA ACCIÓN OBLICUA*

### SECTION 1. REVOCATORY ACTION

### *SECCIÓN 1. DE LA ACCIÓN REVOCATORIA*

Art. 2036. An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency. [Acts 2003, No. 552, §1; Acts 2004, No. 447, §1]

*Art. 2036. El acreedor está facultado a anular un acto del deudor, o el resultado de la omisión del deudor, posterior al surgimiento del derecho del acreedor, que cause o aumente la insolvencia del deudor. [Sección 1, ley n.º 552 de 2003; sección 1, ley n.º 447 de 2004].*

Art. 2037. An obligor is insolvent when the total of his liabilities exceeds the total of his fairly appraised assets. [Acts 2003, No. 552, §1; Acts 2004, No. 447, §1]

*Art. 2037. Se considera insolvente al deudor cuando el total de su pasivo excede el total de su activo tasado de forma justa. [Sección 1, ley n.º 552 de 2003; sección 1, ley n.º 447 de 2004].*

Art. 2038. An obligee may annul an onerous contract made by the obligor with a person who knew or should have known that the contract would cause or increase the obligor's insolvency. In that case, the person is entitled to recover what he gave in return only to the extent that it has inured to the benefit of the obligor's creditors.

An obligee may annul an onerous contract made by the obligor with a person who did not know that the contract would cause or increase the obligor's insolvency, but in that case that person is entitled to recover as much as he gave to the obligor.

*Art. 2038. El acreedor puede anular el contrato oneroso celebrado por el deudor con una persona que sabía o debería haber sabido que el contrato causaría o aumentaría la insolvencia del deudor. En tal caso, la persona está facultada a recuperar lo que dio a cambio solo en caso de que hubiera beneficiado a los acreedores del deudor.*

*El acreedor puede anular el contrato oneroso celebrado por el deudor con una persona que no sabía que el contrato causaría o aumentaría la insolvencia del deudor, pero en ese caso la persona está facultada a recuperar lo que*

That lack of knowledge is presumed when that person has given at least four-fifths of the value of the thing obtained in return from the obligor.

*hubiera dado al deudor. Se presume tal falta de conocimiento cuando la persona dio al menos cuatro quintos del valor de la cosa obtenida a cambio del deudor.*

Art. 2039. An obligee may attack a gratuitous contract made by the obligor whether or not the other party knew that the contract would cause or increase the obligor's insolvency.

*Art. 2039. El acreedor puede anular el contrato gratuito celebrado por el deudor independientemente de que la otra parte supiera o no que el contrato causaría o aumentaría la insolvencia del deudor.*

Art. 2040. An obligee may not annul a contract made by the obligor in the regular course of his business.

*Art. 2040. El acreedor no puede anular el contrato celebrado por el deudor en la operatoria habitual de su actividad lucrativa.*

Art. 2041. The action of the obligee must be brought within one year from the time he learned or should have learned of the act, or the result of the failure to act, of the obligor that the obligee seeks to annul, but never after three years from the date of that act or result.

*Art. 2041. El acreedor debe iniciar la acción dentro del año posterior al momento en que se enteró o debió haberse enterado del acto, o del resultado de la omisión, del deudor que el acreedor pretende anular, pero no puede hacerlo transcurridos los tres años desde la fecha del acto o resultado.*

The three-year period provided in this Article shall not apply in cases of fraud. [Acts 2013, No. 88, §1, eff. Aug. 1, 2013]

*El plazo de tres años dispuesto en el presente artículo no se aplica en casos de dolo. [Sección 1, ley n.º 88 de 2013, vigente desde el 1 de agosto de 2013].*

Art. 2042. In an action to annul either his obligor's act, or the result of his obligor's failure to act, the obligee must join the obligor and the third persons involved in that act or failure to act.

A third person joined in the action may plead discussion of the obligor's assets.

*Art. 2042. En la acción tendiente a anular el acto de su deudor, o el resultado de la omisión del deudor, el acreedor debe acumular al deudor y a los terceros involucrados en el acto o la omisión.*

*El tercero acumulado en la acción puede alegar el beneficio de discusión sobre los bienes del deudor.*

Art. 2043. If an obligee establishes his right to annul his obligor's act, or the result of his obligor's failure to act, that act or result shall be annulled only to the extent that it affects the obligee's right.

*Art. 2043. Si el acreedor demuestra su derecho de anular el acto del deudor o el resultado de su omisión, el acto o el resultado solo se anulan si afectan el derecho del acreedor.*

SECTION 2. OBLIQUE ACTION

*SECCIÓN 2. DE LA ACCIÓN OBLICUA*

Art. 2044. If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor.

For that purpose, the obligee must join in the suit his obligor and the third person against whom that right is asserted.

*Art. 2044. Si el deudor causa o aumenta su insolvencia al no ejercer un derecho, el acreedor puede ejercerlo por sí mismo, a menos que el derecho sea personalísimo respecto del deudor.*

*A esos efectos, el acreedor debe acumular en la demanda al deudor y al tercero contra el que se quiere hacer valer el derecho.*

CHAPTER 13. INTERPRETATION OF CONTRACTS

*CAPÍTULO 13. DE LA INTERPRETACIÓN DE LOS CONTRATOS*

Art. 2045. Interpretation of a contract is the determination of the common intent of the parties.

*Art. 2045. La interpretación del contrato consiste en la determinación de la intención común de las partes.*

Art. 2046. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.

*Art. 2046. Cuando las palabras del contrato son claras y explícitas y no llevan a consecuencias absurdas, no se puede hacer ninguna interpretación adicional en búsqueda de la intención de las partes.*

Art. 2047. The words of a contract must be given their generally prevailing meaning.

Words of art and technical terms must be given their technical meaning when the contract involves a technical matter.

*Art. 2047. Las palabras del contrato deben entenderse conforme a su significado predominante en general.*

*Los términos especializados y los vocablos técnicos deben entenderse conforme a su significado técnico cuando el contrato se refiere a un asunto de carácter técnico.*

Art. 2048. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract.

*Art. 2048. Cuando las palabras son susceptibles de varios significados, deben interpretarse conforme al significado que mejor coincide con el objeto del contrato.*

Art. 2049. A provision susceptible of different meanings must be interpreted with a meaning that renders it

*Art. 2049. La disposición que es susceptible de varios significados puede interpretarse con el significado que la*

effective and not with one that renders it ineffective.

*hace eficaz y no con el que la hace ineficaz.*

Art. 2050. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.

*Art. 2050. Cada disposición del contrato debe interpretarse en función de las demás disposiciones, de modo tal que a cada una se le asigne el significado sugerido por la totalidad del contrato.*

Art. 2051. Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include.

*Art. 2051. Aunque el contrato esté redactado en términos generales, se debe interpretar de modo tal de cubrir solo las cosas que las partes pretendieron incluir.*

Art. 2052. When the parties intend a contract of general scope but, to eliminate doubt, include a provision that describes a specific situation, interpretation must not restrict the scope of the contract to that situation alone.

*Art. 2052. Cuando las partes pretenden celebrar un contrato de alcance general, pero, para eliminar toda duda, incluyen una disposición que describe una situación específica, la interpretación no debe restringir el alcance del contrato a esa situación exclusivamente.*

Art. 2053. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.

*Art. 2053. La disposición dudosa debe interpretarse según la naturaleza del contrato, la equidad, los usos, y la conducta de las partes antes y después de la formación de ese contrato y de otros contratos de naturaleza similar entre las mismas partes.*

Art. 2054. When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

*Art. 2054. Cuando las partes no estipularon nada respecto de una situación en particular, se presume que pretendieron obligarse no solo conforme a las disposiciones expresas del contrato, sino también a lo que la ley, la equidad o los usos consideran como implícito en un contrato de ese tipo o necesario para que el contrato logre su fin.*

Art. 2055. Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.

Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation.

*Art. 2055. La equidad, tal como se entiende en los artículos anteriores, se basa en los principios de que no se puede permitir que nadie tome una ventaja ilícita de otro y de que nadie tiene permitido enriquecerse ilícitamente a expensas de otro.*

*Los usos, como se entienden en los artículos anteriores, se refieren a la práctica regularmente observada en los asuntos de naturaleza idéntica o similar al objeto del contrato sujeto a interpretación.*

Art. 2056. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text.

A contract executed in a standard form of one party must be interpreted, in case of

*Art. 2056. En caso de duda que no pueda resolverse de otro modo, la disposición incluida en un contrato debe interpretarse en contra de la parte que proveyó su texto.*

*El contrato celebrado en un formulario tipo de una parte*

doubt, in favor of the other party.

Art. 2057. In case of doubt that cannot be otherwise resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation.

Yet, if the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor.

Arts. 2058-2291. [Repealed by Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

TITLE V. OBLIGATIONS ARISING WITHOUT AGREEMENT

CHAPTER 1. MANAGEMENT OF AFFAIRS (NEGOTIORUM GESTIO)

[Acts 1995, No. 1041, §1, eff. Jan. 1, 1996]

Art. 2292. There is a management of affairs when a person, the manager, acts without

*debe interpretarse, en caso de duda, a favor de la otra parte.*

*Art. 2057. En caso de duda que no pueda resolverse de otro modo, el contrato debe interpretarse contra el acreedor y a favor del deudor de una obligación en particular.*

*Sin embargo, si la duda surge de la falta de explicación necesaria que debería haber dado una parte, o de la negligencia o culpa de una parte, el contrato debe interpretarse a favor de la otra parte, ya sea el acreedor o el deudor.*

*Arts. 2058-2291. [Derogados por sección 1, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

*TÍTULO V. DE LAS OBLIGACIONES DE FUENTE NO CONVENCIONAL*

*CAPÍTULO 1. DE LA GESTIÓN DE NEGOCIOS*

*[Sección 1, ley n.º 1041 de 1995, vigente desde el 1 de enero de 1996].*

*Art. 2292. Existe gestión de negocios cuando una persona, el gestor, actúa sin facultades*

authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances.

*de representación para proteger los intereses de otro, el dueño, con la creencia razonable de que el dueño aprobaría tal acción si estuviera al tanto de las circunstancias.*

Art. 2293. A management of affairs is subject to the rules of mandate to the extent those rules are compatible with management of affairs.

*Art. 2293. La gestión de negocios está sujeta a las reglas del mandato en tanto tales reglas sean compatibles con la gestión de negocios.*

Art. 2294. The manager is bound, when the circumstances so warrant, to give notice to the owner that he has undertaken the management and to wait for the directions of the owner, unless there is immediate danger.

*Art. 2294. El gestor está obligado, cuando las circunstancias así lo exijan, a notificar al dueño que ha asumido la gestión y a esperar las indicaciones del dueño, a menos que haya un peligro inmediato.*

Art. 2295. The manager must exercise the care of a prudent administrator and is answerable for any loss that results from his failure to do so. The court, considering the circumstances, may reduce the amount due the owner on account of the manager's failure to act as a prudent administrator.

*Art. 2295. El gestor debe ejercer el cuidado de un administrador prudente y es responsable por toda pérdida producida por cualquier omisión de tal deber de cuidado. El juez, considerando las circunstancias, puede reducir el monto debido al dueño en virtud del incumplimiento del gestor del deber de actuar como administrador prudente.*

Art. 2296. An incompetent person or a person of limited legal capacity may be the owner of an affair, but he may

*Art. 2296. La persona incapaz o de capacidad de derecho limitada puede ser dueña de un negocio, pero no puede ser*

not be a manager. When such a person manages the affairs of another, the rights and duties of the parties are governed by the law of enrichment without cause or the law of delictual obligations.

*gestora. Cuando tal persona gestiona los negocios de otro, los derechos y deberes de las partes se rigen por el régimen del enriquecimiento sin causa o de la responsabilidad extracontractual.*

Art. 2297. The owner whose affair has been managed is bound to fulfill the obligations that the manager has undertaken as a prudent administrator and to reimburse the manager for all necessary and useful expenses.

*Art. 2297. El dueño cuyo negocio fue gestionado debe cumplir las obligaciones asumidas por el gestor como administrador prudente y debe reembolsar al gestor todos los gastos necesarios y útiles.*

## CHAPTER 2. ENRICHMENT WITHOUT CAUSE

## *CAPÍTULO 2. DEL ENRIQUECIMIENTO SIN CAUSA*

### SECTION 1. GENERAL PRINCIPLES

### *SECCIÓN 1. PRINCIPIOS GENERALES*

[Acts 1995, No. 1041, §1, eff. Jan. 1, 1996]

*[Sección 1, ley n.º 1041 de 1995, vigente desde el 1 de enero de 1996].*

Art. 2298. A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law provides another

*Art. 2298. La persona que se enriqueció sin causa a expensas de otra persona debe resarcir a esa persona. La expresión "sin causa" se utiliza en este contexto para excluir los casos en que el enriquecimiento es consecuencia de un acto jurídico válido o de la ley. El recurso previsto en este artículo es subsidiario y no puede utilizarse cuando la ley*

remedy for the impoverishment or declares a contrary rule.

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.

*prevé otro recurso para resarcir el empobrecimiento o fija una regla contraria.*

*El monto del resarcimiento se calcula según el que resulte menor entre la medida del enriquecimiento de una parte y la medida del empobrecimiento de la otra.*

*La medida del enriquecimiento o del empobrecimiento se calcula a la fecha de iniciada la demanda o, según las circunstancias, a la fecha del dictado de la sentencia.*

SECTION 2. PAYMENT OF A THING NOT OWED

*SECCIÓN 2. DEL PAGO INDEBIDO*

Art. 2299. A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it.

*Art. 2299. La persona que recibió un pago o una cosa que no le era debida debe reintegrarlo a la persona de la que lo recibió.*

Art. 2300. A thing is not owed when it is paid or delivered for the discharge of an obligation that does not exist.

*Art. 2300. La cosa es indebida cuando se paga o entrega para cumplir una obligación que no existe.*

Art. 2301. A thing is not owed when it is paid or delivered for discharge of an obligation that is subject to a suspensive condition.

*Art. 2301. La cosa es indebida cuando se paga o entrega para cumplir una obligación que está sujeta a una condición suspensiva.*

Art. 2302. A person who paid the debt of another person in the erroneous belief that he

*Art. 2302. La persona que pagó la deuda de otro creyendo erróneamente que él*

was himself the obligor may reclaim the payment from the obligee. The payment may not be reclaimed to the extent that the obligee, because of the payment, disposed of the instrument or released the securities relating to the claim. In such a case, the person who made the payment has a recourse against the true obligor.

*mismo era el deudor puede reclamar el pago al acreedor. El pago no puede reclamarse en caso de que el acreedor, debido al pago, se haya deshecho del instrumento o haya liberado las garantías relacionadas con el crédito. En tal caso, la persona que pagó puede reclamar al verdadero deudor.*

Art. 2303. A person who in bad faith received a payment or a thing not owed to him is bound to restore it with its fruits and products.

*Art. 2303. La persona que recibió de mala fe una cosa o un pago que no le era debido debe reintegrarlo con sus frutos y productos.*

Art. 2304. When the thing not owed is an immovable or a corporeal movable, the person who received it is bound to restore the thing itself, if it exists.

If the thing has been destroyed, damaged, or cannot be returned, a person who received the thing in good faith is bound to restore its value if the loss was caused by his fault. A person who received the thing in bad faith is bound to restore its value even if the loss was not caused by his fault.

*Art. 2304. Cuando la cosa no debida es un bien inmueble o un bien mueble corpóreo, la persona que la recibió debe restituirla en especie, si existe.*

*Si la cosa fue destruida, dañada o no puede restituirse, la persona que la recibió de buena fe debe restituir su valor si la pérdida fue causada por su culpa. La persona que recibió la cosa de mala fe debe restituir su valor aun si la pérdida no fue causada por su culpa.*

Art. 2305. A person who in good faith alienated a thing not owed to him is only bound to restore whatever he obtained from the alienation. If he

*Art. 2305. La persona que de buena fe enajena una cosa que no le es debida solo está obligada a restituir lo que obtuvo de la enajenación. Si*

received the thing in bad faith, he owes, in addition, damages to the person to whom restoration is due.

*recibió la cosa de mala fe, debe asimismo resarcir por los daños y perjuicios a la persona a la que se debe la restitución.*

Arts. 2306-2313. [Repealed by Acts 1995, No. 1041, eff. Jan. 1, 1996]

*Arts. 2306-2313. [Derogados por ley n.º 1041 de 1995, vigente desde el 1 de enero de 1996].*

Art. 2314. [Repealed by Acts 1979, No. 180, §3

*Art. 2314. [Derogados por sección 3, ley n.º 180 de 1979].*

CHAPTER 3 - OF OFFENSES AND QUASI OFFENSES

*CAPÍTULO 3. DE LOS DELITOS Y LOS CUASIDELITOS*

Art. 2315. A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall

*Art. 2315. A. Todo acto de una persona que causa daño a otra obliga a repararlo a aquel por cuya culpa se produjo el daño.*

*B. Los daños y perjuicios pueden incluir la pérdida de los lazos afectivos, de servicio y de sociedad, y pueden ser recuperados por las mismas categorías de personas que habrían tenido derecho a reclamar por la muerte de una persona lesionada causada por un acto ilícito. Los daños y perjuicios no incluyen los costos de futuros tratamientos médicos, servicios, supervisión o procedimientos de cualquier tipo a menos que tales tratamientos, servicios, supervisión*

include any sales taxes paid by the owner on the repair or replacement of the property damaged. [Amended by Acts 1884, No. 71; Acts 1908, No. 120, §1; Acts 1918, No. 159, §1; Acts 1932, No. 159, §1; Acts 1948, No. 333, §1; Acts 1960, No. 30, §1; Acts 1982, No. 202, §1; Acts 1984, No. 397, §1; Acts 1986, No. 211, §1; Acts 1999, No. 989, §1, eff. July 9, 1999; Acts 2001, No. 478, §1]

*o procedimientos se relacionen directamente con una lesión o enfermedad física o mental manifiesta. Los daños y perjuicios incluyen los impuestos a las ventas pagados por el dueño por la reparación o el reemplazo del bien dañado. [Modificado por la ley n.º 71 de 1884; sección 1, ley n.º 120 de 1908; sección 1, ley n.º 159 de 1918; sección 1, ley n.º 159 de 1932; sección 1, ley n.º 333 de 1948; sección 1, ley n.º 30 de 1960; sección 1, ley n.º 202 de 1982; sección 1, ley n.º 397 de 1984; sección 1, ley n.º 211 de 1986; sección 1, ley n.º 989 de 1999, vigente desde el viernes, 9 de julio de 1999; sección 1, ley n.º 478 de 2001].*

Art. 2315.1. A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or

*Art. 2315. A. Si una persona que fue lesionada por un delito o un cuasidelito muere, el derecho de ser resarcido por los daños a su persona, sus bienes u otros daños, causado por el delito o el cuasidelito, permanece vigente durante un año desde la muerte del fallecido a favor de:*

*1) El cónyuge y el hijo o los hijos sobrevivientes del fallecido, o el cónyuge o el hijo o los hijos.*

*2) El padre y la madre sobrevivientes del fallecido, o cualquiera de ellos si el*

either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

*fallecido no dejó cónyuge o hijos sobrevivientes.*

*3) Los hermanos y hermanas sobrevivientes del fallecido, o cualquiera de ellos si el fallecido no dejó cónyuge, hijos o progenitores sobrevivientes.*

*4) Los abuelos y abuelas sobrevivientes del fallecido, o cualquiera de ellos si el fallecido no dejó cónyuge, hijos, progenitores o hermanos sobrevivientes.*

*B. Asimismo, el derecho de percibir una indemnización por los daños al fallecido, sus bienes u otros daños, causado por el delito o cuasidelito, puede ser alegado por el representante de la sucesión del fallecido a falta de un beneficiario de alguno de los tipos detallados en el punto A anterior.*

*C. El derecho de accionar reconocido en este artículo es heredable, pero la herencia no interrumpe ni prorroga el plazo de prescripción definido en este artículo.*

*D. Conforme al uso asignado en este artículo, las palabras "hijo", "hija", "hermano", "hermana", "padre", "madre", "abuelo" y "abuela" incluyen al hijo, hija, hermano, hermana, padre, madre, abuelo y abuela*

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him. [Acts 1986, No. 211, §2; Acts 1987, No. 675, §1; Acts 1997, No. 1317, §1, eff. July 15, 1997]

*E. A los efectos del presente artículo, se considera que no sobrevivió al fallecido el padre o madre que lo abandonó durante su minoría de edad. [Sección 2, ley n.º 211 de 1986; sección 1, ley n.º 675 de 1987; sección 1, ley n.º 1317 de 1997, vigente desde 15 de julio de 1997].*

Art. 2315.2. A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

*Art. 2315.2. A. Si una persona muere por culpa de otra, pueden accionar judicialmente las siguientes personas a fin de obtener una indemnización por los daños y perjuicios sufridos a consecuencia de la muerte:*

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

*1) El cónyuge y el hijo o los hijos sobrevivientes del fallecido, o el cónyuge o el hijo o los hijos.*

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

*2) El padre y la madre sobrevivientes del fallecido, o cualquiera de ellos si el fallecido no dejó cónyuge o hijos sobrevivientes.*

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

*3) Los hermanos y hermanas sobrevivientes del fallecido, o cualquiera de ellos si el fallecido no dejó cónyuge, hijos o progenitores sobrevivientes.*

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he

*4) Los abuelos y abuelas sobrevivientes del fallecido, o cualquiera de ellos si el*

left no spouse, child, parent, or sibling surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him. [Acts 1986, No. 211, §2; Acts 1997, No. 1317, §1, eff. July 15, 1997]

*fallecido no dejó cónyuge, hijos, progenitores o hermanos sobrevivientes.*

*B. El derecho de accionar reconocido en este artículo prescribe al año de la muerte del fallecido.*

*C. El derecho de accionar reconocido en este artículo es heredable, pero la herencia no interrumpe ni prorroga el plazo de prescripción definido en este artículo.*

*D. Conforme al uso asignado en este artículo, las palabras "hijo", "hija", "hermano", "hermana", "padre", "madre", "abuelo" y "abuela" incluyen al hijo, hija, hermano, hermana, padre, madre, abuelo y abuela por adopción, respectivamente.*

*E. A los efectos del presente artículo, se considera que no sobrevivió al fallecido el padre o madre que lo abandonó durante su minoría de edad. [Sección 2, ley n.º 211 de 1986; sección 1, ley n.º 1317 de 1997, vigente desde 15 de julio de 1997].*

Art. 2315.3. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton

*Art. 2315.3. Además de los daños generales y especiales, pueden regularse daños punitivos si se prueba que las lesiones en que se basa la acción fueron causadas por*

and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles, as defined by R.S. 14:81.1, regardless of whether the defendant was prosecuted for his acts. [Acts 2009, No. 382, §1]

*culpa grave o indiferencia temeraria respecto de los derechos y la integridad física de la persona mediante un acto de pornografía que involucra a menores, conforme a la definición de R.S. 14:81.1, independientemente de si el demandado fue perseguido judicialmente por sus actos. [Sección 1, ley n.º 382 de 2009].*

Art. 2315.4. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries. [Acts 1984, No. 511, §1]

*Art. 2315.4. Además de los daños generales y especiales, pueden regularse daños punitivos si se prueba que las lesiones en que se basa la acción fueron causadas por culpa grave o indiferencia temeraria respecto de los derechos y la integridad física de terceros por un demandado cuya alcoholización o intoxicación por drogas fue una causa necesaria de las lesiones resultantes. [Sección 1, ley n.º 511 de 1984].*

Art. 2315.5. Notwithstanding any other provision of law to the contrary, the surviving spouse, parent, or child of a deceased, who has been convicted of a crime involving the intentional killing or attempted killing of the deceased, or, if not convicted, who has been judicially determined to have participated in the intentional,

*Art. 2315.5. No obstante cualquier otra disposición legal en contrario, el cónyuge, progenitor o hijo sobrevivientes de un fallecido que fueron condenados por un delito que involucra el homicidio doloso o la tentativa de homicidio del fallecido, o, en caso de no ser condenados, que fueron considerados judicialmente como*

unjustified killing or attempted killing of the deceased, shall not be entitled to any damages or proceeds in a survival action or an action for wrongful death of the deceased, or to any proceeds distributed in settlement of any such cause of action. In such case, the other child or children of the deceased, or if the deceased left no other child surviving, the other survivors enumerated in the applicable provisions of Articles 2315.1(A) and 2315.2(A), in order of preference stated, may bring a survival action against such surviving spouse, parent, or child, or an action against such surviving spouse, parent, or child for the wrongful death of the deceased.

*partícipes del homicidio doloso e injustificado o la tentativa de homicidio del fallecido, no tienen derecho a percibir una indemnización por daños y perjuicios ni los fondos resultantes de una acción de supervivencia o de una acción por el homicidio por acto ilícito del fallecido, ni los fondos resultantes de un acuerdo transaccional por dicha acción. En tal caso, el otro hijo o hijos del fallecido, o si el fallecido no dejó otro hijo sobreviviente, los demás sobrevivientes enumerados en las disposiciones aplicables de los artículos 2315.1, inciso A, y 2315.2, inciso A, en el orden de preferencia indicado, pueden iniciar una acción en calidad de sucesores supervivientes contra dicho cónyuge, progenitor o hijo sobreviviente, o una acción contra dicho cónyuge, progenitor o hijo sobreviviente por la muerte del fallecido por acto ilícito.*

An executive pardon shall not restore the surviving spouse's, parent's, or child's right to any damages or proceeds in a survival action or an action for wrongful death of the deceased. [Acts 1987, No. 690, §1; Acts 1991, No. 180, §1]

*El indulto no restituye el derecho del cónyuge, progenitor o hijo sobreviviente a percibir una indemnización por daños y perjuicios o fondos en virtud de una acción en calidad de sucesor superviviente o una acción por la muerte del fallecido por acto ilícito. [Sección*

*1, ley n.º 690 de 1987; sección 1, ley n.º 180 de 1991.]*

Art. 2315.6. A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:

*Art. 2315.6. A. Las siguientes personas que vean un hecho por el que se lesiona a otra persona, o que concurran a la escena del hecho poco después, pueden percibir una indemnización por el sufrimiento psíquico o daño emocional que hayan sufrido a consecuencia de la lesión de la otra persona:*

(1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.

*1) El cónyuge, hijo o hijos, y nieto o nietos de la persona lesionada, o el cónyuge, hijo o hijos, o el nieto o nietos de la persona lesionada.*

(2) The father and mother of the injured person, or either of them.

*2) El padre y la madre de la persona lesionada, o cualquiera de ellos.*

(3) The brothers and sisters of the injured person or any of them.

*3) Los hermanos y hermanas de la persona lesionada, o cualquiera de ellos.*

(4) The grandfather and grandmother of the injured person, or either of them.

*4) El abuelo y la abuela de la persona lesionada, o cualquiera de ellos.*

B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the

*B. Para cobrar una indemnización por sufrimiento psíquico o daño emocional en virtud del presente artículo, la persona lesionada debe haber sufrido un daño tal que uno pueda esperar razonablemente que la persona que ocupa el lugar de demandante sea*

claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable.

*víctima de sufrimiento psíquico o daño emocional a partir de la experiencia. Además, tal sufrimiento psíquico o daño emocional debe ser grave, debilitante y previsible.*

Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article. [Acts 1991, No. 782, §1]

*La indemnización por los daños a raíz del sufrimiento psíquico o el daño emocional por lesiones a un tercero solo puede percibirse de conformidad con lo dispuesto en este artículo. [Sección 1, ley n.º 782 de 1991].*

Art. 2315.7. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity which occurred when the victim was seventeen years old or younger, regardless of whether the defendant was prosecuted for his or her acts. The provisions of this Article shall be applicable only to the perpetrator of the criminal sexual activity. [Acts 1993, No. 831, §1, eff. June 22, 1993]

*Art. 2315.7. Además de los daños generales y especiales, pueden regularse daños punitivos si se prueba que las lesiones en que se basa la acción fueron causadas por culpa grave o indiferencia temeraria respecto de los derechos y la integridad física de la persona mediante una conducta delictiva de carácter sexual que haya ocurrido cuando la víctima tenía diecisiete años o menos, independientemente de que el demandado haya sido perseguido penalmente por sus actos o no. Las disposiciones del presente artículo solo se aplican al autor de la conducta delictiva de carácter sexual. [Sección 1, ley n.º 831 de 1993, vigente desde martes, 22 de junio de 1993].*

Art. 2315.8. A. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of a family or household member, as defined in R.S. 46:2132, through acts of domestic abuse resulting in serious bodily injury or severe emotional and mental distress, regardless of whether the defendant was prosecuted for his or her acts.

*Art. 2315.8. A. Además de los daños generales y especiales, pueden regularse daños punitivos si se prueba que las lesiones en que se basa la acción fueron causadas por culpa grave o indiferencia temeraria respecto de los derechos y la integridad física de un familiar o integrante del hogar, conforme a la definición de R.S. 46:2132, mediante actos de violencia doméstica que hayan causado graves lesiones físicas o daño emocional y psíquico agudo, independientemente de que el demandado haya sido perseguido penalmente por sus actos.*

B. Upon motion of the defendant or upon its own motion, if the court determines that any action alleging domestic abuse is frivolous or fraudulent, the court shall award costs of court, reasonable attorney fees, and any other related costs to the defendant and any other sanctions and relief requested pursuant to Code of Civil Procedure Article 863. [Acts 2014, No. 315, §1, eff. Aug. 1, 2014]

*B. Si el juez determina, a solicitud del demandado o de oficio, que la acción por la que se alega violencia doméstica es frívola o fraudulenta, el juez debe condenar al demandado a las costas, honorarios de abogados en un monto razonable y todo otro costo relacionado con el demandado, además de toda sanción y reparación solicitadas conforme al artículo 863 del Código Procesal Civil. [Sección 1, ley n.º 315 de 2014, vigente desde el 1 de agosto de 2014].*

Art. 2315.9. A. In addition to general and special damages, a prevailing plaintiff shall also be awarded court costs and reasonable attorney fees in the appropriate district or appellate court upon proof that the injuries on which the action is based were caused by an act of terror or terrorism resulting in injury to the person or damage to the person's property, regardless of whether the defendant was prosecuted for his acts.

