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## Condominiums

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the legal title<sup>44</sup> of the trustee and his power of sale.<sup>45</sup> In addition, paragraph five was added to section 2046 to provide that the acts of a trustee of a revocable trust prior to revocation are as valid as those of a trustee of an irrevocable trust,<sup>46</sup> thereby foreclosing any possible attacks on the power of the trustee to alienate trust property prior to the settlor's effective revocation or rescission. Section 2046(5) also provides the trustee with limited powers after termination of the trust to carry out the revocation or rescission.<sup>47</sup>

*Alfred W. Speer*

### CONDOMINIUMS

The Louisiana Condominium Act,<sup>1</sup> adopted by the legislature substantially as drafted by the Louisiana State Law Institute, replaces the Horizontal Property Act of 1962<sup>2</sup> as the statutory foundation for the regime of condominium property in Louisiana. Condominium is the property regime under which certain portions of immovable property are subject to individual ownership and the remaining portions are owned in indivision by the individual owners.<sup>3</sup> In practical terms, it is the regime under which individual units or apartments in a multi-unit building or project are individually owned while common elements of the project such as land, principal struc-

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44. See LA. R.S. 9:1731 (Supp. 1964).

45. See LA. R.S. 9:2119 (Supp. 1964).

46. Although the Trust Code sections do not so provide, it would seem that the trust instrument of a revocable trust should provide a procedure for notifying the trustee, beneficiaries, and the public upon revocation and should stipulate that the termination will not be effective until such notice is given. In the absence of such notification, transfers made by the trustees subsequent to revocation are still valid. *Cf.* LA. CIV. CODE art. 2266.

47. LA. R.S. 9:2046(5) (Supp. 1974): "Acts of the trustee with regard to the trust property shall not be affected by the subsequent revocation or rescission of a disposition in trust. After a trust has been revoked or rescinded, the trustee shall have only those powers necessary to carry out the effects of the revocation or rescission." Since the section does not specify what powers the trustee has, if the trust instrument itself is silent, the *RESTATEMENT (SECOND) OF TRUSTS*, § 344 (1959) and its comments provide guidelines for the definition of those powers.

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1. La. Acts 1974, No. 502, *amending & reenacting* LA. R.S. 9:1121-42 [hereinafter cited as Condominium Act].

2. LA. R.S. 9:1121-42 (Supp. 1962) (replaced by Louisiana Condominium Act, La. Acts 1974, No. 502) [hereinafter cited as Horizontal Property Act].

3. Condominium Act § 1123(1), LA. R.S. 9:1123(1) (Supp. 1974).

tural parts of buildings, and common recreational facilities are held in common by the several owners of the units.

Condominium is an ancient concept<sup>4</sup> but has achieved widespread acceptance in the United States only in recent years.<sup>5</sup> In France, condominium was early recognized as a concept compatible with the *Code Civil*,<sup>6</sup> but the Louisiana supreme court's reluctance to condone horizontal division of ownership cast considerable doubt on the regime's status under the Louisiana Civil Code.<sup>7</sup>

The immediate motivation for enactment of the Horizontal Property Act in 1962 was the 1961 amendment to the National Housing Act, permitting the Federal Housing Administration to insure mortgages on individually owned apartments if that form of ownership was established by the laws of the state in which the property is located.<sup>8</sup> The Horizontal Property Act was copied almost verbatim from an Arkansas statute and gave rise to an inordinate number of problems.<sup>9</sup> During the fourteen years of its effectiveness, no reported case has interpreted the statute, no doubt due to the reluctance of lending institutions to finance developments under its provisions.

The Condominium Act is a substantial revision of the Horizontal Property Act and promises to be of much greater service than its predecessor. Terminology is much improved<sup>10</sup> and the Act has been

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4. See Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963).

5. In 1962, when Louisiana's first act was passed, only six other states had enabling statutes. Today all 50 states have such legislation. *Id.* at 987 n.84; Seeber, *Condominiums in North Carolina; Improving the Statutory Base*, 7 WAKE FOREST L. REV. 355 (1971).