*Art. 2315.9. A. Además de los daños generales y especiales, el demandante que obtiene una sentencia favorable tiene derecho a que se regulen costas y honorarios de abogados en un monto razonable a su favor en el juzgado de primera instancia o tribunal de segunda instancia que corresponda si se prueba que las lesiones en que se basó la acción fueron causadas por un atentado terrorista que lesionó a la persona o dañó sus bienes, independientemente de que el demandado haya sido perseguido penalmente por sus actos o no.*

B. The rights and remedies provided by this Article are in addition to any other rights and remedies provided by law.

*B. Los derechos y medios de reparación previstos en este artículo son adicionales a todos los demás previstos en la ley.*

C. As used in this Article, the terms shall be defined as follows:

*C. Los siguientes términos se definen de la siguiente manera conforme a su uso en este artículo:*

(1) "Act of terror" or "terrorism" means the commission of any of the acts occurring primarily in this state and as enumerated in this Subparagraph, when the offender has the intent to intimidate or coerce the civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a

*1) "Atentado terrorista" se refiere a la comisión de cualquiera de los actos que ocurran principalmente en este estado de los enumerados a continuación, si el autor tiene la intención de intimidar o coercionar a la población civil, influir en las medidas políticas de un órgano administrativo del Estado mediante*

unit of government by intimidation or coercion:

(a) Intentional killing of a human being.

(b) Intentional infliction of serious bodily injury upon a human being.

(c) Kidnapping of a human being.

(d) Aggravated arson upon any structure, watercraft, or movable.

(e) Aggravated criminal damage to property.

(2) "Terrorist" means a person who knowingly does any of the following:

(a) Commits an act of terror.

(b) Acts as an accessory before or after the fact, aids or abets, solicits, or conspires to commit an act of terror.

(c) Lends material support to an act of terror.

D. Upon motion of the defendant or upon its own motion, if the court determines that any action alleging an act of terror is frivolous or fraudulent, the court shall award costs of court, reasonable attorney fees, and any other related costs to the defendant and any other sanctions and relief

*intimidación o coerción, o afectar la actividad de tal órgano mediante intimidación o coerción:*

*a) Homicidio doloso.*

*b) Lesiones dolosas graves.*

*c) Secuestro.*

*d) Incendio doloso agravado de cualquier estructura, embarcación o bien mueble.*

*e) Daños penales agravados a los bienes.*

*2) "Terrorista" se refiere a toda persona que deliberadamente:*

*a) cometa un atentado terrorista;*

*b) actúe como cómplice antes o después del hecho, instigue, encubra o coopere en un atentado terrorista o conspire para cometerlo; o*

*c) haga aportes materiales para un atentado terrorista.*

*D. Si el juez determina, a solicitud del demandado o de oficio, que la acción por la que se alega un atentado terrorista es frívola o fraudulenta, debe condenar al demandado a las costas, honorarios de abogados en un monto razonable y todo otro costo relacionado con el demandado, además de toda sanción y*

requested pursuant to Code of Civil Procedure Article 863.

E. An action under the provisions of this Article shall be subject to a liberative prescriptive period of two years. [Acts 2015, No. 337, §1, eff. Aug. 1, 2015]

*reparación solicitadas conforme al artículo 863 del Código Procesal Civil.*

*E. La acción conforme a las disposiciones del presente artículo está sujeta a un plazo de prescripción liberatoria de dos años. [Sección 1, ley n.º 337 de 2015, vigente desde el 1 de agosto de 2015].*

Art. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

*Art. 2316. Se es responsable por el daño causado no solo por acción, sino también por negligencia, imprudencia o impericia.*

Art. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

*Art. 2317. Se es responsable no solo por el daño causado por hecho propio, sino también por el causado por las personas por las que se debe responder, o por las cosas que estén bajo la guarda de uno. Sin embargo, esta disposición debe entenderse sujeta a las siguientes limitaciones.*

Art. 2317.1. The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been

*Art. 2317.1. El dueño o guardián de una cosa es responsable por el daño ocasionado por su ruina, vicio o defecto por la mera demostración de que sabía o, ejerciendo un cuidado razonable, debería haber sabido de la ruina, el vicio o el defecto que causó el daño, de que el daño*

prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Acts 1996, 1st Ex. Sess., No. 1, §1, eff. April 16, 1996]

*se podría haber evitado mediante el ejercicio de un cuidado razonable, y de que omitió ejercer tal cuidado razonable. Ninguna de las disposiciones de este artículo impide que el juez aplique la doctrina de res ipsa loquitur cuando corresponda. [Sección 1, ley n.º 25 de 1996, 1.ª Ses. Ex., vigente desde martes, 16 de abril de 1996].*

Art. 2318. The father and the mother are responsible for the damage occasioned by their minor child, who resides with them or who has been placed by them under the care of other persons, reserving to them recourse against those persons. However, the father and mother are not responsible for the damage occasioned by their minor child who has been emancipated by marriage, by judgment of full emancipation, or by judgment of limited emancipation that expressly relieves the parents of liability for damages occasioned by their minor child.

*Art. 2318. El padre y la madre son responsables por el daño causado por el hijo menor de edad que reside con ellos o que ellos mismos hayan puesto al cuidado de terceros, con reserva del derecho a reclamar a dichos terceros. Sin embargo, el padre y la madre no son responsables por el daño ocasionado por el hijo menor de edad que se ha emancipado por matrimonio, por sentencia de emancipación plena o por sentencia de emancipación limitada que expresamente libera a los padres de la responsabilidad por los daños ocasionados por el hijo menor de edad.*

The same responsibility attaches to the tutors of minors. [Acts 1984, No. 578, §1; Acts 2008, No. 786, §1, eff. Jan. 1, 2009]

*La misma responsabilidad corresponde a los tutores de los menores. [Sección 1, ley n.º 578 de 1984, sección 1, ley n.º 786 de 2008, vigente desde el 1 de enero de 2009].*

Art. 2319. Neither a curator nor an undercurator is personally responsible to a third person for a delictual obligation of the interdict in his charge solely by reason of his office. [Acts 2000, 1st Ex. Sess., No. 25, §2, eff. July 1, 2001]

*Art. 2319. Ni el curador ni el curador supervisor son responsables a título personal frente a un tercero por una obligación extracontractual del interdicto a su cargo solo en razón de su nombramiento. [Sección 1, ley n.º 25 de 2000, 1.ª Ses. Ex., vigente desde el domingo, 1 de julio de 2001].*

Art. 2320. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

The master is answerable for the offenses and quasi-offenses committed by his servants, according to the rules which are explained under the title: Of quasi-contracts, and of offenses and quasi-offenses.

*Art. 2320. Los amos y los empleadores responden por los daños causados por sus sirvientes y sus empleados en el ejercicio de las funciones para las que fueron empleados.*

*Los maestros y artesanos responden por el daño causado por sus estudiantes o aprendices mientras están bajo su supervisión.*

*En los casos anteriores, los amos, los empleadores, los maestros y los artesanos solo tienen responsabilidad cuando podrían haber evitado el acto que causó el daño pero no lo hicieron.*

*El amo es responsable por los delitos y cuasidelitos de sus sirvientes según las reglas detalladas en el título De los cuasicontratos, y de los delitos y los cuasidelitos.*

Art. 2321. The owner of an animal is answerable for the damage caused by the animal. However, he is answerable for the damage only upon a showing that he knew or, in the exercise of reasonable care, should have known that his animal's behavior would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nonetheless, the owner of a dog is strictly liable for damages for injuries to persons or property caused by the dog and which the owner could have prevented and which did not result from the injured person's provocation of the dog. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Acts 1996, 1st Ex. Sess., No. 1, §1, eff. April 16, 1996]

*Art. 2321. El dueño del animal responde por el daño causado por el animal. Sin embargo, es responsable por el daño solo cuando se demuestra que sabía o, ejerciendo un cuidado razonable, debería haber sabido que la conducta del animal causaría el daño, que el daño se podría haber evitado mediante el ejercicio de un cuidado razonable, y que omitió ejercer tal cuidado razonable. No obstante, el dueño de un perro debe, en virtud de su responsabilidad objetiva, resarcir los daños y perjuicios por las lesiones sobre personas o bienes causadas por el perro, si el dueño las podría haber evitado y si no fueron consecuencia de la provocación del perro por parte de la persona lesionada. Ninguna de las disposiciones de este artículo impide que el juez aplique la doctrina de res ipsa loquitur cuando corresponda. [Sección 1, ley n.º 25 de 1996, 1.ª Ses. Ex., vigente desde martes, 16 de abril de 1996].*

Art. 2322. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its

*Art. 2322. El dueño de un edificio es responsable por el daño causado por su ruina, cuando fue causado por su negligencia en repararlo o cuando fue consecuencia de*

original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Acts 1996, 1st Ex. Sess., No. 1, §1, eff. April 16, 1996]

*un vicio o defecto de la construcción original. No obstante, es responsable por los daños cuando se demuestra que sabía o, ejerciendo un cuidado razonable, debería haber sabido del vicio o defecto que causó el daño, que el daño no se podría haber evitado mediante el ejercicio de un cuidado razonable, y que omitió ejercer tal cuidado razonable. Ninguna de las disposiciones de este artículo impide que el juez aplique la doctrina de res ipsa loquitur cuando corresponda. [Sección 1, ley n.º 25 de 1996, 1.ª Ses. Ex., vigente desde martes, 16 de abril de 1996].*

Art. 2322.1. A. The screening, procurement, processing, distribution, transfusion, or medical use of human blood and blood components of any kind and the transplantation or medical use of any human organ, human tissue, or approved animal tissue by physicians, dentists, hospitals, hospital blood banks, and nonprofit community blood banks is declared to be, for all purposes whatsoever, the rendition of a medical service by each and every physician, dentist, hospital, hospital blood bank, and nonprofit community blood

*Art. 2322.1. A. El análisis, la obtención, el procesamiento, la distribución, la transfusión o el uso médico de sangre humana o componentes de la sangre de cualquier tipo, y el transplante o uso médico de cualquier órgano humano, tejido humano o tejido animal aprobado por médicos, odontólogos, hospitales, bancos de sangre de hospitales o bancos de sangre comunitarios sin fines de lucro se consideran, a todos los efectos, la prestación de un servicio médico por cada médico, odontólogo, hospital, banco de sangre de*

bank participating therein, and shall not be construed to be and is declared not to be a sale. Strict liability and warranties of any kind without negligence shall not be applicable to the aforementioned who provide these medical services.

B. In any action based in whole or in part on the use of blood or tissue by a healthcare provider, to which the provisions of Paragraph A do not apply, the plaintiff shall have the burden of proving all elements of his claim, including a defect in the thing sold and causation of his injuries by the defect, by a preponderance of the evidence, unaided by any presumption.

C. The provisions of Paragraphs A and B are procedural and shall apply to all alleged causes of action or other act, omission, or neglect without regard to the date when the alleged cause of action or other act, omission, or neglect occurred.

D. As used in this Article:

(1) "Healthcare provider" includes all individuals and entities listed in R.S. 9:2797, this Article, R.S. 40:1299.39 and

*hospital o banco de sangre comunitario sin fines de lucro que participen en ello, y no se consideran ni se deben interpretar como una venta. Las personas que prestan estos servicios médicos no están sujetas a responsabilidad objetiva ni a garantías de ningún tipo.*

*B. En una acción basada total o parcialmente en el uso de sangre o tejido por parte de un prestador de servicios de salud a la que no se le aplique el inciso A, el demandante tiene la carga de probar todos los elementos de su pretensión, incluido el defecto en la cosa vendida y la relación de causalidad entre sus lesiones y el defecto, mediante una preponderancia de la prueba, sin recurrir a presunción alguna.*

*C. Las disposiciones de los incisos A y B son de carácter procesal y se aplican a todas las supuestas causas u otros actos, omisiones o negligencias independientemente de la fecha en que se produjeron las supuestas causas u otros actos, omisiones o negligencias.*

*D. Conforme al uso dado en este artículo:*

*1) "Prestador de servicios de salud" incluye a todas las personas físicas y jurídicas enumeradas en R.S. 9:2797,*

R.S. 40:1299.41 whether or not enrolled with the Patient's Compensation Fund.

*este artículo, R.S. 40:1299.39 y R.S. 40:1299.41, independientemente de que estén inscritos en el Fondo de Resarcimiento del Paciente.*

(2) "The use of blood or tissue" means the screening, procurement, processing, distribution, transfusion, or any medical use of human blood, blood products, and blood components of any kind and the transplantation or medical use of any human organ, human or approved animal tissue, and tissue products or tissue components by any healthcare provider. [Added by Acts 1981, No. 611, §1; Acts 1990, No. 1091, §1; Acts 1999, No. 539, §2, eff. June 30, 1999]

*2) "Uso de sangre o tejido" se refiere al análisis, la obtención, el procesamiento, la distribución, la transfusión o el uso médico de sangre humana, hemoderivados y componentes de la sangre de cualquier tipo y el transplante o uso médico de cualquier órgano humano, tejido animal aprobado o tejido humano, y productos derivados de tejido o componentes de tejido por parte de un prestador de servicios de salud. [Agregado mediante sección 1, ley n.º 611 de 1981; sección 1, ley n.º 1091 de 1990; sección 2, ley n.º 539 de 1999, vigente desde 30 de junio de 1999].*

Art. 2323. A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not

*Art. 2323. A. En una acción de daños y perjuicios debida a que una persona sufrió una lesión, la muerte o una pérdida, el grado o porcentaje de culpa de todas las personas que causaron o contribuyeron a causar la lesión, la muerte o la pérdida se determina con prescindencia de que la persona sea parte de la acción o no, y sin importar la insolvencia, capacidad de pago,*

limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced. [Amended by Acts 1979, No. 431, §1; Acts 1996, 1st Ex. Sess., No. 3, §1, eff. April 16, 1996]

*inmunidad legal, incluido lo establecido en R.S. 23:1032, de la persona, o si la identidad de la otra persona no se conoce o no es razonablemente determinable. Si una persona sufre una lesión, la muerte o una pérdida a consecuencia de su propia negligencia y en parte a consecuencia de la culpa de otra persona o de otras personas, el monto de la indemnización se reducirá en proporción al grado o porcentaje de negligencia atribuible a la persona que sufrió la lesión, la muerte o la pérdida.*

*B. Las disposiciones del inciso A se aplicarán a toda demanda de daños y perjuicios por lesión, muerte o pérdida en virtud de cualquier régimen jurídico, doctrina jurídica o teoría de la responsabilidad, con independencia del fundamento de la responsabilidad.*

*C. No obstante las disposiciones de los incisos A y B, si una persona sufre una lesión, la muerte o una pérdida a consecuencia en parte de su propia negligencia y a consecuencia en parte del accionar doloso del autor de un hecho ilícito, no se reducirá la indemnización reclamada en concepto de daños y perjuicios. [Modificado por sección 1, ley n.º 431 de 1979; sección 1, ley*

*n.º 25 de 1996, 3.ª Ses. Ex., vigente desde 16 de abril de 1996].*

Art. 2324. A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

*Art. 2324. A. Quien conspira con otra persona para cometer un acto intencional o doloso es responsable solidariamente con esa persona por el daño causado por tal acto.*

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

*B. Si la responsabilidad no es solidaria conforme al inciso A, la responsabilidad por el daño causado por dos o más personas es una obligación conjunta y divisible. El autor del daño que actuó de manera conjunta con otro no es responsable por más que su grado de responsabilidad y no tiene responsabilidad solidaria con otra persona por los daños atribuibles a la culpa de dicha persona, incluida la persona que sufre la lesión, la muerte o la pérdida, sin importar la insolvencia, capacidad de pago, grado de responsabilidad, inmunidad legal o de otro tipo de esa persona, incliudas las disposiciones sobre inmunidad de R.S. 23:1032, o si la identidad de la otra persona no se conoce o no es razonablemente determinable.*

C. Interruption of prescription against one joint tortfeasor is effective against all joint

*C. La interrupción de la prescripción contra uno de los autores conjuntos del daño*

tortfeasors. [Amended by Acts 1979, No. 431, §1; Acts 1987, No. 373, §1; Acts 1988, No. 430, §1; Acts 1996, 1st Ex. Sess., No. 3, §1, eff. April 16, 1996]

*surte efectos respecto de todos los autores conjuntos del daño. [Modificado mediante sección 1, ley n.º 431 de 1979; sección 1, ley n.º 373 de 1987; sección 1, ley n.º 430 de 1988; sección 1, 3.ª Ses. Ex., vigente desde 16 de abril de 1996].*

Art. 2324.1. In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury. [Acts 1984, No. 331, §3, eff. Jan. 1, 1985]

*Art. 2324.1. Al momento de calcular la indemnización por daños y perjuicios en casos de delitos, cuasidelitos y cuasicontratos, el juez o el jurado pueden aplicar amplia discreción. [Sección 3, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985].*

Art. 2324.2. A. When the recovery of damages by a person suffering injury, death, or loss is reduced in some proportion by application of Article 2323 or 2324 and there is a legal or conventional subrogation, then the subrogee's recovery shall be reduced in the same proportion as the subrogor's recovery.

*Art. 2324.2. A. Cuando la indemnización por daños y perjuicios ordenada a favor de una persona que sufrió una lesión, la muerte o una pérdida se reduce en alguna proporción en virtud del artículo 2323 o 2324 y hay subrogación convencional o legal, la indemnización del subrogado se debe reducir en la misma proporción que la del subrogante.*

B. Nothing herein precludes such persons and legal or conventional subrogees from agreeing to a settlement which would incorporate a different method or proportion of subrogee recovery for amounts paid

*B. Nada de lo aquí establecido impide que tales personas y los subrogados legales o convencionales celebren una transacción que incorpore un método o proporción diferentes de indemnización para el*

by the legal or conventional subrogee under the Louisiana Worker's Compensation Act, R.S. 23:1021, et seq. [Acts 1989, No. 771, §1, eff. July 9, 1989]

*subrogado por los montos pagados por el subrogado legal o convencional conforme a la Ley de Indemnización Laboral de Luisiana, R.S. 23:1021 y siguientes [sección 1, ley n.º 771 de 1989, vigente desde 9 de julio de 1989].*

# COVID-19 AND THE ITALIAN LEGAL SYSTEM

Laura Maria Franciosi*



ABSTRACT

*COVID-19 hit Italy with particular violence. Then spreading around Europe and worldwide, the virus raised unprecedented issues requiring the implementation of urgent measures to prevent its propagation. This Article focuses on selected topics of the Italian civil law particularly affected by the rise of COVID-19 and tries to provide brief comparative remarks. Namely, after summarizing the most important events that occurred in Italy—originating from the discovery of the first Italian case of COVID-19 in Codogno—it outlines relevant social and legal scenarios. This Article also concentrates on commercial lease contracts, and subsequently addresses the legal implications of vaccination, with reference to the consent of incapacitated persons.*

Keywords: Covid-19, legal formants, Italy, lease contract, informed consent

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## I. INTRODUCTION

After its appearance in the province of Wuhan, China, COVID-19 hit Italy with violence before spreading around Europe and worldwide. This phenomenon led countries to adopt governmental measures aimed at preventing its dissemination. Absent a proper medical remedy, the lockdown and the containment measures seemed to be the only tools available to hold back such plague. When vaccines finally became available—towards the end of 2020 and the beginning of 2021—the vast majority of countries gave in to the idea of mass vaccination. Ultimately, these countries, and Italy among the first ones, introduced forms of "green pass": this pass granted access to a wide range of services to selected categories of people, namely, people vaccinated against or having recovered from COVID-19, or people whose negativity to COVID-19 had been verified through swabs.[1]

Such an extraordinary scenario has significantly affected the ordinary life of the Italian population, as well as the Italian legal system. The Italian Constitution itself turned out to be a valuable tool during the pandemic.[2] At that time, several changes were introduced, such as the broad recourse to emergency legal provisions, the wide diffusion of smart working in both public and private sectors, the closure of non-essential activities,[3] the restrictions on personal freedom, freedom of movement[4] and other fundamental rights, etc.

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1. Both the chronological list of normative provisions dealing with such topic and the relevant text are available at: https://perma.cc/4KTZ-3M89.

2. COSTITUZIONE [COST.] [CONSTITUTION] (It.), *translated in* SENATO DELLA REPUBBLICA, CONSTITUTION OF THE ITALIAN REPUBLIC 20-21 (hereinafter "CONST. IT."), https://perma.cc/3WG7-9W2D.

3. *See* CONST. IT. art. 41:

> Private economic enterprise is free. It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity. The law determines appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends.

4. *See* CONST. IT. art. 16:

> Every citizen has the right to travel and reside freely in any part of the national territory, except for limitations provided by general laws for reasons of health or security. No restrictions may be imposed for political

The present Article will focus on selected topics of the Italian civil law particularly affected by the rise of COVID-19, as well as try to provide brief comparative remarks: the comparison with what happened in different countries appears particularly significant in order to provide a better understanding of the legal implications and consequences of the situation.

Section I will chronologically evoke the most important events that occurred in Italy—originating from the discovery of the first Italian case of COVID-19 in Codogno—while outlining the relevant social and legal scenarios as well. Section II will focus on commercial lease contracts, and Section III will address the legal implications of vaccination, with particular reference to the consent of incapacitated persons.

## II. THE SOCIAL AND LEGAL CONTEXT

Italy was the first democracy to implement restrictive measures (with the lockdown)[5] to fight the spread of the COVID-19 virus. In January 2020, the first two cases in the country involved two Chinese tourists who were quickly isolated and treated. A day later, the government declared a six-month long state of emergency, which was prolonged from time to time before eventually being extended until March 31, 2022.[6] The Italian patient zero was reported on February 21, 2020 in Codogno, a small town in the province of Lodi,

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reasons. Every citizen is free to leave the territory of the Republic and return to it except for obligations defined by law.

5. *See* for example Giovanni Farese, *The Economics of COVID-19 in Italy and Lessons for Africa*, *in* COVID-19 IN THE GLOBAL SOUTH (Pádraig Carmody, Gerard McCann, Clodagh Colleran, Ciara O'Halloran eds., Bristol University Press 2020) (arguing that there is a general belief about a coronavirus trade-off between economics and health and questioning whether livelihood or lives shall prevail). According to the author, lockdown has different meanings and implications depending on the context, and is therefore not necessarily the only solution available, nor the best. Equally, lifting the lockdown restrictions does not immediately nor necessarily spur economic recovery, as social distancing measures and uncertainty over the future in general continue to limit spending and investment.

6. Decreto-legge Mar. 24, 2022, n.24, G.U. Mar. 24, 2022, n.70. The Ministry of Health broke down the implications of this regulation on its website: https://perma.cc/K3TU-SY4D.

Lombardy. The first red zones, where quarantine was enforced and freedom of movement was heavily restricted, were established a few days later and only involved circumscribed areas. The general lockdown (Phase 1) started on March 9, 2020, and ended on May 4, 2020[7] when a progressive lift of the restrictions took place (Phase 2).[8]

After the end of summer and the lift on most regulations—for example, the use of masks outdoors—new closures and strict restrictions were adopted during Fall 2020. Italy was then divided in different zones according to the occurrence of the new cases, hospitalization rates, and other statistical factors.[9] In particular, four main zones were created: (i) red zones, with the most restrictions. It included the closure of all non-essential economic activities, meaning restaurants could only offer delivery and/or takeaway services, and many shops were subject to e-commerce only. It also encompassed restrictions on personal contact and personal freedom, hence the

7. For many countries, Italy included, lockdown involved significant non-pharmaceutical interventions in public and private life: quarantine, physical distancing requirements, bans on large gatherings, stay-at-home orders, closures of schools, businesses, and public transport, masking requirements, among other measures. *See* Holly Jarman, *State Responses to COVID-19 Pandemic: Governance, Surveillance, Coercion, and Social Policy*, *in* CORONAVIRUS POLITICS 51 (Scott L. Grier, Elizabeth J. King, Elize Massard de Fonseca, André Peralta eds., University of Michigan Press 2021) (arguing that, when effectively implemented, these public health measures controlled the spread of the virus and therefore reduced its death toll, though they come with significant economic costs and political implications).

8. *See generally* Decreto-legge Feb. 23, 2020, n.6, G.U. Feb. 23, 2020, n.45 (establishing the first red zones in Italy, including 10 municipalities in the province of Lodi and the municipality of Vo' Euganeo in Veneto); Decreto Presidente del Consiglio dei Ministri Mar. 1, 2020, n.346, G.U. Mar. 1, 2020, n.52 (laying down urgent measures regarding the containment and management of the epidemiological emergency from COVID-19); Decreto-legge Mar. 2, 2020, n.9, G.U. Mar. 2, 2020, n.53 (instituting a generalized lockdown). The full text of these legal provisions is available at: https://perma.cc/X4AS-A2DA.

9. *See* Decreto-legge May 16, 2020, n.33, G.U. May 16, 2020, n.125, art. 1 § 16-septies, converted into Legge n. 74/2020 (providing legal definitions for each of the zones created), https://perma.cc/8HHF-VJ7F. The determining criteria and the list of allowed and prohibited activities have been repeatedly amended.

*See* for example, Decreto-legge July 23, 2021, n.105, G.U. July 23, 2023, n.224, converted into Legge Sept. 16, 2021, n.126, G.U. Sept. 18, 2021, n.224 and amending Decreto-legge Apr. 22, 2021, n.52, G.U. Apr. 22, 2021, n.96, https://perma.cc/NEJ7-TE2Y.

impossibility to meet friends or relatives at home, or to leave one's residence but for specific reasons; (ii) orange zones, where certain restrictions were mitigated—though cafés and restaurants were still closed—and limitations to personal freedom and movement persisted; (iii) yellow zones, where the economic activities and general services remained opened with limitations—regarding the amount of clients allowed—and where freedom of movement was increased; (iv) white zones, with no particular limitations except for the use of masks indoors. By the late Spring of 2021, with the opening of the vaccination campaign to most of the population, almost the entirety of Italy fell into the yellow zone category and, at the beginning of summer, into the white zone category.

Subsequently, the Italian government introduced the so-called "green pass," a certificate proving either the individual's completion of the vaccination process, his recovery from COVID-19, or the negative result of a swab.[10] The validity period of the green pass fluctuated: initially, it was valid for up to 9 months after the last dose of vaccination, up to 6 months after the successful recovery, and up to 48 hours after the swab. Later, it was progressively reduced to 6 months after the last dose of vaccination and/or the recovery.[11]

The large majority of the Italian population completed the double-step vaccination process during the Fall of 2021 in order to prevent the dissemination of new variants of the virus, in particular, the "omicron-variant." Nevertheless, the Italian government decided to strengthen the scope of the green pass.[12]

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10. *See* Decreto del presidente del consiglio dei ministri June 17, 2021, n.52, G.U. June 17, 2021, n.143, implementing the Art. 9(10) of the Decreto-legge Apr. 22, 2021, n. 52, then converted into Legge June 17, 2021 n.87, G.U. June 17, 2021, n.146, available at: https://perma.cc/GUN2-62HC.

11. *See* art. 9 of the aforementioned D.L. n. 52/2021, then converted into L. n. 87/20021 and the Decreto-legge Dec. 24, 2021, n.221, G.U. Dec. 24, 2021, n.305, art. 3 (introducing the six-month validity period). For further information, *see supra* note 1.

12. Regular basic activities such as eating at the restaurant, going to the gym, theatre, cinema, or even to work, require one to hold the green pass: for normative references, *see supra* note 1.

In the period between December 2021 and January 2022—where the flu season reached its peak and the cases of Covid dramatically increased due to the appearance of new variants—the normative scenario evolved, and stricter limitations were adopted through the introduction of the so-called "super" or "strengthened" green pass. Such kind of green pass was only granted to people who had either fulfilled the entire vaccination process or recovered from COVID-19. This was introduced in order to induce as many people as possible to subject themselves to the "booster," an additional dose of vaccine,[13] and to limit the validity of swabs. The access to the majority of services and activities was therefore only open to holders of the "super" green pass. Furthermore, after a strong debate about imposing vaccination as a general mandatory requirement to access workplaces, public employees—and eventually private workers older than 50 years old—were mandatorily required to hold the super green pass to access their work areas. In particular, the obligation to be vaccinated had initially been charged upon specific categories of workers only, regardless of their age—namely, healthcare professionals and employees, educational professionals including academics, servicemen/servicewomen, etc. Eventually, it was required from every worker older than 50 years old.[14]

During the summer of 2022, the requirement of both the super green pass and the basic green pass progressively decreased. While drafting this Article (Fall 2022), even the requirement of indoor masks has been lifted. The 2022-2023 academic year started without limitations imposing social distancing, distance learning methods, or the use of indoor masks: all academic activities are currently carried out in person.

13. As mentioned in the text, the green pass initially lasted nine months starting from the completion of the vaccination process. Its validity period then decreased to six months, making it necessary to receive a further dose of vaccine to prevent its expiration.

14. *See* Decreto-legge Jan. 7, 2022, n.1, G.U. Jan. 07, 2022, n.4 (imposing the above-mentioned obligation from February 15, 2022).

## III. COMMERCIAL LEASE CONTRACTS

With reference to the legal effects of supervening events, the Italian system distinguishes between the impossibility of performance on one side—dealt with by articles 1463–1466 of the Italian Civil Code—and the case of a performance becoming excessively burdensome—*eccessiva onerosità sopravvenuta*, as stated in the Code itself—dealt with by articles 1467–1468 of the Civil Code.[15] Although the latter does not completely overlap with the general concept of hardship, the aim of both doctrines is to provide the affected party with a remedy, should the performance become excessively burdensome after the contract has been entered into.[16]

The letter of Article 1467 of the Civil Code argues that 1) at least one of the performances must not have been completely executed; 2) the performance shall be excessively burdensome when compared to the normal range of risk;[17] 3) the onerousness shall be due to extraordinary and unpredictable events. If such requirements are met, the affected party is entitled to ask the judge to terminate the contract. To avoid the termination of the contract, the counterparty may offer—but is not obliged—to modify the terms of the contract in order to restore the equity of the bargain. However, the judge does

15. CODICE CIVILE [C. CIV.] [CIVIL CODE] (1942) (It.) [hereinafter "IT. CIV. CODE"] art. 1467 applies to contracts in general. However, the Italian Civil Code also provides for specific applications of the rule in the case of insurance contracts (*see* IT. CIV. CODE art. 1897–1898) and building contracts (*see* IT. CIV. CODE art. 1667).