6. See Comment, 19 LA. L. REV. 668, 669-72 (1959); Comment, 37 TUL. L. REV. 482, 484 (1963).

7. See *Lasyone v. Emerson*, 220 La. 951, 57 So. 2d 906 (1952). Although the court's decision was restricted to horizontal partition of property, dicta indicated that the court considered any permanent horizontal division of ownership contrary to LA. CIV. CODE art. 505 on accession and art. 1289 on partition. These articles are, however, susceptible of a different interpretation. See A. YIANNPOULOS, PROPERTY § 98 in LOUISIANA CIVIL LAW TREATISE 281 (1966); Comment, 19 LA. L. REV. 668, 681-82 (1959); Comment, 37 TUL. L. REV. 482-84 (1963).

8. 12 U.S.C. § 1715y(a) (Supp. 1961).

9. For a survey of the problems presented by the Act see YIANNPOULOS, *supra* note 7, at § 98; L.B. Trenchard III, *Condominium Property Regimes in Louisiana: The Horizontal Property Act, Its Problems and Solutions*, August 31, 1970 (unpublished report submitted to the New Orleans Planning Commission, on file in the office of the *Louisiana Law Review*); *Louisiana Legislation of 1962: A Symposium*, 23 LA. L. REV. 41, 46-48 (1962); Ramsey, *Condominiums in Louisiana*, 10 LA. B. J. 219 (1963); Comment, 37 TUL. L. REV. 482 (1963).

10. For example, the Horizontal Property Act used the rather inaccurate terms "horizontal property regime," "apartment" and "master deed." See former LA. R.S.

made clearly applicable to commercial developments<sup>11</sup> and lateral projects such as townhouses and garden apartments.<sup>12</sup> Condominiums containing non-contiguous lands are now authorized,<sup>13</sup> as are projects in which improvements are constructed in successive stages.<sup>14</sup>

As under the old Act,<sup>15</sup> a condominium regime may be created by execution and recordation of a condominium declaration submitting immovable property to the provisions of the Act.<sup>16</sup> Purchasers of condominium apartments (called units whether commercial or residential) acquire full ownership of their units,<sup>17</sup> undivided and non-partitionable interests in the common elements of the condominium,<sup>18</sup> undivided shares in the common surplus,<sup>19</sup> obligations to pay a portion of the common expenses,<sup>20</sup> and voting rights in the association of unit owners<sup>21</sup> — all as provided by the condominium declaration. Interests and liabilities so acquired are inseparable component parts of unit ownership and are generally permanent in nature, unalterable after the condominium declaration is executed.<sup>22</sup>

An association of unit owners governs the condominium and operates under bylaws established in the condominium declaration. The association, which may be any sort of legal entity,<sup>23</sup> has statutory power to contract, to sue and be sued, to maintain, lease and repair the common elements, to appoint a manager, and to collect assessments against unit owners for the common expenses.<sup>24</sup> Under the new statute, common expense assessments are secured by liens against the individual units,<sup>25</sup> and the questionable provision of the old Act

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9:1122, 23 (Supp. 1962). Under the Condominium Act these terms have been changed to "condominium property regime," "unit" and "declaration." See LA. R.S. 9:1123 (Supp. 1974).

11. Condominium Act § 1124.3, LA. R.S. 9:1124.3 (Supp. 1974).

12. *Id.* § 1126.1.

13. *Id.*

14. *Id.* § 1124.2.

15. Former LA. R.S. 9:1123 (Supp. 1962).

16. Condominium Act § 1126, LA. R.S. 9:1126 (Supp. 1974).

17. *Id.* § 1123(3).

18. *Id.* §§ 1124, 1124.4. The declaration may provide for both general and limited common elements, the latter being reserved for the exclusive use of a certain unit or units. *Id.* §§ 1123(5), (6).

19. *Id.* § 1125.

20. *Id.*

21. *Id.* § 1130.3.

22. *Id.* §§ 1123(7), 1124.1, 1127.1, 1130.3.

23. *Id.* § 1123(8).

24. *Id.* § 1130.1.

25. *Id.* § 1125.1.

imposing joint and several liability on a unit purchaser and his vendor for assessments owed by the vendor<sup>26</sup> has been removed.<sup>27</sup> The integrity of the condominium as a whole is protected by the provision that liens shall arise and taxes shall be assessed only against the individual units and not against the entire development.<sup>28</sup>

As under the Horizontal Property Act, casualty insurance is mandatory,<sup>29</sup> but the developer is now allowed to establish the percentage vote of the unit owners necessary for a decision to reconstruct, repair or distribute insurance proceeds in the event of casualty or loss.<sup>30</sup> This is but one example of the increased freedom for the developer found in the Condominium Act, a feature which should increase use of the regime considerably.<sup>31</sup>

Along with greater developer freedom, the Act provides greater protection for the purchaser against the types of developer abuses that have accompanied the condominium boom in states such as Florida.<sup>32</sup> Under Louisiana's new Act, "sweetheart" management contracts entered into by the developer<sup>33</sup> may be cancelled within one year after individual unit owners assume control of the association of unit owners.<sup>34</sup> Use by the developer of purchasers' deposits for anything other than actual construction of the condominium is prohibited.<sup>35</sup> Moreover, full disclosure of practically all relevant information pertaining to the interest being sold is required before sale of a unit<sup>36</sup> and a cause of action against the seller for materially false or mislead-

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26. Former LA. R.S. 9:1139 (Supp. 1962). At least one writer has suggested that the provision for solidarity liability might be an unconstitutional violation of due process. Ramsey, *Condominiums in Louisiana*, 10 LA. B. J. 219, 228 (1963). See also Trenchard, *supra* note 9, at 32.

27. Condominium Act § 1125.1(c), LA. R.S. 9:1125.1 (Supp. 1974).

28. *Id.* §§ 1131, 1132.

29. *Id.* § 1134.

30. *Id.* § 1126.2(12).

31. Compare, e.g., Horizontal Property Act § 1125 [former LA. R.S. 9:1125 (Supp. 1962)] with Condominium Act § 1124.1 [LA. R.S. 9:1124.1 (Supp. 1974)] (interests in common elements); Horizontal Property Act § 1136 with Condominium Act § 1125 (obligations for common expenses); Horizontal Property Act § 1122(4), (5) with Condominium Act § 1123(5), (6) (definition of general and limited common elements); Horizontal Property Act §§ 1123, 1128 with Condominium Act § 1124.2 (construction of additional units after the regime is established); Horizontal Property Act § 1132 with Condominium Act § 1136 (withdrawal of property from regime).

32. See Comment, 25 U. FLA. L. REV. 350 (1973).

33. These are self dealing contracts wherein the developer or his friends enter lucrative management contracts with the condominium before control is turned over to the association of unit owners.

34. Condominium Act § 1138, LA. R.S. 9:1138 (Supp. 1974).

35. *Id.* § 1139.

36. *Id.* § 1140.

ing statements has been created.<sup>37</sup> The association of unit owners is required to maintain accounting records using good accounting practices and to allow inspection by unit owners at reasonable times.<sup>38</sup> The unit owner unable to afford elaborate improvements to the condominium property is protected against forced contribution to improvements approved by less than seventy-five percent of the unit owners.<sup>39</sup>

The new Act is not, however, without its problems. The sections of the Law Institute draft authorizing a condominium regime on leased land<sup>40</sup> were deleted during the bill's move through the legislature, indicating the legislature's desire to proscribe such an arrangement. A condominium on leased land might often be a practical necessity,<sup>41</sup> and several states have given statutory approval to such an arrangement.<sup>42</sup> Opposition to the leased-land condominium apparently centers around the problems arising upon expiration or termination of the lease, since Civil Code article 2726 provides that improvements constructed on leased land (including units) if "made with lime and cement" may be retained by the lessor upon paying a fair price.<sup>43</sup>

While some purchasers of units might conceivably be misled as to the term of the "unit ownership" they acquire, fears of widespread misrepresentation, especially in transactions involving urban office and professional buildings, seem largely unfounded. In addition to the enacted requirement that the purchaser be provided with a copy of any predial lease affecting the property,<sup>44</sup> a deleted provision of the Law Institute draft would have required a written statement that

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37. *Id.* § 1140(C).