16. For interesting remarks, *see* Olivier Moréteau, *Remedies for Breach of Contract: A Theoretical and Practical Approach to Specific Performance in International Commercial Law*, 2017 INT'L BUS. L.J. 639 (2017) (arguing that the transnational contract practice needs to be emancipated from the conceptual and structural framework of domestic laws by developing its nationless notions while also maintaining dialogue with national jurists, their concepts and structures).

17. The Italian courts grant the remedy even in cases where the party complains that, while the value of the performance remains unvaried, on the contrary, the value of the counter-performance has been excessively devalued. *See* VINCENZO ROPPO, IL CONTRATTO, *in* TRATTATO DI DIRITTO PRIVATO 1021–22 (Giovanni Iudica & Paolo Zatti eds., Giuffrè 2001) (referring to such phenomenon as "indirect onerousness").

not have the power to alter the terms of the contract, nor is the affected party entitled to require the renegotiation of the terms.[18]

On the other side, should the impossibility to perform arise due to a *force majeure* event, the affected party is released from liability if he is not in default. The contract is thus terminated, and both parties are discharged from their obligations. Had one party already performed his obligation, the performance must be returned. When only partial performance is possible, it is up to the counterparty to decide whether he is interested in receiving it or not. In case of acceptance of the partial performance, the counterparty's performance is proportionally reduced.[19] In the event of temporary impossibility, the affected party is not liable for the delay in performing. However, if the impossibility persists, the contract is terminated if—according to the nature of the performance or to the legal ground of the obligation—the affected party cannot still be held as obliged to perform, or the counterparty is no longer interested in receiving the performance.[20]

Nevertheless, if parties provide for such events through *ad hoc force majeure* and/or hardship clauses, the will of the parties prevails, and judicial scrutiny is limited by such clauses. Absent any of these elements, the above-mentioned legal framework rules.

With reference to COVID-19, interesting holdings were introduced by Italian first instance courts dealing with commercial leases. Lease contracts are particularly notable when dealing with supervening circumstances because, in general, these events do not directly affect the performance of the debtor—such as the pecuniary

18. The approach adopted by the Italian legal system about hardship has influenced both the Latin American models and the international trade: *see* in particular Sergio García Long, *The influence of the Italian model of hardship in Latin America and international trade (with some notes from social sciences)*, 28 UNIF. L. REV. 57-77 (2023).

19. IT. CIV. CODE art. 1464.

20. IT. CIV. CODE art. 1256 deals with the question of temporary impossibility under its chapter devoted to obligations. Nevertheless, it is commonly deemed applicable to contracts too: *see* RODOLFO SACCO & GIORGIO DE NOVA, IL CONTRATTO 1669 (4th ed., UTET 2016).

obligation to pay the rent—which remains possible.[21] Consequently, such cases are usually dealt with as hardship cases where the performance has become excessively burdensome, and the equilibrium of the bargain has been dramatically altered. However, the lockdown measures imposing the closure of premises to the public—whether a shop, a beauty salon, or a club—might also be understood as an event directly affecting the core of the commercial lease, since they impede the normal destination and availability of the rented spaces.[22]

The first relevant provision in order to deal with such an issue is Article 3, para 6-bis of the Law Decree n. 6, as of February 23, 2020—or the "Stay at home" decree—then converted into Law n. 13/2020. In particular, the norm provides that compliance with the lockdown measures shall be always taken into account: the idea is to exempt the debtor from contractual liability and/or penalties pursuant to Articles 1218 and 1223 of the Civil Code in the event of

21. For a concrete application of the general principle of *genus nunquam perit*, *see* Cass., Apr. 30, 2012, n. 6594, Giust. civ. 2013, 9, I, 1873; Cass., Mar. 16, 1987, n. 2691, Foro it. 1989, I, c. 1209; Bruno Inzitari, *Il ritardo nell'adempimento del debito di valuta estera*, *in* VI BANCA BORSA E TITOLI DI CREDITO 583 (Giuffrè 1988); GIOACCHINO SCADUTO, I DEBITI PECUNIARI E IL DEPREZZAMENTO MONETARIO 24 (F. Vallardi 1924); MICHELE GIORGIANNI, L'INADEMPIMENTO. CORSO DI DIRITTO CIVILE 299 (Giuffrè 1975); CESARE MASSIMO BIANCA, DELL'INADEMPIMENTO DELLE OBBLIGAZIONI ART 1218-1229 80 (Zanichelli 1979); BRUNO INZITARI, DELLE OBBLIGAZIONI PECUNIARIE ART 1277-1284 13 (Francesco Galgano ed., Zanichelli 2011).

22. About the impact of Covid-19 on relational contracts, *see* Guido Alpa, *Note in margine agli effetti della pandemia sui contratti di durata*, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 57 (CEDAM 2020); Alberto Maria Benedetti, *Il rapporto obbligatorio al tempo dell'isolamento*, *in* 2 CONTRATTI 213 (2020); Cristiano Cicero, I RAPPORTI GIURIDICI AL TEMPO DEL COVID-19 (Edizioni Scientifiche Italiane 2020); Alessandro D'Adda, *Locazione commerciale ed affitto di ramo d'azienda al tempo del Covid-19: quali risposte dal sistema del diritto contrattuale?*, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 102 (CEDAM 2020); D'Amico, *L'epidemia Covid-19 e la "legislazione di guerra"*, *in* CONTRATTI 253 (2020); Emanuele Lucchini Guastalla, EMERGENZA COVID-19 E QUESTIONI DI DIRITTO CIVILE (Giappichelli 2020); Emanuela Navarretta, *Covid-19 e disfunzioni sopravvenute dei contratti. Brevi riflessioni su una crisi di sistema*, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 87 (CEDAM 2020); Fabrizio Piraino, *La normativa emergenziale in materia di obbligazioni e contratti*, *in* CONTRATTI 485 (2020).

non-performance by such party.[23] Indeed, Article 3, para 6-bis, neither refers to impossibility of performance nor to hardship, but generally refers to compliance with the lockdown measures as an element to always be taken into consideration by the judge. Subsequently, this provision has been enriched with the new para 6-ter, ruling that any contractual disputes relevant for the purposes of para 6-bis shall be preliminarily submitted to mandatory mediation.[24]

Although the provision clearly shows the legislative inclination towards lockdown measures as an example of supervening events exempting the obligor from liability, it does not introduce any additional remedy or specific ground for the exemption. In brief, absent such provision, the judges would have in any case considered the factors above in assessing the liability, or not, of the non-performing party.

The common issue of the case law dealing with commercial lease contracts involves the harshness of the duty to pay the agreed rent whilst lockdown measures are in effect. In a first case example, the Tribunal of Venice ruled in favor of the lessees of a clothing store. Located inside a mall closed due to the pandemic and the lockdown measures, the lessees had not paid rent from February to April—amounting to 50,000€ of unpaid bills—and claimed that the lessor was not entitled to enforce the collateral granted by the bank. The Tribunal issued a temporary order on behalf of the debtor, preventing the creditor from enforcing the collateral. The issue of knowing whether the breach of contract was excusable or not was referred to a full hearing and has not been decided on yet. However, the granting of the temporary relief on behalf of the lessee in light

23. *See generally* Claudio Scognamiglio, *L'emergenza Covid-19: quale ruolo per il civilista?*, GIUSTIZIACIVILE.COM (April 15, 2020), available at: https://perma.cc/7YT6-GPEZ; Ugo Carnevali, *Emergenza Covid-19: un anno dopo*, *in* CONTRATTI 145 (2021).

24. Decreto Legislativo Mar. 4, 2010, n.28, G.U. Mar. 05, 2010 n.53 (also known as Legislative Decree 28/2010), art. 5 (setting forth the cases of mandatory mediation), https://perma.cc/3FDP-9QR6.

of the emergency is significant.[25] The Tribunal of Bologna addressed the same issue.[26] In this case, the lessee was the owner of a beauty salon subject to the lockdown, who had provided bank collateral as a guarantee of the regular payment of the rent. The outcome of the temporary judgment was the same as that of Venice. Furthermore, the Tribunal of Genova ruled on the case of the owner of a discotheque who had provided the lessor with a promissory note as a guarantee of the rent but could not pay such rent due to the lockdown.[27] Even in this case, the Tribunal ruled on behalf of the debtor, thus preventing the lessor from enforcing the promissory notes.[28]

In the three cases above, COVID-19 and the consequent lockdown measures were deemed to be events able to legally affect the ordinary course of the contractual relationship. However, the emergency legislation has provided for further piecemeal remedies, lacking a consistent and systematic framework aimed at intervening on the contractual consequences of both the pandemic and the relevant

25. Trib. Venice, decree of May 22, 2020. The legal provision referred to by the Tribunal in order to find for the debtor is art. 3, para 6-bis of the Decreto-legge n. 6, as of February 23, 2020.

26. Trib. Bologna, decree of May 12, 2020.

27. Trib. Genova, decree of June 1, 2020.

28. The three rulings found their legal basis both in the general contractual provisions of the Italian Civil Code and in the special legislative provisions enacted during the COVID-19 emergency. The case law about such issue has been quite significant: *see* for example, Trib. Milan, June 25, 2021 commented by Alessandro Purpura, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 1 (2021); Trib. Palermo, May 26, 2020; Trib. Rome, May 29, 2020; Trib. Pordenone, July 8, 2020; Trib. Milano, July 24, 2020; Trib. Roma, July 25, 2020, Trib. Roma, July 31, 2020; Trib. Roma, Aug. 27, 2020; Trib. Treviso, Dec. 21, 2020; Trib. Milan, May 18, 2021; Trib. Rome, May 21, 2021; Trib. Palermo, June 9, 2021. Among these holdings, the existence of a duty to renegotiate in good faith was affirmed, as well as the judicial power to intervene to restore the equilibrium of the contract: in particular, Gabriele Carapezza Figlia, *Rimedi contrattuali e disfunzioni delle locazioni commerciali. Problemi e limiti dell'attivismo giudiziale nell'emergenza Covid-19*, *in* CONTRATTI 712 (2020) (commenting on Trib. Rome, Aug. 27, 2020); Gianluca Sicchiero, *La prima applicazione dell'intervento giudiziale fondato sull'equità ex art. 1374 c.c*, *in* GIURISPRUDENZA ITALIANA 590 (2021) (commenting on Trib. Treviso, Dec. 21, 2020).

containment measures. The commercial leases have been particularly relevant regarding such phenomenon.[29]

In particular, property repossessions have been suspended until December 2020.[30] Exceptionally, for commercial leases of private gyms, swimming pools and sports facilities only, a monthly reduction of 50% of the rent was provided between March and July 2020.[31] Furthermore, article 95 of the Law Decree 18/2020 argued in favor of the suspension of the monthly rent for sports facilities owned by the State and/or other public entities when the tenant is a national sports federation or a sports company or association, both professional and non-professional. Different tax deductions were also introduced: for example, commercial tenants suffering from a loss of income of at least 50% of the previous tax period could benefit from a tax reduction of up to 60% of the monthly rent from March 2020 to June 2020.[32]

It is also worth mentioning that the Italian Anti-Corruption Authority (*Autorità Nazionale Anticorruzione*, or "ANAC") has recognized the COVID-19 as affecting contractual performance and meeting the requirements of extraordinariness and non-foreseeability of supervening events set forth by Articles 1463 and 1467 of the Italian Civil Code. Within the Guidelines n. 9, approved by the deliberation 20.3.2018 n. 31833—providing for the contracts of private-public partnership—the ANAC has affirmed the principle according to which "among the events not ascribable to the economic operator

29. *See* Massimo Franzoni, *Il COVID-19 e l'esecuzione del contratto*, *in* RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1 (2021) (arguing that the pandemic offers an opportunity to rethink contract law by focusing less on the parties' will, in light of the market's general interest).

30. Decreto-legge Mar. 17, 2020, n.18, G.U. Mar. 17, 2020, n.70, art. 103 para 6, converted into Legge Apr. 24, 2020, n.27, G.U. Apr. 29, 2020, n.110, and its subsequent amendments.

31. Decreto-legge May 19, 2020, n.34, G.U. May 19, 2020, n.128, art. 216, para. 3, converted into Legge July 17, 2020, n.77, G.U. July 18, 2020, n.180.

32. Decreto-legge Mar. 17, 2020, n.18, G.U. Mar. 17, 2020, n.70, art. 65 and D.L. n. 34/2020, art. 28 as modified by Decreto-legge Aug. 14, 2020, n. 104, G.U. Aug. 14, 2020, n.203, art. 77 para. 1 letter a).

33. Autorità nazionale anticorruzione, *Delibera numero 318 del 28 marzo 2018* (2009), available at: https://perma.cc/WH5N-MYEK.

entitling to the revision of the PEF34 there are those events of force majeure able to render, totally or partially, the contractual performance objectively impossible or excessively burdensome." Among the events amounting to force majeure, the ANAC has expressly included "epidemics and contagions."

In addition, with the deliberations 25.11.2020 n. 102235 and 1.7.2020 n. 54036, the ANAC has officially declared that the emergency situation triggered by the COVID-19 pandemic shall be qualified as a legal requirement entitling parties to the request of contractual amendments—in that case, a variation during the execution of the tender contract—due to unforeseen and unforeseeable circumstances, pursuant to article 106 § 1 letter c) of the Procurement Code.[37]

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34. PEF stands for *Piano Economico e Finanziario*, meaning, "Economic and Financial Plan."

35. Autorità nazionale anticorruzione, *Delibera numero 1022 del 25 novembre 2020* (2020), available at: https://perma.cc/3DE6-3UAH.

36. Autorità nazionale anticorruzione, *Delibera numero 540 del 1 iuglio 2020* (2020), available at: https://perma.cc/TDN6-4TYL.

37. In particular, under a particular decree, Decreto legislativo Apr. 12, 2006, n.163, G.U. May 02, 2006, n.100 (superseded by the new Procurement Code: Decreto legislativo Apr. 18, 2016, n.50, G.U. Apr. 19, 2016, n.91), the presence within the public tender contracts of a clause of price adjustment for the periodic supply of goods and services was mandatory, as provided for by art. 115 of the above-mentioned Decree. Consequently, absent such clause, the contract would have been partially null and void pursuant to IT. CIV CODE art. 1419, and the relevant gap would have been filled through the mechanism of art. 1339 c.c. In addition, art. 133 §§ 4, 5 and 6 of D.Lgs. 163/2006 set forth a contractual mechanism to specifically consider the oscillations regarding the price of the materials. On the contrary, art. 106 of the new Italian D.Lgs. 50/2016 ("Procurement Code") overturned the approach above. Accordingly, it is now up to the Contracting Authority (i.e. *stazione appaltante*) to insert within the public tender agreement "in clear, precise and unequivocal terms" which amendments can be made during the performance of the contract. This includes the mechanism of price adjustment as well, which is subject to the limits and requirements set forth by art. 106 itself. This new approach adopted by the Italian lawmaker does not comply with the general principles created by the Italian caselaw under the domain of the previous code (i.e. D.Lgs. 163/2006) that highlighted the strong public interest (i) to avoid the risk for the Contracting Authority to receive a low-quality performance due to its excessive onerousness, on one side, and (ii) to avoid the risk for the Contractor to suffer damages as a consequence of the alteration of the economic and financial landscape wherein the contract had been originally stipulated, on the other. This used to be the rationale to uphold the approval of the request of price adjustment. The caselaw specifically dealing with such issue was copious: ex multis, Cons. Stato, IV division, Aug. 6, 2014, n. 4207; Cons. Stato, V division, Jan. 24, 2013,

Furthermore, Article 216 §2 of the Law Decree 34/2020 provides for the revision of the rental fees within the grant contracts of sports facilities. Articles 103 §2 L.D. 18/2020 and 10 §4 L.D. 76/2020 have prolonged the initial and final terms for the execution of public works provided for by Article 15 DPR 380/2001. Article 1septies §1 L.D. 73/2021 has introduced an automatic system of price adjustment for the building sector, and Article 28bis L.D. 34/2020 has set forth a mandatory revision of the economic and financial plan—PEF—within the field of public grants of refreshment services through vending machines.

Despite a piecemeal process that does not cover all the possible kinds of contractual relationships, the rationale of these legislative provisions seems to be the expression of the same general principle.

Subsequently, with specific reference to commercial lease, Article 6-bis of the Law 69/2021 has introduced the mechanism of their "renegotiation": as a matter of fact, the text of the provision simply stated such aim in the event of a lease contract where the lessee was an entrepreneur suffering a "significant" decrease of his business activity due to COVID-19. However, the norm did not have any binding effects, as it merely enunciated the duty for the parties to cooperate in order to redetermine the rent, without providing a sanction or a remedy.[38] With the subsequent Law n. 106 as of July 23, 2021, the text of the norm has been completely rewritten, on one side introducing a specific duty to renegotiate, and on the other furtherly narrowing its range of application. In particular, contracting parties shall cooperate in good faith to redetermine the rent for a maximum period of five months in 2021. However, the provision

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n. 465; Cons. Stato, V div., Aug. 3, 2012, n. 4444; Cass. civ., Oct. 30, 2014, n. 2307; Cass. civ., Mar. 15, 2011, n. 6016; Cass. civ., Jan. 12, 2011, n. 511; Cass. civ., July 12, 2010, n. 16285.

38. On the unenforceability of the duty at stake, *see* Paolo Scalettaris, *A proposito del "percorso condiviso" per la ricontrattazione delle locazioni commerciali introdotto dalla Legge n. 106/2021*, *in* IMMOBILI E PROPRIETÀ 719 (Wolters Kluwer 2021); Vincenzo Cuffaro, *Rinegoziare, ricontrattare: rideterminare il canone? Una soluzione inadeguata*, *in* CORRIERE GIURIDICO 954 (Wolters Kluwer 2021).

can only be applied to commercial lessees 1) with an activity that has been subject to mandatory closure for at least 200 days—even non-consecutive—from March 8, 2020, and 2) facing at least a 50% reduction of their average business volume in the period ranging from March 2020 to June 2021 compared to that of the same period during the previous year.[39] The two requirements must concur in order to trigger the provision. However, the lessee shall not have previously benefited from other governmental measures of financial support related to the pandemic or from previous agreements with the lessor—for example, temporary reduction of the fee or deferment of the payment.[40]

Accordingly, the impact of the new provision has been very limited due to its narrow range of application. In addition, the norm neither clarifies the "shared path" to be complied with by contractual parties in order to renegotiate the rental fee nor dictates any criteria for the redetermination of the rent.

Another issue deals with possible remedies in the event of a breach of the duty to renegotiate in good faith: in particular, it was debated whether the Italian judge had the authority to redetermine the rent absent an agreement between the parties. It has been highlighted that the parties are under a legislative obligation, that is, the duty to renegotiate in good faith, not the duty to agree on a new rental fee. Consequently, the judge lacks the above-mentioned power.[41] In light of all the remarks above, such legislative intervention has not been particularly successful.

Since the legislator has not expressly addressed the issue of unexpected change of circumstances, the task to deal with the consequences of such occurrence has therefore been left to the courts.[42] It

39. More precisely, the reduction must be due to "sanitary restrictions," to "the economic crisis" and/or to "the decrease of the flows of tourism."

40. Art. 4bis-4ter of the law at stake, amending Decreto-Legge May 25, 2021, n.73, G.U. May 25, 2021, n.123, available at: https://perma.cc/479S-ATAN.

41. With reference to such provision, *see generally* Scalettaris, *supra* note 38, at 724.

42. A comparative example is offered through the lens of the Spanish legal system in cases where the supervening change of circumstance takes place in the

has been highlighted that a significant number of holdings dealing with the issue of supervening events occurred in the last ten years, but no unanimous approach emerged from the relevant case law.[43] The COVID-19 has thus emphasized the need for legislative intervention, with measures aimed at reforming the provisions dealing with the supervening events affecting the ordinary performance of a contract. With regard to such issue, the Italian Supreme Court—known as *Corte di Cassazione*—has published a "Report" on anti-Covid emergency regulations in contract and insolvency matters[44] on July 8, 2020.

The Report focuses precisely on the duty of renegotiation, highlighting the inadequacy of remedies set forth by Article 1467 of the Italian Civil Code to handle the problem of supervening effects. Nevertheless, according to the opinion of the Court, the duty to cooperate helps solve the apparent conflict between the obligation to renegotiate, on one side, and the freedom of the parties, on the other, because the renegotiation aims at giving rise to the will of the parties, and not at limiting their autonomy.[45] Consequently, the duty to renegotiate stems from the duty of good faith, pursuant to Articles 1175 and 1375 of the Italian Civil Code.[46] It thus implies the obligation to undertake all the behaviors that—in light of the

absence of an express legislative provision: *see* Jorge C. Jerez, *The Unexpected Change of Circumstances Under American and Spanish Contract Law*, 25 EUR. REV. PRIV. L. 909, at 912 (2017), arguing that courts have decided on such cases either by adopting foreign solutions or by alleging the doctrine of *clausula rebus sic stantibus*, which is not expressly included in the Spanish Civil Code.

43. Giuseppe Sbisà, *La prima norma in tema di rinegoziazione nel contesto del dibattito sulle sopravvenienze*, *in* CONTRATTO E IMPRESA 15 (CEDAM 2022), with particular attention to n. 7 and the relevant text.

44. Corte di Cassazione, *Novità normative sostanziali del diritto emergenziale anti-Covid 19 in ambito contrattuale e concorsuale* (Rome, July 8, 2020), available at: https://perma.cc/MMS2-UJWC.

45. *Id.* at 23.

46. For interesting remarks about the role of contractual good faith in judicial holdings, *see* Jumoke Joy Dara & Olivier Moréteau, *The Interaction of Good Faith with Contract Performance, Dissolution, and Damages in the Louisiana Supreme Court*, 10 J. CIV. L. STUD. 261 (2017).

circumstances of the case—allow the parties to agree upon the new terms and conditions due to the modified situation.[47]

In the opinion of the Court, while renegotiation[48] seems to be the proper remedy, on the contrary, contract termination or damage compensation are unlikely to give rise to a good outcome because they would lead to a disruption of the contract that renegotiation tries to avoid. The Supreme Court refers to a possible remedy—should one party refuse to renegotiate—identified in the specific performance of the obligation to enter into a contract, as set forth by Article 2932 of the Italian Civil Code.[49] However, this remedy implies that the parties have already reached an agreement on the content of the final contract so that the judge can issue a "constitutive ruling" substituting the effects of the final contract. Nonetheless, in the case at stake, if parties do not renegotiate the terms of the contract, the required agreement remains lacking. To avoid such an impediment, the Court considers that the judge would then be entitled to amend the terms of the contract, taking into account the content of the parties' negotiation before its interruption.[50] Furthermore, according to the Report, referring to Article 1464 of the Civil Code—dealing with the partial impossibility of performance—to partially or fully release the lessee from the obligation to pay the rent means fixing the alteration of the contractual equilibrium, thus allocating the

47. Corte di Cassazione, *supra* note 44, at 24.

48. About the duty to renegotiate, *see generally* FRANCESCO GAMBINO, PROBLEMI DEL RINEGOZIARE (Giuffrè 2004); Aurelio Gentili, *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, *in* CONTRATTO E IMPRESA 667-724 (CEDAM 2003); Aurelio Gentili, *De Jure Belli: l'equilibrio del contratto nelle impugnazioni*, RIVISTA DI DIRITTO CIVILE 27 (2004); Gianluca Sicchiero, *La rinegoziazione*, *in* CONTRATTO E IMPRESA 774 (CEDAM 2002); Francesco Macario, *Rischio contrattuale e rapporti di durata nel nuovo diritto dei contratti: dalla presupposizione all'obbligo di rinegoziazione*, RIVISTA DI DIRITTO CIVILE 63 (2002); FRANCESCO MACARIO, ADEGUAMENTO E RINEGOZIAZIONE NEI CONTRATTI A LUNGO TERMINE (Jovene 1996); Pietro Rescigno, *L'adeguamento del contratto nel diritto italiano. Considerazioni conclusive*, *in* CONTRATTI INTERNAZIONALI E MUTAMENTO DELLE CIRCOSTANZE: CLAUSOLE MONETARIE, HARDSHIP, FORZA MAGGIORE 95 (Ugo Draetta, Mark E. Kleckner, Dino Rinoldi eds., 1989).

49. Corte di Cassazione, *supra* note 44, at 26-28.

50. *Id.* at 27.

financial consequences of COVID-19 from one contractual party to the other, in this case, the lessor. However, as expressly pointed out by the Report, this solution is rather inspired by common sense related considerations rather than by legal grounds.[51]

The Report is noteworthy, namely for two reasons: firstly, it was issued by the Italian distinguished judicial authority of last resort.[52] Secondly, it was issued by the judicial authority of a civil law country where the legislative format is still the prevailing one, and where judicial decisions do not amount to formal sources of law.[53] Indeed, the inconsistencies and the piecemeal approach of the legislative intervention charged upon Italian judges the task to directly deal with the needs of the Italian society in light of the pandemic and the relevant lockdown measures. However, the Report has raised perplexities in the minds of scholars, emphasizing the lack of normative grounds for the judicial power to amend the contract, thus substituting the will of the parties.[54] In fact, Article 1467 of the Civil Code only provides for the judicial termination of the contract should the counterparty not be available to renegotiate the terms of the contract. Similarly, the norms about the *impossibilità sopravvenuta* do not recognize such judicial power. This issue has been one of the most debated on both national and international stages. For example, the

51. *Id.* at 4.

52. This authority prevails in cases of civil law disputes, criminal trials and tax law controversies. The Court is also entitled to rule about conflict of jurisdictions between the ordinary judge and the administrative judge or the foreign judge. For further details, *see* Regio decreto Jan. 30, 1941, n.12, G.U. Feb. 4, 1941, n.28.

53. *See* ANTONIO GAMBARO & RODOLFO SACCO, SISTEMI GIURIDICI COMPARATI 4-8 (2nd ed., Utet Giuridica 2004); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991) (highlighting that the primary purpose of comparative law is the acquisition of knowledge and that, in order to gain proper knowledge of a legal system, the connected "legal formants" must be considered). In particular, legal formants are those elements concurring to characterize a particular legal system. Examples are, in addition to legislative provisions, court rulings, academic writing, professional and administrative practice developed in a particular context.

54. This gap within the Italian legal framework had been previously pointed out by a significant part of the Italian doctrine. Some of these remarks can be found directly on the website of *Civilisti Italiani*, an organization promoting the development of the culture of civil law.

association for the study of Italian civil law—*Civilisti Italiani*[55]—has issued a proposal focusing on the need to introduce conservative remedies within the Italian contractual framework, to properly deal with the COVID-19 emergency. Such remedies are specifically grounded in the duty of the parties to renegotiate in good faith, and, absent such an agreement, in the judicial authority to amend the contract.[56] In particular, this proposal has highlighted that existing remedies are inadequate to manage the topic of supervening events, with peculiar reference to lease contracts and/or supply contracts.[57]

Furthermore, the European Law Institute (ELI)[58] has outlined specific recommendations aimed at dealing with the COVID-19 outbreak. Among them, Principle 13(2) suggests that:

> Where, as a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance has become excessively difficult (hardship principle), including where the cost of performance has risen significantly, States should ensure that, in accordance with the principle of good faith, parties enter into renegotiations even if this has not been provided for in a contract or in existing legislation.[59]

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55. For further information, *see* the official website of *Civilisti Italiani*, available at: https://perma.cc/FJ7S-M8GP.

56. The proposal, titled *Una riflessione ed una proposta per la migliore tutela dei soggetti pregiudicati dagli effetti della pandemia* [A reflection and proposal for the better protection of those affected by the effects of the pandemic] (2020), is accessible online at https://perma.cc/8RVB-QUMZ. In particular, according to the *Civilisti Italiani* organization, the duty to renegotiate in good faith and the related judicial power to amend the contract absent a new agreement between the parties should be provided for by a new article, to be added to the IT. CIV. CODE. Namely, art. 1468-bis should fill the void, as already set forth in the Draft Law for the Reform of the Civil Code: art. 1, letter i), Disegno di legge Mar. 19, 2019, n.1151 (available at: https://perma.cc/GZ84-7565). Pages 7-8 of the Proposal are especially relevant.

57. Civilisti Italiani*, supra* note 56, at 5-6.

58. The European Law Institute (ELI) is an independent non-profit organization established to provide practical guidance in relation to European legal development. The organization's official website offers valuable information, available at: https://perma.cc/5HAB-YKZ3.

59. European Law Institute, *ELI Principles for the COVID-19 Crisis* (April 27, 2020), available at: https://perma.cc/K7LJ-N38F. The footnotes 57-70 and the corresponding text reproduce in brief, sometimes verbatim, some remarks expressed more in detail in Laura Maria Franciosi, *The Effects of Covid-19 on*

The current general favor towards the renegotiation of contractual terms is affirmed, on one side, by the rules developed to provide for international business contracts and, on the other, by the recent legislative reforms that occurred, for example, in France and in Germany.

The 1980 Vienna Convention for the International Sale of Goods ("CISG") purposely neither adopts the terminology of any national legal doctrines nor specifically refers to *force majeure* and/or hardship.[60] Instead, it rather opts in favor of a functional approach: Article 79, which is included within Section IV dealing with "Exemptions," provides a description of circumstances whereby the non-performing party is exempted from liability. The text of the provision is based on the concept of "impediment," which is required to be beyond the control of the non-performing party. The relevant burden of proof is then charged upon that party.[61]

Under the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"), *force majeure* and hardship are provided for separately.[62] In particular, hardship is dealt with in Chapter 6, Section 2, which encompasses three articles—Articles 6.2.1–6.2.3. Article 6.2.1. stresses the importance of the *pacta sunt servanda* maxim, and the exceptional nature of a hardship. On the contrary, pursuant to Official Comment 2 of the article, supervening

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*International Contracts: A Comparative Overview*, 51 VICTORIA U. WELLINGTON L. REV. 413 (2020).

60. *See* Ingeborg Schwenzer, *Article 79*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1130 (Schlechtriem & Schwenzer eds., 4th ed., Oxford U. Press 2016).

61. *See* Peter Schlechtriem & Petra Butler, UN LAW ON INTERNATIONAL SALES 288 (Springer Berlin 2009). *See also* Marcel Fontaine, *The Evolution of the Rules on Hardship*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS: DEALING WITH UNFORESEEN EVENTS IN A CHANGING WORLD 17 (Fabio Bortolotti & Dorothy Ufot eds., Wolters Kluwer 2018) (stressing that "the term *impediment* has been chosen by drafters to replace the wider term *circumstances* which was used in the earlier Hague Convention, in the deliberate intent to express the condition for exemption a more restrictive way," and that, in the opinion of some commentators, "the newly chosen term remained imprecise enough to apply not only to force majeure, but also to hardship").

62. UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2016*, available at: https://perma.cc/874N-P3LH.

circumstances—in order to allow for the application of hardship—must lead to a fundamental alteration of the equilibrium of the contract in order to give rise to an exceptional situation. On the other hand, the UNIDROIT Principles provide for cases amounting to *force majeure* in Article 7.1.7, under the chapter devoted to non-performance. However, since the distinction between hardship and *force majeure* is not always easy to make sense of, the UNIDROIT Principles adopt a functional approach, and highlight in an Official Comment that:

> . . . under the Principles there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.[63]

Consequently, it will be up to the non-performing party to invoke either *force majeure* or hardship in light of the pursued remedy. Generally, should a force majeure event occur, the contract is terminated, or its effects are suspended in case of temporary impossibility to perform.[64] On the contrary, in case of hardship, the UNIDROIT

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63. UNIDROIT Principles, art. 6.2.2, Official Comment 6 and art. 7.1.7, Official Comment 3. Regarding the difficulty of distinguishing hardship from force majeure, *see* Ugo Draetta, *Hardship and Force Majeure Clauses*, 347 INT'L BUS. L. J. (2002).

64. UNIDROIT Principles, art. 7.1.7:

> (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this Article prevents a party from exercising a right to

Principles provide for three different remedies: 1) renegotiation by the parties of the contractual terms, which is not mandatory; 2) termination of the contract; 3) judicial adaptation of the contract. However, the latter does not restate the settled practices of the international business community but is rather the outcome of a specific choice made by the drafters of the UNIDROIT Principles.[65]

The ICC model clause on hardship—on the declared assumption that judicial intervention is highly controversial—purposely allows the parties to choose among three different alternatives:[66] (a) should the renegotiation fail, the party invoking the hardship is entitled to terminate the contract; (b) should the renegotiation fail, either party is entitled to request the judge or the arbitrator to adapt the contract or to terminate it; or (c) should the renegotiation fail, either party is entitled to request the judge or the arbitrator to declare the termination of the contract.

Article 1218 of the French Civil Code provides that *force majeure* justifies suspension or termination of a contract, even if the contract does not contain any provision in that respect. Three conditions must be met for an event to qualify as *force majeure*: 1) the event must have been beyond the control of the debtor; 2) the event must not have been foreseeable by the parties at the time of the conclusion of the contract; and 3) the event must be unavoidable. If the impossibility to perform the contract is temporary, performance of the obligation is only suspended, unless the resulting delay justifies

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terminate the contract or to withhold performance or request interest on money due.

65. *See* Fabio Bortolotti, IL CONTRATTO INTERNAZIONALE 285-286 (2nd ed., CEDAM 2017); *see also* ICC, *Final Award in Case 8873*, *in* 10(2) ICC INT'L CT. ARB. BULL. X 81 (1999), holding that the UNIDROIT Principles on hardship do not correspond, at least in their current state, to current business practice in international trade ["ne *correspondent pas, au moins à l'état actuel, à la pratique courante des affaires dans le commerce international*"].

66. International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses* (March 2020), available at: https://perma.cc/8K2C-8QQ9:

> Since one of the most disputed issues is whether it is appropriate to have the contract adapted by a third party (judge, arbitrator) in case the parties are unable to agree on a negotiated solution, the clause provides two options between which the parties must choose: adaptation or termination.

termination of the contract. If it is permanent, the contract is terminated by operation of law, and the parties are discharged from their obligations. In addition, under Article 1195 of the French Civil Code—titled *Imprévision*—a party to a contract entered into on or after October 1, 2016 may ask their counterparty to renegotiate the contract if a change of circumstances, unforeseeable at the time of the conclusion of the contract, renders performance excessively onerous and if that party did not agree to bear the risks of such a change of circumstances.[67] If the other party refuses, or if the negotiation fails, then the parties may either terminate the contract at a date and under conditions that they agree on, or they can ask a judge to adapt the contract to the new circumstances. If the parties do not reach an agreement within a reasonable period, then either party may ask a judge to revise the contract or to terminate it, at a date and under conditions determined by the judge. Pending the negotiation, however, the parties must keep on performing the contract.[68] French law thus shows a legislative inclination in favor of the renegotiation by the parties and judicial intervention, following the development led by model rules and principles for international contracts.[69]

Similarly, through a 2002 reform of the law of obligations, the German legal system formally recognizes the doctrine of

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67. Public law has recognised the doctrine of *imprévision* since a judgment of the French Council of State in 1916. The theory is nowadays codified in the Public Procurement Code, entered into force on 1 April 2019. Article L.6,3 of the Public Procurement Code provides that an agreement can be modified when an event "exterior to the parties, unpredictable and temporarily disrupting the balance of the contract" takes place. In this case, the other party is entitled to compensation. In exchange for this, the latter is required to keep executing the agreement and all the related obligations.

68. *See generally* Pascale Accaoui Lorfing, *Article 1195 of the French Civil Code on Revision for Hardship in Light of Comparative Law*, 2018 INT'L BUS. L. J. 449 (2018) (stressing the role of the parties' when searching a solution to the change of circumstances in light of the duty to renegotiate and arguing about the role of the judge in revising the contract).

69. *See* Tom Hick, *The Coronacrisis and Its Impact on Creditors: Frustration of Purpose*, *in* 3 EUR. REV. PRIV. L. 389 (2022) (expressing critical remarks about the French and Belgian legal systems due to their adoption of a "debtor centrist" approach, while the German, Dutch and English legal systems, seem to "allow for a doctrine that takes the materialization of the creditor risk, the frustration of purpose, into account").

"foundation of transaction," or *Lehre von der Geschäftsgrundlage*. Consequently, the *Bürgerliches Gesetzbuch*—German Civil Code or "BGB"—now deals specifically with the impossibility of performance under § 275 of the BGB on one hand, and with unforeseen circumstances affecting the contractual equilibrium under § 313 of the BGB[70] on the other.[71]

## IV. THE LEGAL IMPLICATIONS OF VACCINATION, WITH PARTICULAR REFERENCE TO THE CONSENT OF INCAPACITATED PERSONS

Vaccination has been, absent a specific remedy, a fundamental tool to fight against COVID-19. As previously recalled, the Italian government has organized, since the beginning of 2021, a massive vaccination campaign that has raised several legal issues. Examples include the liability regime of healthcare professionals involved in the vaccination process, legal remedies available in case of side effects after the vaccine, consequences triggered by the worker's decision not to be vaccinated, and so on.

One of the most significant issues of such scenarios deals with the consent to vaccination, in particular with consent of the elderly in nursing homes or, in broader terms, of incapacitated persons.[72]

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70. The new provision requires a fundamental change in circumstances upon which a contract was based and that it is unreasonable to hold the party to its (unchanged) duty. *See generally* Tom Hick, *supra* note 69, at 389-418 and, in particular, 404-05.

71. For an analysis of the doctrine of the foundation of transaction and the German legal system before the 2002 reform, *see* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 218 (3rd ed., Clarendon Press 1998). For an analysis of the current role of the *Bürgerliches Gesetzbuch* (German Civil code, also known as BGB), *see* Philip Ridder & Marc-Philippe Weller, *Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law*, *in* 22 EUR. REV. PRIV. LAW 371 (2014). *See also* Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 659 (1992), arguing that Germany has experienced three waves of great importance regarding the question of contract adaptation: first, the phenomenon of inflation post World War I, second, the oil crisis in the seventies, and third, the collapse of the socialist system.

72. *See* the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) (1999), commonly known as "Oviedo Convention."

Article 1-quinquies of Law 29 January 2021 n. 6[73] has specifically provided for the consent to anti-COVID vaccination of incapacitated persons recovering in sheltered housing.[74] This provision works hand in hand with Law n. 219/2017 on medical informed consent in general,[75] according to which the person in question must be involved in the consent-acquisition process as far as is possible with regards to her mental and/or physical condition.[76]

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73. Legge Jan. 29, 2021, n.6, G.U. Jan. 30, 2021, n.24. For a comment of this law, *see* Francesco Spaccasassi, *Ospiti delle RSA e consenso alla vaccinazione anti Covid-19: un percorso ad ostacoli?*, QUESTIONE GIUSTIZIA (July 27 2021), https://perma.cc/D22C-Q2PR.

74. *See* Nunzia Cannovo et al., *Consenso alla vaccinazione anti Covid-19 di ospiti e personale delle RSA*, *in* RESPONSABILITÀ CIVILE E PREVIDENZA 1421 (2021).

75. *See* Michele Graziadei, *Il consenso informato e i suoi limiti*, *in* TRATTATO DI BIODIRITTO 191 (Giuffrè 2011).

76. Multiple countries have taken this requirement into account in their legal framework: the UK Mental Capacity Act 2005 (https://perma.cc/KC5Z-3HJ3), the French *Code de la santé publique* (https://perma.cc/K3S4-93AB), the German *Ratgeber für Patientenrechte* (https://perma.cc/DPN7-5RX5), and the Spanish *Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica* (https://perma.cc/6SEU-9XK4), are various examples. About the UK Mental Capacity Act 2005, *see* Piers M. Gooding, *International Comparison of Legal Frameworks for Supported and Substitute Decision Making*, 44 INT'L J. L. AND PSYCHIATRY 30 (2018), comparing the legal frameworks of Ontario, Canada; Victoria, Australia; England and Wales, United Kingdom (UK); and Northern Ireland, and arguing that:

> Ontario has developed a relatively comprehensive, progressive and influential legal framework over the past 30 years but there remain concerns about the standardisation of decision-making ability assessments and how the laws work together. In Australia, the Victorian Law Reform Commission (2012) has recommended that the six different types of substitute decision-making under the three laws in that jurisdiction, need to be simplified, and integrated into a spectrum that includes supported decision-making. In England and Wales, the Mental Capacity Act 2005 has a complex interface with mental health law; while in Northern Ireland it is proposed to introduce a new Mental Capacity (Health, Welfare and Finance) Bill that will provide a unified structure for all substitute decision-making.

About the French legal framework, *see* Gilles Raoul-Cormeil & Laurence Gatti, *Covid-19: le consentement à l'acte vaccinal des majeurs vulnérables ou l'éprouvante réception du régime des décisions de santé des majeurs protégés*, *in* RGDM 121 (2021); Olivier Drunat et al., *Le consentement à l'épreuve de la vaccination contre la Covid*, ESPACE ÉTHIQUE (Dec. 18 2020), available at: https://perma.cc/6BL7-CVG4; Gilles Raoul-Cormeil, *Le régime des décisions médicales concernant les personnes majeures protégées*, JCP G 2020, act. 331 (LexisNexis 2020). About the German legal framework, *see* Benedict Buchner &

The prerequisite for the application of Article 1-quinquies is recovery in a sheltered house, to be interpreted broadly—nursing home, residential care home, long-term care facilities, etc. The norm distinguishes between incapables subject to a legal form of tutorship, guardianship or other forms of legal assistance or representation, on one side, and natural incapable persons, on the other. In the first case, the consent to vaccination shall be expressed through the tutor, the guardian, or the other representative in compliance with the will—presumed or pre-recorded—of the ward. In the second case, absent a tutor, guardian, trustee for medical treatment[77] or other representative, the consent to vaccination shall be expressed by the director of the nursing house, by the chief medical officer of the ASL—the public entity in charge of the control of hospitals and other healthcare institutions—or by a delegate of the latter, with the involvement of the incapacitated person in question as well. This provision is to be applied even if the tutor, guardian, or trustee for medical treatment is unreachable for 48 hours, for example, for hospitalization purposes.

Article 1-quinquies raises an issue in the event of a conflict between the will of the representative and that of the ward on the question of vaccination, since it fails to provide guidelines to handle such

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Merle Freie, *Informed Consent in German Medical Law: Finding the right path between patient autonomy and information overload*, *in* PROC. YOUNG US. FOR FUTURE EUR. (YUFE) L. CONF. 2021 (2022); Kevin De Sabbata, *Dementia, Treatment Decisions, and the UN Convention on the Rights of Persons with Disabilities. A New Framework for Old Problems*, 11 FRONTIERS PSYCHIATRY 1, 9 (2020) (describing European efforts to change professional standards when obtaining informed consent to encompass supported decision-making for persons with dementia so that medical professionals will not fear liability, and the issuance of guidelines by German medical associations on how to support people with dementia in making choices about health care). About the Spanish legal framework, *see* Federico De Montalvo, *La Competencia Constitucional de Coordinación Sanitaria en Tiempos de Pandemia: Análisis de la Naturaleza Y Eficacia de la Estrategia Nacional de Vacunación Frente a la Covid-19*, *in* REVISTA DE DERECHO POLÍTICO 43 (2021). For an interesting analysis of the US legal system taking into account other foreign experiences, *see* Morgan K. Whitlatch & Rebekah Diller, *Supported Decision-Making. Potential and Challenges for Older Persons*, 72 SYRACUSE L. REV. 165 (2022).

77. Legge Dec. 22, 2017, n.219, G.U. Jan. 16, 2018, n.12, art. 4.

a scenario. Should this conflict occur, it will be fundamental to refer the matter to the judge supervising guardianship cases.[78]

A further issue deals with the consultation of a spouse, a partner to a civil union, a *more uxorio* cohabitant or, absent these figures, of a relative within the third degree. Their opinion is useful in order to ascertain the will of the ward about vaccination. However, should the prevailing categories of spouse and similar figures fail, the law does not point out who—among relatives of the same degree—shall be prioritized. It has been highlighted that this gap risks burdening the guardian and/or the other representatives with excessive discretional power. According to the scholars' majority opinion, in this event, the representative shall refer the matter to the judge as well.[79]

## V. CONCLUSION

COVID-19 has dramatically hit Italy, urging the adoption of measures aimed at limiting its dissemination as well as dealing with the myriad of legal concerns connected to both the pandemic and lockdown provisions. The legislative power has undertaken several initiatives, but the unprecedented emergency and the piecemeal nature of such interventions did not allow for a consistent and systematic response. Accordingly, the judicial power has been called to deal with such extraordinary scenario, with the contribution of the Italian doctrine. Both the field of commercial lease contracts and that of informed consent of incapacitated persons to the anti-COVID-19 vaccination, though extremely different, are paradigmatic expressions of such phenomenon.

78. The Tribunal of Milan has outlined guidelines based on a case-by-case approach, https://perma.cc/M4N4-496J.

79. *See* Paola Frati, *Risvolti etici e medico-legali nelle vaccinazioni anti Covid-19 nei pazienti delle RSA*, *in* RESPONSABILITÀ CIVILE E PREVIDENZA 590 (2021); Angelo Venchiarutti, *Una disciplina speciale per la manifestazione del consenso dei soggetti incapaci al trattamento sanitario del vaccino anti Covid-19*, *in* LE NUOVE LEGGI CIVILI COMMENTATE 76 (2022).

# THE 2020 REVISION OF THE PUERTO RICAN CIVIL CODE: A BRIEF EXPLANATION OF MAJOR CHANGES

Luis Muñiz Argüelles*



ABSTRACT

*Puerto Rico is with Louisiana one of the two United States jurisdictions having kept the civil law tradition as the bedrock of its private law. One of the last Spanish colonies, Puerto Rico became a US Territory in 1899. The Spanish Civil Code was replaced by a Puerto Rican Civil Code in 1930. A revision process spanned over a period of 23 years, ending with the adoption of a new Civil Code in 2020. After a presentation of the revision process, this report presents and discusses the changes and innovations in family law, property, contractual obligations, torts, and successions, also discussing the transitory provisions. It focuses on changes. The report also shows that in order not to weaken the US inspired commercial*

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*legislation, Spanish-speaking Puerto Rico resisted a contemporary trend of merging the Commercial Code into the Civil Code.*

Keywords: Puerto Rico, Civil Code, Code Revision, Codification, Private Law, Civil Law, Commercial Law

## I. INTRODUCTION

Some 23 years after formally starting its Civil Code revision, Puerto Rico adopted a new code on June 1st, 2020. The pages which follow will attempt to explain what changes the Civil Code of 2020 brought about. Some changes were significant, some were minor, and others were cosmetic. A general assessment would probably conclude that the new code generally brought welcome but timid changes to the existing law, which might reflect the fact that Puerto Rico is a relatively conservative society.

The goal of this report is to explain—not to justify, applaud or condemn—the revision. Much of what at first was thought would be revised remains unchanged and will not be modified, at least soon. Legal revisions, be they of major codes and constitutions, or of minor municipal ordinances, rarely achieve the goals that were initially stated. This is especially the case after public debate. The initial proposals proved to be ill-advised, too hard to achieve or out of sync with current societal values. Firstly, there will be a summary of the revision and drafting process, secondly, there will be a discussion of some of the main innovations in the code, and finally, the report will address some of the ongoing efforts to revise the new code, initiated just a few months after its adoption.

Some confusion exists as to Puerto Rico itself, which should be explained. Often, people are confused as to its political status, and its place within US and Latin-American culture. Puerto Rico was discovered by Spain in 1493 in Christopher Columbus' second voyage to what eventually became known as the Americas. Though it is important to recognize that the island was not uninhabited at the time

the Spanish colonizers had arrived, the native Taino who lived there have essentially been wiped out. In modern times, the main groups of people that live on the islands are descendants from Spain and Western Africa, a reminder of Puerto Rico, and the Spanish Empire's involvement in the Atlantic Slave Trade. Puerto Rico remained one of Spain's last colonies in the Americas throughout the 19th century. Despite most other Latin-American countries gaining their independence from Spain earlier on, Puerto Rico and Cuba remained as the last remnants of what used to be one of the largest colonial empires in history.

Spain was late to the Civil Code adoption race. France, Louisiana, and most of Latin-America and Europe, had already adopted a Civil Code for their respective nations in the early and mid-19th century. It was not until 1889 that Spain adopted its very first Civil Code, a code that was also meant to apply to their colonies. This code became the framework for what Puerto Rico would use as its main source of law for when it developed its own Civil Code later on. A decade later, Puerto Rico, Cuba, and the Philippines, as well as some other Pacific territories, were taken over by the United States as part of the Spanish-American War of 1898 or of events closely linked. In the Treaty of Paris of 1899, Cuba became a US Protectorate, and Puerto Rico and the Philippines became US territories. Though Cuba and the Philippines gained full independence from the US later in the 20th century, Puerto Rico remains the sole, predominately Spanish-speaking, jurisdiction in the United States.[1]

With that language distinction, there is also a cultural distinction, as Puerto Ricans are inherently different from the rest of the American, Anglo-Saxon culture. When the time came to organize the local government and decide on what would become of the territory, many legal challenges arose. Firstly, the Spanish Civil Code, which at the time had been in force for a little over a decade, was

1. Olivier Moréteau & Luis Muñiz Argüelles, *Multicultural Populations and Mixed Legal Systems in the United States: Louisiana and Puerto Rico*, 70 (Supp. 1) AM. J. COMP. L. 1 (2022).

left as the main source of law in the island. This code was modified to account for differences in American and Spanish culture, as well as to ensure there were no constitutional conflicts with the US. The first version of this revision process became known as the Puerto Rican Civil Code of 1902.[2]

This adaptation of the Civil Code, as well as a series of Supreme Court decisions collectively known as the "Insular Cases" (*Casos insulares*),[3] concluded that Puerto Rico was to be an unincorporated territory. That is, a territory that—unlike all other territories acquired in the US western expansion—did not necessarily need to become a state in the nation. This decision is still constantly debated in Puerto Rican society. The goal of the US mainland at the time was to establish and strengthen political and military control. This is why the decision to develop a mixed legal system was made. In essence, the legal system became predominately civil law-derived in its private law aspect, and common law-derived in its public, as well as its commercial law aspect.

The Civil Code of 1902 was revised and updated in what became the Puerto Rican Civil Code of 1930. Though not much was changed from the previous edition, the code was the primary source of private law in Puerto Rico until the new, 2020 edition was adopted. The 2020 Civil Code revision did not bring about drastic changes, some of the code articles can be traced all the way back to the Spanish

2. For a more detailed explanation of Puerto Rican legal history, *see* VERNON PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (2d ed., Cambridge U. Press, Cambridge 2012). The 1889 Code was slightly modified in 1902 to reflect the new political reality (nationality articles were repealed, as they were now ruled by Congressional statutes, and divorce, decreed by a US military order, was formally introduced). Further changes were made in the 1930 code revision, but most legislative changes were made to commercial statutes, many of them copied from US unform statutes which in the mainland led to the adoption of the first version of the Uniform Commercial Code (UCC) in 1952.

3. Downes v. Bidwell*,* 182 U.S. 244 (1901), Balzac v. Porto Rico*,* 258 U.S. 298 (1922); De Lima v. Bidwell*,* 182 U.S. 1 (1901), etc. There are about a dozen Insular cases; these are some of the most relevant to the topic.

Civil Code of 1889 as verbatim copies of it. This has led some to question the purpose of the revision.

Often doubts exist as to the meaning of some amendments. Some say the goal was merely to use modern Spanish language; others that the goal was far more reaching. Normally, one would go to the legislative history of the bill, and to prior laws that served as model for the specific change. Although this is certainly the case with the 2020 code, the explanations one often finds—especially in the House Civil Justice Commission Report (*Reporte de la Comisión Jurídica Civil de la Cámara*), hereafter, the House Commission Report—are very ambiguous. At times, one finds reference to scholarly journals and treatises that support conflicting ideas, and at other times one finds general comments that shed little light on the meaning of the new articles. Although discussion in the House Commission were often deep and lively, little of that is reflected in the report and one often finds no guidance as to how the courts should ascertain the legislative intent.

It is perhaps telling that the House Commission Report, which was supposed to guide the elected representatives and senators as to why a certain rule was proposed, was filed seven months after—not before—the final House and Senate votes were issued. This was two days before the end of the calendar year, and four days before newly elected senators and representatives were to swear office. Obviously, given that the legislators did not even have access to it, the House Commission Report was not a guide for elected officials on why they should vote for or against certain rules. It was issued merely to comply with protocol rules. That report does give some guidance, but certainly not enough, and the legislative intent will often be hard to ascertain.

## II. THE HISTORY OF THE REVISION AND DRAFTING PROCESS

Formal revision efforts started in August 1997, with the approval of Law No. 1997-85. This law created the Joint Permanent Commission for the Revision and Reform of the Puerto Rican Civil Code (*Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico*),[4] hereafter 1997 Commission. It was obvious from the start that a full code revision would not be possible in the less than three years from the statute's adoption to the end of the legislative session, hence the "permanent" nature of the commission, which meant it would continue in its investigative role after the 2000 legislative year ended. Since it was a joint commission, it was cochaired by two elected officials, the head of the House Civil Matters Judiciary Commission and the chairman of the Senate Judiciary Commission.

Inspired by suggestions from French professor André Tunc and others, the plan was first to revise, in other words, to take a new look at the existing code and related rules to determine which should be kept, and which required revision or substitution.[5] Obviously, some things warranted change, and both major and minor statutory and judicial reforms had already taken place in the more than one hundred years since the 1889 Spanish Civil Code was made applicable to Puerto Rico, Cuba, and the Philippines. For example, in 1963, the Puerto Rican Supreme Court held in the *Ocasio v. Díaz*[6] case that filiation rules granting children born in wedlock more rights in their parent's estates were impermissibly discriminatory and thus

4. Very few of the documents examined in the revision process are in languages other than Spanish. The code itself has not been formally translated.

5. In GENEVIÈVE VINEY, LE DÉCLIN DE LA RESPONSABILITÉ INDIVIDUELLE p. ii. (L.G.D.J. 1965), Professor Jean Louis Baudouin, who was Vice President of the Quebec Civil Code Revision Office, emphasized that often, much of the previous law is retained, even if the exact language changes. *See* Jean-Louis Baudouin, *Quelques perspectives historiques et politiques sur le processus de codification*, *in* CONFÉRENCES SUR LE NOUVEAU CODE CIVIL DU QUÉBEC 17-18 (Yvon Blais, 1992). *See also* GERARD CORNU, LA LETTRE DU CODE A L'ÉPREUVE DU TEMPS, MÉLANGES OFFERTS À RENÉ SAVATIER 157-181 (Dalloz, 1965).

6. Ocasio v. Díaz, 88 D.P.R. 676, 727 (1963).

nullified a number of code articles adopted during the latter part of the Spanish colonial rule. In the 1970s, statutory changes granted women equal administrative status in the marital estate. Court rulings, some isolated statutes and administrative regulations had also modernized much of family law, consumer law and contract law doctrines regarding no fault mutual consent divorce, unconscionability, changed contractual conditions like the doctrine of *rebus sic stantibus*, and other rules. Although the formal language remained unchanged, the law was more attune with general theories adopted elsewhere than what would at first appear. In the early part of the 21st century, new adoption and child custody statutes were adopted, and spouses were allowed to change the matrimonial regimes under which they were originally married. Thus, there was some consensus of what should be modified. However, that consensus did not cover certain areas, such as secured transactions and government contracts.

The 1997 Commission adopted guidelines regarding what was to be examined, and what procedures were to be implemented for the revision effort. The procedural model was patterned after the Quebec Civil Code Revision Office (*Office de Révision du Code Civil*)[7] and the guidelines that preceded the Dutch revision efforts.[8] Unfortunately, the announced procedure was often ignored, which led many of the originally identified revision topics to be left aside. In depth studies were, however, conducted and published, and are available through the Office of Legislative Services website

7. *See* FRATICELLI TORRES ET AL., EL CÓDIGO CIVIL DE 2020: PRIMERAS IMPRESIONES (Fideicomiso para la Escuela de Derecho, 2021). For a more detailed guideline, *see* Luis Muñiz Argüelles, *La Revisión y Reforma del Código Civil de Puerto Rico*, 59 REV. COL. ABOG. P.R. 149 (1998). The article is a slightly expanded version of the Commission resolution, and was preceded by an initial proposal, published some years earlier in Luis Muñiz Argüelles, *Propuesta para un mecanismo de revisión del Código Civil de Puerto Rico*, 54 REV. JUR. U.P.R. 159, 160 (1985).

8. Joseph Dainow, *Civil Code Revision in the Netherlands: The Fifty Questions*, 5 AM. J. COMP. L. 595 (1956).

(*Oficina de Servicios Legislativos*), hereafter OSL.[9] The University of Puerto Rico Law School and the OSL have digitalized and are in the process of publishing much of the documents that were damaged after extensive flooding due to the 2017 Irma and María hurricanes. These hurricanes hit the island within days of each other, and caused damages beyond what living Puerto Ricans had ever witnessed.

After some time, legislative interest in the process waned and progress was seen as too slow and costly. Finally, funding for the 1997 Commission was cut and, although the Commission remained in the books, for all practical purposes, it and the civil code reform were all but dead. It was not until 2016 when, on the last day to file new bills, Senate Judiciary Commission Chairman Miguel Pereira filed Senate Bill 1710. The new bill was based partly on suggestions made by various members of the 1997 Commission. Because of this, the effort to revise the code took on a new life. Contrary to what had happened earlier, even though academic and public input was limited, Pereira held public hearings regarding the revision efforts. For the first time, a significant number of academics expressed their views over the proposals. Although the bill was never brought to a floor vote in either the Senate or the House, it did become the blueprint for the House Civil Law Judiciary Commission to work on until 2020, when Bill no. 1654 became Law 55-2020, the new Civil Code.

Initial goals were spelled out in a resolution adopted in 1998. Contrary to what many have stated was the political unification and national identity goals of the early and mid-19th century codifications, the stated aim of the late 20th century codifiers was more of providing a coherent and comprehensive tool of social and economic organization. Overall, the goal was to reach a codification that would encompass scattered statutes and court mandated rules

9. Oficina de Servicios Legislativos, Sistema Único de Trámite Legislativo (SUTRA), available at https://perma.cc/62HW-9TPN. Bills mentioned later in this report— such as the Senate Bill No. 1710 of the 2013-2016 legislative term and the House Bill 1654 of the 2017-2020 legislative term—can be downloaded from this very user-friendly website with its own tutorial.

into a relatively coherent group of legal mandates accessible in a simple to use statute.

As it turned out, nationalistic politics did play an important role in the process, although perhaps subconsciously. In analyzing what went on, University of Puerto Rico Law School professor José Julián Álvarez has said that the fact that some of the initial late-20th century Western civil code revisions have taken place in Quebec, Catalonia and Puerto Rico, reflect the aim of these jurisdictions to reassert their cultural uniqueness *vis à vis* another country: English-speaking Canada, the United States, and Spain, countries that sometime earlier had conquered them. This is made explicit in the very first article of the 2020 Puerto Rican Civil Code, which states that the new code will be interpreted ". . . pursuant to the techniques and methodology of the civil law, so as to protect its character,"[10] a clearly nationalistic phrase with little legal significance as legal methodology and techniques are part of a society's culture and not learned or dictated by any legislative body.

The revision process was to begin with an examination of existing law, as modified by special statutes and case law, and an evaluation of what needed to be modified. It also evaluated the extent of the proposed changes, and whether they were merely grammatical, or substantive. Following this, when substantive changes were to be carried out, the new proposals were to be drafted to avoid contradictions and lacunae and prevent conflicts with federal or international

10. The new code has not been formally translated; all translations are the author's. We personally believe that the inclusion of this article, as well as article 2—which states cases solved by the Supreme Court—will merely *complement* the other legal sources, is more a recognition of the fear Puerto Ricans have of being assimilated into the US legal world than a legal rule as such. In the first place, legal techniques and methodologies are part of a cultural tradition and not susceptible of being enforced as legal norms. Secondly, the fact that publishers throughout the world, in both common law and civil law countries, make immense amounts of money printing or publishing court decisions is more than needed proof that case law is also a source of law that all lawyers use. There is little doubt an attorney would rather read a first-rate novel or poetry book than a court case, were it not for the fact the latter will help him or her win a case and the first will provide the reader with a necessary, but not economic advantage.

statutes and treaties. During the 20th century, Puerto Rico adopted new statutes regarding adoption, condominium rights, consumer protection, exempt property, land reforms, labor, and other statutes often not adequately correspondent to code articles. Property, secured transactions, and intellectual property were registered in a wide array of government offices, so legal needs were often met on an *ad hoc* basis. The goal was to consult with many players in various committees, chaired by university professors, as was done in Quebec under the guidance of Paul André Crépeau. The purpose was to achieve consensus following an inclusive discussion process, while keeping in mind that many problems would later again be fought out in the legislature.