38. *Id.* § 1130.2.

39. *Id.* § 1141.

40. La. H.B. 1592, § 1126.1, 37th Reg. Sess. (1974).

41. "A developer in the market for a suitable tract may find that the owners of the best or cheapest land available refuse to part with title, but are willing to lease the land on a long term basis." Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1134 (1969).

42. See ALASKA STAT. § 34.07.450(13) (Supp. 1963); FLA. STAT. § 711.08(1) (Supp. 1970); HAWAII REV. STAT. § 514-2(18) (1963).

43. The lessee has the option, of little value here, of removing "the improvements and additions which he has made to the thing let, provided he leaves it in the state in which he received it." LA. CIV. CODE art. 2726. Note that the lessor does not have to compensate the lessee for improvements not removed from the premises if the lessor makes no use of them and elects not to retain them. *Riggs v. Lawton*, 231 La. 1015, 93 So. 2d 543 (1957). Whether a given use of the improvements will be considered an election to keep them is a matter of fact for the court's determination. See *Taylor Lumber Co. v. Fuller*, 292 So. 2d 878, 883 (La. App. 1st Cir. 1974).

44. Condominium Act § 1140(A)(4), LA. R.S. 9:1140(A)(4) (Supp. 1974).

upon termination of the predial lease the ownership of improvements on the land, including the particular unit, would revert to the lessor.<sup>45</sup> These requirements, coupled with the almost certain presence of a closing attorney, would surely preclude any serious harm to unit purchasers.

Another problem is the possible conflict between provisions authorizing withdrawal of all or part of the condominium property from the regime and provisions making certain interests and liabilities of the unit owner permanent in nature. Under section 1136(a), the condominium developer may provide for withdrawal of all or part of the condominium property by the vote of a percentage of the unit owners established by the declaration.<sup>46</sup>

Section 1125, on the other hand, provides that the common surplus may be distributed among and the common expenses shall be the obligation of the unit owners in the proportion or percentages of sharing common surplus and common expenses provided in the condominium declaration. The proportions established by the condominium declaration for sharing common surplus and expenses "*shall* have a permanent character and *shall not* be altered" except when additional units are constructed or a commercial unit is subdivided.<sup>47</sup> No provision is made for alteration of these interests and obligations in the event of withdrawal. Similarly, section 1124.1 excludes alteration of the interests in the common elements by anything less than a unanimous vote of all unit owners if withdrawal of units occurs for any reason other than casualty loss or expropriation. These latter provisions are irreconcilable with section 1136 since a portion of the units in a condominium cannot be removed without decreasing the number of unit owners and thus proportionately increasing the interests and liabilities of the remaining unit owners. The conflict is clearly an oversight in drafting and should be remedied by amendment at the first opportunity.

The possibility also exists that the unit owner will be open to unlimited tort liability for a wide variety of claims arising out of the ownership of the common elements and their administration by the

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45. See La. H.B. 1592, § 1140(4)(5), 37th Reg. Sess. (1974).

46. According to the comments of the committee reporting the Act for the Law Institute, "[i]t is the intent of [section 1136] . . . to empower the drafter of the condominium documents to authorize the unit owners owning units located in a separate improvement on the condominium property to withdraw said improvement from the condominium regime." Comments — Proposed Condominium Act at 10, on file in the office of the *Louisiana Law Review*.

47. Condominium Act § 1125, LA. R.S. 9:1125 (Supp. 1974) (emphasis added).

association of unit owners.<sup>48</sup> The new Act should have addressed this potential problem area; for although incorporation of the association of unit owners may provide adequate protection against unlimited liability arising from the acts of the association of unit owners,<sup>49</sup> it has no effect of itself upon the unit owner's liability as an owner or occupier of land.<sup>50</sup> The unit owner's liability is no different in nature from that of the average home owner's, but it is significantly greater in scope and may include risks over which the individual co-owner has little control.<sup>51</sup> Although insurance would seem the logical means of protecting against liability, the possibility of lapses in coverage, together with the considerable danger of uninsured risks due to the condominium's relative newness, prevents insurance alone from providing adequate protection at present.<sup>52</sup>