Unfortunately, for a variety of reasons, this was not done. Each committee chairman personally gathered the information he or she felt was necessary, with little interaction amongst them or with actors in the greater society. As perhaps should have been expected, some of those outside the process felt threatened and prepared to combat what they feared would be proposed changes. At one moment, for instance, the Catholic Church was actively preparing its opposition to what it anticipated could be proposed family law amendments. This happened through at least five different pressure groups, ranging from the Episcopal Conference where all island bishops belong to, to informal groups which were in alliance with fundamentalist protest groups with which they were normally at odds. An attempt to get judges to cooperate with the revision effort failed when the 1997 Commission chairwoman—instead of requesting informal meetings—chose to formally summon the Chief Justice of the Supreme Court. The Chief Justice was a former legal counsel to the previous governing party, later in opposition. She summoned him to a public hearing headed by the chairmen of the joint House and Senate commission, and the Chief Justice feared he would be questioned over the need for granting the Judicial Branch more funds, as he had requested. The Chief Justice did not comply with the summons and issued instructions to all judges that they must first

seek his permission prior to sharing their suggestions with the Joint Civil Code Revision Commission, which essentially closed the door to the flow of information.

Yet many excellent studies were made, that are available through the OSL website, with so much of the groundwork laid out for latter commissions to work on, particularly with regards to family and successions law. The Puerto Rican Academy of Law and Jurisprudence (*Academia Puertorriqueña de Legislación y Jurisprudencia*) also cooperated in suggesting its draft revision on conflict of laws be made part of the new code. These three areas of law—family, successions, and conflict of laws—are the areas where one finds most changes. Obligations, property law and torts were revised and, although some important changes were made, these changes are generally less dramatic than those previously mentioned. Very little was done regarding integrating procedural, evidentiary, commercial statutes, or government contract rules into the new code.

Early on, a decision was taken to adopt what is known as a *modern* code structure. This meant steering away from the French Civil Code structure and adopting a German-type, more theoretical model. There was some opposition from those who felt the existing code—essentially the French-inspired 1889 Spanish Civil Code—had proven useful and thus, that adoption of a revised code would be easier. To a large extent, the advocates of the more *modern* structure won, and articles dealing with persons (both natural and juridical), domicile, capacity, emancipation, tutorship, absence, presumption of death, animal rights (a new category distinct from things in general[11]), obligations and contract formation, validity, and transmission were placed in Book 1. Prescription and preemption,

11. The term "animal rights" is used for lack of a better term but is not technically correct, as articles 232 to 235 and 1157 not only do not regulate all aspects of the law as it pertains to animals, but also only state that those domesticated or domesticable animals not used for commercial purposes may not be seized in contract or family cases and should be protected by the courts in ways which recall child custody rules.

however, were placed in Book 4, the book that deals with obligations, despite the fact that time affects all legal relationships: contractual, property, or family in nature.

An initial decision to incorporate Commercial Code articles and merchant law statutes into the code was rejected. This was mainly due to informally voiced opposition from business lawyers, who warned that any attempt to vary existing rules would be seen as an effort to repeal the adoption of the US Uniform Commercial Code articles that were already adopted.[12] The reasoning for these decisions will be more adequately elaborated on later.

Conflict of laws provisions were also left as part of the *Preliminary Title.* These do not deal with problems of jurisdiction, *forum non conveniens,* recognition of foreign judgements, international procedural cooperation in matters—such as provisional remedies—or serving of process. This reflects the pull of the Spanish Civil Code, which had four articles on choice of law in its 1889 version. Of these, three were retained after the 1902 and 1930 code revisions in Puerto Rico. There was a suggestion to adopt a comprehensive statute on Private International Law, however it was not adopted by the Legislature. Although, the 1997 Commission had favored the idea that one of the code's books was made to deal with all aspects of conflicts, as was done in the new Quebec Civil Code. Rules on the recognition of foreign judgements and on *apostilles* are found in Rule 56 of the Puerto Rico Rules of Civil Procedure. These are supported by US ratified treaties, case law, and US constitutional and federal jurisdiction rules (both US and local). They help determine if the court has jurisdiction on a certain case.

The conflict of laws rules—articles 30 to 66—focus on the applicable law to a given case. The articles were drafted with recommendations from professors Arthur von Mehren and Symeon Symeonides, who worked on a revision of the old Spanish Code and

12. Puerto Rico has adopted all UCC articles except articles 2 and 2-A, although some have not been revised as suggested by the National Conference of Commissioners on Uniform State Laws.

on some special statutes adopted during the 20th century.[13] Major changes to their proposal reflect a reluctance to delegate to judges the task of determining the applicable law. The new code adopts a more Continental European methodology of having the legislature establish which will be the applicable law, unless that law is so irrelevant and unjust that an escape clause—such as article 66 of the new code—may be invoked. Overall, the new rules favor the validity of marriage, contracts and wills. They are in favor of children receiving full filiation rights, and promote the protection of secured creditors, as well as freedom of contract. Regarding civil liability or torts, the code adopts the US choice of law rules derived from the 1963 *Babcock v. Jackson*[14] decision. The doctrine of *Renvoi* is eliminated, and prescription rules are those of the jurisdiction whose laws are deemed to be binding on the rest of the case: consumers, employees, and tort victims are generally favored.

Except for the conflicts of law provisions, the initial code articles in the *Preliminary Title* change little regarding the prior law, even though it incorporates some special statutes dealing with how time is measured, the legal value of case law, and the like. One major and very welcomed change, was the adoption of article 8, the *vacatio legis* article, which states that unless stated otherwise, no statute will come into effect until after 30 days of publication.[15]

The *Preliminary Title* is followed by six books: (1) Juridical Relationships: Of Persons, Animal Rights, Of Things, and General Contract Law (juridical facts, juridical acts, and judicial agreements or transactions); (2) Family Law; (3) Property and Real Rights; (4) Obligations; (5) Contracts, Special Contracts, and other Sources of Obligations; and (6) Successions Law. Transitional Articles and

13. A new effort is being made by the Academy of Legislation and Jurisprudence (*Academia de Legislación y Jurisprudencia*) to amend the code and reinstate the judge-controlled statutes rather than rely more on legislative guidance. Its initial report was published in mid-2023.

14. Babcock v. Jackson, 91 N.E.2d 279, 12 N.Y.2d 473 (N.Y. 1963).

15. The code itself was effective 180 days after its publication, a time span many felt was too short given its complexity and the fact few continuing legal education courses could be offered during a time of global pandemic.

Provisions are included at the end, from articles 1806 to 1817. The internal structure of these books is very similar to that of other civil codes, although at times there is less detail than in recent versions of the Quebec or Louisiana codes. For reasons having to do with US Federalism, topics such as Maritime Law and Bankruptcy are left out of the code.

## III. Changes and Innovations in the Civil Code

### *A. Changes and Innovations in Family Law*

Most of the 2020 revisions dealt with family law, which had already been the object of reform in the 1970s when women were recognized equal rights with men in the administration of matrimonial property. The 2020 changes dealing with persons appear in Book 1, and others dealing with same sex marriages, divorce and matrimonial regimes appear in Book 2.

The code incorporates legislative reforms adopted during the 20th and early 21st century, as well as changes made by local and federal court decisions. These statutes—particularly those adopted by the Puerto Rican legislature regarding the adoption process, admittance of changes to matrimonial regimes after the marriage celebration, the power given to notaries to celebrate marriage and administer divorce—came about shortly before or soon after the revision process started. They belong to the revision process because debate as to their usefulness was part of the general revision effort. This is also true of other major changes to the law of succession, such as those increasing testamentary freedom as well as the share allocated to the surviving spouse.

Other changes do reflect a new vision of the family enhancing the traditional family support, called "the solidary family" *(familia solidaria).* These affect both the property held by spouses before marriage and the rights on the succession of the deceased, as explained below. They are the result of a conscious debate to modify

legal rules which might not have come about had a revision effort not been performed.

Although there was some debate as to whether the recognition of the rights of the unborn child might erode a pregnant woman's right to an abortion, article 70 of the new code specifically states that this is not the case.[16] The Civil Code grants these rights and it is generally felt that despite the Supreme Court's decision in *Dobbs v. Jackson Women's Health* Organization,[17] abortion in Puerto Rico is protected by article II §8 of the Puerto Rico Constitution.[18] This was reaffirmed in *People v. Duarte Mendoza,*[19] a case where the Puerto Rico Supreme Court interpreted the right to an abortion for purposes of "preserving the life and health of the pregnant person" to include both physical and mental health.

Theoretically, the debate is still open, and some feel that if the Puerto Rican Constitution is amended, abortion might be forbidden, but it is doubtful this will occur. One author, Carlos Sagardia Abreu, has stated that the decision is,

> a great setback in the historical role of the United States Supreme Court as a granter of individual liberties set out to protect all citizens in the course of their lives in the nation, and in the pursuit of happiness that the Constitution recognizes as crucial in the American social experiment.[20]

Article 74 lists the essential rights of persons, not limiting them to those spelled out in the new code, and accepting that through legislation or case law, other rights might be recognized.

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16. The article states that this recognition ". . . in no way reduce the constitutional rights of a woman to take decisions regarding her pregnancy." [. . . *no menoscaban en forma alguna los derechos constitucionales de la mujer gestante a tomar decisiones sobre su embarazo*].

17. Dobbs v. Jackson Women's Health Organization*,* 142 S.Ct. 2228 (2022).

18. P.R. CONST. art. II, § 8: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."

19. People v. Duarte Mendoza*,* 109 D.P.R. 596 (1980).

20. Carlos Sagardia Abreu, *Dobbs, Supremo asedio de la libertad individual,* MICROJURIS AL DIA (June 28, 2022), available at https://perma.cc/FK4Y-C5TG. The original quote is in Spanish, and the translation is provided by the editor.

Article 77 now allows organ donations and transplants, provided these are not profit based. A proposal in the 2012 Senate bill to allow a terminally ill patient to end his or her life, known as the "right to die with dignity" was rejected. A similar provision was rejected in the legislative joint commission. However, there is an effort to reconsider the matter as part of a new code revision started in 2021.

A proposal to authorize the medical director of a hospital or health institution to consent to treatment of an unconscious person if the patient's parents, spouse, or other legal guardian are unavailable, and the medical director fears the patient's life or health is in danger, was long debated but not approved. The right would have conveyed the obligation to try to locate the relative or guardian in the shortest possible time. This would have involved calling on the help of the police and other officials. It was believed it would save crucial time, for a judicial authorization would not be essential to provide such treatment.

Article 97 retains the legal age of majority at 21. This is in part because of the fear of losing federal funds for highway improvements, for example. Here too, there is an attempt to reexamine the rule, as part of the revision of the revised code.

Even when the legal age of majority is set at 21 (based on a Quebec Civil Code revision project), article 107 provides that some contracts entered into by minors over 18 can be considered legally binding. In those cases, the minor must be deemed sufficiently mature to enter into the contract and the contract cannot be one that normally requires consultation with a parent or guardian.

In practical terms, if the minor was given the means—money, credit cards, or the like—to enter into contracts such as a lease for student housing, the purchase of clothing, books, and other items, and the amounts paid are deemed to be reasonable, the contract will be upheld. Although article 97 keeps the age of majority at 21,[21] an

21. This means that, according to articles 380 and 381, marriages consented to by minors of even 18 years old without parental approval, and all marriages of persons under 18 years old, even with parental approval, are deemed null.

anomaly in today's world, and though parents retain the support obligations of children up to age 26, article 99 provides that support obligations may extend beyond that age if the child is undergoing uninterrupted and fruitful higher education.

The new rule is part of the code's view of the family as a mutual support venture which extends beyond formal dates or legal relationships. Thus, according to articles 399 and 653 et seq., spouses and former spouses may be held liable for some measure of support. This can even apply to former in-laws, for example, if these were dependent on the spouses' income, as typically occurs when they used to share common quarters. This obligation can be imposed even when the marriage has been terminated by divorce. This concept of "the solidary family," which stems from articles 476 et seq., has ramifications on a former spouse or a widow or widower's claim to possession of what were family living quarters after dissolution of marriage by death or divorce, called the right of *preferential attribution.*

Tutorship was also modified and articles 101, 104 and 107 allow for partial incapacity. This allows the incapable to express him or herself regarding decisions by the tutor. According to article 122, the courts will provide the degree to which such consent is necessary.

Closely related to this is the allowance of extended parental rights when a child reaches legal age but remains incapable. The measure, which appears in articles 109 and 622 et seq. avoids having to claim for official tutorship of an incapable minor when the incapacity extends beyond the 21st birthday.

Rules regarding absence—often thought unnecessary—were also revised. As natural catastrophes, such as hurricanes Irma and María, left several thousand dead, it revealed that some unaccounted persons simply disappeared. If these people may well be dead, there is a chance they simply left leaving no trace. Articles 182 et seq. also simplify and shorten the time span for declaring the absent person dead, and for allowing a divorce from this person.

The following is perhaps the most profound change in family law regard marriage and its dissolution: Article 376 allows for same-sex marriage, pursuant to US Supreme Court decisions.[22] Polygamy was never suggested and not even remotely considered. Some of these changes are the result of adapting US Supreme Court decisions to local law, while following an international trend that might also have triggered this evolution. In any case, resistance to same-sex marriages and the recognition of almost unrestricted abortion rights was consciously made because it was apparent that any opposition would probably be overruled by the courts.

Based on recent legislative changes, articles 392 and 473 also allow for notaries to both marry and divorce people, the latter subject to certain conditions in cases where there are minor, common children, or other incapables.[23] It is also possible, under article 91, for spouses not to share a common domicile. The two main obligations of mutual support and marital fidelity are maintained.

Legal prohibitions for marriage based on physical health reasons were abolished. However, articles 385 and 386 do mandate medical laboratory tests and would allow for annulment should one party keep essential information regarding the test results from the other. The other grounds for annulment are the lack of mental capacity of one of the spouses, or that they are genetically or legally related to each other or to their offspring within certain limits. The main intent is to forbid marriages between uncles and nieces and the like, or for cases where they have been convicted of killing their own, or the other spouse's partner. Marriage bonds with incapables or with

22. There was some early debate as to whether persons of the same sex would be allowed to marry, or if their agreement should be deemed a *civil union*, for example. US Supreme Court decision of Obergefell v. Hodges, 576 U.S. 644 (2015) sealed the debate and led to recognition of same sex marriages and civil unions entered in another jurisdiction. The new code article defines marriage as an institution entered into by two "natural persons" with no reference to sex or gender.

23. Laws No. 201-2016 and 52-2017. Puerto Rico has a Latin or European type notary, which in our case means that all notaries must have law degrees and have passed the general bar exam and a special notary exam.

those declared to be absent may be dissolved by divorce, with proper legal assistance for all parties, but not by annulment.

The new code abolishes all grounds for a fault-based divorce.[24] Article 425 allows only for joint petition to declare the marriage bond dissolved due to mutual consent or irrevocable rupture of the marriage liens. It also allows for one party to establish that the irrevocable rupture has occurred. In the latter case, the only controversy before the court would be if such rupture does or does not exist. While judges, notaries, and ordained ministers may marry, religious annulment—while not forbidden—has no legal consequences, as has been the case since the takeover of Puerto Rico in 1898.

Another rule established in article 455 states that after a spousal separation prior to divorce, debts incurred by one spouse are considered exclusive and not matrimonial community obligations. This, of course, presupposes that the spouses were married pursuant to the community property regime, as is the case where no marriage contract has been agreed to.

Article 488 retains a recent change[25] that allows spouses to modify their matrimonial regime or agreement even after the marriage has taken place.

A suggestion to automatically modify the alimony or support obligation pursuant to increases or reductions in the consumer price index—aimed at avoiding recurring court procedures to adjust these obligations as prices and salaries increase—was not incorporated into the new code. The variations would have been subject to court revision, if deemed unfair. Another suggestion to have courts mandate security on the support obligation to simplify collection was also not incorporated into the code.

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24. The prior law had some 12 grounds, most of them fault based.

25. With Law No. 62-2018, changes in the economic aspects of the marriage arrangement must be registered in a special registry if they are to have any legal effect on third parties.

Filiation rules adopted in a recent law were kept and are similar to those in force in the US, Europe, and Latin American countries.[26] In the wake of the *Ocasio v. Díaz* case, cited earlier, Puerto Rico has maintained a steadfast rule that children born out of wedlock have the same rights as those born in wedlock. This applies to children whose filiation is established through medical tests, traditional judicial methods, or adoption, regardless of their nationality or place of birth.

The new code also allows for name and gender changes to be recorded. However, some debate has brought to question whether the fact that the original certificate is not held permanently unavailable to anyone, violates constitutional rights of the affected party. Proposals to revise the statute are now being discussed in the Bar Association and the Legislature.

One of the goals of the new code was to create a uniform registry of both natural and legal persons.[27] Articles 216 and 222 require—as a matter of public policy—that all legal persons be registered in a special registry to be created in the State Department, or in a preestablished legal registry. The result of non-registration is that the entity would not have a legal personality or, to put it in another way, that the officials and shareholders would not benefit from limited liability and could not enter into contracts.

There is currently no such special registry and, while most entities could claim that they are registered in the State Department Corporations Registry or others, there seem to be significant lacunae. The State Department is currently working at creating such a

26. The basic adoption statute is Law No. 61-2018 and is complemented by Law No. 223-2011 on the protection of minors subject to custody.

27. The 1997 Commission guidelines called for a creating of an integrated registry to comprise all persons, natural or legal (including trusts, banks, financial institutions, insurance companies, cooperatives and other legal entities), all vital statistics, all property law claims, all secured transactions and all commercial registries. Such entities exist elsewhere—Uruguay being a case in point—and modern electronics make the registry viable. The suggestion was rejected, and the legal mandate was limited to creating a unified natural and legal person registry.

registry, also integrating all existing registries electronically or physically.

*B. Changes in Real Rights, Property Law, and Rights over Things*

There were few changes regarding things and real rights in property law. The code respected doctrines of an unlimited number of rights under the *numerus apertus* doctrine. Even when *emphyteusis* and other annuities running with the land (*censos reservativos* or *consignativos*) are no longer statutorily recognized, nothing prevents parties from establishing rules whereby rights over things may be valid against all, regardless of whether they were part of the contract that created them or not.

The old 1930 rules establishing that delivery (*tradición*) occurs if real rights implying possession are involved was also kept, in article 797.

Article 761 purports to expand rights to property through accession but adds little in practice. The article states that a builder in good faith may claim title even if he built exclusively on land belonging to a third party, and not only partially on this land and partially on his own, as before, but requires that the construction takes place after acquiring all legal permits, which in practice means that only isolated cases may qualify. Indeed, the Government Buildings Permit Office usually verifies thoroughly that the applicant holds a legal title or has been granted the right to build by the owner, who must generally endorse the construction proposals.

The provisions on usufruct (articles 877 et seq.) were slightly revised. A number of special usufructs rarely used over the past century (eg, mines, petroleum usufructs) or of little use nowadays (livestock and sugar cane field usufructs) have been eliminated. The obligation of inventory and surety payments (*fianzas*) is also eliminated unless required by the parties (article 920). It is expressly provided that parties may, by contract, create these rights, should they wish to, thus exercising their right to create real rights not spelled

out in the law. To the surprise of many, use and habitation rules were revised and are part of the legal claims that surviving spouses and divorced parties may invoke. These rules are ambiguous, and courts must fill the lacunae.

Although articles 991 et seq. somewhat spell out in greater detail some real property security rights, such as pledges and antichresis, no effort was made to modify or incorporate secured transaction rules copied from the UCC in Law No. 208-1995, which is specifically mentioned in article 1000.

Some special statutes are now in the code at least by reference. They include those dealing with moral rights (Law No. 55-2012) and condominium rights, now governed by statute 2020-129, adopted some weeks after the new Civil Code; timeshare, water and mining rules are also mentioned the code, at articles 871 et seq. which refer to special laws.

Although the annuities running with the land *(censos)* are expunged from the code, air or surface rights—as regulated by the Mortgage Law No. 210-2015—are kept, and if a condominium is built on land leased or subject to these surface rights, the landowner must forever renounce to all claims based on violation of the lease or surface rights contract, which in practice means that the land has been in effect sold to the condominium developer. This also closes the door on arrangements valid in other jurisdictions, such as Spain, France, Argentina, Quebec and the US such as those stemming from leases with the right to build or *baux à construction*. The fear, not shared by the author, was that consumers might be tricked into thinking they were acquiring perpetual property rights when only buying temporal rights.

Options to buy, rights of first refusal (*tanteos*) and redemption rights *(retractos)* are regulated in more detail than previously though with little change. The time allocated to exercise these rights remains very short, previously 7 to 30 days, now more generally 30 days, so that they are seldom used, as banks and financial institutions rarely have the time to evaluate loan requests in this time span.

An effort was made to prevent certain things from being seized, but it remains to be seen how the categories listed in article 239 are to be protected from judgement and other claims. The article states that things having environmental, historic, cultural, artistic, monumental, archeologic, ethnographic, documental or bibliographic value are not subject to private claims (*están fuera del tráfico jurídico*) and claims as to them will be determined by special laws that have not been passed yet.

The three most noteworthy changes are the following. Firstly, the shortening of acquisitive prescription (adverse possession). Possession of immovables must last 10 to 20 years instead of 10 to 30 years, depending on whether the possessor is in good faith (article 788) and possession of movables must last two to four years instead of three to six years (article 786).[28] Secondly, the requirements for the validation of some contractual or as they were called equitable predial servitudes—now called voluntary restrictions on property rights are changed—and thirdly, the solar and wind energy servitudes are now recognized.

Article 813 codifies earlier jurisprudence[29] in stating that for what was formerly called equitable servitudes to exist they must be reasonable, be part of a general land improvement scheme and be registered. However, it also adds that these servitudes must also be compatible with public policy regarding land use. This opens the door to having land registers deny registration, and thus also deny any value to the restrictions, should they feel public policy forbids them or, as some land planners have held, if they interfere with

28. 1916 Senate Bill 1710 proposed time spans on immovables to be shortened to 5 and 15 years. The 2020 statute, probably through an oversight, kept adverse possession of dividing walls, enclosures, or fences *(medianerías)*, article 861, and servitudes at 15 years, article 945. These articles will probably be amended to unify the acquisitive prescription time spans on all real rights over immovables. Paragraph (e) of article 1205, which states that prescription on real property clams runs out after 30 years is also probably an oversight, given that no real property rights affected by adverse possession may be claimed after the 20-year statutory span decreed by article 788.

29. *See* Colón v. San Patricio, 81 D.P.R. 242 (1959).

legitimate government land use plans. This means that developers would probably have to get prior endorsement from land use agencies for the restrictions to be registered. The legislative process says nothing as to the reasons for the new validation requirement.

Article 963 creates a new legal servitude which seeks to promote the installation of solar panels and windmills in substitution to fossil energy. If the owner has already installed either of these on his land, the neighbor must either refrain from interfering with the usefulness of the new devices or supply the affected party with the energy he has lost. As an alternative, he or she may allow the affected party to pay half of the transfer costs of his devices to the plot where the interference exists, which would normally be a new high-rise building where solar or windmill energy devices are being installed. Article 747 complements this article establishing that no one may be charged or taxed for using solar or wind energy which by nature exists on this land. The goal is to bar public power companies from charging a special surtax on those landowners for not using and therefore not paying for electricity they supply on the network.

Proposals to incorporate basic land use rules into the code were not considered. This in effect means that these laws and regulations retain all the force they had before, but conflicting rules might prevail. The same can be said of cooperative apartment schemes, governed by special laws that sometimes conflict with the general law on condominium or possession to be found in the code. The housing cooperative statutes, for example, allow for eviction of unruly tenants, something not contemplated by condominium or Civil Code rules.

### *C. Modifications in the Law of Obligations and Contracts*

The law of obligations is largely unchanged, except a few significant provisions making some clauses in contracts of adhesions presumptively null.

A change was made in the categorization of obligations. The jurisprudential recognition of a tripartite division of obligations was adopted, the code now distinguishing juridical facts (*hechos jurídicos*), juridical acts (*actos jurídicos*) and juridical transactions (*negocios jurídicos*). Juridical facts will have whatever legal effect the law assigns to them regardless of the parties' intent. Birth, death, perception of income, passage of time, for example, will imply that a party has gained or has lost legal personality, must pay income tax, will have attained legal age or whatever regardless of that party's willingness to be a taxpayer, a fully capable adult, or the like.

Juridical acts, such as negligent or intentional killing—while causing a death that will have legal consequences such as the opening of a succession—will also trigger the liability of the perpetrator according to the law. Intentional or negligent homicide, speeding on a highway, damage to property of a third party, justify the law to impose special obligations to pay fines, serve time in prison and repair the damage.

Juridical transactions have whatever effect the parties wished, within the limits or prohibitions imposed by the law. Thus, a sale will transfer ownership while a lease allows the use of property not owned by the user or occupant. A testator may intentionally transfer title to assets by drafting a will, as long as it does not adversely affect the reserved rights of legitimate heirs, as provided by law.

The new classification is more theoretical than practical and reflects the general theory of contracts. The change was made to acknowledge that wills, for example, will have whatever consequence the deceased wished for, provided they do not infringe on legitimate heir's rights.

As to general contract theory, concepts such as cause, object and consent are retained. No effort was made to reform these as happened recently in France, which did away with cause. Rules governing nullification of contract based on vices or lack of consent were retained.

The jurisprudence regarding *culpa in contrahendo* was codified in articles 1271 and 1272 and rules validating and regulating penal clauses were clarified, with little change, in articles 1257.

One significant change was the inclusion of article 282, which allows for the validation of contracts signed in blank, contrary to earlier jurisprudence. Unless there is proof by the signatory that the other party did not follow the instructions, these contracts will now be regarded as concluded based on a so-called *tacit mandate*, though this concept of tacit authority (*poder tácito*) is not defined in the Code.

Article 299 provides that a creditor winning a revocatory action of a contract for fraud to the creditors' rights (*acción pauliana*) is the primary beneficiary of property reverted to the debtor.

As stated, many changes were merely semantic. Novation, which under the 1889 Spanish Code implied either the extinction of a prior obligation and the birth of a new one or merely a change in the prior one, with no extinctive effects, will now, under article 1182 always convey the extinction of the prior obligation, unless it is established that the parties merely wished to modify it, in which case the word novation will not be used. This does not change the law—since just like before the parties may either merely modify or novate the prior obligation—but brings language clarification.

Several articles, starting with number 1528, spell out the conditions and effects of unilateral declarations of will (*declaraciones unilaterales de la voluntad*), but these will seldom, if ever, be used. They may only affect parties in cases involving offer and acceptance, commercial advertisements and reward offers, which are already regulated in some detail under special regulations or specific Code articles.

There was some debate as to whether there was an increase in creditor's rights of retention of movables or immovable. It is however agreed that the new code recognizes retention rights only where special statutes provide for it, such as in cases known as mechanic's liens, a guarantee of payment to builders, contractors, and

construction firms that build or repair structures. No change was made by the new code.

Major changes affect consumer protection, especially regarding things and rights not subject to seizure by creditors other than lenders (purchase money creditors). Article 1157 modernizes an archaic legislation passed in the 1930s exempting some debtor property from seizure. However, criticism remains regarding inadequate valuation of farm equipment and the total protection of the main home when recorded as homestead (*hogares seguros*) by the owner.

Earlier jurisprudence on unconscionability (*clausula rebus sic stantibus*) was formally adopted in articles 1258 and 1259. Initial unconscionability occurs when one party takes unlawful advantage of another party's needs, age or other conditions and contracts beyond twice or under half of the value received or given. Subsequent unconscionability or the possibility of contract revision for subsequent events requires an aggrieved party to file suit withing six months of that event taking place, a peremptive, not a prescriptive term. In both unconscionability cases, courts may either annul or modify the contract but must opt for modification if the defendant so requests.

Perhaps a more drastic change was the adoption of article 1249, which lists a series of clauses that are "especially susceptible of nullification" in adhesion contracts. The new article fairly targets clauses allowing the drafter of the contract to modify the contract unilaterally or to impose a contract written in a language unknown to the other party. The law specifically mentions Spanish and English, but US jurisprudence has stated that there is lack of consent if one of the parties does not know the language used in the written contract.

The main problem lies with an effort to annul clauses limiting or excluding liability, and to forbid arbitration clauses, although the word arbitration was replaced by a longer phrase addressing any clause "limiting or forbidding a party to sue under any legal procedure or reversing burden of proof."

The phrase "especially susceptible of nullification" (*especialmente anulables*) is problematic because it suggests a hard and fast rule against the use of these clauses and yet does not make them automatically null. Some of these clauses, such as those limiting or excluding liability (article 1249(d)), are deemed essential to mass market offers of consumer goods. The article will probably be interpreted in some of the first cases to reach the Supreme Court.

Efforts to include the formation and performance of special public or government contracts did not come to fruition. This is in part due to a debate as to whether these warranted a special statute or should be part of a civil code, as in the 19th century, the civil code did not apply to governmental entities. These special rules and regulations are nevertheless in force and available in the island's controller website.[30]

Some significant changes took place regarding liberative prescription and peremption *(caducidad)*, though less radical than many vied for. The terms are generally used to signal the impossibility of requesting compliance with obligations while the word *usucapión* is used to point out the loss to a third party of a right due to non-use.

Articles 1190 et seq. provide new clearer rules regarding prescription, peremption and suspension of times to file suit. The Spanish Civil Code of 1889 did not have any peremption rules, which were adopted by Spanish law after analysis of the 1896 German Code, and there was some confusion regarding peremptive terms. Prior to 2020 it was generally held that if the law fixed a term as part of a special statute or in a part of the code dealing with special situations—the contract articles allowing for annulment of contracts for vices of consent or for builder's responsibility in construction contracts—then these were deemed to be peremptive terms. Those fixed in the final part of the code were deemed to be prescriptive. As of

30. Oficina del Contralor, Estado Libre Asociado de Puerto Rico, available at https://perma.cc/6FC9-LJ7Y.

2020, for the term to be peremptive it must be so stated in the law, although there remains some doubt as to whether terms fixed on statutes prior to the new code are prescriptive or peremptive.

Articles 1196 and 1198 provide that prescription does not run unless parties may start legal action against each other. A very early 20th century case had ruled likewise in a case where the Catholic Church sued for payment where the cause of action had been barred under Spanish law because the debtor was a government agency, and suits between government agencies and the Church were barred under a treaty (*concordato*) between the Vatican and the Spanish Crown. It was held that the prescriptive period had not run when the suit was finally filed.

A major change was brought by article 1203 that lowered the prescriptive period from 15 to 4 years in the absence of a special provision. This means that actions for failure to perform a contractual obligation prescribe after 4 years. Unfortunately, the number of special provisions with different times remains quite high, despite calls to limit their number. For example, the 20-year period for prescription of hypothec-guaranteed obligations was kept because it was part of the Commercial Transaction Statute, Law No. 208-1995, copied from the UCC. Even if vested rights are to be protected, the time span could have been shortened in obligations incurred after entry into force of the new code, but fear of business opposition led to keep the law unchanged.

Given the application of US Bankruptcy Law rules and the impossibility of providing alternate rules in this area, privileges and liquidation rules inherited from the 1889 Spanish Civil Code were repealed. Business bankruptcy rules in the Commercial Code have not been invoked in over a century since the US takeover of the island in 1898.

Part of the reform effort dealt with updating rules on existing special contracts and adding four new contracts that, despite their commercial nature, were made part of the Civil Code for fear that if they were left out, no new special statute would adopt them.

At the start of the revision process, it was felt that an effort to integrate civil and commercial rules would take place. The special mercantile rules were in a large part the result of the special status granted to businessmen in Europe, and particularly in France, where commercial court judges are elected by delegates of merchants operating within the territorial jurisdiction of the court and not in the normal judicial selection process. Puerto Rico has no special commercial law courts. The Spanish Commercial Code, in force in Puerto Rico, has been depleted of many of its rules due to federal US statutes (on bankruptcy, maritime and aviation law, for example). Special laws have been copied from US model laws and thus abrogated other Commercial Code provisions regarding insurance, banking, secured transactions among others. Yet, Argentinians, Italians, Quebeckers, Americans and other have integrated civil and commercial legislation with no apparent problems.

The business community, however, feared that what they perceived as a decade long effort to have the UCC adopted in Puerto Rico would be lost should US rules be replaced by civil-law style rules, felt to be incompatible with common-law legislation. Although no analysis was conducted—it may have revealed that Louisiana enacted the sales provisions of the UCC inside its Civil Code, at the cost of some inconsistencies—the opposition of the business community was conveyed informally, but effectively. The 2016 Senate Civil Code Reform Bill No. 1710 discarded suggestions to remove four commercial contracts from the Civil Code, with no suggestion of integrating them into the somewhat weakened but still valid Commercial Code. The new bill introduced after the New Progressive Party victory in November 2016 reincorporated the special contract provisions but did not further any civil-commercial code integration and never seriously considered adopting the US compatible Organization of American States Model Secured Transaction statutes to replace almost unintelligible translations of the UCC Secured Transaction statutes. The four contracts were those of supply (*suministro*) (article 1297 et seq.), financial leases over immovable

(article 1351 et seq.), brokerage (article 1416 et seq.), and agency or mandate (*agencia*) (article 1421 et seq.).

Some minor changes were also made to existing special contracts. Here are a few examples. In the absence of agreement to the contrary, leases of immovables have a one-year term, and the sale of leased immovables no longer entailed the dissolution of leases (article 1348). Loan contracts are enforceable after agreements to lend are made and not only after the loaned thing or money is delivered to the other party and the like. Annuities running with the land were suppressed. Air or surface rights (*superficie*) and secured transaction agreements such as rules on pledges and antichresis and some hypothec rules have been moved in the book dealing with real property rights.

Compromises or settlements (*transacciones*) must all be in writing, which the legislative commission held would prevent anyone from alleging that agreement to end a suit be accord and satisfaction would no longer be possible, something not yet tested before the courts.

### *D. Changes and Innovations in Tort Law*

Tort rules were also somewhat modified, in large part to incorporate US inspired judge-made rules regarding product liability. The main change was the adoption of punitive damages, albeit timidly, at least in tort law or non-contractual liability cases. According to article 1538, when the wrong is a criminal offence, or an act made with intent or in complete disregard of a third party's life, safety or property (gross negligence), the court may increase the damages by an amount that may not exceed the cost of the damage caused. Proof of damage remains of course necessary. Puerto Rico has other, but isolated punitive-damages statutes, such as those dealing with antitrust claims (article 12.10 of Law No. 77 of June 25, 1964, 10 L.P.R.A. §268). The Supreme Court insisted, in interpreting the 1930 Civil Code, that the role of tort law is to compensate the victim,

not to punish the tortfeasor. The adoption of punitive damages is therefore a breakthrough, even if the victim cannot receive more than a double compensation.

Some tort articles were brought in line with jurisprudence, particularly regarding family immunity, to prevent lawsuits between spouses, parents and siblings or grandparents and grandchildren if not explicitly authorized by a special statute, provided there are healthy family relations between the parties. Article 1537 describes this relationship, in so far as grandparents and grandchildren are concerned, as tight and affectionate or loving (*estrecha y afectuosa*). Domestic violence statutes allow for such suits between family members. The same applies when the tort is also a criminal offense.

Articles 1541 to 1544 impose strict liability to all those involved in the distribution chain of defective products, product liability encompassing defects in manufacture, design and directions. Vicarious liability rules, codified in article 1540, make custodial parents, tutors and teachers responsible for damages caused by their children, pupils, or students, provided they do not establish that they exercised due care in their supervision. Employers, whether of the private or public sector, are responsible for harm caused by their employees and also independent contractors when the activity is unreasonably dangerous. The same rule applies to vehicle owners. This part of the law remains unchanged.

Owners of animals, trees, homes or building sites remain liable for damage attributable to them. Yet a new rule is making hospitals responsible for harm caused by those holding exclusive rights in health institutions or for those caused to patients who visit the health facility on their own, not referred by a doctor.[31] Suggestions to limit

31. The Spanish text of Article 1541, paragraph (g) states that these health institutions are liable:

> (1) por los daños que causan aquellas personas que operan franquicias exclusivas de servicios de salud en dichas instituciones; o
> (2) por los daños causados por las personas a quienes la institución encomienda atender a un paciente que accede directamente a la institución sin referido de un médico primario.

strict liability to amounts payable under liability insurance contracts were left out.

Another suggestion was to allow the reopening of damage claims within a limited time after the judgment, to obtain supplemental damages when the actual damage was not properly ascertained during the initial proceedings. This proposal was not even considered.

Payment of damages may either be in the form of a lump sum, which is usual, or through structured agreements. The court cannot deviate from the payment of a lump sum payment when the victim so desires.

*E. Modifications Affecting the Law of Successions*

The last Civil Code book, Book 6, deals with the distribution of the succession of the deceased. Though views to the contrary have been expressed, the succession does not include monies or benefits derived from insurance or contracts or annuities, even when constituting the most substantial part of what is left by the decedent.

Puerto Rico has inherited forced heirship from Spain and shares this institution with most civil law systems. Legitimate heirs protected by a reserved portion are the offspring, the surviving spouse, and in their absence, the ascendants of the deceased. In the presence of legitimate heirs, the testator may only dispose of up to half of his or her belongings, as one-half is reserved to the legitimate heirs. In the absence of legitimate heirs, the testator may dispose of everything as he or she wishes (articles 1621-1624). This centuries-old tradition of reserving part of the estate to legitimate heirs such as descendants and ascendants proved strong enough to resist the free-will proponents' suggestions to allow the testator to distribute all monies and assets as he or she saw fit.

The new code is placing the surviving spouse in a much stronger position. As in times past, in the absence of a prenuptial agreement to the contrary, the surviving spouse owns half of the community

property. This share is not part of the succession but is a matrimonial right. The surviving spouse traditionally inherited a usufruct over a fraction of the spouse's succession. The new code is making a radical change, making the surviving spouse a legitimate heir. Under article 1721, "the children of the deceased and the surviving spouse inherit equally." In addition, according to article 1625, "the surviving spouse can request preferential allocation [*atribución preferente*] of the family home" or can request a lifelong right of habitation for whatever exceeds the combined value of the inheritance right and the share in the community.

The new code also validates trusts, which have been in place for most of the 20th century, pursuant to the adoption of a Panamanian statute, as recipients of part of the succession, provided they do not infringe on the reserved share of legitimate heirs.

An important innovation limits the heirs' liability for the deceased's debts to the value of the assets they receive in the succession (article 1587). Article 1588 however provides:

> When the obligations of the succession exceed the value of the assets, the heir is liable on his own patrimony if he disposes of, consumes or uses hereditary assets to pay undue hereditary obligations. He is also responsible for the loss or deterioration that, due to his fault or negligence, occurs to the hereditary assets.

Rules regarding testaments were also modified and closed wills—those where the testamentary provisions are kept sealed and secret, normally under a notary's care—are now abolished, as they were very rarely used (article 1644). Joint wills (*testamentos mancomunados*) were not valid under prior law and remain null (articles 1641). According to article 1644, notarial wills can be made with or without witnesses. Special wills, such as those made on the deathbed, remain regulated in the code but are very rarely used. Military wills, allowed by federal military law, are not expressly recognized but remain valid, as they exist pursuant to federal law. If a decedent made two wills, the second testament may now be used to modify

the first one without totally nullifying it, as was the case under the 1930 code. Minors over fourteen are allowed to make wills, but they must be eighteen or older to make an ológraphic testament.

The testamentary exclusion or omission of a legitimate heir from a succession (*preterición*) for reasons other than those expressly allowed, does not automatically annul the distribution of assets as mandated by the will, as was the case in prior law. Article 1629 allows the excluded heir to receive the reserved share as if the exclusion had not taken place.

The execution of the decedent's succession may be carried out by various parties with different persons being called to defend, divide or otherwise carry out the decedent's wishes (article 1729 et seq.).

The fideicommissary substitution (*reserva, retorno y de la sustitución tanto fideicomisaria como pupilar y ejemplar*) is a gift of property under Roman and civil law by testament or donation *inter vivos.* There, the donee (as an heir of the testator or an heir of such person) is directed and under a duty to transfer the property to another or other persons designated as donees. It is now abolished.

*F. Transitory Provisions*

The code ends with some transitory provisions, in articles 1806 to 1817, aimed at solving conflicts regarding the transition between the 1930 and the 2020 codes. Unfortunately, little thought was given to these, as can be ascertained by the fact that nowhere does one find anything regarding the legislative intent or discussion of these articles. Some of these provisions may generate litigation, for instance regarding the prescription of contractual action, after 15 years under the old code and 4 years under the new one. Likewise, problems may occur regarding civil penalties, where neither the old nor the new code provide guidance.

The House Civil Justice Commission chose to simply copy rules adopted in 1889, 1902 and 1930, with no analysis, and one finds

little guidance or update in the report to the legislative body. Quebec and German studies are available on the Internet and there is thus no excuse for the perfunctory treatment of these articles.

Examples of this lacuna are articles 1806 and 1817. The first states that vested rights will be respected—without defining what these are—despite varied definitions of these being found in the Spanish and US legal systems Puerto Ricans normally resort to. Article 1817 states that where there are doubts as to which law applies, these will be resolved pursuant to the principles stated in the previous articles,[32] which indirectly refers to the principle of non-retroactivity of the law, articulated in the Preliminary Title of the Code at article 9. Indeed, non-retroactivity is pervasive in these transitory provisions.

32. ". . . aplicando los principios que les sirven de fundamento."

# FORTHCOMING: LOUISIANA CIVIL CODE COMMENTARY (JOURNAL OF CIVIL LAW STUDIES)

*"Louisiana still does not have what every advanced civil law jurisdiction has, a commentary on the entire Civil Code"*
A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*[1]

In civil-law jurisdictions, a most useful and popular tool in the arsenal of lawyers, judges, law professors, and students is the commentary of the civil code, presented in a series of volumes providing needed information concerning the derivation, meaning, interpretation, and application of each article of the civil code.

Previous attempts to introduce this form of writing to Louisiana readers[2] have received praise by scholars as an analytical and didactic contribution.[3] Nevertheless, a comprehensive commentary is still missing from the bookshelves of the Louisiana law libraries. It is the intention of the undersigned Co-Editors to fill this void.

The *Louisiana Civil Code Commentary* is an ambitious multi-issue project for an article-by-article commentary on the entire Louisiana Civil Code that will be published in the Journal of Civil Law Studies under the auspices of the Center of Civil Law Studies of the LSU Law Center. This systematic elaboration on each article includes:

1. The *text* of each article in force.

2. Review of the *historical derivation* of each article with references to the Digest of the Civil Laws of 1808, the Civil Codes

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1. 54 TUL. L. REV. 830, 844-45 (1980).

2. *See* Symeon Symeonides & Wendell Holmes, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087 (1999); Symeon Symeonides & Nicole Durante Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69 (1993); Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69 (1983).

3. *See* Katherine Shaw Spaht, *Co-Ownership of Former Community Property: A Primer on the New Law*, 56 LA. L. REV. 677, introductory footnote ("The form of the Kommentar facilitates its use by lawyers and scholars through systematic treatment of the law in article by article commentary").

of 1825 and 1870, the Louisiana Constitution, and the Louisiana Revised Statutes.

3. *Discussion* on the meaning of each article and its application by Louisiana and Federal Courts, and *critical review* of leading cases and pertinent legal literature, including treatises and law review articles.

4. References to *Conflict of Laws and Comparative Law*, including the provisions of Book IV of the Louisiana Civil Code, sections of the Louisiana Revised Statutes, controlling judicial decisions, and foreign civil codes and treatises.

5. References to pertinent Louisiana *procedural legislation* and comments on the treatment of such procedural issues by the Louisiana and Federal Courts.

The first issue of the *Louisiana Civil Code Commentary* focuses on the Preliminary Title of the Louisiana Civil Code (articles 1-14), and it will be published in the Journal of Civil Law Studies. As the project progresses, additional issues will be published in future volumes of the Journal, making it an open-access project. Once completed, a consolidated version will be published in printed form. The Co-Editors of the *Louisiana Civil Code Commentary* will assign specific sets of articles to specialists, such as law professors and members of the judiciary and bar. The dedicated student editors of the Journal of Civil Law Studies will also contribute to this ambitious and long-term project. The Co-Editors of the *Louisiana Civil Code Commentary* look forward to the publication of the first issue and they welcome any feedback or suggestions.

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# CUETO-RÚA'S JUDICIAL METHODS OF INTERPRETATION OF THE LAW: A GUIDE FOR THE FUTURE

Olivier Moréteau*



Writing an introduction to a masterpiece of legal scholarship is a humbling exercise, as much as it is to be the successor of Joe Dainow and Saúl Litvinoff at the helm of the Louisiana State University (LSU) Center of Civil Law Studies (CCLS). Joe Dainow introduced Julio Cueto-Rúa to a group of Louisiana judges to analyze and discuss how hard cases come to be decided, in a series of seminars conducted in New Orleans and Baton Rouge in 1976 and 1977. Saúl Litvinoff encouraged him to develop his work into a book published in 1981, where Cueto-Rúa added the analysis of many more cases and furthered the discussion. We thus owe this publication to Don Saúl, as the great Litvinoff was called at LSU and in Louisiana.

## I. THE TOPIC

Every jurist reading Julio Cueto-Rúa's *Judicial Methods of Interpretation of the Law*[1] feels like a student experiencing revelation

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1. JULIO C. CUETO-RÚA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW (Pub. Inst. Paul M. Hebert Law Center Louisiana State University 1981). Excerpts are published in 15 J. CIV. L. STUD. 445 (2023).

after revelation. The book is a page-turner for whomever is interested in judicial work and method. One may read the works of superior minds at a younger age and revisit them later in life, as it always feels like a new or renewed learning experience. While eager students will marvel at discovering the world of judicial interpretation, more seasoned attorneys, judges, and law professors will rediscover this art when reading this book, reflecting in depth on what all too often appears like a routine activity. I asked several Supreme Court justices in different parts of the world, every one of them responded that the core of their activity is interpretation.

This book is an attempt to answer an intriguing question: how do judges decide hard cases? There is more to learn from these than from run-of-the-mill cases. One tends to believe that the answer will differ based on the judge's legal system or tradition. Who would try to answer this question embracing both civil law and common law traditions? Mastering all techniques of lawyering in both of them is necessary but not enough. It entails adopting a holistic vision of the law, combining legal history, linguistics, and philosophy, in addition to being a first-class jurist versed in comparative studies. It takes to be Julio Cueto-Rúa or to have reached the top of comparative law scholarship. In my most inspired moments when teaching Western Legal Traditions to LSU first-year law students, I bridge the divide between civil law and common law and identify commonalities when addressing hard cases, those where a traditional approach is a road to nowhere, a dead-end, a denial of justice, sounding like hitting hard on a silent piano key. This is because the answer to hard cases is an invitation to transcend legal techniques ascending to a meta-juridical dimension, as my master in legal philosophy and comparative law used to put it.[2] As Shael Herman has it in his review of the book, "[t]he essential point of Dr. Julio Cueto-Rua's new volume, *Judicial Methods of Interpretation of the Law*, is that judicial

2. *See* Olivier Moréteau, *Hans-Albrecht Schwarz-Liebermann von Wahlendorf (1922-2011)*, 4 J. CIV. L. STUD. 227 (2011).

method in both civil and common law secretes issues of philosophy and value as naturally as bees make honey."[3]

Interpreting legislation is the same process whether one is in one tradition or the other. One says that the paradigm of the civil law tradition is the code and its general provisions, which come to life when interpreted by scholars and judges. This is undoubtedly true, but the civil law tradition also produces hordes of technical and very detailed regulatory provisions. Likewise, one says that the paradigm of the common law tradition is the case, and that legislation is very detailed and based on hypotheticals rather than general norms. This is once again certainly true, but the common law also has codes, such as the Uniform Commercial Code in the US, and bills of rights, such as the First Amendments to the US Constitution and the Human Rights Act 1998 in the United Kingdom. Differences therefore reside in the context. In the civil law tradition, the civil code is the general law that guides the interpretation of special laws. Special laws derogate from the general law, and the general law prevails when special laws are silent, sometimes calling for extensive interpretation so that no gap remains unfilled.[4] In the common law, however, every statute is special law. The statute addresses particular problems left unsolved or resolved inadequately by the courts. Statutory law develops in the context of case law, which serves as a general law, and remains applicable by default when the statute is silent. Like special laws in civil law systems, common law statutes call for restrictive or strict interpretation, as they derogate from the general law. In both systems, as Cueto-Rúa shows with mastery, principles and value control when hard cases are to be decided, and the process is far from purely empirical and subjective. A judgment may be, at the same time, result-oriented, principle and value-oriented.

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3. Shael Herman, *Judicial Methods of Interpretation of the Law by Julio C. Cueto-Rúa*, 42 LA. L. REV. 1213 (1982).

4. As stated though in different terms in the Preliminary Provision of the Civil Code of Quebec: CODE CIVIL [C. CIV.], Preliminary Provision (Que.). 1991, c. 64, in force since January 1st, 1994.

Though the civil law tradition has been the cradle of interpretative methods due to its historical reliance on the book and later on the codes, legal interpretation is by nature transsystemic. As such, maxims of interpretation such as *a pari materia* or *eiusdem generis* support judgments in both the civil law and the common law. In both legal traditions, every jurist knows or should know of the nuances between *a pari* and *a fortiori* arguments. The rich toolbox of exegetical techniques developed in the civil law tradition is to be shared with the whole world. Eminent scholars have repeatedly promoted the study of the civil law in common law jurisdictions, particularly the United States.[5]

Modern methods of interpretation burgeoned in civil law jurisdictions, particularly in France where the Napoleonic Code neared its centenary without much revision. Indeed, it became artificial to second-guess legislative intent in the new social and economic context created by the industrial revolution. These new ideas crossed the Atlantic: while conservative civilians worried at courts embracing Gény's *libre recherche scientifique*, the American realists marveled at Francois Gény's creative thinking.[6] They followed his recommendation to encompass sociology, economics, and all available social data in attempts to transcend legislation made in earlier times or to push towards judicial breakthrough in the absence of legislation.[7] In the civil law world, Gény's admonition to go beyond the

5. Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1 (1938); ARTHUR T. VON MEHREN, THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW 825 (Englewood Cliffs 1957) and subs. eds; JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (Stan. U. Press 1969) and subs. eds.; Paul R. Baier, *The Constitution as Code: Teaching Justinian's Corpus, Scalia's Constitution, and François Gény, Louisiana and Beyond—Par la constitution, mais au-delà de la constitution*, 9 J. CIV. L. STUD. 1 (2016).

6. *See* ROSCOE POUND, JURISPRUDENCE 183 (West 1959); JULIUS STONE, LEGAL SYSTEMS AND LAWYER'S REASONINGS 216, 220-222 (Stan. U. Press 1964); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16, 46-47, 119-121, 138-139, 143-145 (Yale U. Press 1921); KARL N. LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 189, 260-261, 422 (Little, Brown & Co. 1960).

7. Olivier Moréteau, *La traduction de l'œuvre de François Gény : méthode de traduction et sources doctrinales*, *in* LA PENSEE DE FRANÇOIS GENY 69 (Olivier Cachard et al. eds., Dalloz 2013).

code risked empowering the courts to go well beyond acceptable limits, moving jurisprudence to become a full-fledged source of the law. Gény's master, Raymond Saleilles, also a visionary and a comparatist in addition, foresaw the danger that could threaten a brilliant idea. In his 1899 preface to Gény's book, he recommended that one may go beyond the code but through the code, to keep up with the tenets of the civil law tradition.[8] The plan is thus to find legislative support to a novel solution, citing to the Civil Code general clauses or open-ended provisions.[9] The French Court of Cassation does this with mastery, hiding bold arguments in short and cryptic language paying lip service to code provisions while serving as alibi to judicial activism.[10] Francois Gény's *Méthode d'interprétation et sources en droit privé positif* was translated into English at LSU,[11] and is of significant influence in the State of Louisiana.[12] Cueto-Rúa may have met Jaro Meyda, the translator. Mayda rejected translating *libre recheche scientifique* by "free scientific research," as was commonly done,[13] and instead used the phrase "free objective search for a rule,"[14] applying Gény's method to his translation work.[15]

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8. Raymond Saleilles, Preface to FRANÇOIS GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF, CRITICAL ESSAY (2d ed. 1954, trans. Louisiana State Law Institute 1963), p. lxxxi. The book was first published in 1899.

9. Olivier Moréteau, *The Future of Civil Codes in France and Louisiana*, 2 J. CIVIL L. STUD. 39 (2009).

10. Olivier Moréteau, *Codes as Straitjackets, Safeguards and Alibis: The Experience of the French Civil Code*, 20 N.C.J. INT'L & COM. REG. 273 (1995).

11. GENY, *supra* note 8.

12. François-Xavier Licari, *François Gény en Louisiane*, *in* LA PENSEE DE FRANÇOIS GENY 91 (Olivier Cachard et al. eds., Dalloz 2013); *François Gény in Louisiana*, 6 J. CIV. L. STUD. 475 (2013).

13. *See* POUND, *supra* note 6, at 183; STONE, *supra* note 6, at 216, 220, 221, 222 (also using the French term at 223), as does CARDOZO, *supra* note 6, at 16, 46-47, 119-121, 138-139, 143-145.
*loc. cit*.); *see* also VON MEHREN, *supra* note 5.

14. Jaro Mayda, *Gény's Méthode after 60 Years. A Critical Introduction*, *in* GÉNY, *supra* note 8, at x-xii.

15. Nicholas Kasirer, *François Gény's libre recherche scientifique as a Guide for Legal Translation*, 61 LA. L. REV. 331 (2001).

Julio Cueto-Rúa was familiar with this literature and interpretative evolution.[16] As such, his thinking and analysis go beyond the straitjacket of positivism and formalism, while his work transcends civil law and common law boundaries. Cueto-Rúa searches how judicial minds analyze and solve the hard cases, but he does not err on the side of subjectivity. On the contrary, he analyzes interpretation with objectivity, considering rules not in the abstract but in the context of the facts to which they are to be applied, as judges do and have to do. He makes room for value judgments that are inevitably made by the parties, and ultimately by the court.

## II. THE AUTHOR

I did not have the privilege of meeting Cueto-Rúa in person. Julio César Cueto-Rúa (1920-2007), "one of the most prominent Argentinean jurists,"[17] earned his law degree at the National University of La Plata in 1942 and his Doctorate in Law in 1949 at the same University. He was an active politician from the 1950s to the 1980s, and operated as the Minister of Industry and Trade of the Argentine Republic in 1957-1958 during Pedro Eugenio Aramburu's de facto administration. In Argentina, he was a disciple of Carlos Cossio, a renowned legal philosopher who crafted the "egological theory of law,"[18] much cited in Cueto-Rúa's book. In 1949, Carlos Cossio debated with Hans Kelsen in a famous meeting that took place at the Universidad de Buenos Aires.

Following Cossio's advice, Cueto Rúa pursued higher legal studies in the United States. This was a remarkable move at a time when legal scholars in Argentina and South America focused on Europe rather than North America. Cossio insisted that Cueto-Rúa travelled to the United States to better understand the normative

16. *See* Bibliography, CUETO-RÚA, *supra* note 1, at 495-501.

17. For a short biography, *see* Note, *Julio Cesar Cueto Rúa, One of the Most Prominent Argentinean Jurists, Has Passed Away - He Was an Academic and Political Centrist - His Passing*, 13 L. & BUS. REV. AM. 793 (2007).

18. CARLOS COSSIO, LA TEORÍA EGOLÓGICA DEL DERECHO Y EL CONCEPTO JURÍDICO DE LIBERTAD (2d ed. 1964).

structure of the common law. In 1953, Cueto-Rúa completed an LL.M. at Southern Methodist University (SMU), in Dallas. After his LL.M., he wrote El Common Law,[19] seen by many as the best book on the common law in Spanish, and SMU appointed him director of the Law Institute of the Americas. In the 1970s and the 1980s, Cueto-Rúa taught at SMU and then at LSU. At LSU, he taught civil law courses, spending half a year in Baton Rouge and half a year in Argentina. His association with LSU was most fertile. He was a great friend of Saúl Litvinoff, who left a durable print on the civil law of Louisiana, as the leader of the revision of the law of obligations.[20] He published well-cited articles in the Louisiana Law Review and Tulane Law Review. These include a much-cited essay on Abuse of Rights,[21] his Tucker Lecture on The Future of the Civil Law,[22] and a rebuttal to an article by Vernon Palmer.[23] In 1976, he was invited to give the Fifth Tucker Lecture, the signature civil law lecture organized every year by the CCLS. Among the first ten Tucker lecturers are René David, Paul-André Crépeau, T.B. Smith, Henry Merryman, André Tunc, who like Cueto-Rúa are all beacons of comparative law scholarship. He meanwhile had a strong presence in Argentina, as president of the Argentine Association of Comparative Law and as a short time Justice of the Argentine Supreme Court.

Judicial Methods of Interpretation of the Law was published in January 1981 by the Publications Institute at the Paul M. Hebert Law Center, during Saúl Litvinoff's tenure as director of the CCLS and chairman of the Publications Institute. This was at the peak of the LSU Cueto-Rúa era. All these years, the book had been available in

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19. JULIO C. CUETO-RÚA, EL "COMMON LAW": SU ESTRUCTURA NORMATIVA, SU ENSEÑANZA (La Ley 1957).

20. *See* ESSAYS IN HONOR OF SAÚL LITVINOFF (Olivier Moréteau, Julio Romañach, Alberto Zuppi, eds., Claitor's 2008).

21. Julio C. Cueto-Rúa, *Abuse of Rights*, 35 LA. L. REV. 965 (1975).

22. Julio C. Cueto-Rúa, *The Future of the Civil Law*, 37 LA. L. REV. 645 (1977).

23. Julio C. Cueto-Rúa, *The Civil Code of Louisiana Is Alive and Well*, 64 TUL. L. REV. 147 (1989).

English only, a language that the author mastered perfectly. A Spanish translation is now soon to be available, of which I was asked to write the preface, which triggered the present publication as well as the excerpts that follow. Such a masterpiece needs no second edition, but translation makes it available to a larger public. The CCLS is considering a reprint of the English edition.

## III. THE BOOK

The book has a corpus followed with substantial illustrations. An Introduction and ten chapters expose the substance of interpretative methods, showing that the way judges interpret the law in hard cases is not purely empirical or formalistic. The following illustrations consist of thirty-three cases taken from Louisiana and other jurisdictions. These cases are summarized and used as testing materials for Cueto Rúa's theoretical contentions made in the preceding chapters. The Journal of Civil Law Studies publishes a sample, including the introduction, the full text of Chapter II and the first half of Chapter IV. Two cases have been selected among the thirty-three illustrations, from Louisiana and Tennessee, in which the defendants were blamed for not blowing a horn or ringing a bell.[24]

The reader should not expect a traditional description of the interpretative methods when reading the book. As a distinguished reviewer observed in his book review,

> the various methods of judicial interpretation are not discussed side by side, in a traditional comparative fashion, but in an integrated manner. This is a result of Professor Cueto-Rua's belief that "essentially, civil law judges and common law judges follow the same dialectical process of evaluating and understanding the law as evidenced by the judges' grounding their decisions in similar logical and axiological considerations."(p. 3).[25]

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24. Julio C. Cueto-Rúa, *Judicial Methods of Interpretation of the Law (Excerpts)*, 15 J. CIV. L. STUD. 445 (2023).

25. Boris Kozolchyk, *Judicial Methods of Interpretation of the Law, By Julio C. Cueto-Rúa*, ARIZ. J. INT'L & COMP. L. 138 (1984).