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48. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1007-08 (1963) [hereinafter cited as *Berger*]; Knight, *Incorporation of Condominium Common Areas? An Alternative*, 50 N.C. L. REV. 1, 5 (1971) [hereinafter cited as *Knight*]; Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance*, 32 LAW & CONTEMP. PROB. 305, 308-09 (1967) [hereinafter cited as *Rohan*]; Note, 23 VAND. L. REV. 321, 339-50 (1970). "These claims may arise from a failure to maintain properly the common elements, the negligence of personnel employed by the owners' association, a failure to carry adequate workmen's compensation insurance coverage on these employees, negligence in operating playgrounds and pools, and the violation of fire ordinances and building codes. In addition, the individual unit owner may face product liability claims for injuries caused by defective vending machines and miscellaneous exposure under theories such as nuisance." *Knight* at 5.

49. *Berger* at 1007.

50. *Knight* at 7; *Rohan* at 309.

51. *Knight* at 5.

52. *Knight* at 6; *Rohan* at 306. Writers have recently offered various solutions to this problem including actual conveyance or long-term leasing of the common elements to an incorporated association of unit owners. See Note, 23 VAND. L. REV. 321 (1970). Under the new Act the first suggestion is impossible since the unit owner's undivided interest in the common elements may not be transferred separate from the unit. Condominium Act §§ 1123(8), 1124.1, LA. R.S. 9:1123(8), 1124.1 (Supp. 1974). Long-term leasing of each unit owner's interest in the common elements to the incorporated association of unit owners would provide no real solution in Louisiana. Even if the lessee-association of unit owners were to assume responsibility for injuries caused by the condition of the premises, the lessor-unit owners would still be strictly liable under LA. CIV. CODE arts. 670 and 2322 in at least two situations. The first is where injuries are caused by a defective condition of the premises and the unit owner knew or should have known of the defect. *Brooks v. Southway Furniture*, 290 So. 2d 438 (La. App. 4th Cir. 1974); *Gilliam v. Lumberman's Mut. Cas. Co.*, 240 La. 697, 124 So. 2d 913 (1960); *Thompson v. Suprena*, 65 So. 2d 801 (La. App. Or. Cir. 1953); LA. R.S. 9:3221 (1950). More important is where persons deriving their right to be on the premises from the lessor-unit owner or from someone other than the lessee are injured due to a defective condition. The lessor-unit owner may not avoid liability for injuries to such persons by means of a stipulation with the lessee. However, the lessee may be called in war-

The most direct method of dealing with the problem would be a statutory limitation on the unit owner's liability, coupled with mandatory liability insurance for the association of unit owners.<sup>53</sup> Such a limitation need not materially affect the tort victim's rights. The new Act provides that the association of unit owners has the capacity to "sue and be sued as to any cause of action involving the common elements or arising out of the enforcement of the condominium declaration or bylaws."<sup>54</sup> A provision could be added that any judgment rendered against the association which cannot be paid through insurance or assets of the association of unit owners shall be assessed to the unit owners as a common expense and shall create a lien against each unit. If the judgment creditor is given the right to enforce timely assessment of the judgment by mandatory injunction and to force foreclosure on the liens if the assessments are not paid, his rights should not be substantially prejudiced.<sup>55</sup>

The legal description of units within a condominium may also give rise to difficulties if not handled correctly. Under the new Act the unit deed must contain the number or letter designation of the unit and "any other data necessary for its proper identification."<sup>56</sup> The developer should not take this to mean that a precise legal description of the air space enclosed by or comprising the unit would be desirable. If a condominium building shifts laterally, settles or is destroyed and rebuilt, the actual location of the units might no longer coincide exactly with the legal descriptions.<sup>57</sup> The resulting encroachment of one unit upon air space legally belonging to another would create unnecessary title problems. One solution is to describe the unit by reference to the building plat plan required in the condominium declaration,<sup>58</sup> which need only identify the units "and their relative location and approximate dimensions."<sup>59</sup>

A final concern of the condominium developer and unit purchasers may be taxation and securities regulation. If the association of unit owners exhibits certain characteristics,<sup>60</sup> income from assess-

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ranty. *Green v. Southern Furniture Co.*, 94 So. 2d 508 (La. App. 1st Cir. 1957); LA. R.S. 9:3221 (1950). See Comment, 42 TUL. L. REV. 178, 180-81 (1967).