Chapter I describes the scope of the study, starting with the subject matter and a presentation of the officials dealing with the law. "Fact finding" is presented as the contextual framework, as judicial interpretation does not operate in the abstract but in the context of a case. Chapter II addresses the structure of the case, insisting on an important element all too often overlooked:

> Traditionally, the prevailing theories of the judicial process of interpretation of the law have focused only upon these two components of a case, i.e., the empirical and logical elements. There is, however, a third and vitally important element which must be considered in any proper and complete theory of judicial interpretation. Although theoretical emphasis upon this element has been lacking, experience and reality reveal its pervasive influence and importance. Structurally, this element is found in every case as the values inherent in juridical experience. That is to say that the events, i.e., human behavior and the natural phenomena linked thereto, constituting juridical experience are value laden, having either positive or negative value. The axiological element of a case is, then, the value or worth exhibited by the "facts" of the case, the behavior of the parties, and the behavior of the judge.[26]

The whole book focuses on the centrality of this axiological element, often neglected in the discussion or hiding in the parties' arguments and echoed in the discussion of what civilians call the spirit of the law. Chapter III discusses the judicial process, describing the fascinating judicial back-and-forth: starting with *a priori* logical elements; moving to the logico-normative mind of the judge who gets acquainted with the facts of the case; going back to the rules of law which may be applied to those facts; then having a closer look at the facts; returning to the rules of law with an increased understanding of the facts; going back to the facts after the search of new normative meanings; and exploring again the rules of law in search of specific grounds for the decision. One cannot be further away from the

26. CUETO-RÚA, *supra* note 1, at 15.

traditional dichotomy between the allegedly civilian deductive approach and the allegedly common law inductive approach. This does not mean that Cueto-Rúa ignores those differences—he acknowledges them in this chapter and all along in the book, extending his investigation from legislation to judge-made law. Custom is also discussed in this dialectical presentation of the judicial process. The book then successively details the logical elements, the historical element, the pragmatic and teleological elements, and the influence of the doctrinal elements and axiological factors.

The conclusive Chapter X opens on the following statement:

> There is a tendency to assume uncritically that only one rule, or at least only a few rules, refer to each case, that each one of those rules has a single, true meaning, and that there is only one proper method of interpreting those rules and that the method selected leads to one and only one logical conclusion. All those assumptions are wrong. The entire legal system, including principles, standards, and basic concepts, such as "good faith," "public order," "good morals," "due diligence," and "the reasonable man," is involved in each case. These principles, standards, and concepts can, moreover, be called to bear upon the interpretation of every rule of law and upon its application to the facts of the case.[27]

The mention of standards is unusual and is to be noted.[28] The chapter and corpus of the book ends with the following paragraphs that summarize the entire work but cannot be a substitute to the reading:

> In summary, any theory of the judicial process of interpretation of the law that ignores social reality and juridical experience is obviously incomplete and unsatisfactory. Moreover, any such theory which, although acknowledging social reality, and juridical experience, fails to recognize and provide for the complex structure of juridical values is likewise

27. CUETO-RÚA, *supra* note 1, at 273.

28. See Olivier Moréteau, *Le standard et la diversité*, *in* LAW AND HUMAN DIVERSITY 71 (Mauro Bussani and Michele Graziadei eds., Stämpfli, Bern 2005); *Estándard y diversidad* (Carla Arrobo trans.), 7 REVISTA ARGENTINA DE DERECHO EMPRESARIO 79 (2007).

> incomplete and unsatisfactory. The complex structure of juridical values gives meaning to the law. That structure must be taken into account in any complete and satisfactory theory of the judicial process of the interpretation of law. Finally, any such complete and satisfactory theory is a theory of the understanding of the meaning of justice.[29]

## IV. THE CENTRALITY OF HUMAN INTELLIGENCE

The book no doubt offers a solid jurisprudential theory for judges to interpret the law: it is an antidote to possible artificial intelligence poisoning. At a time when artificial intelligence appears as a new frontier of human and legal affairs, it is essential to reflect on what is intrinsically human in judgment making. Predictive justice appears as a progress over the time when jurists had to do patient and partial research in card-indexed catalogues, and later in databases. Having access to a corpus of all recorded earlier decisions and the capacity of identifying identical situations and possible solutions in a matter of seconds is formidably attractive. Compliance with suggested solutions gives a sense of doing justice. However, it has considerable flaws.

The machine cannot weigh the context of each case, its temporality, the axiological or value-based part of the judgment. It cannot replace the judge or dictate the decision in the unique, individual case at bar. The judge mediates the law, moral and social values (vertical dimension) while resolving the conflicting interests of the parties (horizontal dimension). The judge keeps the kite of law and life floating in the air, and tries to prevent a crash in every case, particularly the hard ones. We owe this fertile metaphor to Werner Menski,[30] who places religion, ethics and morality at the front end of the kite, under the generic name of nature. The left end of the kite points to what he refers to as state law, to designate the positive law of the nation-state, whether unitary or federal. Conversely, the right

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29. CUETO-RÚA, *supra* note 1, at 277.

30. WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT (2d ed., Cambridge U. Press 2006).

end points to society and socio-legal approaches. The tail of the kite is the place of international law, whether hard or soft, that weighs more and more on the life of the law. The good judgment keeps the kite in the air by allowing none of its four ends to pull down too heavily. Too much weight on positive law may undermine society and natural principles, while ignorance of state law and too much weight on socio-legal approaches and religion may cause the kite to drift, or nosedive if actioned by religion or morality alone. International law should balance the kite, without pulling back too heavily or ignoring the particular experience of a given society and its positive law, while being in harmony with the natural forces operating at the front end. This activity is quintessentially human, as the reader realizes at every page of Cueto-Rúa's book. Artificial intelligence is no safe hand to keep balance in ever changing winds and variable atmospheric pressure. It is a source of information at best, but a dubious predictor, especially in hard cases. Only a well-trained human hand can keep the kite floating in changing air, firm or lenient at times, sentient at all times.

There is another potential risk. Artificial-intelligence-driven predictive justice is all eyes in the rearview mirror. It does not look forward. It stocks what was done, unable to judge whether right or wrong, and has no knowledge of the aspirations of the group and of what is to come. It is therefore conservative in nature; not that there is anything wrong in being conservative, or progressive for that matter. Both forces are needed for balanced solutions. It takes formidable human energy to pull a system forward and to meet societal aspirations that may become the new normal in the future. Think of the abolition of slavery, of gender and racial equality, of climate change. Legal trailblazers need more talent and hard work to pull the system forward and lead to improvement, when facing opponents having wholesale knowledge of past decisions at their fingertips.

In legal activity, artificial intelligence may be a fine learning tool to improve writing skills, an interactive law library accessible everywhere at every moment, and a gain-saver for routine tasks, which are all good things. It must not become a substitute to intrinsically human activity. Aspiring and seasoned lawyers must not give up on intellectual effort and emotional intelligence.

Cueto-Rúa was a humanist. His book exemplifies the great work of judges using their knowledge and understanding of the law, their sense of where society leans as a whole, of the tensions that may pull it apart. He gives us methods to adjudicate hard cases, a human method. Of course, the book is based on past cases; however, it does not teach the past but judicial methods. This teaching cannot feed a computer program, as sophisticated and self-developing as computing may be, and reducible to the size of a gavel. Only the person of a naturally intelligent judge can make a judicial decision, not an artificially intelligent gavel. Judicial Methods of Interpretation of the Law is a marvelous guide to human-centered, natural intelligence.[31] After four decades, it is as fresh and future oriented than at the time of its publication. It is time to blow the dust off the edge of the book and start the reading, especially if you live in Louisiana.

## V. A TOOL FOR THE FUTURE IN LOUISIANA AND BEYOND

Due to its bridging civil-law and common-law systems and methods, this remarkable volume is a perfect tool for students, scholars, attorneys, and judges alike in Louisiana and beyond. Louisiana jurists need once and for all to accept that being bijural is like

31. Though many will keep thinking that there is apparent arbitrariness and empiricism in the way judicial decisions are made. Shael Herman expressed "a widely shared doubt that anyone—including the judges—can explain how cases are decided. In this iconoclastic era, we tend to be stubbornly skeptical about anyone's ability to give a full, rational account of any human experience, whether it is politics, economics, or physics," yet concluded his review of the book as follows: "For lawyers, it is a powerful antidote to the pragmatism and hypertechnicality of daily practice. For students, it can counteract the typical tendency to read cases as if they were only rules, devoid of philosophical implications." Herman, *supra* note 3, at 1219 and 1221.

being bilingual. Just like languages, no legal system is superior to others. The more systems one masters, the less confused and more effective one becomes in any of these systems, with better intellectual equipment to handle human and legal affairs, whenever and wherever. The focus on social reality and juridical experience, also fully encompassing juridical values, helps the reader understand that the mastery of the law is no pure technique that can be reduced to algorithms and equations. As understood by Julio Cueto-Rúa, judicial interpretation is no perfect machinery, but an essential and perfectible human process shaping the law towards fair outcomes in individual cases and better justice in evolving societies.

# JUDICIAL METHODS OF INTERPRETATION OF THE LAW* (EXCERPTS)†

Julio C. Cueto-Rúa





† These excerpts are presented as a sample of the book by Julio C. Cueto-Rúa. They should be read together with the preceding introduction in Olivier Moréteau, *Cueto-Rúa's Judicial Methods of Interpretation of the Law: A Guide for the Future,* 15 J. CIV. L. STUD. 431 (2023).

## PREFACE

[ix] When Dr. Joe Dainow introduced Julio Cueto-Rua to a group of Louisiana judges a few years ago he said, "If I were a young man, I'd leave my work and follow him." Before the conference ended the next day, we had begun to understand why.

Most of us had been appellate judges for a long time. Nevertheless, few of us could have adequately explained the process used to decide the hard cases. Nor could we have explained that there was a degree of objectivity employed in reaching what we thought was a just result.

The hard cases, of course, are the ones that test the judge. How does the judge, after he finds out what happened, decide the hard cases? The case where the law is silent, or where the applicable rules of law are ambiguous, or conflicting? Or where the literal application of the relevant statute would produce a harsh result surely not envisioned by the legislator?

At that conference Cueto-Rua had selected a few opinions from the reported cases written by some of the judges present. Each was a hard case. He explained the method used in reaching the decision, and even the considerations which brought the judge to the conclusion in a case that could have gone either way. The opinion authors, who themselves might have described the process as groping and muddling to find a satisfactory solution, were pleased and surprised to learn that there was a method used and an object sought—justice—which had real meaning.

When I was a young lawyer, if I thought of justice, it was as a rather vague ideal. And, when the judge in my case began to speak of justice, I [x] would tell my client to brace himself because he was about to get it, and probably wouldn't like it. But lawyers are not born judges, and judges are seldom taught how to decide cases. Our efforts to balance the legitimate interests of society are usually crude, elemental and narrow, because axiology—the study of the nature and types of value judgments is foreign to us.

For this reason the good judge will never cease his efforts to understand the juridical values at work in the cases before him. Cueto-Rua's description of those values, the relationships among them and their part in the judicial process is an essential aid to the judge seeking a solution to the hard case. The one best solution to the case before the judge is the one that will realize all the positive juridical values in a properly balanced way. This best solution, says the author, is an objective solution, made so by the process. Justice, then, is done.

Every judge should be aware of the reality of justice. The good judge will be aware of the contents of this book. The best judge will understand and apply the principles in it.

July, 1980 *John A. Dixon, Jr.*
Chief Justice,
Louisiana State Supreme Court

ACKNOWLEDGMENT

[xi] I am greatly indebted to Professor Saul Litvinoff, Director of the Louisiana State University Center of Civil Law Studies, for his wise suggestions and comments and for his intellectual support.

I owe inspiration and insight into the operation of the Louisiana courts to the members of the Louisiana judiciary, especially the Justices of the Supreme Court of Louisiana, who generously shared with me their time and efforts devoted to the examination of the nature of the judicial process.

To my colleagues of the Louisiana State University Paul M. Hebert Law Center, my gratitude for their encouragement and assistance.

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May, 1980

*Julio C. Cueto-Rua*

## INTRODUCTION

[1] I wish to preface this work with a few words about its origin and motivation. Several years ago, Dean Paul M. Hebert of the Louisiana State University Law Center and Professor Joseph Dainow then Director of the Louisiana State University Center of Civil Law Studies, organized a series of seminars for Louisiana appellate judges for the discussion and analysis of judicial methods of interpretation of law. Those seminars were held in New Orleans and in Baton Rouge during 1976 and 1977. Dean Hebert and Professor Dainow urged me to expand the content of the seminars by writing an essay in the hope that it would be of some benefit to judges and practitioners alike. Through the present work, I have attempted to satisfy their request and, although I do not know whether its content would meet the standard of scholarship which they always demanded, I do wish to render this tribute of my admiration and recognition to the memory of these two outstanding legal scholars.

Professionally trained judges in both civil law and common law countries appear to apply methods of interpretation of law which follow the same basic pattern. This work is an attempt to describe those methods by pointing out their essential similarities and their technical differences.

Such a description is possible not only because outstanding civil law and common law judges have discussed the methods which they have applied in reaching their decisions, but also because the judges' reasoning and the actual disposition of their cases make evident the type of considerations, factors, and elements which led to the final judgments.

The traditional theory of judicial interpretation of the law, which [2] perceives in the judicial process only the operation of logical considerations and nothing else, has been shown by uniform judicial experience to be inconsistent with actual courtroom experiences. Since the time of Ihering in Germany, Gény in France, and Holmes in the Anglo-American law world, the traditional theory has been challenged by judges and jurists who**,** in writing from both civil law and common law perspectives, have used different theoretical approaches, e.g., historical, teleological, and psychological, that have led to the development of numerous methodological doctrines. The list of these doctrines is so lengthy as to necessitate their classification, yet the results of such a classification have not been very encouraging for, after an examination of the different categories, one may be inclined to embrace either a pluralistic, syncretic theory that does not dissipate his doubts or to choose one from among the many competing theoretical conceptions that will probably leave him with an obvious feeling of its inadequacy.

It has been the prevailing approach in studies and investigations of the judicial methods of interpretation of law to focus attention on the general rules of law, as though the question of interpretation was concerned exclusively with the discovery and statement of the meaning of these general rules. Such an approach implies the presence of two separate fields of analysis, each one of them being subjected to specific, yet unrelated, methodological requirements. One is the field of facts, i.e., those actual events which led to the dispute. The other is the field of law—the region of rules which provides the normative ground for the adjudication of the case. There are many convincing reasons to doubt the accuracy of such a separation of law and fact. An approach which views the process of interpretation of law solely as an intellectual task that operates at the abstract level unaffected by social facts and immune to the exigencies, claims, and expectations of the parties and the community is not consistent with experience as it is lived and felt by jurists and professors of law, who

explain and teach the law, nor by judges and lawyers, who decide and argue cases.

This work approaches its subject from a different perspective. In analyzing cases, judicial reasoning, and judgements, it became apparent that at least in the adjudication of cases the process of interpretation of law does not begin at the abstract and general level of the rules of law but does begin at the very concrete and specific level of the facts of the case. It just does not correspond to reality to think that the judge approaches the general rules of law unaffected by the specific nature of the case submitted to him for final adjudication. Thus, the search for the rule of law [3] to be applied to the case is essentially linked to the axiological nature of the relevant facts of the case. Similarly, the process of interpretation of the general rules of law is influenced by axiological considerations, since any general rule of law is expressive of processes of evaluation and choice. On the basis of this common axiological influence, there appears, therefore, to exist an essential relationship between facts and rules which colors the entire process of interpretation.

Furthermore, that relationship is dialectical in nature. The theoretical foundations for this dialectical construct of the method of interpretation were laid in the forties and fifties by an outstanding legal philosopher, Carlos Cossio, in his pioneering works: *La Teoría Egológica del Derecho y el Concepto Jurídico de Libertad* (first and second editions), "El Substrato Filosófico de los Métodos lnterpretativos," *El Derecho en el Derecho Judicial, Teoría de la Verdad Jurídica,* and *La Valoración Jurídica y la Ciencia del Derecho* (second edition).[1] Cossio's doctrinal foundations have been applied in this work along with the very important theoretical contributions made by great common law lawyers such as Holmes, Cardozo, Pound, and Llewelyn. Together these doctrines and theories provide

1. C. COSSIO, LA TEORÍA EGOLÓGICA DEL DERECHO Y EL CONCEPTO JURÍDICO DE LIBERTAD 329-48 (2d ed. 1964) [hereinafter cited as COSSIO, LA TEORÍA EGOLÓGICA]; EL DERECHO EN EL DERECHO JUDICIAL (1959); LA VALORACIÓN JURÍDICA Y LA CIENCIA DEL DERECHO (1954); Cossio, *El Substrato Filosófico de las Métodos lnterpretativos,* 6 REVISTA UNIVERSIDAD (1949).

an adequate basis for the understanding of the judicial methods of interpretation of law and a sufficient theoretical basis for the discovery of the objective meaning of judicial decisions.

The ensuing analysis and its theoretical foundation show that, essentially, civil law judges and common law judges follow the same dialectical process of evaluating and understanding the law as evidenced by the judges' grounding their decisions in similar logical and axiological considerations. Although the differences in the logical approach to the normative materials given the judges in each system of law (a *formulated* general rule of law in the case of the civil law and a general rule of law *to be formulated* in the common law) create some specific problems of logics in the handling of these materials, such differences do not alter the basic steps of the dialectical process followed by the professional judges nor the final axiological nature of their decisions. In this sense then, it may be stated that once the general rules to be used in a given case have been selected or derived, common law judges and civil law judges, professionally trained in the study and application of the law, follow similar methods in the performance of their respective judicial functions.

[4] However, Professor Frank Mitchell thinks otherwise. He is of the opinion that the technical differences which may be identified in the process of learning and applying civil law rules and common law rules are such that jurists in one system may be considered lay in respect to those of the other system. He has stated, for example:

> Because professional control of both Anglo-American and civil law has been maintained by means of esoteric legal method, thus excluding the validity of lay interpretations, both Anglo-American and civilian legal regimes, which for centuries have developed separately from each other, possess dissimilar legal methods, including methods of interpretation, with the result that the jurists of one system have been in a lay position in regard to the legal methods and content

of the other.[2]

In my opinion, such technical, or logical, differences which may be found in the handling of normative materials by judges of the respective systems do not reach sufficient intensity and scope to nullify the following fundamental similarities:

a) civil law and common judges go through a *dialectical process* in their search for legal and just decision of the case;

b) in both systems of law, the same *traditional methods of interpretation* have been and are being applied by judges for the decision of cases, to wit: logical, historical, and teleological;

c) in both systems, the judges face *a choice* of normative premises and methods of interpretation;

d) in both instances, *axiological factors are determinative* of the choice of normative premises and of the choice of methods.

Both civil law and common law judges work with general rules of law, although at civil law these rules are given to the judges *a priori* by the lawmakers, while at common law the general rules are extracted from precedents by the judges themselves. It remains, however, that those basic similarities still provide the basis for understanding the process of judicial interpretation of law evolving at both civil law and common law.

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## CHAPTER II – THE STRUCTURE OF THE CASE

### *1. Elements of the Case*

[14] A person who brings a case before the court is seeking an official recognition of his claims or interests and the use of state machinery or procedure to force performance by or to obtain redress from the other party.

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2. Mitchell, *A Study of Interpretation in the Civil Law,* 3 VAND. L. REV. 557, 559 (1950).

A judicial petition is based upon the allegation that certain facts have occurred and that particular consequences are imputed to those facts by rules of law.[3] These rules perform a logical function: they establish a normative relationship between certain antecedent events (the alleged facts) and particular consequences (the performance or the sanction) which ought to follow.[4] It appears then that at least two elements are directly involved in the claim. One is empirical, mutable, contingent. The other is logical, relational.

The party against whom the claim is judicially made may deny the plaintiff's allegations by asserting either that the facts invoked by the plaintiff are not true or, if they are recognized as true, that they do not entail the legal consequences asserted by the plaintiff. (Of course, if the [15] plaintiff and the defendant disagree as to the facts of the case, then two conflicting sets of facts are present. Eventually, on the basis of the evidence this conflict will be resolved through a judicial determination of what the "facts" of the case "really" were.) Nevertheless, the same type of elements present in the claim are also found in the answer: an empirical component (the facts as alleged or recognized by the defendant) and a logical element (the link or connection between those facts and their legal consequences).

Traditionally, the prevailing theories of the judicial process of interpretation of the law have focused only upon these two components of a case, i.e., the empirical and logical elements. There is, however, a third and vitally important element which must be considered in any proper and complete theory of judicial interpretation.

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3. *See* COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1, at 329-48; H. KELSEN, GENERAL THEORY OF LAW AND STATE 38 (20th century Legal Philosophy Series Vol. 1, trans. A. Wedberg 1945) [hereinafter cited as KELSEN].

4. In the most simplified manner, it may be stated that because something has occurred someone has become bound either to do, to omit, or to give something-the performance or to suffer a penalty—the sanction. That which is due as a performance or that which ought to be suffered as a sanction is due or is owed merely because a rule of law establishes such a relationship. *See* COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1, at 333; Cueto-Rúa, *Limites de la Normación Positiva de la Conducta, in* DEL PENSAMIENTO JURÍDICO ARGENTINO ACTUAL (1955) [hereinafter cited as Cueto-Rúa, *Limites*].

Although theoretical emphasis upon this element has been lacking, experience and reality reveal its pervasive influence and importance. Structurally, this element is found in every case as the values inherent in juridical experience. That is to say that the events, i.e., human behavior and the natural phenomena linked thereto, constituting juridical experience are value laden, having either positive or negative value. The axiological element of a case is, then, the value or worth exhibited by the "facts" of the case, the behavior of the parties, and the behavior of the judge.

*2. The Empirical Element: The "Facts" of the Case*

The "facts" of the case may differ in nature. Usually, facts consist of human acts—human behavior, the doing or the omitting of certain acts, such as the delivery of merchandise, the deposit of money, the consenting to marriage, the injury to limbs, the embezzlement of property, the conveyance of land, the drilling of wells, the use of water, or the installation of a manufacturing plant. On the other hand, the "facts" may be physical events—natural phenomena beyond the will or control of the persons involved, such as the flooding of a valley, the fall of hail, the occurrence of a contagious disease, the growth of plants, the procreation of cattle, or the avulsion of land. However, psychic phenomena, which do not gain some kind of temporal-spatial manifestation through acts or gestures, have no juridical significance. Moreover, they most certainly are not "facts" susceptible of being proved before the judge.

Because human action is empirical, in the sense that it takes place at a certain time and at a certain location, any human act is essentially linked to natural elements. In juridical experience, then, natural elements [16] are taken into account when they exhibit some connection with human life or behavior. Furthermore, natural "facts" become juridically relevant only when they are linked to, or intertwined with, human beings and their actions in such a way that

this connection gives rise to certain rights or duties.[5] The following examples are offered to illustrate this point: the spontaneous fruits of the earth and the young of animals belong to the owner by right of accession (La. Civ. C. Art. 484); the accretion which is formed successively and imperceptibly to any soil situated on the shore of a river or other stream becomes the property of the owner of the soil so situated (La. Civ. C. Art. 501); the sudden loss of a considerable tract of land adjoining a river and its addition to land situated either downstream or on the opposite shore, if the former can be identified, remain the property of the original owner (La. Civ. C. Art. 502); cases of venereal disease which come to the attention of physicians ought to be reported by them to the state board of health (La. R. S. 40: 1065).

Thus far, reference has been made only to those "facts" which are alleged by the parties and which form the bases for the plaintiff's claim that the defendant should be ordered to execute or to refrain from some act or acts (the performance) or to suffer some penalty and for the defendant's claim that he is not bound to do so. In addition to such "facts," there are other "facts" which are similarly relevant for a proper understanding of the case.

This latter category of "facts" consists of the acts performed by the parties themselves before the court and to those performed by the court itself, e.g., the filing of the claim or demand by the plaintiff, the filing of an answer by the defendant, any amendments and corrections to those instruments, and all other procedural acts performed by the parties or by the judge up until the rendition of the final judgment.[6] Such procedural [17] acts are executed before the

5. The terms "rights" and "duties" in this work are used in their most extensive con· notation. "Rights" include privileges, immunities, and powers; "duties" include liabilities, no rights, and disabilities. The meanings attributed to these latter, definitional terms are those given them by Wesley Hohfeld. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 35-64 (1964) [hereinafter cited as HOHFELD].

6. A final judgment is rendered for or against a party to a case, not only because certain "facts" were found to be relevant by the judge, but also because a demand or claim was made, a defense was asserted, and a trial was had. Yet, in

judge or are produced in such a manner that the judge is immediately apprised of their content and implications. These "facts" are also linked to specific juridical consequences since they serve to define the subject matter with reference to which the judge will exercise the powers of his office, to specify the contested "facts" in need of proof, and to aid in the determination of the type of relief which the parties will be afforded.[7] Therefore, in addition to being called upon to "find" and interpret the "facts" of the case, the judge is bound to interpret the behavior of the parties before the court by determining the meaning and relevancy thereof.

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defining the "antecedent facts" of a case, legal writers have generally been hesitant to include within the category of "antecedent facts" those acts which may generally be referred to as "procedural." This reluctance is rooted in the need for clarity and simplicity in describing the norm represented by the term "antecedent facts." For instance, Ross has pointed out how cumbersome such a description would become if procedural acts were included as antecedent facts. In his book *On Law and Justice,* for instance, he states:

> [I]f one single norm of conduct were to be presented in its entirety, it would be an enormously complicated matter. However, the conditions governing the bringing of an action-proof and other procedural measures together with the rules concerning the content of the judgment and its enforcement, are to a large extent the same for various norms of conduct in their certain groups. Therefore, the complete norm of conduct was divided into fragments and similar fragments reassembled for treatment in separate disciplines. This resulted in great advantages in economy of presentations.

A. ROSS, ON LAW AND JUSTICE 209 (1958) [hereinafter cited as ROSS, ON LAW AND JUSTICE]. The relevancy of judicial claims and procedural matters as conditioning or determining the operation and application of rules of law and the adjudication of disputes has been recognized, under quite different theoretical reasoning, by some of the most influential jurists of our rime. *See* H. HART, THE CONCEPT OF LAW 94-96 (1961); KELSEN, *supra* note 2, at 81-83; H. KELSEN, PURE THEORY OF LAW 134-37 (M. Knight trans. 1967); A. ROSS, DIRECTIVES AND NORMS 91 (1968).

7. In Morawetz's opinion: *"Who* the decision-maker is and *how* he is situated are often critically important in an assessment of consequences." Morawetz, *A Utilitarian Theory of Judicial Decision,* [1979] ARIZ. ST. L. J. 339, 357 [hereinafter cited as Morawetz].

### *3. The Logical Element: The Normative Relationship Between the Antecedent "Facts" and the Juridical Consequences*

In every case, the parties and the judge engage in a discussion of controverted rights and duties. In approaching this discussion, the judge and the parties perceive their own behavior, insofar as that behavior relates to the case, in normative terms. By "normative" is meant that particular way of thinking characterized by the use of the logical copula "ought" which is relied upon in order to link the "facts" of the case to juridical consequences. While the sociologist may be looking for the *cause* of some human event, the judge and the parties, through their legal representatives, seek to determine what *ought to be done* by certain persons due to the occurrence of a particular event or events. The relationship between certain "facts" and particular, specific consequences is [18] established by the rules of law, whether such rules be statutory, customary, or judge-made.

The logical relationship between such "facts" and the *duty* to do, to give, or to omit is easily illustrated:

If F(abc), then P by D to C ought to be,

where "F(abc)" represents the "facts," "P" refers to the performance (to do, to give, or to omit), "D" is the debtor, and "C" the creditor. The logical relationship in the case in which sanctions are imposed because of a *breach* of a legal duty may be illustrated in a like manner:

If no P, then S by O against L ought to be,[8]

where "no P" means the breach of the legal duty, "S" is the penalty to be applied, "O" represents the state organ (usually the judge) responsible for the application of the sanction or penalty, and "L" is the liable person—the person who is bound to suffer the application of the penalty.[9]

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8. *See* COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1, at 333.

9. Usually, the responsible or liable party is the debtor himself, i.e., the person who failed to do, to omit, or to give what was due; however, this is not always the case. A legal system may have established that persons other than the debtor

This logical structure is present in every instance of human experience when such experience is thought of in terms of rights and duties, whether it be viewed as such by the parties themselves, by judges, or by anyone else who is interested in examining such events from a juridical, normative perspective.

Of the two preceding logical propositions, the first represents the mutual relationship between the creditor and the debtor of a given performance. The second proposition, on the other hand, reflects the relationship between the party who is liable for the violation of the duty, or performance, and the state organ which is called upon to enforce the performance, or its equivalent.[10] There is, moreover, a logical relationship between these two propositions: Either there is performance of the duty owed by the debtor, or there is a violation of that duty; there is no third alternative-tertium *non datur.* Thus, both propositions may be linked in the disjunctive and illustrated as follows:

[19] If F(abc), then P by D to C ought to be, *or* if no P, then S by O against L ought to be.

This formula, then, reads: If some facts have occurred, a certain performance is owed by a person (debtor) to another person (creditor) or, if the performance is not rendered,[11] then a particular sanction ought to be applied by the state organ (the judge) against the liable party.[12]

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may be liable in the event the debtor breaches the duty. *See* KELSEN, *supra* note 2, at 65-67.

10. The important function of state organs in the operation of the rules of law is discussed with keen insights by Max Radin. Radin, *Solving Problems by Statute,* 14 ORE. L. REV. 90 (1934).

11. In private law under most modern centralized legal systems, such as the American one, lack of performance alone will not be sufficient to put coercive state action into motion. The law usually requires that a claim he filed by a person who can exhibit proper standing, i.e., a right to demand damages. The creditor is the person normally qualified by the legal system to file such a claim. *See* KELSEN, *supra* note 2, at 51.

12. The second logical proposition refers directly to the person who ought to suffer the penalty and to the person, e.g., an organ of the state in modern centralized legal systems, who ought to apply the penalty. No reference is made to the creditor insofar as the act of applying the sanction is concerned, because the creditor himself is not allowed, except in very rare instances, to apply sanctions against

Since every act of human behavior when considered from the juridical standpoint is perceived in normative terms, then whoever views the human events which have taken place from that perspective must necessarily think of those events in terms of rights, duties, breaches of duties, and sanctions. Juridical experience itself, then, appears to comprise an empirical element—the "facts" of the case, including the behavior of the parties and the behavior of the judge, and a logical element—the formal relationship between those facts and certain specific consequences as established by the rules of law.

### *4. The Axiological Element: The Value of the Facts of the Case, the Behavior of the Parties, and the Behavior of the Judge*

In every case submitted to a judge for decision, in addition to the empirical and logical elements, there is a third and rather elusive element which has been the cause of considerable difficulty within juridical theory. This element is of an axiological nature; it is the value, or worth, of the facts of the case, of the behavior of the parties, and of the behavior of the judge.

Juridical experience is meaningful experience; it is experience having [20] inherent value.[13] Juridical experience exhibits particular

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the liable party. *See* COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1*,* at .333; KELSEN, *supra* note 2, at 50-51; Cueto-Rúa, *Limites, supra* note 3.

13. Juridical experience is human experience, but a specific type of human experience. It is constituted by the interference or limitation that can be identified in the action of one person vis-a-vis the action of another person. Georgio Del Vecchio calls it "intersubjective coordination of actions," which he defines as:

> the inter-subjectivity or bilaterality belonging to every juridical determination, that is, the simultaneous consideration of several subjects placed ideally on the same plane and represented, as it were, the one as the function of the other; ... the reciprocity or inseparable correlation, through which the affirmation of a personality in this form is at the same time its limitation with regard to a personality of another necessarily affirmed in the same act. The limit is at once a separation and a joining; claim goes with obligation, superiority with subordination; none of these terms can exist by itself, each one is valid as a complement of the other and draws its own meaning from the other.

G. DEL VECCHIO, JUSTICE; AN HISTORIC AND PHILOSOPHICAL ESSAY 83 (1952) [hereinafter cited as DEL VECCHIO]. Similar ideas, developed in great detail, are found in COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1, at 295-308. For the meaning of "intersubjective coordination," *see* note 19 and ch. 3, note 30, *infra.*

value, whether such be positive or negative,[14] and requires the taking of a position and the perception of the values involved. Human beings are not indifferent when confronted with it. To the contrary, the events which constitute juridical experience necessarily evoke a responsive attitude of approval or disapproval. Those events are "deemed" just or unjust, peaceful or conflictual, orderly or disorderly, safe or unsafe, cooperative or uncooperative. Neither the parties nor the judge can ignore the meaning of such events nor the effects of these events upon the lives of the parties, the judge, and the community as a whole.

Every human action, whether consciously or unconsciously undertaken, is an act of preference. During each waking moment, a person has to make choices. He has to elect one from among several courses of action available to him as a result of his historical situation—the peculiar circumstances of his past, present, and future. In life, choice is unavoidable. Choice is rooted in the very nature of human existence. Even a totally passive attitude of renunciation or disinterest expresses a choice of, a preference for one manner of living over another.[15] One makes a choice on the basis of the value which he perceives in the chosen alternative, yet any given choice may be "the best" or it may be "the worst." [21] Moreover, a choice may be neither the best nor the worst; it may be of moderate value; it may, in sum, be positioned at some intermediate point on the axiological scale.

If living necessarily requires constant choice, then any human act will be reflective of choice and, thus, will exhibit a certain value.

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14. Values exhibit what may be called a polar structure: to a positive value, e.g., beauty, corresponds a negative one, e.g., ugliness, as its opposite. To each positive value corresponds at least one negative value. Between the poles, a graduation may be established. Each value, whether positive or negative, may achieve different degrees of realization. See COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1, at 600 et seq.; N. HARTMANN, ETHICS 253, 410, 444 (S. Coit trans. 1932) [hereinafter cited as HARTMANN]. For further development of this concept *see* Chapter IX.

15. *See* J. MARIÁS, INTRODUCCIÓN A LA FILOSOFÍA 251-57 (4th ed. 1956) [hereinafter cited as MARIÁS].

This value will be rated as being higher or lower on the axiological scale depending upon the intrinsic merit of the chosen course of action as compared with the merits of the other, but rejected, available courses of action. Therefore, inasmuch as human behavior is composed of an act or acts predicated upon choice, and thus has inherent value, the behavior of the parties and that of the judge will be of greater or lesser value, i.e., more or less worthy of approval or disapproval, depending upon the kind of choice each of them makes.

Because the behavior of the parties, whether past or present, is not neutral, but exhibits a positive or negative value, any attempt to deal with that behavior as though it were neutral-indifferent to or unaffected by preferences-is inadequate and methodologically insufficient, since such a treatment ignores and distorts reality.[16] Any theory of the judicial process which omits consideration of the axiological element that is involved in every case and which excludes the value of the judge's behavior is unsatisfactory as a theory because it does not take reality into account. The first condition to be met by a "good" theory of the judicial process is a neutral description of the datum, regardless of the disturbing nature of its reality.

It should be noted that one of the most intriguing aspects of traditional legal theory is the acknowledged fact that, although judges and lawyers are clearly aware that values and value-judgments play a fundamental role in the process whereby a case is studied, analyzed, and finally decided, it has not been common, particularly for judges, to expound upon this role which such values and value-judgments play nor to openly discuss these factors.[17] Not even the obvious benefits to be derived for achieving a better administration of

16. COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1, at ch. 3.

17. There are of course exceptions, some of which are very significant because of the personality and intellectual powers of the authors or speakers. *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) [hereinafter cited as CARDOZO]; J. Gmelin, *Dialectic and Technicality: The Need of Sociological Method*, in SCIENCE OF LEGAL METHOD, SELECTED ESSAYS BY VARIOUS AUTHORS (Modern Legal Philosophy Series No. IX, 1921); Holmes, *The Path of Law,* 10 HARV. L. REV. 457 (1896) [hereinafter cited as Holmes, *The Path of Law*].

justice, for the adequate and more complete training of lawyers and judges, or for a smoother [22] operation of the institutions of government (including the increased awareness of the citizens as to what actually transpires in court) have been enough to persuade judges, lawyers, and jurists to fully disclose and discuss the complex axiological process which judges must necessarily and unavoidably undertake in deciding a case.

A case is the judicial expression of a human conflict. And, human conflicts, like behavior, do have inherent value, such value being either positive (worthy) or negative (unworthy).[18] The value involved in a case is, in the first place, the value of the behavior of *both parties,* the plaintiff and the defendant. It is a bilateral value because, when considered from a juridical standpoint, the behavior of one person interferes with or limits the behavior of another person. Such an interference, or limitation, is worthy or unworthy, i.e., it will exhibit some degree of worthiness or unworthiness. Thus, there is some inherent value in each one of the two (or more) mutually dependent acts of human behavior.

By interference, in this context, is meant the limitation of the freedom of action of one person simply because of the presence or behavior of another person. Positive action is not indispensable. Interference occurs by the mere presence of two or more humans in any social group or at any given location. For instance, the mere presence of a person sitting on a park bench and enjoying the sunny afternoon imposes certain limitations on others in the park, e.g., bystanders will be prevented, among other things, from sitting on that occupied space on the bench. A second example is the fact that spouses, even when separated by distance, impose limitations on each other's freedom of action. Of course, interference is more obvious in cases of positive action, such as entering into a contract, entering into a marriage, erecting a common wall, forming a joint

18. *See* 3 A. HERNÁNDEZ-GIL, METODOLOGÍA DE LA CIENCIA DEL DERECHO 418-19 (1973) [hereinafter cited as HERNÁNDEZ-GIL].

venture, causing damage by negligence, or converting goods. In all of these instances, preferences and choices have taken place. Certain courses of action were adopted, other courses were omitted. The actions taken, whatever their content, did have certain effects upon the lives of other human beings. And vice versa.

When the behavior of one of the persons involved in a case is examined from a juridical standpoint, such behavior is understood by the intuitive appreciation of the value of that behavior as well as of the value of the conduct of the other person who was subject to the former's interference. [23] Both behaviors express, in their mutual interference, a certain juridical meaning, i.e., some degree of justice or injustice, of order or disorder, of security or insecurity, of peace or discord, of solidarity or isolation.[19] This juridical meaning is "felt," or intuitively comprehended, by the lawyers who have been called upon by the parties to take their case to the courts. The lawyers' training and experience enable them to gain a rapid understanding of the conflict, its implications, and its possible judicial outcome. This meaning is similarly "felt" by the judge.

In addition to its mutual interference, the behavior of the plaintiff and the defendant also interferes with the behavior of the judge. There is no question that because of the actions taken by the parties the judge is consequently limited in his freedom to act. He is *bound* to take some procedural action. Conversely, the behavior of the judge interferes with the behavior of the parties. It is because the judge chooses to do or to omit certain acts that the parties become bound to engage in some specific kind of behavior vis-a-vis the judge. Thus, the behavior of the judge and of the parties is expressive of an axiological meaning: it is just or unjust, secure or insecure, orderly or disorderly, peaceful or conflictual.

The axiological meaning of the behavior of the parties *per se* is expressed by the "facts" on the basis of which the claim and the

19. Chapter IX of the present work is devoted to the analysis of this complex topic.

denial thereof were made. Those antecedent "facts" are usually acts of human behavior or, if not, they are natural events closely linked to human behavior. Nevertheless, in both instances, because human behavior is directly or indirectly involved, the nature of the "facts" is the same: those "facts" are not neutral to values—they are expressive of legal values, whether negative or positive. Therefore, because every case is an instance of bilateral human behavior,[20] it follows that every case presented to a judge for decision is expressive of an axiological meaning. It is the duty [24] of the judge to discover that meaning.[21] This task, of course, presents varying degrees of difficulty which range from the easy, common, "run-of-the-mill" cases (the meaning of which is obvious even to lay persons) to the "hard" or "difficult" cases (the meaning of which seems to be hidden, contradictory, or ambiguous).

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20. Expressions such as, "bilateral behavior," "intersubjective coordination of actions" as used by Del Vecchio, or "behavior in intersubjective interference" as per Cossio refer to the same central point: that the action of one person, whatever its content, limits or interferes with the action of another person. *See* COSSIO, LA TEORÍA EGOLÓGICA, *supra* note 1*,* at 284 *et seq.*; DEL VECCHIO, *supra* note 10. Judges and lawyers are particularly devoted to the study of those interferences in order to discover their juridical meaning. That is in fact the main professional task of judges and lawyers. For the sake of clarity and in order to avoid terminological problems related to the meaning of "intersubjective coordination" or "intersubjective interference," the relations between persons who are identical or identifiable from a biographical standpoint out of which rights and duties, *lato sensu,* are created will be referred to as "interpersonal" or "interindividual" relations. For further clarification of this point, *see* ch. 3, note 30, *infra.*

21. To interpret, says Josef Kohler, is *to* discover meaning and significance. Kohler, *Judicial Interpretation of Enacted Law,* in SCIENCE OF LEGAL METHOD; SELECT ESSAYS BY VARIOUS AUTHORS (Modem Legal Philosophy Series No. IX 1921) [hereinafter cited as Kohler].

## CHAPTER IV – CLOSING THE DIALECTICAL PROCESS: FINAL INTERPRETATION AND SELECTION OF THE APPLICABLE RULES OF LAW

### *1. Clarity of the Facts and Clarity of the Rules*

[93] The dialectical process through which the judge has journeyed in an attempt to understand the facts of the case and the behavior of the parties and to identify the rules of law which correspond to the case has narrowed the number of rules of law deemed applicable thereto. A screening process has taken place whereby rules invoked by the parties or considered *motu propio* by the judge were discarded from, while others were incorporated into, the set of rules still competing for application to the case. In order to adjudicate the dispute, a final choice must now be made.

The judge has gained some concrete ideas as to how the case should be decided and as to which specific rules of law he will apply, whether those rules have been given to him by the legislative organs of the state, or created in the past by judges deciding similar cases, or lived and experienced by the people through their customary behavior. In the common or typical dispute having recurring factual elements, the case is rather simple to decide. The meaning of the facts is obvious and the applicable rules of law, i.e., the rules having meanings which correspond to the meaning of those facts, are similarly clear and easy to identify and follow. It suffices to read and to interpret them in accordance with their apparent, plain grammatical meaning. In these cases, it is not so much [94] that the rules are clear, plain, and unambiguous in meaning[22] but that the facts of the case are clear, plain, and unambiguous in *their* meaning. The clarity and simplicity of the facts of the case are the crucial factors in the judge's quickly and directly being able to choose the rules of law which provide the normative ground for the solution of the dispute. *A priori*

22. Joseph Witherspoon has even stated: "The very process of judicial decisions, particularly in administration of statutes, belies the existence of 'plain meaning'." Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Low Road,"* 38 TEX. L. REV. 392, 426 (1960).

abstract statements concerning the degree of clarity and lack of ambiguity of a given rule of law have a limited scope. Final judgment about clarity must await the test of experience. Logic and grammar are not sufficient guarantees of correctness and accuracy. Consider the following case. School authorities pass a regulation forbidding students to bring cats into the classrooms. It is clear, of course, that kittens are not allowed in a classroom. Simply using the techniques of grammar and semantics provides sufficient ground for the assertion that kittens are included within the meaning and scope of the prohibition. On this basis then, it may *be* said that the rule is dear and unambiguous. But, is it so clear if a small dog is involved? And, what if the student brings the dog to the school but leaves it tied to a tree dose by the door of the classroom? Will the prohibition still apply? Finally, what if the animal brought into the classroom by the student is neither a cat nor a dog, but an ant placed in a box which the student keeps in his pocket?

A great number of cases do not present complicated problems of interpretation and selection of rules for the simple reason that a majority are "run-of-the-mill" type cases, the meanings of which are easy to understand and the solutions of which are easy to arrive at by the application of well-known rules of law similarly clear in meaning. There is a common tendency, however, to think that rules, by themselves, are clear and therefore not in need of interpretation; yet, such thinking implies a very superficial understanding of the operation of law.[23]

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23. According to Witherspoon:

> If there is a valid use of the term 'plain' or 'clear' relative to legislative language, it is not a use that can be enveloped in a rule or that can serve in any fashion as a cause for assigning meaning to language. In the case of language the concept 'plain' is essentially a relational concept. It refers to or expresses the relation between a human judgment concerning the meaning of language and the grounds or reasons for reaching such a judgment. When these grounds or reasons are deemed to be very good or strong, we may give vent to the conclusion (although with doubtful wisdom) that that meaning is 'plain' or is '*the* plain meaning.' When the concept 'plain' is thus properly understood, the notion of a 'plain meaning *rule*' must always be viewed as the supreme nonsense and futility of

[95] Article 13 of the Louisiana Civil Code states: "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." This normative statement seems to imply that rules of law may be classified into two broad categories: those that are clear and free from all ambiguity and those that are vague or ambiguous and hence in need of some sort of interpretation. Such a categorization overlooks the fact that every rule of law may be clear with reference to certain facts but ambiguous or vague with reference to a different set of facts. *(See* Illustration No. 12.) Returning to the above example, there is no question that if a student brought a kitten into the classroom, he would violate the rule enacted by the school authorities. But would he commit such a violation if he brought an ant in a box or if he had leashed a small dog to a tree just outside the main entrance of the school? It is easy, then, to see that the rule is clear with reference to some acts, e.g., bringing in kittens, but ceases to be clear with reference to certain other acts, e.g., bringing small dogs to the school or ants into the classroom.

The ambiguity and vagueness found in the common case is not ambiguity and vagueness in the words chosen by the maker of the rule entirely aside from any relationship with the objects to which the words refer. Prohibition against bringing cats clearly means prohibition against bringing *small* cats. It may even be alleged, by analogical interpretation, that a prohibition against bringing cats means, similarly, a prohibition against bringing dogs. However, it is difficult to say that a prohibition against bringing cats means also the prohibition against bringing ants kept in a box or leashing a dog to

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> a nominalist age. The 'rule' simply misses the point about 'plainness' and its proponents simply avoid discussing the real issues concerning meaning. Those issues relate to the grounds or reasons for assigning meaning to statutory language. A meaning may be 'plain,' but it will rarely, if ever, be *indisputably* 'plain.'

Witherspoon, *Administrative Discretion to Determine Meaning: "The Middle Road": I,* 40 TEX. L. REV. 751, 763 (1962).

an outside tree. The process of interpretation of rules of law is essentially conditioned by the nature of the facts of the case and by the meanings attributed to those facts by the respective judges. Many differences in the meanings of rules of law as traditionally interpreted by the judges may be shown to be only apparent differences, because the differences in rule meanings are related to differences in the nature and meaning of the facts of the various cases in which the rules were applied. Attempts to determine in the abstract the final and definite meaning of rules of law, without relating them to concrete social experience, to social conflicts, or to individual disputes, may, however, become purely logical and grammatical exercises unconnected to reality.

*2. Plain Meaning of Words and Plain Meaning of Rules*

[96] In order to better understand the problems involved in statements like those made in Article 13 of the Louisiana Civil Code, it may be helpful to take a closer look at the meaning of the words used in stating general rules of law. Common general words used in natural languages,[24] as opposed to artificial or technical languages, are inherently ambiguous in the sense that each of them has several meanings. It is sufficient to look in any good dictionary to discover that plurality of meaning exists. The meaning of a word is conditioned by the factual circumstances which surround its utterance and by the grammatical context in which it is found. Interpretation by reference to circumstances, situations, and context occurs spontaneously throughout daily life. To understand the spoken or written words of a natural language implies that an interpretation of words has taken place and, therefore, a selection of their meaning has taken place as well. The common observation that because the words are

24. In contemporary philosophy of language, "natural" languages are languages understood in the ordinary sense, such as English or Spanish. Natural languages are distinguished from artificial or symbolic languages, that is, languages used at a special level of communication. *See* J. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

clear and their meanings plain no interpretation is needed *ignores the process of interpretation which has already taken place.*[25]

[97] The ambiguity of words is further complicated by the fact that different meanings of the words may or may not be related to objects having some common element. It is easier to interpret a word and to choose one of its meanings when there is no common element among the several meanings of that word. For instance, the word "root" has, among others, the following meanings:

(1) a subterranean plant part

(2) part of a tooth within a socket

(3) something that is an origin or source

(4) a quantity taken an indicated number of times and an equal factor

(5) the part by which an object is attached to something else

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25. Harry Jones states:

> Theoretically, the plain meaning rule raises a preliminary issue of admissibility in every case, and the acceptance or rejection of offered extrinsic aids should depend upon the disposition which the court makes of that preliminary issue. The evidence afforded by extrinsic aids, logically speaking, should be irrelevant unless the interpreting court has *first* come to the conclusion either that the statute is 'ambiguous' with respect to the fact situation of the particular controversy, or that the application of the statute, according to its literal meaning, would lead to 'absurd or wholly impractical consequences.' The frequently quoted formula that extrinsic aids may be resorted to 'to solve but not to create ambiguity' can only mean that the evidence provided by such aids should be considered solely for the light which it throws upon the proper resolution of a doubt or 'ambiguity' apparent to the court *before* it examines the extrinsic sources. In other words, the theory of the plain meaning doctrine is that the 'ambiguity' or 'absurdity' which will take a case outside the scope of its application must be discoverable upon a bare or literal reading of the text, wholly apart from the background or context which the committee reports and other extrinsic sources provide.

Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Statutes,* 25 WASH. U. L. Q. 2, 10-11 (1939). To come "first" to the conclusion that the statute is ambiguous is tantamount to concluding that the statute is not clear or that its meaning is not plain. This conclusion implies, certainly, that in other cases the court may come to the conclusion, "first," that there is a "plain meaning" to be followed. What is to be doubted is the assertion made by Jones to the effect that the court may come to a conclusion concerning "ambiguity" or "clarity" upon a "bare or literal reading of the text." The court finds a statute "clear" when the facts of the case are "clear" and when the statute, in accordance to its "plain meaning," provides the expected just solution *of* the dispute.

(6) the simple element inferred as the basis from which a word is derived by phonetic change or by extension

(7) the tone from whose overtones a chord is composed.[26]

The circumstances or situation in which the word "root" is uttered or the grammatical context in which it appears will allow a rapid, almost instantaneous selection of one of those different meanings. The situation becomes more complicated, however, if the word refers to different objects which have a common element. For example, the word "immovable" has, among others, these meanings:

(1) incapable of being moved

(2) not moving or not intended to be moved

(3) steadfast, unyielding

(4) real property.[27]

The common element in this instance is immobility. There is no question that land is an immovable, as is a building built on the land. But, what about a mobile home from which the wheels have been removed and which is fixed to the ground by short steel posts? What about wooden partitions in a house which are nailed to the walls and screwed to the floor? What about the central heating system installed in a building? What about air conditioners placed on window sills and attached to the windows? The dictionary refers to "immovables" as "incapable of being moved," "not moving," or "not intended to be moved." A common element is present in all of those meanings; there are also shades of meaning, and those shades of meanings may be of great importance in [98] understanding the meaning of a particular factual situation. That which is "not moving" may nevertheless be moved. That which is "not intended to be moved" may be moved under certain circumstances. Thus, is a removable object an immovable?[28] To say that a word is not ambiguous merely means

26. WEBSTER'S NEW COLLEGIATE DICTIONARY (1976).

27. *Id*.

28. *See, e.g.,* Vincent v. Gold, 261 So. 2d 75 (La. App. 3d Cir. 1972); La Fleur v. Foret, 213 So. 2d 141 (La. App. 3d Cir. 1968), wherein the nature of schogie screens—colored glass "doors"—and window air conditioners was discussed by the court.

that there is no doubt as to the meaning which should be chosen in a particular situation. The choice of meaning is made by the simple and direct technique of looking at the circumstances, situation, or context involved. Thus, to say that a word is unambiguous does not mean that the word alone has one, and only one, meaning. When the word used is not the name of an individual object, then more than one meaning will usually be involved and interpretation is therefore needed.

In addition to ambiguity, words suffer from unavoidable vagueness. The vagueness of words is related to the extent of the objects to which the words refer, e.g., to what semanticists call "referents." Words exhibit this peculiar structure: A word has a clear core or central nucleus of meaning, clear in the sense that there are no doubts about which object or objects are referred to by the word, but the word is also surrounded by a halo of uncertainty whenever an object which does not fall within the clear core of reference is involved. For example, it is clear that the expression "private automobile" refers to a four-wheeled, self-propelled vehicle with a body that provides seating accommodations and driving facilities. There may, however, be some doubt as to whether a car is properly named or referred to by that expression, "private automobile," when half of the seats have been removed and replaced by a flat board on which cargo can be transported, or if the self-propelled vehicle were to have only three wheels and room for transportation of merchandise in addition to seating accommodations.

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ILLUSTRATION 13

*I. Introduction*

[364] The following case involves a discussion of the meaning of the word "animals." By statute, trains in Tennessee are required

to sound the alarm whistle and to put down the brakes when an animal appears on the tracks. In the case below, three geese were run over and killed by a train on which the whistle was not sounded and the brakes were not put down. The court indicated the need "to draw the line somewhere" as to what animals fell within the purview of the statute. Accordingly, the court concluded that the goose was a proper animal at which to draw the line. Left unexplained is the reason for the court's choice. Certainly no logical reason can be asserted, and apparently there was nothing in history which indicated any such limitations. The judgment is clearly based on axiological considerations of order, security, and cooperation.

NASHVILLE & K. R. CO.
v.
DAVIS
Supreme Court of Tennessee

WILKES, J.

This is an action for damages against the railroad company for running over and killing three geese of the value of $1.50. The owner of the geese lived about one mile from the railroad, but permitted them to run at large, and they went upon the railroad track near a public crossing. The engineer blew the whistle and rang the bell for the crossing, but there is no proof that he rang the bell or [365] sounded the alarm for the geese. Whether the geese knew of this failure to whistle for them does not appear. We think there is no evidence of recklessness or common-law negligence shown in the case, and the only question is whether a goose is an animal or obstruction in the sense of the statute (section 1574, subsec. 4, Shannon's Compilation), which requires the alarm whistle to be sounded, and brakes put down, and every possible means employed to stop the train and prevent an accident when an animal or obstruction appears on the track. It is evident that this provision is designed, not

only to protect animals on the track, but also the passengers and employés upon the train from accidents and injury. It would not seem that a goose was such an obstruction as would cause the derailment of a train, if run over.[1] It is true, a goose has animal life, and, in the broadest sense, is an animal; but we think the statute does not require the stopping of trains to prevent running over birds, such as geese, chickens, ducks, pigeons, canaries, or other birds that may be kept for pleasure or profit.[2] Birds have wings to move them quickly from places of danger, and it is presumed that they will use them (a violent presumption, perhaps, in the case of a goose, an animal which appears to be loath to stoop from its dignity to even escape a passing train). But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at. We do not mean to say that in the case of recklessness and common-law negligence there might not be a recovery for killing geese, chickens, ducks, or other fowls, for that case is not presented. Snakes, frogs, and fishing worms, when upon railroad tracks, are, to some extent, obstructions; but it was not contemplated by the statute that for such obstructions as these trains should be stopped, and passengers delayed.[3] We are of the opinion that there is error in the court below giving judgment for the plaintiff, and the judgment is reversed, and, the case having been heard without a jury, the suit is dismissed, at the plaintiff's cost.

*II. Discussion*

1. The statute is seen as a means for the achievement of a certain end, and thus it should be interpreted in such a way that its aim is achieved.

2. A judicial interpretation of the statute consistent with the logical extension of the class "animals" would be irrational. Trains are not to be stopped because a bird alights on the railway tracks.

3. A grammatical and logical interpretation would lead to absurd results.

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ILLUSTRATION 20

*I. Introduction*

[412] The First Circuit Court of Appeal of Louisiana deals in this case with the effect that the changed conditions for the movement of cars on multilane highways has on the statutory regulation of drivers' behavior. The wording of the statute remained unchanged, but the social reality to which it referred had changed substantially. Such a change brought new meaning to the old words.

LEE MAJOR SANDERS, Plaintiff-Appellant,
v.
RAYMOND O. HISAW ET AL., Defendants-Appellees.
Court of Appeal of Louisiana

TATE, Judge.

Plaintiff Sanders was riding as a passenger in defendant Hisaw's automobile when it was involved in a collision with a car owned by Edward Marshall and driven by his daughter. Sanders brought suit against Hisaw, Marshall, and their respective liability insurers. After trial, his claim against Marshall and his liability insurer was compromised.

Plaintiff appeals from judgment of the District Court dismissing his suit against Hisaw and the latter's insurer upon a holding that the sole proximate cause of the accident was the negligence of Miss Marshall in turning left suddenly across Hisaw's path.

The accident occurred at mid-morning on May 3, 1953 on the Air Line Highway on the approaches to the city of Baton Rouge. The southern two lanes of this four-lane highway reserved for eastbound traffic. Both the Hisaw and [413] Marshall vehicles were proceeding easterly, the former on the inside lane next to the neutral ground in the middle of the highway, and the latter on the outside

lane. Prior to the accident, the Hisaw vehicle at a speed of 55 mph was overtaking the Marshall vehicle, which was going less than 25 mph.

It is not disputed that Miss Marshall turned suddenly left to the other highway from the outside lane across the path of the Hisaw vehicle in which plaintiff was riding so that Hisaw was unable to avoid colliding with her. But it is urged, and this presents the sole question of this appeal, that Hisaw failed to sound his horn as he was overtaking Miss Marshall to pass her; and that this violation of his statutory duty, LSA-R.S. 32:233, subd. B, was a contributory proximate cause of this accident, so that Hisaw and his insurer are liable to Hisaw's passenger (the plaintiff) injured as a result thereof.

LRS-R.S. 32:233, subd. B provides: "The driver of an overtaking vehicle shall give audible and sufficient warning of his intention before overtaking, passing or attempting to pass a vehicle proceeding in the same direction."

We do not believe this statutory provision to be applicable to the present situation. The accident occurred on a four-lane highway; two lanes were reserved for each direction's traffic. If applicable to multiple-laned highways, motor vehicles would be required to sound the horn when passing any vehicle going in the same direction whether to their right or left and no matter how many lanes distant they might be. On our crowded eight-lane and four-lane highways designed to facilitate the passage of congested traffic there would be a never-ending cacophony of constantly blowing horns, an intolerable burden both on the ears of the public and on the batteries of the vehicles involved in the crowded traffic. [1] We do not believe the legislature intended the statute to apply in such circumstances or that the legislative provision contemplated application thereof to multiple-lane highways.[2]

In Mooney v. American Automobile Ins. Co., La. App. 1 Cir., 81 So.2d 625, we recently had occasion to consider a companion statutory provision, LSA-R.S. 32:233, subd. A, which provides that overtaking vehicles must pass to the left in passing other vehicles

proceeding in the same direction. Likewise, considering the effect the application thereof might have as burdening rather than facilitating traffic in such situations, we concluded that the legislative intention did not contemplate application of the provision to multiple-laned highways.[3]

In effect, the Mooney case holds that the burden of signalling [*sic*] his intention on a multiple-laned highway is upon the driver who intends to shift into another lane reserved for traffic going in the same direction, rather than upon the driver who intends to pass in his own lane other traffic proceeding in the same direction in other lanes.

Further, although in many jurisdictions the statutory requirement that the horn should be sounded has been construed as being for the purpose of warning the forward vehicle so that it will not tum left into the overtaking vehicle's path, cf. 2 Blashfield, Cyclopedia of Automobile Law 133, Section 938; in Louisiana, "the purpose of the law in requiring the giving of an audible warning by the overtaking vehicle, as we view it, is to favor its driver to the extent that his normal progress on the highway will not be unnecessarily impeded by the driver [414] of the car preceding him in not leaving or giving him sufficient clearance in which to pass ahead," De La Vergne v. Employers Liab. Assur. Corp., La.App. 1 Cir., 4 So.2d 66, at page 69, certiorari denied, Noted, 16 Tul.L.Rev. 283.

This distinction as to the statutory purpose is important, since the violation of a statute or ordinance does not constitute actionable negligence unless the statute is designed to control the situation at the time of the accident and to protect the class of person who seeks to invoke its protection, 38 Am. Jur. 834, "Negligence" Section 163. Thus, in Louisiana the overtaking motorist is under no duty to sound his horn when the forward vehicle is proceeding in its own lane leaving sufficient clearance for passing, and his failure to sound his horn in such circumstances will not be a proximate cause of an accident resulting when the forward vehicle suddenly turns across his path since the purpose of sounding the horn is *not* to warn the forward

vehicle not to turn left, De La Vergne v. Employers Liab. Assur. Corp., above cited.

*II. Discussion*

1. The judge is saying that if no new meaning was given to the old words under the changed social conditions of the time, then disorder would take place.

2. This is a purely rhetorical statement. The judge does not even attempt to prove his statement to the effect that the legislature "intended" not to apply the statute, i.e., giving "audible and sufficient warning of ... intention of overtaking," in the case of multilane highways.

3. See comment 2, *supra.*