53. *Rohan* at 315.

54. Condominium Act § 1130.1(a), LA. R.S. 9:1130.1(a) (Supp. 1974).

55. See section 1124.6 of the April, May 1974 drafts of the Act as proposed by the reporter for the Law Institute, on file in the office of the *Louisiana Law Review*.

56. Condominium Act § 1127(3), LA. R.S. 9:1127(3) (Supp. 1974).

57. *Trenchard* at 3; Comment, 17 U. MIAMI L. REV. 145, 160-62 (1962).

58. Condominium Act § 1126.2(2), LA. R.S. 9:1126.2(2) (Supp. 1974).

59. *Id.*

60. "These are: (i) associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability

ments, investment of reserves, and rental of units owned by the association may be taxed as corporate income.<sup>61</sup> Reserves used for the improvement or replacement of the common elements might be taxed as constructive dividends and thus as income for unit owners.<sup>62</sup> Where condominium marketing focuses on the profit potential for unit purchasers or the units are rented by the management on a pool basis when not occupied, the seller of the condominium units might also be involved in the offering of securities within the meaning of the federal Securities and Exchange Act of 1934.<sup>63</sup> Attention should also be given to possible application of the state Blue Sky laws.<sup>64</sup>

*Paul Lawrence*

### THE MINI-COMMERCIAL CODE: AN OVERVIEW OF CHAPTER 3

After years of consideration and debate, the Louisiana legislature in Act 92 adopted, with minor variations,<sup>1</sup> the Uniform Com-

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for corporate debts limited to corporate property, and (vi) free transferability of interests." Treas. Reg. § 301.7701-2(9)(a) (1974). An organization will be taxed like a corporation if it more nearly resembles a corporation than a partnership or trust. See *Berger* at 1007-10; Note, 23 VAND. L. REV. 321, 327-28 (1970).

61. For a general discussion of the subject, see *Berger* at 1007-10; Brauer, *Federal Income Taxation of the Condominium Management Corporation*, 52 TAXES 196 (1974); Mancuso, *Some Aspects of Condominium Development*, 34 ALA. LAWYER 45, 58-60 (1973); Note, 23 VAND. L. REV. 321, 327-28 (1970).

62. Brauer, *supra* note 61, at 201. Complete disclosure of the financial status of the project is also required.

63. 15 U.S.C. § 78(c)(10) (1970). See Note, 27 OKLA. L. REV. 104, 107 (1974): "The ramifications of having one's development fall within such a classification are that the offeror would have to register with the SEC and all his salesmen would have to be licensed as brokers under the Act, rather than just being real estate salesmen under the applicable state law."

64. LA. R.S. 51:701-20 (Supp. 1972).

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1. *E.g.*, some language of the original UCC provisions was changed to avoid reference to terms or concepts foreign to Louisiana law. See LA. R.S. 10:1-103, 3-207, 3-305, 3-419 (Supp. 1974) and comments thereto. References to unadopted sections of the UCC were also omitted. See LA. R.S. 10:1-105, 3-201 (Supp. 1974) and comments thereto. Some sections were deleted because they were considered either unnecessary or had not generally been received favorably in other jurisdictions. See LA. R.S. 10:1-108, 1-209 (Supp. 1974). The Louisiana draftsmen also changed the language used to define several terms to improve the UCC text. See LA. R.S. 10:1-201 (Supp. 1974) and comments thereto. To conform to LA. CODE CRV. P. art. 643, alternative payees are classified as necessary rather than indispensable parties. LA. R.S. 10:3-116 (Supp. 1974). A portion of UNIFORM COMMERCIAL CODE § 1-106 [hereinafter cited as UCC], dealing with consequential, special and penal damages was deleted to avoid conflict